Administrative contract for the provision of service performed continuously: deadline extension made after its final term*

Contrato administrativo de prestação de serviço executado de forma contínua: prorrogação de prazo efetuada após seu termo final

*Leandro Sarai***

ABSTRACT

This paper, of dogmatic nature and using the hypothetical-deductive reasoning, explores the term extension of administrative contracts made after its expiration. The focus is on contracts of services that are performed continuously. The main hypothesis is that the term extension is possible. To treat this issue, it studies what justifies the extension of such contracts in general, the problems involved with longer-term contracts, the distinguish element of services that are performed continuously, besides the possibility of contracts with this type of object having duration exceeding 12 months.

* Article received on July 12, 2017 and approved on April 19, 2018. DOI: http://dx.doi.org/10.12660/rda.v277.2018.76709.

** Universidade Presbiteriana Mackenzie, São Paulo, SP, Brazil. E-mail: leandro.sarai@yahoo.com.br. Doctorate and Master's in political and economic law and specialist in business law from the Universidade Presbiteriana Mackenzie. Federal public attorney.

It makes a distinction between fixed term contracts and contracts for scope. Finally, after checking that the concern of the law in dealing with extensions as exceptions are due to the annual duration of the budget and that the legal system recognizes the existence of expenses that exceed this duration, it points out that there is no prohibition to the contract's deadline extension made after its expiration, provided that certain conditions are fulfilled.

KEYWORDS

Administrative contract — services performed continuously — term extension — budget — per-scope contracts — contracts with a fixed period

RESUMO

O presente artigo, de natureza dogmática, elaborado segundo o método hipotético-dedutivo, analisa a prorrogação do contrato administrativo de prestação de serviços executados de forma contínua. A hipótese tomada para análise é a de que é possível essa prorrogação, ainda que o contrato esteja vencido. Para tanto, analisa o que justificaria a prorrogação desses contratos de modo geral, os problemas envolvidos com os contratos de prazo mais longo, o que caracterizaria os serviços executados de forma contínua, além da possibilidade de contratos com esse tipo de objeto terem vigência superior a 12 meses. Efetua ainda uma distinção entre contratos com prazo determinado e contratos por escopo. Finalmente, após verificar que a preocupação da lei em tratar as prorrogações como exceções decorre da vigência anual do orçamento e que o próprio sistema jurídico reconheceria a existência de despesas que ultrapassariam o exercício, conclui que não há vedação à prorrogação do contrato após seu termo final, desde que atendidas certas condições.

PALAVRAS-CHAVE

Contrato administrativo — serviços executados de forma contínua — prorrogação — orçamento — contratos por escopo — contratos com prazo determinado

1. Introduction

If the State is to properly fulfill its regulatory mission, it must be structured, and it must function, in the appropriate manner.

One of the instruments that enables the State to fulfil its objectives is the administrative contract. Administrative contracts include those intended for continuously performed services. Although Law No. 8.666 of June 21, 1993 has permitted extensions to the effectiveness periods of such contracts, the interpretation prevailing at the Federal Accounting Court, and even within the federal government in general, points to the prohibition of such extensions after the contract has expired. Thus, this results in solutions being proposed which are not always the most appropriate.

The article's main objective, therefore, is to analyze the possibility of extending administrative contracts for continuously performed services.

The research method will be hypothetical and deductive,[1] its principal base being the legal system and specialized literature, including identifying the rules and regulations governing the matter and several rulings by the Federal Accounting Court chosen only to prove the prevailing interpretation to be debated within the body of the text.

Use was also made of older bibliographies, searching history for the origin of the current interpretation and the thinking behind the current rules and regulations.

The hypothesis of this article is that administrative contracts for continuously performed services can be extended, even where their effectiveness period has expired. So, it will be necessary to verify whether the hypothesis is true and under what conditions.

To that end, as secondary objectives and, additionally, to isolate the subject matter of the study, the analysis will require approaching the characterization of a continuously performed service, and the distinction between fixed-term and scope-based contracts.

Thus, this article is divided into five sections, in addition to this introduction.

Section one will clarify the prevailing understanding surrounding the impossibility of extensions to contracts that have expired.

---

[1] MEZZAROBA, Orides; MONTEIRO, Claudia Servilha. *Manual de metodologia da pesquisa no direito.* 5th ed. São Paulo: Saraiva: 2009. pg. 68-70.

The second section attempts to explain the concept of a continuously performed service. It is subdivided into two topics dealing, respectively, with the aspect of binding the duration of the contract to the budget, and that of the element that would characterize the continuously performed service.

In section three, a distinction is made between fixed-term contracts and scope-based contracts.

Section four deals with issue of extensions to expired contractual periods, explaining the difference of this measure in scope-based contracts and in contracts for continuously performed services.

Lastly, the final topic brings together the conclusions arrived at during the text, with the expectation that the academic community will use them to discuss the issue and propose a change in the government's interpretation.

Until then, public managers will have to abide by the binding guidance of the Accounting Courts and the Executive Branch itself.

2. The current interpretation

Some time ago, the Federal Accounting Court (TCU) issued an opinion as to the requirement, in general, for administrative contracts to have a fixed term. This was the subject matter of its Precedent No. 191.[2] This interpretation is currently founded in section 57, paragraph 3 of the Bidding Law, according to which "contracts for an indefinite term are prohibited."

In addition, according to the TCU[3], once expired, any continuity of the arrangement will be null and void, since it characterized a verbal contract according to the interpretation given to the sole paragraph of art. 60 the Bidding Law.[4]

---

[2] Precedent No. 191 of the TCU: "It is, in principle, essential to set the limits on the effectiveness period of administrative contracts, so that time does not prejudice the original conditions of the contract; this notwithstanding, there is no legal obstacle to the extension of time limit when the government itself agrees, by virtue of the very nature of the arrangements, to interrupt the execution thereof by the principal. Precedent No. 191 dated October 26, 1982".

[3] "[...] 197. Therefore, according to the understanding of this commission, where an administrative contract has expired without a timely extension, the formal contract ceases to exist, creating a situation where obligations exist (are pending) under a mere verbal contract with an indefinite expiration date, an irregularity to be put right using methods acceptable to the courts. [...]" (Plenary Session, Appellate Decision No. 2143/2015, Reporting Judge Raimundo Carreiro, j. Aug. 26, 2015).

[4] "Section 60. The contracts and their amendments will be executed at the interested departments, who will keep chronological records of their signatures and systematic records

Even where the extension is subsequently formalized, the TCU has asserted that "entering into an amendment to extend the term of a contract whose effectiveness period has already expired constitutes renewal of the contract without a bidding process".[5]

Thus, within the TCU, the consolidated position is that it would be forbidden to extend a contract to a date subsequent to the end of its effectiveness period.[6]

This interpretation also prevails in the federal government, in accordance with Normative Guidance No. 3 of the Office of the General Counsel to the Federal Government, dated April 1, 2009.[7] Within the scope of the Office of the Federal Prosecutor-General, for example, in the summary of the conclusions of the Permanent Chamber on Biddings and Contracts, one can see that even in the case of scope-based contracts, the extension of contracts that have expired is not admitted, in which case it is recommended "inserting the remaining part in a new administrative contract, which shall be preceded by a bidding process or classified in some situation of waiver or non-enforceability", because "performance of the expired contract, whether scope-based or continuously performed, constitutes a verbal contract and is subject to ON/AGU No. 04/2009 which determines payment by recognizing the obligation to indemnify pursuant to section 59 of Law No. 8.666/93", also asserting that not even the rescission of such contracts would be permitted.[8]

---

of their abstracts, except for those involving in rem rights over property, which are formalized using instruments executed at the office of a notary public, collating copies of the processes that gave rise to them. Sole paragraph. Verbal contracts with the government are null and void, except for small purchases with immediate payment where the amounts involved do not exceed 5% (five per cent) of the limit established in section 23, subsection II, letter 'a' of this Law, by way of advances."

5 TCU, 2nd Chamber, Appellate Decision No. 2546/2017, Reporting Judge Ana Arraes, j. Mar. 14, 2017.

6 "Extensions are not granted to contracts whose effectiveness periods have expired, even if only for one day. A new contract shall be signed." (BRAZIL. Tribunal de Contas da União. *Licitações e contratos:* orientações e jurisprudência do TCU / Tribunal de Contas da União. 4th ed. Brasília: TCU, Secretaria-Geral da Presidência: Senado Federal. Secretaria Especial de Editoração e Publicações, 2010. pg. 659, 766, 773).

7 Normative Guidance/AGU No. 3, of April 1, 2009 (OUJ of April 7, 2009, S. 1, pg. 13): "In analyzing processes involving extensions of terms, it is incumbent on the legal bodies to verify whether or not the current effectiveness period has been exceeded, as well as any incidents of disruption in the preceding addenda, situations that result in the extinguishment of the arrangement, preventing its extension".

REFERENCE: section. 57, subs. II, Law No. 8.666, of 1993; Decor Note No. 57/2004-MMV; TCU Appellate Decisions 211/2008-Plenary Session and 100/2008-Plenary Session.

8 CONTRATO ADMINISTRTIVO. VIGÊNCIA DO CONTRATO DE ESCOPO. Conclusão No. 58/2013. Reference: Opinion No. 13/2013/CPLC/DEPCONSU/PGF/ AGU, approved by the

On the other hand, only exceptionally has the TCU allowed the extension of expired contracts, and only for those that are scope-based.[9]

Lastly, regarding continuously performed services contracts, an opinion of the Prosecution Office and the Accounting Court of the Federal District has been given in favor of actually extending expired contracts only where the principal has formulated such manifestation within the duration of the contract.[10]

Thus, this calls for a more in-depth approach to the concepts of continuously performed services under fixed terms and scope-based contracts, to verify whether the prevailing interpretation is the most appropriate for dealing with extensions.

3. Continuously performed services

Continuously performed services are defined, for example, by section 15 of Normative Instruction No. 5 of the Management Secretariat of the Ministry of Planning, Development and Management, of May 25, 2017, which lists as an important element the essential nature of the service.[11]

The definition in this Normative Instruction had already appeared in Appellate Decision No. 132/ 2008 of the 2nd Chamber of the TCU which had also

---

Federal Attorney General on 03.12.2013." Available at: <www.agu.gov.br/page/download/index/id/22168843>. Accessed on: Jun. 24 2017.

9 "5. As a rule, administrative contracts must be extended prior to the expiration of their effectiveness period, so as to avoid extinguishment of the arrangements. Nevertheless, exceptionally, and to avoid adverse effects on the public interest, in the case of scope-based contracts where the agent is slow to formalize the proper amendment in good time, it is possible to consider the stoppage period of the work, on the initiative of the contracting government, as periods during which the counting of the effective period of the arrangements is suspended.

[...]. Appellate Decision 127/2016 — Plenary Session, Audit, Reporting Judge Substitute Justice André de Carvalho." (Tenders and Contracts Case Law Bulletin No. 272) Likewise, Appellate Decision No. 3131/2010-Plenary Session, TC-008.318/2005-9, Reporting Judge. Justice Augusto Nardes, 24.11.2010. (Tenders and Contracts Case Law Bulletin No. 44)

10 CUNHA, Francisco Pedro Carneiro da. Contrato administrativo — revisão, prorrogação e aditamento — registro. *Revista de Direito Administrativo,* Rio de Janeiro, v. 17, pg. 274-276, July 1949. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/11093/10068>. Accessed on: July 11, 2017.

11 "Section 15. Continuously provided services are those which, given their essential nature, aim to meet the government's needs in a permanent and continuous manner for more than one financial year, ensuring the integrity of public property or the fulfillment of the core activities of the body or entity whereby, should these be interrupted, this would adversely affect the public service provided or the fulfilment of the institutional mission."

drawn attention to the risk to public interests in case of interruption to the service.[12] In this Appellate Decision No. 132/008, the understanding is that the continuous nature lay in the service itself and that it arose from the fact that interrupting it could compromise the activities of the public entity. Prior to that Appellate Decision, the TCU had submitted as conceptual elements the fact that those services represent "obligations to be fulfilled" and "permanent necessities".[13]

The fact is that the essential nature of the service is neither indicated in the law as a *sine qua non element*, nor does it arise in the actual context. If a service is performed in a continuous manner, it is because it is intended to meet a necessity of a continuous nature.

Since each entity has different necessities, the same service may be performed continuously at one entity, and discontinuously at another.

What must be established is that the aspect of continuity refers to the necessity, not to the service itself. In practice, it will be the administrator who will evaluate the reality of the entity he manages, to decide whether or not the necessity is continuous.

The most important thing, therefore, is to define what a necessity of a continuous nature would be. Besides this question, it is also important to discuss the reason why the law has authorized the extension of continuously performed services contracts and the problems involving long-duration contracts.

3.1 Duration of the contract and budget

The concern with the duration of the contract appears to have arisen from the practical problems involving financial law. Whatever the subject matter of

---

[12] "[...] 29. In reality, what characterizes the continuous nature of a given service is its essential nature for guaranteeing the integrity of public property in a routine and permanent manner, or to ensure that the core activities or the governmental body continue to be performed, whereby the interruption thereof could adversely affect the rendering of the public service or the fulfillment of the institutional mission.

[...] (TCU. Appellate Decision No. 132/2008 — Second Chamber. Reporting Judge: Justice Aroldo Cedraz. Appellate Decision date: 12/02/2008)." Perhaps there would be no need to mention this Appellate Decision, but it is mentioned merely to demonstrate how the interpretation of case law has been consolidated and is becoming the norm,

[13] "9.2. Thus, for the services to be classified as continuous, it is necessary to analyze the contracts case by case and to compare this with the manner in which the DFA/PR has acted, determining in this case that the body, when executing and extending contracts, should pay close attention to item II of article 57 of Law 8.666/93, so as to only classify as continuous services contracts whose purposes represent the obligations to be undertaken and permanent necessities" (TCU, Plenary Session, Ruling 1.136/2002).

the contract, article 57 of Law No 8.666, of 1993, holds that the duration of the contract must correspond to the effectiveness period of the budgetary credits which, according to financial law, are usually valid for a financial year, in accordance with the principal of a one-year cycle provided for in article 2 of Law No 4.320, of March 17, 1964.[14] The rule, thus, is that the contract should last for one year at the most,[15] from January 1 to December 31 of the same year, based on article 34 of Law No. 4.320 of 1964, for which the "financial year coincides with the calendar year".

The principle of the one-year cycle is a traditional feature of financial law, seeking to accompany the similarly natural annual program of economic agents in the market. There is no requirement for it to cover the period from January 1 to December 31, since everything depends on the reality of each country and the what the legislation provides for.[16]

It is worth recalling that the requirement to abide by the one-year cycle in managing public expenditure is enshrined in the Constitution itself, in accordance for example, with the text of sections 165 onwards. On that point, subsection I of section 167 prohibits "the commencement of programs or projects not included in the annual budget law"[17], and subsection II "incurring expenses or assuming direct obligations that exceed budget or additional credits".

However, there are expenses that may be extended, if necessary beyond the end of the year. Aware of this reality, the text of the constitution itself included, for example, the figure of the multi-year plan intended for long-term planning for capital expenditures, expenses arising from the latter and for programs of a continuous nature. Otherwise, only by way of clarification, no works lasting more than one year could be executed. It is also worth remembering that, in the absence of expenses of a continuous nature, not only

---

[14] "Article 2 The Budget Law will itemize the revenues and expenses in order to demonstrate the Government's economic and financial policy and work program, with due regard for the principles of unity, universality and the one-year cycle."

[15] CONTI, José Maurício. *Levando o direito financeiro a sério*. São Paulo: Blucher, 2016. pg. 101, 137, 141 e 142.

[16] FRANCO, Antônio Luciano de Sousa. *Manual de finanças públicas e direito financeiro.* Lisboa: 1974. v. 1, pg. 661-689. TORRES, Ricardo Lobo. *O orçamento na Constituição.* Rio de Janeiro: Renovar, 1995. pg. 202-205.

[17] According to Ordinance No. 42 of April 14, 1999: "Section 2 — For the purposes of this Ordinance, the following meanings apply: a) Program, the instrument for organizing the government's actions for achieving its intended objectives, measured using indicators established in the multi-year plan; b) Project, a scheduling instrument for achieving the objectives of a program, involving a set of time-restricted operations that result in a product that contributes to expanding or enhancing the action of the government".

capital expenses but also cost expenses, it would be impossible to hire public servants who can spend years on end working for the government.

Acknowledging these extended expenses, however, is not incompatible with the one-year cycle insofar as they can be evaluated and voted by the legislature once a year. This annual control is a compromise, since it is difficult to approve longer periods and difficult to execute in shorter periods.[18]

In the legislation, restricting contracts to the duration of budgetary credits has been in existence since at least the advent of Law No. 3.018 of November 5, 1880,[19] and was incorporated into the General Regulations on Government Accounting.[20] However, it clearly acknowledges situations requiring expenses that exceed the financial year. Just refer to sections 56, 73, 228, 230, 767 and 777 of those Regulations dealing, among other things, with budget programming and allocation, including cases of expenses that recur year after year, in addition to, at that time, having restricted the duration of the contracts to the effectiveness period of the respective credits, but providing for extensions of more than one yearly cycle, provided the period of five years is not exceeded.

From the moment when the budget legislation permits contracts exceeding 12 months, the reason for limiting them, as was the case of section 777 of those Regulations, to five years makes no sense. Neither the motive behind that limitation, nor the reason for adopting five years, rather than a different term, make sense.

In the Brazilian Civil Code of 1916, service contracts were limited to four years. The argument for this limitation was to ensure the liberty of the individual service provider, that is, it was a reaction to the slavery system of the past. Even for that reason, in the case of unspecified duration contracts, it was possible to rescind them under prior notice.[21]

This was perhaps why, in the Code of Government Accounting, the legislator decided to limit the term. Thus there remains the question regarding

---

[18] Antônio Luciano de Sousa Franco, *Manual de finanças públicas e direito financeiro,* op. cit., pg. 662, 687-689; Ricardo Lobo Torres, *O orçamento na Constituição,* op. cit., pg. 54-55.

[19] ALVIM FILHO, A. Contrato — prazo e prorrogação. *Revista de Direito Administrativo,* Rio de Janeiro, v. 1, n. 1, pg. 233-235, Jan. 1945. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/8345/7120>. Accessed on: 11 July 2017.

[20] Approved by Decree No. 15.783, of November 8, 1922, dealing in greater detail with the Code of Federal Accounting organized by Decree No. 4.536, of January 28, 1922.

[21] BEVILÁQUA, Clóvis. *Código civil dos Estados Unidos do Brasil:* comentado por Clóvis Beviláqua. Historical edition. Rio de Janeiro: Rio, 1958. v. IV, pg. 332-333. VENOSA, Sílvio de Salvo. *Direito civil:* contratos em espécie. 4th ed. Published by São Paulo: Atlas, 2004. v. 3, pg. 198-199.

the limitation period which, while under civil law was four years, in the latter it was limited to five years.

It is probable that this period arises from the formality of public law, primarily for the purpose of the statute of limitation, of limiting the terms to five years as one can see, for example, in section 178, paragraph 10, VI, of the Brazilian Civil Code of 1916, in sections 174, paragraph 1, 353, j, 356, 453, 503, 518, 609 and 767, sole paragraph, of the Code of Government Accounting, and it is worth noting that this five-year term had already been applied since the law of November 30, 1841, interpreted by Decree No. 857 of November 12, 1851.[22]

Regardless of this issue, this also appears to have been the origin of the period that was to become the limiting factor on continuously performed service contracts with the government. This contract and others, which Law No. 8.666 of 1993 acknowledged as needing to extend beyond the financial year, were covered in article 57 as exceptions to limiting the duration of the contracts to the budget allocations requited to cover their respective expenses.[23]

---

[22] BRAZIL. Federal Senate. *Decree No. 857, of November 12, 1851.* Explains article 20 of the Law of November 30, 1841 regarding the statute of limitation on the Nation's executable and payable debt. Available at: <www25.senado.leg.br/web/atividade/legislacao>. Accessed on: Apr. 3, 2018. Another possibility lies in the fact that the presidential term of office at the time was four years, as per section 43 of the Constitution of the Republic of the United States of Brazil of 1891 (BRAZIL. Office of the President of the Republic. *Constitution of the Republic of the United States of Brazil,* of February 24, 1891. Available at: <www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm>. Accessed on: Apr. 3, 2018). Although at the time there was no multi-year plan, as people knew about the existence of long-term expenses, by establishing the maximum term of five years for the contracts, on the one hand one would avoid the interruption thereof due to a change of president, since the contractual period extended beyond the term of office. On the other, it would enable the new president to evaluate the continuous expenses during his first year in office in order to decide whether or not to continue them. Indeed, the multi-year plan enshrined in the 1988 Constitution of the Federative Republic of Brazil also affords the same situation insofar as it is created in the first year of the presidential term of office to last for the last three years of that same term of office, while taking in the first year of the subsequent term of office.

[23] "Article 57. The duration of the contracts governed by this Law will be confined to the effectiveness period of the respective budgetary credits, except with regard to: I — projects whose outcome is included in the targets established in the Multi-Year Plan, which may be extended if the government sees fit, and provided this has been factored into the invitation to bid; II — rendering of services in a continuous manner, whose duration may be extended for equal and successive periods in order to obtain more advantageous prices and conditions for the government, limited to sixty months; [...] IV — lease of equipment and the use of computer programs whose duration may be extended for a term of up to 48 (forty-eight) months following the commencement of the effectiveness period of the contract. V — the situations provided for in items IX, XIX, XXVIII and XXXI of article 24, whose contracts may have an effectiveness period of up to one hundred and twenty (120) months, should the government so wish. [...] Para. 4 Exceptionally, with proper justification and with the approval of a higher authority, the term covered in item II of the main paragraph of this article may be extended by up to twelve months."

Several conclusions can be drawn from this legal instrument. Firstly, not only continuously performed services contracts, but also other types of contracts can be extended, or their effectiveness period can exceed the duration of the budget allocations.

Secondly, the extension which most concerned the Law was precisely that in which the duration of the contract extends beyond the financial year, as this would be an exception to the rule of binding the duration to the effectiveness period of the budget allocation, although all situations need to abide by their own procedures, even where the extension takes place within the same business year.

Thirdly, specifically in the case of continuously performed services, provided for in item II of article 57, the time aspects refers to the fact of the need to exceed the end of the financial year and, therefore, the effectiveness period of the budget allocation. The term can, therefore, be less than a financial year, that is, it can be less than 12 months, but the concern of the law is to make it clear that it will be possible to extend effectiveness period, even when it commences in one financial year and ends in another.

Fourthly, one must take into account that item II itself did not stipulate a minimum term, rather only the maximum limit of 60 months which, in exceptional circumstances, can be increased by 12 months in accordance with paragraph 4 of article 57.

Fifthly, another important conclusion is that even when the service is performed in a continuous manner and when there is a permanent need, it will not be permitted to extend the contract beyond the legal limit (60 months plus a further 12 months, in exceptional circumstances). Thus, during the final contractual period, if the necessity persists, there should be a tender for a new procurement, or, according to the actual circumstances, direct procurement.

This makes it evident that the argument based on the "essentiality" of the service as a reason for extending the contract has been undermined. According to this argument, it would be the "essentiality" of the service, that is, the impossibility of interrupting it due to possible losses to the entity and the achievement of its objectives, that would justify the extension. This argument appears to overlook the aspect of financial law, the one-year cycle of the budget, seeing only the need for a tender process each time the contract expires. Thus, the argument appears to see the extension not only as an exception to limiting the contractual term to the effectiveness period of the budget allocation, but primarily as an exception to the rules for biddings.

Also according to this argument, it appears that the bidding process is seen as bureaucracy harmful to the continuity of the service. As the service could not be interrupted, the rules for bidding would not apply, clearing the way for an extension of the contract. The risk of the bidding process adversely affecting the continuity of the service refers to possible incidents inherent to the competition, such as the time needed for the process, possible appeals and challenges, among others.

Of course, risk also lies in the procedure required for the extension. The contractor may wish not to continue with the contract, and the contract may cease to be advantageous, among other situations that would lead to the need for a bidding process.

If, indeed, it was the essentiality of the service and the impossibility of interrupting it that justified the extension, the latter, in principle, could not be limited. Furthermore, it would also be necessary for the other situations in article 57 to cover subject matters essential to the government.

Thus, it appears more to be a practical aspect involving the one-year budget cycle that led the Bidding Law to permit the extension of those contracts. If there was no limitation on the annual budget (and the rules that prevent unspecified duration contracts), there would be nothing to prevent entering into an unspecified duration services contract or on with a very long term in cases where the need to be attended would extend over time.

Just draw a parallel with a works project to understand this assertion. If a works project is estimated to last seven years, should the government hold a bidding process every year, or enter into a contract restricted to the financial year, thereafter making yearly extensions until the work is completed?[24]

Here, it is clearly evident that the term of the works contract has to be whatever is required to conclude the work. When, however, there is a demand to be met by providing a service, the term of the contract should correspond to the time required for meeting that demand.

Note that even if the term of the service contract were indeterminate or very extensive, it would not fail to meet the bidding requirement provided for in section 37, XXI, of the Constitution.

---

[24] Construction of the Itaipu hydroelectric plant, for example, began in 1974, and it only started producing energy in 1984 (ITAIPU BINACIONAL. *FAQ.* Available at: <www.itaipu.gov.br/sala-de-imprensa/perguntas-frequentes>. Accessed on: Apr. 3, 2018).

Unfortunately, confusion appears to have arisen between the issue of the budget and that of the tender process, which has even led the law to limit the terms of services contracts.

Such has been the confusion that, at the beginning of the effectiveness period of the instrument that permitted extensions to continuously performed services contract, the understanding was that whatever the starting date of the contract, its expiration date should fall on December 31 of the year in which it began. It was also held that the extension should take place by December 31, so that the contract could continue as of January 1 of the following year and this time, with an effectiveness period running once again to December 31.[25]

Nowadays, the matter appears to have been resolved, since the government, through the AGU, published Normative Guidance No. 1 of 2009, according to which "the effectiveness period of continuous services contracts is not confined to the financial year", this Guidance having been based on Decision No. 586/2002 of the 2nd Chamber of the TCU and Decision No. 25/2000 of the TCU at a Plenary Sitting.

If any relations with the government required annual bidding, it would render the concession contracts or public permissions provided for in Law No. 8.987, of February 13, 1995 impossible. Since in these contracts the concessionaire or permissionaire performs the service or carries out the work for their account, that is, without the need for the government budget, there was no concern with such strict limitation on the terms of those contracts. So much so that their term is estimated to offset the private investment, which can take many years.

And in cases where a service is provided, given the legal limitation of the term of up to five years, Law No. 11.079, published on December 30, 2004, ruled on public-private partnerships and stipulating much more extensive terms. By the way, this Law prohibits contracts with terms of less than five years.

The reference to these laws shows that it is possible to comply with the constitution requirements for biddings without the need for annual renewal

---

[25] ALVIM FILHO, A. Contrato — prazo e prorrogação. *Revista de Direito Administrativo,* Rio de Janeiro, v. 1, n. 1, pg. 233-235, Jan. 1945. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/8345/7120>. Accessed on: July 11, 2017. MARQUES NETO, Floriano Azevedo. A duração dos contratos administrativos na Lei nº 8.666/93. In: GARCIA, Maria (Coord.); MARQUES NETO, Floriano Azevedo; SANTOS, Mareia Walquiria Batista dos; TANAKA, Sonia Yuriko. *Estudos sobre a lei de licitações e contratos*. Rio de Janeiro: Forense, 1995. pg. 175-178.

of the bidding procedure. It also shows, primarily in the case of public-private partnerships in which the government invests funds from the public purse, that contracts with terms exceeding one year, and even five years, are possible without violating the annual budget planning, above all because the Constitution itself acknowledges the existence of projects and programs whose duration has to exceed this term.

Lastly, in the case of continuously performed services where the Bidding Law holds that extensions are possible, it must be understood that with due regard for the maximum limit of 60 months (with an exceptional increase of 12 months), it is possible to maintain the contract beyond the effectiveness period of the budget allocation, and it really does not matter whether the extension will occur during the effectiveness period of the contract or not, since what matter for maintaining the contract, as we will see, is the continuing public need to be met. To put it another way, the concern of item II of article 57 of the Bidding Law was not to restrict the approval of the extension only to cases in which the contract was in force and effect, rather only to clarify that the duration of such contracts could extend beyond the budget allocation.

Also, for this reason, both the initial period can now be set for periods exceeding one year, and the extension period "can be equal to or less than, and even greater, than that of the initial contract, with due regard for the restrictions of article 57 of Law 8.666/93", according to Hely Lopes Meirelles,[26] a position that we have adopted.

The only concern with longer-term contract is the need to maintain the advantage, by the way, a requisite demanded by item II of article 57 of the Bidding Law as a condition for approving extensions. And that, while in a bidding process there is competition among the bidders that can result in a relatively more advantageous proposal, in the case of extensions, there is a possibility that this advantage will cease to exist over the life of the contract, for example, when the adjustments applied to the contract result in a price that exceeds that of the market. That is why it is essential that, regardless of the term of the contract, there is an express provision that the advantage must be maintained, under penalty of termination. Furthermore, the government

[26] MEIRELLES, Hely Lopes. *Licitações e contrato administrativo*. 11th ed. São Paulo: Malheiros, 1996. pg. 201. This position is reflected in section 25 of TCU Ordinance No. 128 of May 14, 2014, which "deals with the tender process and services contracts within the scope of the Department of the Federal Accounting Court": "Section. 25. Depending on the characteristics of the subject of the continuous services contract, when justified, the initial or total procurement may exceed 12 (twelve) months, limited to 60 (sixty) months".

must constantly ascertain that this advantage is being maintained, at least once a year, remembering that as an alternative to termination, it will be possible to reestablish the economic and financial balance, in accordance with article 65, II, *d* of the Bidding Law.

If an advantage exists, and with due regard for the maximum duration of sixty months, what will determine the approval of the extension to the services contract will be the necessity to be addressed. Therefore, it is necessary to verify what type of necessity authorizes this extension.

3.2 What characterizes the continuous nature of the necessity to be addressed

It has already been shown that the objective of a continuously performed service is to attend to a necessity of a continuous nature. By the way, the continuous nature refers to the necessity, not the service. Thus the expression "service of a continuous nature" is inappropriate.

This brings us to the main point of this topic, which would be the analysis of the element characterizing this type of necessity.

To analyze the question raised, let us take the following example: cleaning services. In principle, when an entity is in operation, work will need to be carried out in a clean environment. Besides the accumulated dust, the government officials themselves naturally soil the premises by throwing garbage in the waste, using the rest rooms, walking around the premises, etc. Thus, there is a continuous need for this service.

It is acknowledged, however, that as a rule the service is not provided during the night or at weekends. That is, the service is interrupted at night and at weekends, without this interruption eliminating the continuous nature of the necessity to be met.

This shows that the previous concepts raising the impossibility of interruption as a characteristic of "service of a continuous nature" are fraught with at least two imperfections. Firstly because, as already said, it is not the service, rather the necessity, whose nature is continuous. Secondly, because there may be interruptions without eliminating the continuous nature of the necessity.

But, if it is not the interruption that is relevant for the continuous nature of the necessity, what element would it be?

Starting with an extreme situation, this continuous nature would be eliminated by an interruption arising from the service no longer being necessary at the time, and the expectation that, in principle, it would no longer be necessary in the future.

Imagine a situation in which an entity ceases to exist, and an entire floor of public building is to be vacated, with the other entities continuing to function normally; the cleaning service on the vacated floor will be no longer necessary, the interruption arising from the service no longer being required.

With the two previous examples, the daily cleaning service and the example of the end of that service, it is clear, firstly, that the continuous nature arises out of the necessity to be met, not the service itself. This was the interpretation adopted, for example, in Appellate Decision No. 766/2010 of the Plenary Session of the TCU. Moreover, in that same ruling, the TCU acknowledged that even certain cases of supply could be extended based on article 57, item II of the Bidding Law. The court acknowledged, "exceptionally, based on an extensive interpretation of item II of article 57 of Law No. 8.666, dated June 21, 1993, that procurement for the acquisition of coagulation factors be considered services of a continuous nature".

Thus, the "public necessity to be met" is such a fundamental element that the Accounting Court even removed the literal terms of the law to allow extension of supply contracts which, according to the legal interpretation itself, would not entail services.[27]

---

[27] Merely by way of illustration, while at the federal level this is a very rare situation, applying the possibility of extensions on diverse services contracts appears to be more acceptable with the State of São Paulo: "On merit, I admit the opinions of the Head of Technical Advisory and the SDG, since, after analyzing each particular case, and provided there are proper motives and certain conditions are met, there are certain situations in which one could acknowledge a context of continuous supply in which there will be an ample interpretation of article 57, item II of the Bidding Law, so as to admit the extension of terms provided for in that legal instrument.

Indeed, just as happens with the provision of services of a continuous nature, there are situations in which there are supply contracts which, likewise, are of a continuous and predictable nature, as there is a list of products repeatedly supplied over time, for the duration of an agreed effectiveness period based on quantities previously estimated by the principal, whereby the continuity of this supply is seen as an essential requisite for maintaining certain public services.

Regarding the issue of budgets dealt with in the main paragraph of article 57 of the Bidding Law, there is no prohibition since we are dealing with the continuous and predictable supply of products, and the resources required will have already been earmarked under a specific budgetary allocation previously established in the Annual Budget Law, which will be used, likewise, both for new procurement and extensions to terms, as the case may be, since this supply contract cannot be interrrupted. (Reporting Councillor Eduardo Bittencourt Carvalho, j. Apr. 26, 2006)" (TC 000178/026/06 of the TCE/SP)

Going back to the example of cleaning services, after considering that the daily and weekly interruption of the service does not exclude it from item II of article 57 of the Bidding Law, one has to analyze what the situation would be if the service was provided on just one or a few days per week, or even on a monthly, quarterly, semi-annual or annual basis. In other words, much longer interruptions.

Once again, there is no reason for disqualifying the necessity as having a continuous nature. Just imagine, for example, the cleaning service of a water tank in a building housing a government entity, once or several times a year. The service is necessary, or if you prefer, "essential" for the entity to function.

These illustrations seem to suggest that instead of focusing on the absence of interruption, the element that characterizes the continuity of the necessity would be the expected future repetition, that is, it is known beforehand that the service will once again become necessary. So, perhaps the very terms "continuous" or "continuity" are not appropriate. Preference must be given to services intended to meet recurring or repetitive necessities.

This repetition or recurrence also does not require a standard frequency, that is, there is no requirement for the necessity to arise always at the same period of time, for example, once a month, quarterly, every four months, etc. All that is required is a degree of certainty that it will be repeated.

One can image the services of a locksmith, when we know that the entity will require such a service, but we cannot say precisely how often. Ideally in this situation, the procurement would be on demand, that is piecework at a unit price.

Having configured the expected recurrence of the necessity, the administrator should firstly ascertain if the public interest is best served by holding a periodic tender process or direct procurement, the latter only in those cases expressly approved by the law. Secondly, whether the procurement will be for a shorter period, with the possibility of extension, or with an extended period with no possibility of extension. He may also decide between procurement using a price registration system or under a services contract to be performed in a continuous manner.

In the same vein, Normative Ruling No. 3, of November 10, 1999 of the Federal District Accounting Court, according to which "ample interpretation of the provisions of item II of article 57 of Law No. 8.666, dated June 21, 1993, is admitted in situations characterized as continuous supply contracts, properly justified by the interested bodies or entities, case by case".

4. Fixed term contracts, unspecified duration contracts and scope-based contracts

In addition to the budget planning aspect dealt with previously, the time frame refers to very characterization of the obligation to be met.

The obligation, as a rule, ceases to exist when delivery is fulfilled, that is, upon settlement. This settlement goes by the name of payment and, according to the Special Part of the Brazilian Civil Code, Book I, Chapter III, it is clear that the obligation relationship includes the debtor (whose duty it is to pay); the creditor (to whom the payment must be made); the subject matter of the payment (the deliverable to be given, made or not made); proof of payment (settlement); place of payment; and, lastly, the time of the payment, that is, when the obligation must be discharged. Thus, payment is technically fulfilment of the obligation, not necessarily the handing over of money.

When the time of payment is not stipulated, section 331 of the Brazilian Civil Code holds that payment can be demanded immediately.

The essentiality of the time frame in the obligation relationship thus also gives rise to the requirement contained in item IV of article 55 of the Bidding Law, which inserts as a necessary clause in all administrative contracts: "IV — the time frames for initiating the phases involving execution, conclusion, delivery, inspection and definitive receipt, as the case may be".

By stipulating the time frame, the government can plan the payment, thereby organizing its cash flow.

It should go on record that the payment can be made in several ways, according to the nature of the contract or the obligation to be performed.

That is why the term, which is a time lapse according to jurists, can have several functions depending on how the contract is to executed. Eventually, jurists distinguish between deferred execution and immediate execution, according to whether there is a longer or shorter time lapse between the formation of the contract and its execution. Likewise, while immediate execution refers to once-only fulfilment, successive fulfilments, or deferred execution, refers to situations where execution occurs over time. In spite of the different ways in which the matter is dealt with, classification is usually in three major groups: immediate execution, successive deliveries and conclusion of a given work project or service.[28]

---

[28] FIGUEIREDO, Lúcia Valle. *Extinção dos contratos administrativos*. São Paulo: RT, 1986. pg. 22-24.

In this classification, the first group covers contracts in which payment or fulfilment is immediate, at a single time, such as the delivery of goods in a procurement contract.

This classification also covers contracts involving successive deliveries over a given period, such as cleaning services in which there is a daily routine to be fulfilled. In this case, the term sets the time frame during which the service must be provided, as well as its frequency internal to this time lapse.

Lastly, contracts in which the term covers the period granted to the contractor for executing the contract, concluding its purpose.

While in the group, fulfilment is immediate and should take place at any time up to the final maturity date, in this latter group, fulfilment of the contract begins during the term, and the subject matter should be concluded by the final maturity date. In this latter case, execution takes place over time.

In the second group in which there are successive deliveries, in common with the last group is the fact that execution and, therefore, fulfilment, occurs over time. But, whereas in the second group there are several set deliveries that are repeated over the duration, in the last group, the purpose is partially completed at each instance, and must be concluded by the final maturity date, that is, in principle there would be a single, gradually delivered provision.

The fact is that in all these classifications, it is difficult to precisely determine the time frame that would define each situation. How many hours are characterized in this contract? Can there be pauses in fulfilment? This difficulty in precisely defining each situation is a similar phenomenon to what happens in mathematics in distinguishing between discrete and continuous. Similarly, this happens in Law when distinguishing rules from principles. Based on this, we believe that a time lapse would involve several indiscernible degrees, various degrees of intensity. That is why we preferred to analyze different situations separately. It is our understanding, firstly, that execution can commence on a date shortly after, or long after, the contract has been entered into. Once initiated, it can have a longer or shorter duration. Furthermore, execution can be one-off or be repeated over a given period (and the frequency of the repetition can even represent a permanent state or constant deliverables). Whether execution has begun, or not, whether the deliverable is repeated, or not, there may be a time frame whose final maturity date will define whether the contract is to be extinguished — with full payment or default— or not, the debtor incurring arrears in the latter case. The following is a scheme to better illustrate our thoughts.

Table 1

Classification of the configurations of contractual terms

Elements for analysis	Configuration possibilities		Type of term
Commencement of execution	Closest to the formation	Furthest from the formation	To begin
Duration of the execution	Shorter	Longer	To conclude
Repetition of the execution	Does not occur	Occurs	To be repeated
Termination of the contract	Termination	Delay	To be defined

Source: Prepared by the author.

Once again, the public necessity to be addressed will be the primordial factor in defining the previous situations: a) Regarding when execution commences, if the necessity exists and requires urgent attention, it is more likely that execution will take place on the closest date possible to the formation of the contract; b) In the case of the duration of the execution, the simpler the task, the less time will be required to execute the delivery; c) As for repetition, the more recurrent or constant the necessity, the greater the probability of the deliveries being repeated or becoming permanent. Let us just take the example of water and electricity supply; and d) Lastly, regardless of the recurrent or repetitive nature of the execution, there will be situations in which the law or the contract will restrict its duration to a certain term, while in other cases, the delivery will only be useful if made by a certain date, even if after the termination of the contract so that, whereas in the first situation the expiration of the term will, as a rule, result in the termination of the contract, in the latter, the debtor, if to blame, will be liable for losses and damages, without prejudice to the contractual sanctions, if they fail to pay by that date, but they will remain bound until actual termination.

At any rate, it should go on record that according to paragraph 3 of article 57 of the Bidding Law, contracts for an indefinite term are prohibited. Once again, however, reality has left behind the compulsion of the lawmakers to grasp in its terms the general nature of the phenomena, a fact that has been evident since before Christ.[29] Thus, as the Accounting Courts removed the

[29] Aristóteles had already pointed out that "every law is universal, but one cannot universally assert that this is correct in relation to certain special cases" (ARISTÓTELES. Ética a Nicômaco. Translation by Pietro Nassetti. São Paulo: Martin Claret, 2003. pg. 125). But if this was already

legal restriction of item II of article 57, which only allowed the extension of contracts in the cases specified therein while permitting the extension of supply contracts, it could not be any different in the case of this generic prohibition of paragraph 3 of section 57. The classic example of the exception to this provision involves providing "essential" public services.[30]

Discounting this exception, it should be pointed out that although all contracts must have a fixed term, the title of "fixed term contracts" only applies to those where the expiration of the term results in their termination.

Fixed term contracts include continuously performed service contracts. Thus, for example, where there is a contract of this time with an effectiveness period from January 12, 2010 to January 12, 2011, January 12, 2011 will be the termination date of the contractual term, resulting in the termination of the contract. One must not forget, however, that there will be terms for the contractor to fulfill his obligations, such as the term for fulfilling service orders or the frequency for performing certain routines. But, it is not these terms that characterize fixed term contracts.

It is not only continuously performed service contracts that are classified as fixed term contracts. Just recall items III and IV of article 57 of the Bidding Law already mentioned.

The "fixed term contract" nomenclature is used not only to distinguish these from unspecified duration contracts, especially because, as a rule, these are not permitted under the Bidding Law, but also from scope-based contracts.

Once again, it is the element used as the criterion for terminating the contract that is the differentiating factor here. Whereas in fixed term contracts

---

common knowledge for some time, why does it still happen? Perhaps, as Noam Chomsky told us, "history doesn't repeat itself, but it does rhyme".

30 As acknowledged by Normative Guidance No. 36, of December 13, 2011, of the Office of the General Counsel to the Federal Government: "The government can stipulate an unspecified effectiveness period in contracts in which it is a user of essential public services like electricity, water and sewage, postal services monopolized by the ECT (the Brazilian Postal and Telegrapg Service) and arrangements entered into with the Brazilian press, provided the procurement process explicitly mentions the motives that justify adopting an unspecified effectiveness period and with proof, at each financial year, of the estimated consumption and the existence of earmarked budget resources". Available at: <www.agu.gov.br/page/atos/detalhe/idato/418797>. Accessed on: June 23, 2017. According to this Normative Guidance, since article 62, paragraph 3 of the Bidding Law, not to mention article 57, waived the rules of articles 55 and 58 to 61 for contracts to which the government is a party as a user of public service, the understanding is that such article 57 would not apply to those contracts. The conclusion of the Normative Guidance was that such contracts could be entered into for indefinite periods. However, this Normative Guidance fails to mention the need to constantly investigate the appearance of other service providers, enabling more advantageous contracts for the government by having them compete among themselves.

it is the final term of the contract that triggers its usual termination, in the case of scope-based contracts, it is the fulfilment of the purpose that produces this effect.

Jurists' opinion tells us that the intention of scope-based contracts is a completed objective.[31] However, it should be noted that in a continuously performed services contract, usually classified as a fixed term contract, there is also an purpose to be fulfilled, usually a routine to be completed, but only during the effectiveness period of the contract.

A works contract is usually classified as a scope-based contract insofar as only the completion of the work will terminate the contract. Nevertheless, one cannot ignore the situation where works will only be considered useful for the government if completed by a certain date. In this case, although the work has not been completed, the contract may be terminated if its clauses provide for this.

In spite of these points raised, the distinction between a fixed term contract and a scope-based contract is recognized by jurists[32] and case law.[33] This distinction, let it be said, is primarily applicable in administrative law and for administrative contracts. And, it is based on this that the TCU, as already mentioned, has allowed extensions to terms in scope-based contracts, even where these have expired, in situations where the objective has not been concluded.

We will see, however, that the purpose is not always fulfilled, in spite of the extension to the term. In addition to this aspect, there is also the need to, finally, analyze the main issue of this paper which concerns the extension of the terms of fixed term contracts, primarily those involving the provision of continuously performed services and those cases where the term expires.

5. Extension

In Appellate Decision No. 2.143/2015 the Plenary Sitting of the TCU perfectly reflects the impossibility of extending contracts that have expired.

---

[31] MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo.* 29th ed. São Paulo: Malheiros, 2012. pg. 640.

[32] Ibid., pg. 640-641.

[33] "[...] jurists and case law separate government contracts into two types: 1) fixed term, which terminate when the effectiveness period expires; and 2) "scope-based", which expire when the purpose has been fulfilled. In the case of the latter, if they expire without the respective purpose having been fulfilled, the term can be extened, in accordance with article 79, paragraph 5 of Law No. 8.666/1993 [...] Appellate Decision 5.466/2011 — 2nd Chamber."

Everything points to the fact that, in the eyes of the TCU, even in the case of scope-based contracts, extensions would be the exception. It is interesting to note that in the text of this ruling, the court mentions the interpretation of Hely Lopes Meirelles in his book of 1999, which indicates the impossibility of extending contracts beyond their final termination.[34]

As we know that this renowned specialist in administrative law passed away in 1990, we need to turn to previous editions to ascertain whether this was indeed his position. The fact is that in the 1979 edition, the excerpt cited in the appellate decision already contained the same wording, but this same excerpt only referred to the termination of unspecified duration contracts, that is, that interpretation did not apply to scope-based contracts.[35] Also, in the same book, the author made it clear that "in the case of contracts that are only terminated when their purpose has been fulfilled, extensions do not depend on expectations and biddings, because although the term of the contract has been exceeded, the contract is still being performed".[36]

This same interpretation distinguishing contracts that terminate upon final expiration, from those that depend on fulfillment of their purpose, also appears in the latest edition of his *Direito administrativo brasileiro* prior to his

---

[34] "201. The book by Hely Lopes Meirelles interpets the issue as follows:

'Termination of the effectiveness period, without an extension, extinguishes the arrangement under the law, requiring a new contract in order to continue with the work, services or procurement previously contracted. Expired contracts are not extended or renewed: they are re-done and formalized in a new instrument totally divorced from the previous one.' (MEIRELLES, Hely Lopes. *Licitação e contrato administrativo.* 12th ed. São Paulo: Malheiros, 1999. pg. 214.)

202. The Federal Accounting Court ratifies this interpretation in several of its precedents. Take, for example, Appellate Decision 1.335/2009-TCU-Plenary Session, Reporting Judge. Raimundo Carreiro, Appellate Decision 3.863/2011-TCU-2nd Chamber, Reporting Judge. Min. José Jorge, Appellate Decision 738/2006-TCU-Plenary Session, Reporting Judge. Min. Marcos Bemquerer, Appellate Decision 740/2004-TCU-Plenary Session, Reporting Judge. Min. Ubiratan Aguiar.

203. Likewise, AGU Normative Guidance No. 3 was issued [...]" (TCU, Plenary Session, Appellate Decision No. 2.143/2015, Reporting Judge Justice Raimundo Carreiro, j. Aug 26, 2015).

[35] "Termination of the contract through expiration of its term is the rule in fixed term arrangements. Therefore, it is necessary to distinguish between contracts that are terminated when the purpose has been fulfilled, and those that that are terminated when their effectiveness period expires: in the former, the aim is to have the purpose fulfilled, with the term functioning as a cut-off date for delivering the works, service or procurement without contractual penalties; in the latter, the term is the efficacy of the legal business contracted and, in this case, when the term expires the contract is terminated regardless of the phase of execution of the purpose, as is the case in public utility concessions or in the simple lease of something for a certain period of time. The contract, therefore, has a delay term and a deadline" (MEIRELLES, Hely Lopes. *Licitações e contrato administrativo.* 4th ed. São Paulo: RT, 1979. pg. 253-254).

[36] Ibid., pg. 258.

death,[37] as well as in his specific work on *Biddings and contracts*,[38] appearing again, for example, in the 34th edition of his *Direito administrativo brasileiro*,[39] subsequent to the one used by the TCU.

If you will pardon the pun, this distinction makes all the difference, and, therefore, the interpretation of the TCU, with the intention of terminating contracts on their final expiration date, is inappropriate, either because there are certain peculiarities that require specific treatment for each type of contract, or because Hely Lopes Meirelles, on whom the argument was based, was not of that opinion.

So, let us move on with the analysis of scope-based contracts to deal with the issues involving expiration of the term of the contracts, now also bearing in mind paragraph 1 of the already mentioned article 57 of the Bidding Law.[40]

Firstly, one can see that whereas the items of the main paragraph of article 57 refer to the exceptions to the rule that binds the contractual term to the effectiveness period of the budget, the subsections of paragraph 1 deal with situations referring to extensions to terms involving performance of the contract, in other words, different subject matters.[41]

---

[37] Id. *Direito administrativo brasileiro.* 16th ed. São Paulo: RT, 1991. pg. 210.

[38] Id. *Licitações e contrato administrativo.* 4th ed. São Paulo: Malheiros, 1996. pg. 196-198, 200-201.

[39] Id. *Direito administrativo brasileiro.* 34th ed. São Paulo: Malheiros, 2008. pg. 234-235; 237. "1. Fulfillment of the purpose: termination of the contract upon fulfilment of the purpose is the rule, by operation of the law when the parties completely fulfill their contractual obligations, that is, fulfillment of the purpose of the arrangement by one of them, with payment of the price by the other. [...]

2. Expiration of the term: the end of the contract when the effectiveness period expires is the rule in fixed term contracts in which the deadline is the efficacy of the legal business contracted, so that, once it has expired, the contract is terminated regardless of the phase of execution of the objective, as is the case in public utility concessions."

[40] "Art. 57 [...] para. 1The initial terms of the execution, conclusion and delivery phases can be extended, the other conditions of the contract remaining unchanged and ensuring the economic and financial equilibrium, provided one of the following motives arises, duly noted in the process: I — changes in the project or specifications by the government; II — prevalence of an exceptional or unforeseen fact, against the will of the parties, fundamentally altering the conditions for performing the contract; III — interruption to the performance of the contract or a reduction in the pace of the work by order, or in the interests of the Government; IV — increase in the quantities initially provided for in the contract up to the limits permitted by this Law; V — impediment to performance of the contract by facts or acts of third parties acknowledged by the Government in a document issued at the time these occur; VI — omission of or delay in the arrangements under the Government's responsibility, including with regard to the payments provided for, directly resulting in impediment or delay in performing the contract, without prejudice to the legal sanctions applicable to those responsible."

[41] Likewise: JUSTEN FILHO, Marçal. *Comentários à lei de licitações e contratos administrativos.* 16th ed. São Paulo: RT, 2014. pg. 945.

So, in a scope-based contract, it is possible right at its formation, it provides for a fixed term exceeding a financial year, or its initial term is extended, provided the project is included in the Multi-year Plan as per article 57, I. Once the term is fixed, in case of an event beyond the will of the parties, there may be an extension, but based on paragraph 1, II, of article 57.

What interests us here, however, are the situations of extension and how the situation is handled when the contractual term has expired.

In scope-based contracts, as has been made clear, the arrival of the final expiration date does not terminate the contract. The contractor has to fulfill the purpose for the contract to be terminated in the normal manner. It may happen, however, that the deadline for delivery or fulfillment of the purpose expires before this occurs. In this case, will it be possible to extend the contract?

The answer will depend on the circumstances of an actual case. Such extension is permitted, according to the spirit of the Law, only in the event of facts beyond the will or responsibility of the contractor, usually attributed to the government, third parties or nature. This is what can be found in paragraph 1 of article 57 of the Bidding Law, already mentioned. Thus, if there is a delay due to the fault of the contractor, extensions will not be approved.

So then, the question arises: if scope-based contracts only expire when the purpose is fulfilled, what use does an extension serve?

Herein lies a fundamental aspect of the extension: it represents, firstly, recognition by the government that the delay or non-fulfilment of the contract cannot be attributed to the contractor and, for that reason, additional time can be granted. Given this recognition, this consequently removes the need for commencement of punitive administrative proceedings to investigate the breach by the contractor.

This extension will result in an amendment to the contractual term within which fulfilment of the contract will continue in the proper manner. So much so that paragraph 5 of article 79 of the law, likewise, holds that "in the event of an impediment, stoppage or suspension of the contract, the execution schedule shall be automatically extended for an equal period of time".

This amendment, arising as already said from reasons not attributable to the contractor, will have to be formalized via an addendum.

On the other hand, if the contractor is to blame, extending the term is out of the question, nor will the contract be amended. This notwithstanding, the government will be required to formally manifest itself in order to clarify whether the provision of the service is still useful and up until which date this

service will continue to be useful, in the event this has not yet been provided for in the call notice.

There will be cases in which it will be possible to include in the contract the date until which the obligation will continue to be useful. One can imagine the situation involving the supply of snacks for a two-day event. In the event the company supplies nothing on the first day, they may possibly supply the snacks on the second day without prejudice to being held liable for what was missing on the first day. The two days having elapsed however, the service is no longer useful, there remaining but the administrative process to ascertain the losses and damages and the imposition of the proper sanctions, in addition to the rescission of the contract.

However, in other situations, it will only be possible to know whether the service will continue to be useful when the term expires. In this case, when the government sets a date, this means that the contractor will be behind schedule up until that moment, if the service is not provided *a priori*. Also, in this situation, if the contractor manages to conclude the purpose within that deadline, the contract will be terminated without prejudice to the need for commencement of punitive administrative proceedings to ascertain the losses arising from the delay and the imposition of the proper penalties, which includes taking into account the prevailing circumstances, like the conclusion of the purpose.

On the other hand, if the service being provided ceases to be useful for the government, as we have already seen, an administrative proceeding will be required to ascertain breach of contract, in addition to culminating in the termination of the contract.

Since no amendments to the contract are required, the government can formally manifest its position via simple annotations. Indeed, the term of the contract does not change. By the way, the expiration of the term of the contract will serve as the initial delay period of the contractor, as the case may be.

Another question that could arise is the following: either in situations where extension is permitted, like those mentioned in paragraph 1 of article 57 of Law 8.666 of 1993, or in situations where extension is not permitted, but the provision of the service is still useful for the government, it is possible for the extension or formal manifestation setting the deadline for fulfillment of the purpose to be granted after the contract has expired?

In the case of scope-based contract, as we have seen, even the TCU has admitted, although exceptionally, to extemporaneous extensions. This understanding that consent would be exceptional appears to arise from an

incorrect interpretation of the law and of jurists' opinion. Of course, however, ample and unrestricted permission to extend expired contracts could lead to abuses by scrutinized agents, as well as irregularities that would result in legal uncertainty and lack of control and transparency in the management of public affairs. But first, thought must be given to the public interest to be satisfied and, only secondly, investigate the responsibilities for any deviations arising.

At any rate, it is clear that both extensions — using addenda— and establishing the cut-off date for useful delivery of the service provided— using annotation— can take place after the term of the contract has expired, depending on the circumstances of the actual case which will be important, not for permitting that extension, but for indicating whether or not there is a need to hold the players involved accountable. Indeed, everything will depend on when the supervening events that led to the delay or failure to fulfill the purpose arose, as well as the motives that prevented the government from taking steps before the term expired. Just imagine the situation of a contract in which a service can be delivered up to the final day of its term. It could happen, as the case may be, that it is only possible to know whether or not the contract will be fulfilled on that day, and it is evident that, in principle, there will not be enough time for the entire bureaucratic procedure required for extending it.

The situation is a little different in those cases of fixed term contracts. In this case, as far as can be gathered, case law and jurists' opinion, including that of Hely Lopes Meirelles, appear to be unanimous in not permitting extensions. Let's begin with a simpler situation, in order to get a better understanding. In these contracts, as a rule, when the term expires the contract is terminated. So, if for example there is a fixed term continuously performed service contract with an effectiveness period between January 10, 2010 and January 10, 2011, in principle one can say that on January 11, 2011 the contract will cease to exist.

What is to be done when the necessity prevails after the contract has expired? Is extension possible when a continuously performed service contract is involved?

In our opinion, yes, depending on the circumstances of the actual case. As this position defies common sense, a better explanation is in order.

Firstly, as it involves a fixed term contract which is terminated when the period expires, in theory it is forbidden to continue performing it. This is because, in principle, continued performance could be construed as a verbal contract, which would be null and void based on the sole paragraph of article 60 of the Bidding Law.

In this case, one must remember that when there is an extension, an addendum is drawn up to set the new term. Thus, no verbal contract is involved, rather a written one, thereby complying with section 60.

Secondly, the dominant position holds that one can only extend what is already in force and effect or, to put it another way, a term that has already expired cannot be extended.

In this case, one could argue that nowhere does the law prohibit extensions to terms that have already expired, just as there is no obligation to grant an extension within the effectiveness period.

If we take continuously performed service contract, the only legal restriction will be that the duration cannot exceed 60 months, extendible, exceptionally, for another 12 in accordance with article 57, II and paragraph 4 of the Bidding Law.

Although the law states that extensions will take place for equal and successive periods, one can already see that extensions do not have to be the same as the preceding term.

In turn, when the law mentions extensions for successive periods, it is obvious that the subsequent term will only commence when the preceding term ends, so that the previous term will not elapse for the extension period to begin. The intention of the law, then, was only to limit the maximum duration of the contractual relationship, never to prevent it from taking place, even if for different periods over time.

The concern was with establishing what is permitted, whereby the terms of contracts can exceed the duration of the budget allocation, with due regard only for the maximum limit of 60 months. If it is possible to extend the period, which is a duration of 60 months, then obviously it should be permitted to reduce it, which would be a duration of less than 60 months, something that happens in cases where extensions do not immediately occur when the term expires.

In this respect, if a continuously performed service contract has an initial effectiveness period from January 11, 2010 to January 11, 2011, it may have as many extensions as are required, and these may be formalized at any time, even after January 11, 2011, but the effectiveness period of the contract will not be allowed to exceed January 11, 2015 (or, exceptionally, January 11, 2016).

Thus, in the case of those contracts, while they are still within the legal limit of 60 months, the government may extend them provided this is the

most advantageous alternative in comparison, for example, with a tender or direct procurement.

A third argument that could be based on common sense would be that if the contract were interrupted on account of termination, this would lead to a continuity solution that would eliminate the continuous nature of the services.

In response to this argument, one should recall that, as previously mentioned, continuity derives from the nature of the necessity to be served, not from the service. Thus, for as long as there is a necessity, extension will be possible within the legal limit of 60 months.

The contract is ancillary, an instrument for serving the main element, which is the public necessity. This is not to say that interrupting the contract would eliminate the continuous nature while the necessity prevails. This would be an unwarranted inversion of all logic.

Examples are once again required for a better understanding: in the case of the cleaning service in which daily routines have to be performed, even where, strictly speaking, they cannot continue to be performed once the effectiveness period has expired, there will be nothing to prevent the contract from being performed again once the extension has been formalized, even where this has occurred, for example, one week after the expiration of the preceding period. And this in stricter cases requiring *a priori formalization, as this does not eliminate the possibility of a posteriori formalization, when properly justified, especially because this is a corrigible mistake. Likewise, there may be cases where the parties have already agreed the extension and this has been approved by the proper authorities, so that it would be unacceptable not to pay the private party who has acted in good faith to fulfill the contract and attend to the public necessity*.[42]

However, there are other cases where the public necessity, although recurrent, involves longer intervals of time. Cleaning a water tank, for example. If we consider the same effectiveness period from January 11, 2010 to January 11, 2011 and bearing in mind that the water tank must be cleaned every six months, one can imagine that once the contract has been signed, the first cleaning occurs, for example, on March 10, 2010; and that, after the

[42] Quanto à possibilidade de pagamento, embora sem afastar a necessidade de apuração das responsabilidades: VILLAÇA, Marcos Vinicios. Contrato — prorrogação tácita — ilegalidade. *Revista de Direito Administrativo,* Rio de Janeiro, v. 201, pg. 307-311, Jul. 1995. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/46602/46408>. Accessed on: July 11, 2017.

contract is signed, the need may arise for planning so that the service does not disrupt the normal workings of the entity. Undertaken on March 10, 2010, the next cleaning should be on September 10, 2010 and the following one on March 10, 2011. These intervals do not detract from the continuous nature of the necessity to be addressed. Thus, there is also no problem in the event the extension occurs after January 11, 2011.

Thus, after this discussion, it does not seem reasonable to prevent an extension only because the term of the contract has expired and, for that reason, force the government to go to tender or direct procurement. These solutions could adversely affect attention to the public necessity, or even the public purse in cases where the price is greater than the one prevailing for the extension.

Regarding the formalities, in turn, if one assumes that they serve to control the government and protect the public purse and, as a last resort, the citizens, one cannot allow them to be used to adversely affect them.

Therefore, it is possible, in theory, to extend continuously performed services contracts after their terms have expired.

During the period between the termination of the term and the formalization of the extension, as a rule, no work can be carried out, except in cases where the public necessity to be met cannot wait for that formalization. In all these situations, however, formalization should take place, even if extemporaneously, and any responsibilities ascertained.

6. Final considerations

Throughout this text one can see that many conceptions are repeated and consolidated When one detects that reality demands solutions that fly in the face of these conceptions, quite often those cases end up being treated as exceptions. However, when certain distinctions are made, one can see that, indeed, instead of exceptions there are different rules for different realities.

From everything that has been analyzed throughout the article, the first thing that needs to be pointed out is that the current interpretation, which asserts that, as a rule, it is impossible to extend an contract that has run its course, requires certain repairs.

This, in principle, can only apply to fixed-term contracts. However, even in those cases, if for example continuously performed services are involved, an extemporaneous extension will be possible, provided the public necessity to be addressed requires this.

As we have seen, the "continuous nature" refers not to the service, but to the necessity to be addressed which, consequently, demands continuity.

Limitations on the terms of contracts are based on financial law, such as the annual nature of budgets; but, here too, there is the acknowledgement of the possibility of exceptions that have to be factored in to the multi-year plan.

Because of those exceptions, the Bidding Law has done nothing other than clarify the possibility of the term of an contract exceeding the effectiveness period of the budget allocation, including, among other things, continuously performed services.

It is clear that in the case of longer term contracts there are certain problems primarily involving the maintenance of advantages while they are being performed.

This notwithstanding, where a public necessity requires attention and involves a continuously performed service, the term of this contract may extend beyond the effectiveness period of the budget allocation. Even so, however, the law has established 60 months as the maximum duration of this contractual relationship, with exceptional extensions of 12 months.

What characterizes this continuous public necessity is its predictable repetitive or recurrent nature. It is not, as one is accustomed to hearing, the essentiality of the service or possible losses for the government in the event of interruption that would justify extending the contract.

Given that such a continuous necessity exists, right at the outset of the contract it is possible, in principle, to establish as term exceeding 12 months, where this can be so justified.

What differentiates a fixed term contract from a scope-based contract is that in the first case, the contract ends on the termination date. The reason for this is that although in the case of scope-based contracts the term is also fixed, expiration of the latter does not terminate the contract.

In exceptional circumstances there may be contracts of unspecified duration, such as in electricity, water and sewage treatment utility contracts.

A continuously performed service contract qualifies as a fixed term contract, whereby when the effectiveness period expires, the contract is terminated.

What determines the possible extension of the term of the contract, whether it is scope-based or fixed-term, is not the fact that the effectiveness period still has to run its course. There is no requisite in the law for permitting the extension.

In scope-based contracts, extension is needed in order to fulfill the purpose. It will only apply when the breach of contract arises from facts that cannot be attributed to the contractor. But, in cases where the contractor has caused a delay, he will be behind schedule, when the service provided is still useful for the government. When the service provided is no longer useful, this will be characterized as total default. In both cases, it will be necessary to ascertain the losses and damages, in addition to the contractual sanctions and rescission of the contract to terminate it when the objective is not delivered.

In fixed-term contracts, on the other hand, one can see that these can also be extended, even where the term has expired, when they involve the continuous provision of services, since the justification for the extinction is the continuity of the public necessity to be addressed. The only legal limitation is the term of 60 months, in addition to the requirement for this solution to be as advantageous as possible for the government.

This brings to mind an oft-repeated phrase of Lenivaldo Gaia do Nascimento: "a lei é trilha, não é trilho" (the law is the means, not the end). The law is an instrument that must be used intelligently, bowing to human reason. The opposite is out of the question, where man bows unthinkingly and irrationally to the letter of the law, applying it in a manner that is absurd and which conflicts with the purposes for which it is intended.

References

ALVIM FILHO, yr. Contrato — prazo e prorrogação. *Revista de Direito Administrativo,* Rio de Janeiro, v. 1, n. 1, pg. 233-235, Jan. 1945. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/8345/7120>. Accessed on: July 11 2017.

ARISTÓTELES. Ética a *Nicômaco.* Translation by Pietro Nassetti. São Paulo: Martin Claret, 2003.

BEVILÁQUA, Clóvis. *Código civil dos Estados Unidos do Brasil:* commented by Clóvis Beviláqua. Historical edition. Rio de Janeiro: Rio, 1958. v. IV.

BRASIL. *Constituição da República dos Estados Unidos do Brasil,* de February 24, 1891. Office of the Presidency of the Republic. Available at: <www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm>. Accessed on: Apr. 3, 2018.

____. Federal Senate. *Decree No. 857, of November 12, 1851.* Explains article 20 of the Law of November 30, 1841 regarding the statute of limitation on overdue federal tax liabilities. Available at: <www25.senado.leg.br/web/atividade/legislacao>. Accessed on: Apr. 3, 2018.

____. Federal Accounting Court. *Licitações e contratos*: orientações e jurisprudência do TCU / Tribunal de Contas da União Accounting Courts. 4th ed. Brasília: TCU, Secretaria-Geral da Presidiência: Senado Federal, Secretaria Especial de Editoração e Publicações, 2010.

CONTI, José Maurício. *Levando o direito financeiro a sério.* São Paulo: Blucher, 2016.

CUNHA, Francisco Pedro Carneiro da. Contrato administrativo — revisão, prorrogação e aditamento — registro. *Revista de Direito Administrativo,* Rio de Janeiro, v. 17, pg. 274-276, July 1949. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/11093/10068>. Accessed on: July 11 2017.

FIGUEIREDO, Lúcia Valle. *Extinção dos contratos administrativos.* São Paulo: RT, 1986.

FRANCO, Antônio Luciano de Sousa. *Manual de finanças públicas e direito financeiro.* Lisboa., 1974. v. 1.

ITAIPU BINACIONAL. *FAQs.* Available at: <www.itaipu.gov.br/sala-de-imprensa/perguntas-frequentes>. Accessed on: Apr. 3, 2018.

JUSTEN FILHO, Marçal. *Comentários à lei de licitações e contratos administrativos.* 16th ed. São Paulo: RT, 2014.

MARQUES NETO, Floriano Azevedo. A duração dos contratos administrativos na Lei nº 8.666/93. In: GARCIA, Maria (Coord.) et al. *Estudos sobre a lei de licitações e contratos.* Rio de Janeiro Forense, 1995. pg. 168-184.

MARX, Karl. *O capital:* crítica da economia política. Translation by Regis Barbosa and Flávio R. Kothe. São Paulo: Nova Cultural, 1996. v. 1, t. 1.

MEIRELLES, Hely Lopes. *Direito administrativo brasileiro.* 16th ed. São Paulo: RT, 1991.

____. *Direito administrativo brasileiro.* 34th ed. São Paulo: Malheiros, 2008.

____. *Licitações e contrato administrativo.* 4th ed. São Paulo: RT, 1979.

____. *Licitações e contrato administrativo.* 11th ed. São Paulo: Malheiros, 1996.

MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo.* 29th ed. São Paulo: Malheiros, 2012.

MEZZAROBA, Orides; MONTEIRO, Claudia Servilha. *Manual de metodologia da pesquisa no direito.* 5th ed. São Paulo: Saraiva, 2009.

TORRES, Ricardo Lobo. *O orçamento na Constituição.* Rio de Janeiro: Renovar, 1995.

VENOSA, Sílvio de Salvo. *Direito civil:* contratos em espécie. 4th ed. São Paulo: Atlas, 2004. (Civil Law, v. 3).

VILLAÇA, Marcos Vinicios. Contrato — prorrogação tácita — ilegalidade. *Revista de Direito Administrativo,* Rio de Janeiro, v. 201, pg. 307-311, July 1995. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/46602/46408>. Accessed on: July 11 2017.