

Allocation of environment risks under Brazil's New Government Contracting Law

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Authors

José Guilherme Berman

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Brazil's new Government Contracting Law (Law 14.133 of April 1, 2021) reveals a greater concern with environmental matters, and has reinforced and broadened provisions made under the earlier legislation (Law 8.666/1993). In fact, Law 14.133/2021 does not merely require compliance with applicable law: it creates important incentives for companies that are interested in providing goods and services to the government to foresee environmental risks and develops measures to mitigate them.

Measures to assess environmental impacts, and the related mitigation actions, are provided for in the new legislation throughout the contracting process, from the preliminary technical study and preparatory phase, to the award of the contract. For example, indirect costs related to environmental impacts can be taken into consideration in determining the lowest cost when the criterion for judging bids is the lowest price or highest discount (although regulations on this measure have not yet been issued).

In addition, the new Law provides for the possibility of adopting a risk matrix to allocate risks between the contracted company and the government. The risk matrix introduced by the Law 14.133/2021 (which is mandatory for PPPs) is very welcome, especially for environmental matters, since the lack of clarity on the allocation of risks in contracts made under Law 8.666/1993 led to demands for contractual revision to re-establish the financial and economic balance between the parties. Risk matrices offer greater legal certainty for the parties, and allows bidders to price the environmental risks involved and take the action needed to prevent or mitigate them.

Another innovation is that bid documents can stipulate that the contracted company is responsible for "obtaining environmental licensing", without specifying the type of environmental license that may be required from the contracted company. This provision addresses understanding issued by the federal budget oversight board, the TCU (Tribunal de Contas da União), to the effect that if environmental licensing will be required, the installation license should be obtained before the competitive contracting process.

The new Law also provides that environmental licensing for engineering works and services will be processed on a priority basis, in accordance with principles that ensure a swift, cooperative, economic and efficient process. The priority status is especially important in light of the fact that delays in

environmental licensing routinely impose serious losses on suppliers and lead to claims for contractual revision. Furthermore, in cases where even priority status will not ensure that the required licenses will be issued in time, the Law provides that the contracted company will have the right to contractual revision to re-establish the economic and financial balance, when the delay in the licensing process occurred for reasons beyond its control.

Law 14.133/2021 thus follows the worldwide trend toward greater transparency in environmental matters, by including environmental risks – and measures to mitigate those risks – in its provisions. As for environmental licensing, which for some time has been one of the main sources of disputes in competitive bidding procedures and in the execution of government contracts, the Law seeks to establish more detailed rules than the previous legislation. The concern shown by the legislator makes environmental matters a question of fundamental importance for all businesses that have (or wish to obtain) contracts at the various levels of government in Brazil.

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José Guilherme Berman