

Innovation challenges in public construction contracts in Brazil: Municipality of Itu Headquarters Building case

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The paradox of innovation in public construction contracts

Although historically seen as antagonists, efforts are currently in place to establish a truce between innovation and legal certainty and to create new systems without profoundly compromising stability, enabling novelty and safety to coexist. In order to achieve this goal, mechanisms that can offer paths to foresee consequences and evaluate new models' gains and losses are increasingly being devised.

The aversion to the new, out of fear of creating instability in the actual order, contributes massively to inflexibility, in which anything that deviates from the conventional or the obvious way is viewed with suspicion, and those who attempt to innovate receive censure. As a result, opportunities for evolution through the implementation of new technologies can be suppressed by concerns about the risks that originality might bring.

From this premise, which is present in the vast majority of social exchanges, a scenario of rigidity has set in, especially in the scope of public law, known for its inflexible rites and statutory regimes. Consequently, public managers are constrained to stick to traditional contracts in which intelligent and effective solutions are sometimes avoided as unprecedented and new to the public administration, which could cause significant losses in terms of development and effectiveness.

In public law, the very rigid structure of the administration, based on fundamental principles and mandatory rules applicable to the performance of managers at all administrative levels, can be explained by the need to create a structure which is sound enough to prevent fraud and not collapse when there are changes in governing authority personnel. However, this structure seems incompatible with the idea of innovation. Very often administrations which try to introduce new models to contracts are censored, despite criticism from legislative, executive and judiciary powers, along with law scholars, and such censure poses a risk to the progress of society.

Consequently, certifications such as LEED assume great importance in encouraging the adoption of green and sustainable construction methods

Society is constantly changing, as is technology. In the name of progress, it is necessary for doors to be opened to innovation even, or especially, in the administrative context. The challenge faced by agents working in the sphere of administrative law, which ranges from public servants to private agents, is to find a compromise in which legal certainty facilitates innovation, by allowing the predictability of consequences, so that innovation benefits as many people as possible.

Another point that has been discussed within the scope of public law is the commitment to consensus between public entities and private agents. Until recently, the dominant doctrine provided that relations with the public administration were vertical and the public interest prevailing in any discussion was supreme. It would therefore not be possible to find an environment conducive to consensual and efficient dialogue between parties engaged in public contracts.

Case study: Municipality of Itu Headquarters Building

In this symbolic case, in the debate of innovation versus legal stability and the need for collaboration between private and public officials in Brazil, the construction of the Municipality of Itu Headquarters Building (Paço Municipal de Itu) demonstrated the potential harm that results when there is a lack of dialogue when contracting and developing projects. It also demonstrates the clear paradox between the need for technology and intelligent solutions in public buildings versus the rigidity imposed by the public procurement and public contract rules, which limit the performance of public administrators and undermines efforts in achieving innovation within government.

As the first public building of its kind in Latin America, the construction sought to obtain LEED certification, which is awarded to innovative green buildings that meet pre-established sustainable construction standards that help reduce water and energy consumption, CO₂ emissions and the generation of waste. This certification is becoming increasingly relevant, as alternatives are being sought to curb carbon emissions and slow climate change.

According to the Global Alliance for Buildings and Construction's 2020 Global Situation Report for Buildings and Construction, which was the last report containing data prior to the Covid-19 pandemic,[1] emissions from the construction sector accounted for 38 per cent of total energy-related global CO₂ emissions,[2] the highest level on record. This data is important in understanding how costly construction can be from an environmental perspective and how essential it is to find alternatives to reduce costs.

In developing countries such as Brazil, unfortunately there is a lack of regulation and/or building codes which are effective enough to control the use of resources in building construction and maintenance. Consequently, certifications such as LEED assume great importance in encouraging the adoption of green and sustainable construction methods and consequently, encouraging water conservation, energy efficiency, waste management and balanced use of materials during construction.[3]

In the case of the Itu Headquarters Building, data published by the Environmental Agenda Programme in Public Administration (A3P),[4] from the Ministry of the Environment and the UN Environment Programme,

showed positive sustainability results. These included a reduction in: electricity consumption by 30 per cent; water consumption by 50 per cent; carbon emissions by 35 per cent; and generation of waste by 60 per cent.

However, although the project appeared to be a success from a sustainability perspective, putting Itu at the forefront of the green building certification in Latin America, irregularities in the contract were found by the São Paulo Court of Audits, which inspects the legality of public expenditure in respect of contracts executed by the State of São Paulo and its municipalities.

The Contract 129/2010, signed on 31 August 2010, has been amended on four occasions: (1) 20 October 2010 – adding new clauses to the contract; (2) 30 November 2010 – promoting changes to basic engineering design; (3) 5 December 2011 – extending the contract term and increasing the original price by approximately 50 per cent; (4) 4 April 2012 – expanding the contract's scope to fulfil LEED certification conditions. In June 2012, the building was inaugurated, but the contractual scope was only formally accepted by the Municipality almost a year later, when the LEED certification was effectively issued, in March 2013.

The contractual amendments were perceived by the São Paulo State Court of Audits as a sign of poor planning and deficiency in the original basic engineering project. This meant that the changes required were not due to the need to update the project in view of technological changes (therefore aiming at qualitative improvement), but due to the need to carry out studies and hire services that should have been in place to support the engineering basic project and its tendering from the start.[5] Moreover, the Court of Audits found the increase in the final contract price excessive and against Brazil's Public Procurement Law, which only permits scope expansion equivalent to a maximum of 25 per cent of the original contract price.

The parties to the contract argued that, although the project had been conceived as a sustainable building from the start, it was only when it was amended a fourth time that they decided to incorporate services and materials required for LEED certification. They also indicated that the Green Building Council was new in Brazil, so lack of experience from all parties involved (the certifying authority, the municipality preparing the project and the contractor) had resulted in the additional costs.

Nevertheless, according to the Court of Audits, there was insufficient evidence that additional services and materials directly related to the LEED certification or to promote qualitative improvements. Consequently, on 7 May 2019, the Court declared the contract illegal.[6] Furthermore, the former mayor who was responsible for executing the contract is currently being investigated and may be held personally liable for the illegality of the contract.

Lessons learnt, and the attempt of the Brazil's new Public Procurement Law to address incorporating innovation into projects

The Municipality of Itu Headquarters Building case teaches us important lessons. Even though the importance of international sustainability certification is broadly recognised, in countries such as Brazil, challenges to innovation result from very strict public procurement and government

contract rules and the lack of knowledge and/or effective training of the public officials involved.

Challenges to innovation result from very strict public procurement and government contract rules

Another important lesson is the need for greater collaboration between the private and public parties in fully understanding the challenges of implementing new technologies and of incorporating innovation in public works.

Conscious of all these issues, the new Public Procurement and Public Contracts' Law (Law No 14,133/2021), enacted on 1 April 2021 (and to come fully into effect by 1 April 2023), introduces some changes which try to overcome issues relating to innovation.

One such issue is integrated contracting, based on which the public administration, when contracting for works, is able to include in the scope of the same contract: (1) preparation of basic and detailed engineering projects; (2) supply of materials; (3) effective construction; and (4) commissioning the building up to its full operational stage. The previous law only allowed construction projects to be procured and/or contracted on the existence of a basic engineering project, which had to be attached to the request for proposals.

Another change which may benefit innovation is the introduction of the competitive dialogue as a new form of procurement for works, services and acquisitions, particularly aimed at projects which include technological and/or technical innovation. The new law provides for conversations or negotiations between the public administration and bidders according to objective criteria. Its aim is to develop at least one alternative capable of meeting the administration's needs, with bidders having to submit a final proposal after the dialogue stage has closed. In doing so, the procurement proceeding acquires the valued contribution of several market specialists, with meetings duly recorded and, when concluded, allows the selection of a project which best meets the needs of the contracting public entity.

The new law also provides for a clearer rule for the submission of unsolicited proposals by private companies (which, in Portuguese, are known as Expression of Interest Procedure or 'PMI'). This creates room for effective collaboration between private and public sectors, with market agents being able to propose projects and carry out studies, investigations and surveys, proposing innovative solutions that contribute to solve issues of public relevance or interest.

In the case of the Itu Headquarters Building, such tools would have been useful to allow the project to be better designed and achieve the intended sustainability-oriented results and certification without the need for various amendments to the contract. This also would potentially have led to less challenges about its results and legality.

The recently enacted law also allows changes to the basic engineering project in cases in which innovation proposed by the contractor achieves cost reduction and/or increases in quality, and the contractor takes full responsibility for the risks associated with changing the basic engineering design. Such a provision, in the specific case of the Itu Headquarters Building, would have facilitated encompassing the intended improvements with

sustainable technological developments, cutting maintenance costs throughout the lifetime of the building.

The new legislation may not solve every issue, but it certainly better equips public administration to take on and develop innovative projects.

Motivated by cases such as the Itu Headquarters Building, the legislative improvements provide all parties with better instruments for dealing with innovative and unprecedented projects, therefore avoiding the censure of public officials who are leading innovation and creating a safer environment for such contracts to be executed and performed. By implementing these new instruments, we may reduce – or even eliminate – current tensions between innovation and public construction contracts, allowing innovation and legal certainty to cooperate in working towards a better and more sustainable future.

*This article was written by our Infrastructure and Regulatory & Government Affairs partner, Ana Cândida de Mello Carvalho, and published by IBA in Construction Law International Magazine, [click here](#) to find out more.

NOTES:

[1] The Covid-19 pandemic has redefined world parameters of production and consumption. Lockdowns and slowdown of economies played an important part in decreasing levels of emissions.

[2] UN Environment Programme Global Alliance for Buildings and Construction, 'Global Status Report for Buildings and Construction', <https://globalabc.org/news/launched-2020-global-status-report-buildings-and-construction>, accessed 21 July 2022.

[3] Evidence and lessons from Latin America. Policy brief: Green Building in Latin America, https://assets.publishing.service.gov.uk/media/57a08a07e5274a31e00003aa/131106_ENV_TheGreEco_BRIEF1.pdf, accessed 21 July 2022.

[4] A3P 'Construção do novo Paço Municipal em Itu', <https://a3p.eco.br/produto/construcao-do-novo-paco-municipal-em-itu> accessed 21 July 2022.

[5] Administrative Proceeding No TC-001215/009/10.

[6] TCE-SP XVII TCESP Legal Week, lecture by Floriano Azevedo Marques Neto, 14 August 2019 www.youtube.com/watch?v=6WkqUCm_m3Q, accessed 21 July 2022.

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