International Journal of Law in Changing World

Volume 2 Issue 1 (2023) ISSN 2764-6068

Research article
JNL: https://ijlcw.emnuvens.com.br/revista
DOI: https://doi.org/10.54934/ijlcw.v2i1.49

DURATION AND EXTINCTION OF ADMINISTRATIVE CONTRACTS IN THE NEW BRAZILIAN BIDDING LAW

Rafael Carvalho Rezende Oliveira
Universidade Veiga de Almeida, Rio de Janeiro, Brazil

Thiago Gomes do Carmo
Universidade Veiga de Almeida, Rio de Janeiro, Brazil

Article Information:

Received
May 4, 2023
Approved
May 9, 2022
Accepted
May 31, 2022
Published
June 15, 2022

Keywords:
administrative law,
administrative contracts,
extinction,
new Brazilian bidding law

ABSTRACT

This article addresses the causes and consequences of the termination of administrative contracts. The choice of topic is justified by the limited bibliography on the subject, by the recent enactment of Law 14.133/2021 (New Law on Bids and Administrative Contracts) and by the relevance of the causes and effects arising from the termination of contracts entered into by the Public Administration, which require attention to the continuity of serving the public interest. It is intended to use deductive and comparative methods to analyze the similarities and differences between legislative treatments conferred by Law 8.666/1993 and Law 14.133/2021. After studying the legal aspects of the duration of administrative contracts, the text will focus on the causes of termination of the contractual relationship and the forms and consequences of the termination.

FOR CITATION:

Oliveira, R. C. R., & Carmo, T. G. (2023). Duration and Extinction of Administrative Contracts in The New Brazilian Bidding Law. International Journal of Law in Changing World, 2 (1), 3-16. DOI: https://doi.org/10.54934/ijlcw.v2i1.49

1. INTRODUCTION

This article intends to address the duration and termination of administrative contracts based on the comparative analysis between Law 8.666/1993 and Law 14.133/2021 (The new Bidding Law, cited throughout this text by its acronym in Portuguese NLCC).

The reduced bibliography on the subject justifies the choice of theme, the recent enactment of Law 14.133/2021 (New Law on Public Procurement and Administrative Contracts) and the relevance of the causes and effects arising from the termination of contracts entered into by the Public Administration, which require attention on the continuity of serving the public interest.

As in life in general, there are two decisive and opposite moments in administrative contracts: life (contract celebration and execution) and death (extinction of the adjustment). On the one hand, when entering into a legal transaction, the parties define the conditions and the period of binding to the rights and obligations assumed by consensus. On the other hand, the termination of the contractual relationship is of great importance since it disconnects the parties from the commitments taken, opening the way, eventually, for legal discussions, notably in cases of premature termination of the adjustment.

Usually, legal debates focus on issues related to the conditions, mode, and form of contractual execution, with little emphasis on the causes and consequences of the termination of the agreement.

Just as people avoid talking about death and fail to plan, not infrequently, the succession of their assets, something similar happens in contracts, with little attention to the causes and consequences of the termination of the adjustment.

This is an excessively optimistic and non-pragmatic view of legal transactions, which believes in the full performance of contractual obligations and overlooks the relevance of the causes and consequences of the termination of contracts.

In this way, it is essential to deepen the causes and consequences of the termination of administrative contracts, especially in cases of premature termination of the contractual relationship, to ensure the maintenance or restoration of public interests related to the contracted object.

The text will adopt the deductive and comparative methods, analysing the similarities and differences of legislative treatments conferred by Law 8.666/1993 and Law 14.133/2021.

After presenting the evolution of bidding in Brazilian legislation and the general considerations on the duration of administrative contracts within the scope of the NLLC, the article will explain, in detail, the

https://doi.org/10.54934/ijlcw.v2i1.49

causes of contractual termination provided for in the new legal diploma and sequence, the forms of extinction of said adjustments, highlighting comparisons between the legal regimes of Law 8666/1993 and Law 14133/2021.

2. EVOLUTION OF BIDDING IN BRAZILIAN LEGISLATION

The legal regime for bids and administrative contracts is provided for the Constitution of the Federative Republic of Brazil (CRFB) and can be summarized as follows: a) article 22, XXVII, CRFB: establishes the Union's exclusive competence to legislate on general bidding and contracting rules; b) article 37, XXI, CRFB: enshrines the bidding rule and admits that the Law establishes exceptions; c) article 173, § 1.º, III CRFB: assigns the legislator the task of elaborating the Statute of the economic state-owned companies, which will contain its rules for bids and contracts.

In the Brazilian legislation, several normative texts deal with bidding, with the following statutes deserving more attention, for example, Law 14.133/2021 (new Law on Public Bidding and Administrative Contracts), Law 8.666/1993 (general rules for public bidding and administrative contracts), Law 10.520 /2002 ("pregão"), LC 123/2006, amended by LC 147/2014 (different treatment for micro and small companies), Law 8,987/1995 (concession of public services), Law 11.079/2004 (PPPs), Law 9.427/1996 (ANEEL), Law 9,472/1997 (ANATEL), Law 9.478/1997 (ANP), Law 12.232/2010 (publicity bids), Law 12.462/2011 (Differentiated Regime for Public Procurement – RDC), Law 13.303/2016 (State Company Law) etc.

Despite the existence of more remote normative frameworks (ex.: Decree 2.926/1862; articles 49 to 58 of Decree 4.536/1922; articles 125 to 144 of DL 200/1967 etc.), the DL 2.300/1986 was the first norm to establish the "legal status" of public tenders and administrative contracts.

After the enactment of the Constitution of the Federative Republic of Brazil (CRFB) in 1988, which constitutionalized the issue of public bids and administrative contracts (e.g., articles 22, XXVII and 37, XXI), DL 2.300/1986 was repealed by Law 8.666/1993, which instituted general rules on public tenders and administrative contracts related to works, services, including advertising, purchases, disposals and leases within the scope of the Powers of the Union, States, Federal District and Municipalities.

With the enactment of Law 14.133/2021, which constitutes the new Legal Statute for administrative bids and administrative contracts, the following rules were repealed immediately or deferred: a) arts. 89 to 108 of Law 8.666/1993, on the date of publication of Law 14133/2021; b) Law 8.666/1993 (Law of Administrative Tenders and Contracts), Law 10.520/2002 ("pregão"), and arts. 1.º to 47-A of Law 12.462/2011 (RDC), two years after the official publication of the new Bidding and Contracts Law.

https://doi.org/10.54934/ijlcw.v2i1.49

As a result, the new Procurement Law repeals, on the date of its publication, the provisions of Law 8.666/1993 relating to crimes and penalties, but article 178 of the new Law amends the Penal Code to include, in that specific legal diploma, the crimes committed in the scope of bidding and public contracting. It concerns the other provisions of Law 8.666/1993, Law 10.520/2002 ("pregão"), and arts. 1 to 47-A of Law 12.462/2011 (RDC), there was no immediate revocation. On the contrary, said legal diplomas will remain in force for another two years after the publication of the new Bidding Law.

For two years, public managers will be able to choose between applying the new Bidding Law and maintaining the traditional bidding legal regimes. It is a choice inherent to the discretion of managers who cannot, however, merge the devices of conventional legislation with those inserted in the new Bidding Law in the form of article 191 of Law 14.133/2021.

Setting the deadline for deferred revocation of traditional bidding diplomas is to establish a transitional regime so that public managers can better understand the new bidding regime, qualify their teams, and gradually promote the institutional adjustments necessary for the effectiveness of the provisions of the new Procurement Law.

3. DURATION OF ADMINISTRATIVE CONTRACTS IN THE NEW BIDDING LAW

The duration of administrative contracts reflects the period established by the contracting parties for the execution of the contractual object. The term impacts not only the duration of contractual obligations but also the economic-financial balance of the adjustment.

For this reason, adequate planning by public managers in defining contractual terms that must reconcile administrative needs and execution costs is essential. In the initial stage of the bidding procedure, public managers must consider the appropriate provisions for the respective contracts, including their stipulation in terms of reference and the basic project, as provided, respectively, in article 6, XXIII, "a" and in article 6, XXV, of Law 14.133/2021

The absence of adequate state planning can lead, on the one hand, to the need for contracts with concise terms, which increase the costs involved in the agreement, or, on the other hand, the execution of excessively long contracts that do not meet the needs of the Public Administration.

However, setting the contractual term is not a blank check for the manager. The definition of the period must be proportional to the needs of the Public Administration in the specific case. It must consider the minimum and/or maximum limits the legislator sets.

https://doi.org/10.54934/ijlcw.v2i1.49

Traditionally, legislation has shown more significant concern with setting maximum deadlines for adjustments entered into by the Government, not only because of the temporary natural nature of business relationships and the opening of new "entries" of potentially interested parties, with more advantageous conditions, but also, especially in contracts involving budgetary resources, to allow adequate financial programming of disbursements by the Public Administration.

As a rule, the end of the contractual term entails terminating the contract itself, called a "contract for a fixed term." Exceptionally, in the so-called scope contracts, the termination of the contractual relationship is not related to the term but to the execution of the contracted object.

In scope contracts, therefore, the adjustment will only be terminated with the effective execution of the contracted object, regardless of the term (e.g., in the contract for the construction of a particular public building, the adjustment is considered completed with the completion of the structure, regardless of the time necessary). This differs from saying that time is unimportant in these kinds of contracts. The contractual term will be fundamental for verifying any delay in fulfilling the contractual obligation. Once the agreed period has passed, the contracted party remains obliged to fulfill its contractual obligations, plus the burden of delay.

In contracts for a fixed term, in turn, time is fundamental for the fulfillment of the contracted obligations. The contracted party will fulfill its obligations until the end of the period established in the agreement (e.g., when hiring cleaning services, the contracted party must clean the public office during the contract term). The contract is considered extinct with the advent of the final period.

The distinction between fixed-term contracts and scope-based contracts, with effects on the term stipulated in the respective adjustments, was enshrined in the new Bidding Law. (OLIVEIRA, 2021; OLIVEIRA et. al. 2021).

According to article 6.º, XVII, of Law 14.133/2021, non-continuous services or contracted by scope impose on the contractor the duty to perform the provision of a specific service in a predetermined period, which may be extended, provided that it is justifiably, for the period necessary for the completion of the object.

Further, article 111 of Law 14,133/2021 deals with the scope contract and provides that the term will be automatically extended when its purpose is not completed within the period signed in the contract, revealing that the time is not essential for characterizing the term and eventual termination of the adjustment, but rather the execution of your object. In the event of non-compliance with the contractual scope due to the contractor's fault, two paths open up (article 111, sole paragraph, of Law 14,133/2021):

https://doi.org/10.54934/ijlcw.v2i1.49

a) the contractor will be considered in arrears, with the respective administrative sanctions applicable; or b) the Administration may choose to terminate the contract, adopting the measures allowed by Law for the continuity of contractual performance.

As for contracts for a fixed term, the duration of the contracts will be as provided for in the public notice. The availability of budgetary credits must be observed at the time of contracting and each financial year, as well as the forecast in the multiannual plan when it exceeds one financial year (article 105 of Law 14.133/2021).

Linking contractual validity to budgetary availability is nothing new. It is a concern already identified in article 57, caput, of Law 8.666/1993, as a natural result of the prediction contained in article 167, I and II, of the CRFB.[1]

The new Bidding Law intends to admit hiring only in cases where the Administration has the necessary resources to pay the contracted party, thus guaranteeing responsibility and planning with public expenses. Therefore, if the budget credits are provided for in the annual budget law (article 165, III, of the CRFB), the contracts have, as a rule, a term of up to one year, not exceeding the financial year.[2] [3]

In this regard, the new Bidding Law follows, to a certain extent, the trend already enshrined in Law 8666/1993 in which, as a rule, the duration of contracts is linked to the availability of budget credits. However, Law 14,133/2021 presents a more detailed treatment of the period of contracts, with the institution of new terms and new hypotheses for hiring longer than one year (e.g., continuous supply contracts; contracts that generate revenue; efficiency contracts; supply contract or associated service provision).

The new Bidding Law allows contracting indefinitely in cases where the Administration is a user of a public service offered under a monopoly regime, provided budgetary credits linked to the contracting are proven each financial year. (109 of Law 14.133/2021).[3]

[1] See the repealed Brazilian Bidding Law - 8.666/1993: "Article 57. The duration of the contracts governed by this Law will be restricted to the validity of the respective budgetary credits, except for the relative"; CRFB: "Article 167. The following are prohibited: I – starting programs or projects not included in the annual budget law; II – the carrying out of expenses or the assumption of direct obligations that exceed budgetary or additional credits". It is worth remembering that, in certain cases, the term of the contract may exceed the financial year in which it was signed. As provided in Normative Guidance/Attorney General of the Union 39: "The term of contracts governed by article 57, caput, of Law 8.666, of 1993, may exceed the financial year in which they were entered into, provided that the expenses related to them are fully committed by December 31, thus allowing their registration in outstanding amounts to be paid".

[2] According to article 34 of Law 4.320/1964, which institutes general rules of Financial Law, the financial year will coincide with the calendar year (January 1st to December 31st).

[3] Traditionally, when Law 8666/1993 was in force, the Federal Court of Auditors admitted the signing of some private contracts for an indefinite period, notably the lease contract: "The terms established in article 57 of Law 8.666/1993 do not apply to lease contracts, according to the provisions of article 62, § 3, item I, of the same law" (TCU, Judgment 170/05, Plenary, Reporting

https://doi.org/10.54934/ijlcw.v2i1.49

From an optimistic point of view, a contract will be extinguished with the advent of the term established therein. However, from a pragmatic perspective, contracts, in many cases, are terminated prematurely, before the end of their period, either for reasons of public interest or due to default by one of the contracting parties, as will be highlighted in the next topic.

4. CAUSES FOR THE EXTINCTION OF ADMINISTRATIVE CONTRACTS IN THE NEW BIDDING LAW

After formal analysis, contradictory administrative contracts may be terminated for the following reasons (article 137 of the new Bidding Law):[4]

a) violation of the rules of the bidding notice or contractual clauses, specifications, projects or deadlines: this is the total or partial non-compliance with contractual duties, which covers the public notice, the respective annexes and the contract itself, making it unfeasible the continuity of the execution of the agreement and the correct service of the public interest;

b) disregard of determinations issued by the authority designated to monitor and supervise its execution or by a higher authority: non-compliance with the determinations of the contract supervisor or higher authority may lead to the premature termination of the contract, especially since it reveals that in principle, the contract is not being performed regularly;

c) social alteration or modification of the purpose or structure of the company that restricts its ability to complete the contract: changes to the social status, purpose or structure of the company may give rise to contractual termination, provided that they restrict the ability of the contractor to complete the contract (e.g., the simple alteration of the social contract, of the terminology and the corporate transformation, in which the company ceases to be a limited liability company to become a corporation, do not entail, in principle, contractual termination, since they do not place the performance of the administrative contract is necessarily at risk; the dismissal of employees and the closing of branches, which compromise the continuity of the contractual relationship, may lead to the premature termination of the contract);[5]

Minister Ubiratan Aguiar, DOU 03.10.2005). In the discussion, see NIEBUHR, Joel de Menezes. Licitação pública e contrato administrativo. 2. ed. Belo Horizonte: Fórum, 2011. p. 737-738; Statement 22 of the Rio de Janeiro State Attorney's Office: "Real estate lease contracts, in which the Public Administration appears as lessee, may be extended for an indefinite period, pursuant to article 56, sole paragraph, of Law 8.245/1991"; Normative Guidance/Attorney General of the Union 6: "The term of the real estate lease agreement, in which the Public Administration is the lessee, is governed by article 51 of Law n.º 8.245, of 1991, not subject to the maximum limit of sixty months stipulated by article 57, II of Law No. 8.666 of 1993".

[4] The procedures and parameters for verifying the occurrence of reasons for extinction may be defined in regulation (article 137, § 1, of Law 14,133/2021).

[5] The corporate transformation "is the operation through which the company passes, regardless of dissolution and liquidation, from one type to another", in the form of article 220 of Law 6.404/1976 (example: limited liability company becomes a corporation). Incorporation "is the operation by which one or more companies are absorbed by another, which succeeds them

https://doi.org/10.54934/ijlcw.v2i1.49

d) declaration of bankruptcy, civil insolvency, dissolution of the company or death of the contractor: the hypotheses include the judicial decree of bankruptcy or civil insolvency, as well as the dissolution of the company or the death of the contractor, but do not include the judicial recovery of the business company which does not, in isolation, lead to contractual termination;[6]

e) act of God or force majeure, regularly proven, impeding the execution of the contract: the act of God and force majeure entail the termination, without fault, of the contract when it is impossible to continue its execution, being certain that in the cases in which that there is the possibility of continuity of the contractual relationship, the Administration should adopt less restrictive measures that allow the continuity of the adjustment, such as the extension of the contractual relationship (article 111 of Law 14.133/2021) or the economic and financial rebalancing of the contract (article 124, II, d, of Law 14.133/2021) [3][5];[7]

f) the delay or impossibility of obtaining the prior license or the installation license or substantial alteration of the preliminary project that may result from these licenses, even if obtained within the foreseen period: the public notice may assign responsibility for obtaining the environmental license to the contractor (article 25, § 5, I, of Law 14.133/2021) and, in this case, the delay or the impossibility of obtaining the license leads to the termination of the contract, with the contractor's fault, admitting, however, that the responsibility for the licensing is attributed to the Administration, in which case the eventual delay or the impossibility of obtaining the license leads to the termination of the agreement, at the fault of the Public Administration itself;

g) the delay or impossibility of releasing areas subject to expropriation, vacancy or administrative easement: as in the previous case, the notice may establish the contractor's responsibility for carrying out

in all rights and obligations" (article 227 of Law 6.404/1976). Merger, in turn, "is the operation by which two or more companies unite to form a new company, which will succeed them in all rights and obligations" (article 228 of Law 6.404/1976). Finally, a spin-off "is the operation by which the company transfers portions of its assets to one or more companies, incorporated for this purpose or already existing, extinguishing the spun-off company, if there is a transfer of all its assets, or dividing its capital, if the version is partial" (article 229 of Law 6.404/1976).

[6] It should be noted that the judicial reorganization also does not prevent the participation of the respective company in bidding processes and the execution of administrative contracts. In that regard: OLIVEIRA, Rafael Carvalho Rezende. Licitações e contratos administrativos, 10. ed. Rio de Janeiro: Forense, 2021, p. 241; OLIVEIRA, Rafael Carvalho Rezende. Nova lei de licitações e contratos administrativos comparada e comentada, 2. ed. Rio de Janeiro: Forense, 2021, p. 198; Superior Court of Justice, AREsp 309.867/ES, Rapporteur Min. Gurgel de Faria, 1st Panel, DJe 08.08.2018; Federal Court of Accounts, Judgment 1.201/2020, Plenary, Representation, Rapporteur Min. Vital do Rêgo; Federal Court of Auditors, Judgment 2.265/2020, Plenary, Representation, Rapporteur Min. Benjamin Zymler. As for the bankruptcy of the contractor, which prevents participation in a bidding process and constitutes a reason for the termination of the administrative contract, it is necessary to remember article 117 of Law 11.101/2005 (Bankruptcy Law), which provides for the absence of resolution of bilateral contracts through bankruptcy, is not applicable to administrative contracts, due to the prevalence of the specific legal provision contained in article 137, IV, of Law 14.133/2021.

[7] Traditionally, it's difficult to distinguish between acts of God and force majeure. We understand that the controversy in this distinction has no greater practical relevance since the legal order defines the two situations (an act of God and force majeure) as inevitable and unpredictable events (article 393, sole paragraph of the Civil Code) and assigns identical consequences (articles 65, II, "d," and 78, XVII, of Law 8.666/1993; articles 124, II, "d," and 137, V, of Law 14.133/2021).

https://doi.org/10.54934/ijlcw.v2i1.49

the expropriation authorized by the public authorities (article 25, § 5, II, of Law 14.133/2021), paving the way for the termination of the contract due to the contractor's fault in the event of delay or impossibility of releasing the areas that prevent the continuity of the contractual relationship, being certain that, in the event of attribution of said responsibility of the Public Administration, the delay or the impossibility of releasing the areas would lead to the extinction of the adjustment due to the Administration's fault;

h) reasons of public interest, justified by the highest authority of the contracting body or entity: in this case, the Public Administration may terminate the contractual relationship for reasons of public interest, which must be clearly presented in the justification presented, with the practical and legal considerations of the decision, the mere invocation of an abstract "public interest" being insufficient; and

i) non-compliance with obligations relating to the reservation of positions provided for by Law for people with disabilities, for rehabilitated Social Security or apprentices, as well as other specific rules: the new Bidding Law turned it into a qualification requirement (article 63, IV, of Law 14.133/2021) the traditional margin of preference in favor of companies that prove compliance with the reservation of positions provided for by Law for people with disabilities or for rehabilitated Social Security and that meet the accessibility rules provided for in the legislation (article 3.º, § 5.º, II, of Law 8.666/1993), which is why the non-compliance with the reservation of vacancies during the execution of the contract may lead to its premature termination, in case the attempt to restrain the contracted party from fulfilling said obligation is fruitless.

The hypotheses listed in article 137 of the new Bidding Law are, to a great extent, similar to the cases indicated in article 78 of Law 8.666/1993. In addition to some wording adjustments, the new legal provision inserted new situations that may justify the premature termination of the contract, notably those indicated in items VI, VII and IX of article 137.

Instead of using the term "rescission", the new Law opted for the terminology "extinction," which has a broader meaning, covering cases of termination of the contractual relationship, with or without the parties' fault. At this point, the term used by the new legislation seems better than the one used in Law 8666/1993

There is no doctrinal uniformity regarding the terminologies used in cases of termination of contracts. Part of the doctrine has differentiated the terms "rescission" (default by one of the parties), "resolution" (impossibility of continuity of the contract, without fault of the parties) and "termination" (will of the parties that do not wish to continue with the contract), accepting unilateral (complaint) or bilateral (termination) termination.

https://doi.org/10.54934/ijlcw.v2i1.49

Thus, not all hypotheses of article 137 of Law 14.133/2021 technically involve the termination of the contract. It is possible to insert the causes of contractual termination, indicated in the aforementioned legal provision, in the following groups: a) conduct attributable to the contracted party (items I to IV and IX); b) reasons attributable to the Administration (item VIII and § 2); and c) cases that are not attributable to the parties (item V)[8] [2]. The hypotheses provided for in items VI and VII of article 137 of the new Bidding Law may involve default by the contractor or by the Public Administration (in the latter case, § 2.º will be applied), based on what was provided in the risk matrix and the contractual clauses.

Note that article 137 of Law 14.133/2021 indicates the reasons for premature termination of the contractual relationship, which does not exclude, of course, the so-called natural termination of the contract that occurs with full compliance with the obligations or with the advent of the term set in the contractual instrument.

In addition, the hypotheses provided for in article 137 of Law 14.122/2021 require motivation, complete defense and contradiction to formalize the termination of the contract. Thus, the finding of a hypothesis described in the said device is not enough to declare, necessarily and automatically, the contractual termination, proving necessary the prior hearing of the contractor amid the respective administrative process and the motivation of the decision.

In the duty of motivation, the Public Administration must demonstrate that termination is the proportionate solution to be adopted in the specific case, with no other less restrictive measure that allows the continuity of the contractual relationship (e.g., contractual rebalancing, term extension, contractual amendments).

Likewise, the motivation cannot be restricted to presenting abstract arguments and must consider the practical consequences of the administrative decision in the form of arts. 20 and 21 of the Law of Introduction to the Norms of Brazilian Law (known in Portuguese by the acronym LINDB).[9]

[8] It's important to remember that Law 8987/1995, which deals with concessions and permissions for public services, adopts the expression "rescission" only for cases of default by the Administration, using the term "expiry" to terminate the contract due to the concessionaire's fault.

[9] Introduction Law to the rules of Brazilian Law - LINDB: "Article 20. In the administrative, controlling and judicial spheres, decisions will not be made based on abstract legal values without considering the practical consequences of the decision—sole paragraph. The motivation will demonstrate the need and adequacy of the imposed measure or the invalidation of an act, contract, adjustment, process or administrative rule, including because of the possible alternatives. Article 21. The decision that, in the administrative, controlling or judicial spheres, decrees the invalidation of an act, contract, adjustment, process or administrative rule must expressly indicate its legal and administrative consequences. Single paragraph. The decision referred to in the caput of this article shall, when applicable, indicate the conditions for the regularization to occur proportionally and equitably and without prejudice to the general interests, not being able to impose on the affected subjects any burdens or losses that, in depending on the peculiarities of the case, whether abnormal or excessive."

https://doi.org/10.54934/ijlcw.v2i1.49

In addition to the contractual termination hypotheses indicated above, § 2 of article 137 of Law 14.133/2021 presents situations that entail the right of the contracted party to terminate the contract, namely: a) suppression, by the Administration, of works, services or purchases that entail modification of the initial value of the contract beyond the limit allowed in the article 125;[10] b) suspension of its execution, by written order of the Administration, for a period exceeding three months; c) repeated suspensions totaling 90 working days, regardless of the mandatory payment of indemnities for successive and contractually unforeseen demobilizations and mobilizations and other foreseen ones; d) delay of more than two months, counted from the issuance of the invoice, payments or installments of fees due by the Administration for expenses with works, services or supplies; e) failure by the Administration to release, within the contractual terms, the area, place or object for the execution of work, service or supply and the sources of natural materials specified in the project, including due to delay or non-compliance with obligations related to expropriation, vacancy of public areas or environmental licensing attributed by the contract to the Administration.

The cases of extinction are indicated in article 137, § 2.º, of Law 14.133/2021 presents some news.

Regarding the termination of the contract due to the suspension of its execution by order of the Administration, the previous legislation authorized the implementation of the contractual termination after 120 days of suspension. The new legislation, on this point, reduced the tolerance regarding the period of suspension, admitting the contractual termination after three months of the suspension or after repeated breaks totaling 90 working days.

As for contractual termination caused by delay in payment by the Public Administration, the previous legislation allowed the ending when the delay was of more than 90 days. The new legislation, in turn, enables the termination of the contract in cases of late payments of more than two months, counted from the issuance of the invoice, payments or payment installments due by the Administration for expenses with works, services or supplies.

The new Bidding Law has reduced the tolerance periods for suspension by order of the Administration and for delays in payments due to individuals that prevent the premature termination of the bond on the initiative of the individual or exceptio non adimpleti contractus. This legislative stance seeks to ensure greater legal certainty in public-private relations.

[10] Article 125 of Law 14.133/2021 provides: "In the unilateral changes referred to in item I of the caput of article 124 of this Law, the contractor will be obliged to accept, under the same contractual conditions, additions or deletions of up to 25% (twenty-five percent) of the updated initial value of the contract that are made in the works, services or purchases, and, in the case of renovation of a building or equipment, the limit for increases will be 50% (fifty percent)."

https://doi.org/10.54934/ijlcw.v2i1.49

5. FORMS AND CONSEQUENCES OF THE TERMINATION OF ADMINISTRATIVE CONTRACTS

Termination of the contract can be implemented in the following ways (article 138 of Law 14.133/2021): a) by a unilateral and written act of the Administration, except in the case of non-compliance resulting from its conduct; b) by agreement between the parties, conciliation, mediation or dispute resolution committee, provided there is an interest of the Administration; c) by judicial or arbitration decision, under the terms of the legislation and, in the latter, in the form of an arbitration clause or arbitration agreement.

The new legislation confirms the possibility of an arbitration agreement to resolve conflicts in administrative contracts, in the line already permitted by articles. 1.º, §§ 1 and 2, and 2, § 3, of Law 9.307/1996, amended by Law 13.129/2015, in addition to other specific legal norms. [1][5]

Incidentally, article 151 to 154 of Law 14.133/2021 admit the use of alternative (or appropriate) means of preventing and resolving disputes, notably conciliation, mediation, the dispute resolution committee and arbitration.

As for the first two hypotheses of extinction indicated in article 138, I and II (unilateral and consensual), the termination of the contractual relationship must be preceded by written and reasoned authorization from the competent authority and reduced to term in the respective process (article 138, paragraph 1, of Law 14,133/2021).

Suppose termination is the sole fault of the Public Administration. In that case, the contracted party will be compensated for the regularly proven damages it has suffered and is also entitled to (article 138, § 2.º, of Law 14.133/2021): a) return warranty; b) payments due for performance of the contract up to the date of termination; c) payment of the cost of demobilization.

Unlike article 79, § 2, of Law 8.666/1993, which establishes the indemnity obligation even in contractual termination through no fault of the Administration (the act of God and force majeure), article 138, § 2.º, of Law 14.133/2021 established the responsibility of the Administration only in cases of its only fault.

This does not mean management would never be responsible for the premature termination of the adjustment in the event of acts of God and force majeure.

The responsibility of the Public Administration and the contractor in cases of unforeseeable circumstances and force majeure will depend on the allocation of risks included in the contract.

https://doi.org/10.54934/ijlcw.v2i1.49

Unilateral extinction by the Administration entails the following consequences, without prejudice to the application of legal sanctions[11] (article 139 of Law 14.133/2021): a) immediate assumption of the object of the contract, in the state and place in which it is found, by an act of the Administration; b) occupation and use of the premises, installations, equipment, material and personnel employed in the execution of the contract and necessary for its continuity;[12] c) execution of the contractual guarantee, for c.1) reimbursement of the Public Administration for damages resulting from non-execution; c.2) payment of labor, land and social security sums, when applicable; c.3) payment of fines due to the Public Administration; c.4) requirement for the insurer to assume the execution and completion of the object of the contract, when applicable; and d) retention of credits arising from the contract up to the limit of the damages caused to the Public Administration and the fines applied.

The immediate assumption of the object of the contract and the occupation provided for in items "a" and "b" above are at the discretion of the Administration, which may continue the work or service by direct or indirect execution (article 139, § 1.º, of Law 14.133/2021).

6. CONCLUSION

In a conclusive summary, it is possible to state that Law 14.133/2021 established special treatment for the duration of administrative contracts and for the causes, forms and consequences of contractual termination.

The changes concerning the text of Law 8.666/1993 were smooth. Still, the small innovations presented demonstrate that the new Bidding Law intended to ensure greater legal certainty and pay special attention to consensuality in public-private relations.

Alongside the legislative treatment given to the causes, forms and consequences of contractual termination, the hypotheses can and should be better detailed in the respective administrative contracts to ensure greater consensus in the resolution of conflicts, emphasis on the adoption of preventive measures for premature termination of adjustments and predictability to the parties involved, including the pricing of contractual risks. Based on a pragmatic analysis of contractual termination, the path is clear for stipulating clauses that encourage adequate and full compliance with contractual obligations, reducing the uncertainties and risks of default.

[11] The legal regime of infractions and the respective sanctions is provided for in arts. 155 to 163 of Law 14.133/2021.

[12] The completion of the occupation must be preceded by express authorization from the Minister of State, state secretary or competent municipal secretary, as the case may be (article 139, § 2, of Law 14,133/2021).

https://doi.org/10.54934/ijlcw.v2i1.49

REFERENCES

[1] Ferreira, D.B. & Oliveira, R.C.R. (2019) "*A arbitragem no direito administrativo: Perspectivas atuais e futuras através de um estudo comparativo e temático entre Brasil e Portuga"*, Revista Brasileira de Alternative Dispute Resolution – RBADR, vol. 01, nº 2, pp. 139-158.

[2] Garcia, Flávio Amaral (2010). *Licitações e contratos administrativos*, 3. ed. Rio de Janeiro: Lumen Juris.

[3] Justen Filho, M. (2021) *Comentários à Lei de Licitações e Contratações Administrativas: Lei 14.133/2021*, São Paulo: Thomson Reuters Brasil.

[4] Niebuhr, J.M. (2011) *Licitação pública e contrato administrativo*, 2. ed. Belo Horizonte: Fórum, 2011.

[5] Oliveira, R. C. R. (2021) *Licitações e contratos administrativos*, 10. ed. Rio de Janeiro: Forense, 2021.

[6] Halpern, E.A. (2020) *"Duração dos contratos na futura nova Lei de Licitações*", Revista de Contratos Públicos – RCP, Belo Horizonte, ano 10, n. 18, p. 155-175.

ABOUT THE AUTHORS

Rafael Carvalho Rezende Oliveira – Ph.D., professor, University Veiga de Almeida – UVA, Rio de Janeiro, Brazil, Universidade Candido Mendes - UCAM, Rio de Janeiro, Brazil
e-mail: mailto:contato@roaa.adv.br
ORCID ID: 0000-0002-8823-1393
Google Scholar ID: SARWWjsAAAAJ

Thiago Gomes do Carmo – Ph.D. Candidate,
Certified by the Institutional Certification
Institute and Social Security Professionals – ICSS. Attorney.
University Veiga de Almeida – UVA, Rio de Janeiro, Brazil
e-mail: mailto:thiagocarmogc@gmail.com
ORCID ID: 0009-0006-3658-1267

ABOUT THIS ARTICLE

Conflict of interests: Authors declare no conflicting interests.