



## **PUBLIC-PRIVATE PARTNERSHIPS, COMPETITIONS AND PUBLIC ARCHITECTURE QUALITY**

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**Abstract:** This paper presents an overview and reflections on international and national experiences related to qualitative judgement of Architecture and Urban design, especially architectural competitions, in the context of Public-Private Partnerships (PPPs). This work results from research carried on at the CEFOR Graduate Program – Center for Qualification, Training and Improvement in the Chamber of Deputies, with the purpose of analyzing the main legislative tools related to the issue, besides the confrontation of management experiences. As methodology, one has applied the documental analysis of laws, regulation and technical documents produced in national and international contexts. Preliminary conclusions indicate the need to review the partnerships models, aiming to ensure design and built environment quality, placing competitions as vital instruments for such purpose.

**Keywords:** Public-Private Partnerships (PPPs). Architectural Design. Architectural Competitions. Qualitative Judgement. Built Environment.

### **Introduction**

In recent years, there have been increasing discussions in Brazil, especially in the sphere of the Legislative Branch of the various spheres, on Public-Private Partnerships (PPPs) and other management models in which the Public Administration delegates to third parties a series of services and elements of infrastructure, focusing on performance, service delivery and the reduction of the state's administrative structure. Potential conflicts have been observed in this scenario, especially with regard to the quality of the projects and the resulting built environment, with a direct impact on the quality of services and the inherited assets inherited by the State at the end of the concession period. This is the central theme of this article.

The first chapter of the article presents the concept of PPP and a panorama about the Brazilian legislation related to the theme. The second chapter is devoted to the analysis of the role of the Architecture project in a Brazilian case study: the PPP of the Housing Center in São Paulo. The third part of the article is devoted to discussions about the role of the Architecture project in PPPs in the European context. Particularly noteworthy are the cases in the United Kingdom, due to the tradition in the implementation of partnerships in the countries that comprise that group of countries, and in France, for the relevant studies carried out in this field in recent years. They are also presented, more summarized due to the smaller availability of information and the lesser

tradition in the subject, studies carried out in the United States and Canada. In each case, according to the availability of information, normative instruments, reports and studies of professional entities, public administration and the Legislative Branch were analyzed. The fourth part of the article deals with the competitions as selection instruments based on the qualitative judgment of the projects, with a brief panorama on the context of the competitions in Brazil and in Europe. The article concludes with the discussion about the role of architecture contests as tools for quality promotion and the possibilities of their inclusion in the processes and models of PPPs.

The objective of this article is to open discussions about the qualitative judgment of architectural projects in processes of public-private partnerships in Brazil that involve constructions of buildings and public spaces, based on international experiences on the subject. Preliminary conclusions indicate the importance of deepening the issue, considering the frequency with which the subject has been addressed in the Brazilian Public Administration, the volume of resources involved and the impact of these contracts on the quality of infrastructure, buildings and public spaces.

## **1 Public-Private Partnerships**

Public-private partnerships (PPPs) are administrative concession contracts in which the State delegates to private companies the provision of services of public interest, which may include the execution of the public works or infrastructure. In a PPP the focus is on service delivery, which is measured based on performance indexes (SÃO PAULO, 2015).

When involving buildings and infrastructure, payments to the private partner generally occur from the completion of the work and are made based on measurements of performance of services performed over the term of the contract. For example, in a PPP in the health area the payment to the private partner in general is made based on indices of performance of the hospital service and not on the construction of the hospital or health post.

Similarly, in PPPs in the educational field, school construction in general is only part of a broader contract of providing educational services. In such cases, decisions about the design of public equipment tend to move from the public manager to the private partner, who decides on the typology, quality standard and general configuration of the equipment (schools, hospitals, sports complexes, administrative headquarters, etc. ).

One of the main arguments of the sectors advocating the realization of PPPs is that private initiative would have more agility, innovation potential and the technical and financial capacity to provide a series of services that would be more costly and less expensive under the responsibility of the State . On the other hand, one criticism of the modality is that when the private partner is responsible for making project decisions, the final quality of the public works

can be affected, since the focus leaves the quality of the public architecture and passes to be cost-effective in providing the service and the profit of the private partner.

### **1.1 Federal Legislation**

In Brazil Public-Private Partnerships are regulated by Law 11,079 of 2004, which established general rules for bidding and contracting PPPs within the scope of public administration. According to the Explanatory Memorandum (MS 335/2003 / MP / MF) presented on 10/11/2003 as a subsidy to the draft Law that gave rise to Law 11,079 / 2004,

[...] the public-private partnership is a contracting modality in which public entities and private organizations, through the sharing of risks and with financing obtained by the private sector, assume the performance of public services or enterprises (BRASIL, 2004).

The explanatory memorandum points out the PPPs as indispensable alternatives to the "recovery and sustainability of economic growth", as they allow risk sharing and private financing.

The document lists a number of countries where the procedure would have been successful due to "lack of availability of financial resources and utilization of private sector management efficiency". Also according to the explanatory memorandum, Brazil's social and economic needs could be met "through the positive collaboration of the public and private sectors." The document does not, however, mention the various criticisms and revisions that PPPs were passing in the same countries cited as successful references, as we will see later.

For example, with respect to the design and development of building and infrastructure projects that are part of PPP contracts, Paragraph 4 of Article 10 stipulates that "Engineering studies for the definition of the value of PPP investment level of detail of draft ". It is assumed, therefore, that the PPP modeling must be preceded by the production of technical documents of engineering and architecture. In the spirit of decentralization of PPPs, it follows that such studies should preferably be carried out by private initiative.

In this context, it is worth highlighting the veto presented by the Presidency of the Republic to Item II of Article 11, in the process of discussion and approval of Law 11,079 / 2004. This article mentioned the "responsibility of the contractor for the elaboration of the executive projects of the works". In the reasons for the veto the argument is presented that in a PPP context the private initiative should be responsible not only for the executive project, but also for the basic project. According to the text that justifies the veto:

Public-private partnerships are only justified if the private partner can provide the services contracted more efficiently than the public administration. This efficiency gain can come from several sources, one of which has been deserving special attention in the international experience: the elaboration of the basic and executive projects of the work by the private partner. Contracts of public-private partnerships carried out in several countries have already proven that the cost of contracted services decreases significantly if the service provider is responsible for the preparation of the projects. This is because the private partner, in most cases, has the necessary technology and the ability to innovate in the definition of efficient solutions in relation to the cost of investment, without loss of quality, reflected in the lower cost of the service to be remunerated by the Administration or by the user. (BRASIL, 2004)

Noting that international experience favors the development of projects by the private partner, criticism is not taken, in England and France (MIQCP, 2003; UNITED KINGDOM, 2012), among others, of conflicts of interest. establish in this link between the entrepreneur and the author of the projects and the quality problems of the public works resulting from this procedure when the State delegates to the private partner the decisions about the quality of the Public Architecture. Such criticisms are presented in this article in the following sections.

## **1.2 Proceedings of Expressions of Interest - Regulation**

Decree 8.248 / 2015 (BRAZIL, 2015) regulates the Procedure for Manifestation of Interest (PMI), which are the studies and projects carried out by the private initiative, presented as a subsidy to the public administration in the modeling of PPPs. The Brazilian law allows that in a PMI the Public Administration is limited to only indicating the problem to be solved through a particular enterprise, leaving to individuals and legal entities of private law the possibility of suggesting different means for its solution (Article 4, § 2º). The spirit of decentralization proposed in Law 11,079 / 2004 (BRASIL, 2004) and detailed in the explanatory memorandum of the Bill that gave rise to it, is observed in this topic of the normative instrument. This is one of the points that have been criticized in PPPs in the international context, since the State transfers to private initiative the decision-making on projects that may affect the public interest (ORDRE DES ARCHITECTES, 2006; MIQCP, 2003).

Chapter IV of Decree 8.428 / 2015 (BRAZIL, 2015) is dedicated to the regulation of "evaluation, selection and approval of projects, surveys, investigations and studies" in PMIs. According to Art.10, the criteria for evaluation and selection of projects and studies should consider, in summary:

- I – The observance of directives and premises defined by the organ;
- II – The consistency and coherence of the information that supported its achievement;
- III – The adoption of the best elaboration techniques;
- IV – Compatibility with applicable legislation and relevant technical standards;
- V – The comparative cost and benefit demonstration of the project proposal in relation to functionally equivalent options;

## VI – The socioeconomic impact of the proposal for the enterprise.

In contrast to what is defined in Law 8.666 / 1993 (Art.9) (BRASIL, 1993), in the case of PMIs, the authors or persons responsible for the projects, surveys, investigations and studies presented may participate directly or indirectly in the bidding or execution of works or services provided for in the PPP tender. In this case, the conflict of interest between project author and entrepreneur, which justified the participation restriction foreseen in Article 9 of Law 8.666 / 1993, was disregarded by the legislator.

The projects submitted under the PMIs and effectively used in the process will be reimbursed to the authors exclusively by the winner of the PPP bidding (Article 16). In no event, according to the Law, any amount will be owed by the Government for the execution of projects, surveys, investigations and studies. There is a risk in these cases of the monopolization of projects by large groups and companies, since the small service providers, although technically qualified, would not have the financial structure to assume the risks of projects that eventually will not be reimbursed.

### 1.3 Recent Reviews

In this context of reducing the state's responsibilities for public works projects, Provisional Measure 727/2016 (BRAZIL, 2016) was published in May 2016 by the interim president of the Republic, which created the Investment Partnerships Program - PPI, "aimed at expanding and strengthening the interaction between the State and the private sector through the conclusion of partnership contracts for the execution of public infrastructure projects and other privatization measures." In the explanatory memorandum accompanying the MP 727/2016, the argument was made that the Program would enable, enhance and strengthen the partnership between the State and private initiative, "bringing significant improvements in terms of governance and investment structuring".

MP 727/2016 was converted into Law 13,334 on 09/13/2016 (BRAZIL, 2016). The PPI Council (Article 7) was created, with the participation of the Presidency of the Republic, various ministries, the BNDES and the Caixa Econômica Federal.

There are no explicit and direct references, in the set of federal legislation mentioned, to the qualitative judgment of architecture and urban planning projects that integrate the PPPs. The word "quality" is mentioned in two moments: in Article 2, Section II, which deals with the objectives of the PPI ("ensure the expansion with quality of the public infrastructure, with adequate tariffs") and in Art.3, Section II, which deals with the principles according to which the PPI should be implemented ("legality, quality, efficiency and transparency of state action"). The idea of "evaluation" of such quality is related to the concept of "performance", not the proposed "object" or "solution". In the referred law, the "evaluation" is mentioned only in Article 5, Item

VII: in public-private partnership contracts, it is necessary to provide for "objective criteria for evaluating the performance of the private partner"

## **2 PPP – Housing Center in São Paulo - Case Study**

In Brazil, one of the units of the federation that has invested most in the promotion of PPPs is the State of São Paulo, which through State Law 11.688 / 2004 established its Public-Private Partnerships Program.

The said Law also established the Companhia Paulista de Parcerias, a legal entity in the form of a partnership, with the specific purpose of supporting and making feasible the implementation of the Public-Private Partnerships Program of the State. According to Article 21 of the State Law, PPP projects must be subject to public consultation, at least 30 days before the publication of the bidding notice.

State Law 11.688 / 2004 (SÃO PAULO, 2004) is regulated by State Decree 48.867 / 2004 (SÃO PAULO, 2004), which, among other provisions, defines the composition and competencies of the State Public-Private Partnerships Program Management Council from Sao Paulo. In 2011, State Decree 57.289 (SÃO PAULO, 2011) was published, with the purpose of detailing the procedure for the presentation, analysis and use of proposals, studies and projects sent by the private initiative, with a view to the inclusion of projects in the Partnership- Public Private - PPP of the State of São Paulo. The Decree, as provided by the pertinent legislation, reinforces the possibility of eventual interested parties to submit projects and studies for PPP bids, "without prejudice to the right to participate in the contest and the corresponding reimbursement, by the winner of the bid." Article 1 provides definition and conditions for the presentation of the "Expression of Interest of the Private Initiative - IPM". In paragraph 6 it is highlighted that, if approved by the Management Council, the MIP is received as preliminary proposal of PPP project. In this case, a call for the presentation, by any interested parties, of IPM on the same subject should be published. The Executive Secretariat of the Management Council is responsible for coordinating the consolidation of the final modeling, based on the technical studies resulting from the Call for Public Appeal.

The São Paulo State Government Office, with the purpose of disseminating good practices of the State for the structuring of partnerships and guiding the activities of the organs and entities involved in said Program, launched the "Manual of Partnerships of the State of São Paulo" (SÃO PAULO, 2015).

Regarding the architecture and urban planning projects that subsidize the PPP proposals in which construction of buildings and infrastructure are planned, the following references were identified in the aforementioned Manual:

- In the consolidation and use of studies, when different models are evaluated, it is possible that a particular study stands out in relation to the others and is fully utilized. On the other hand, there

may be different advantageous aspects in two or more of the proposed models. In these cases, for example, "it is possible that the engineering and architecture proposal of one of the studies is more interesting, while the business model of another meets the demands of the state better" (SÃO PAULO, 2015, p..64);

- The Manual stresses that engineering and architecture studies "integrate the design elements necessary for the full characterization of the investment, revenues and expenses of the enterprise" (SÃO PAULO, 2015, p.68), but emphasize that in PPPs, different from what occurs in the contracts subject to the regime of Law 8.666 / 1993, it is necessary only the characterization of the elements of the basic project that allow to model the partnership, and that according to the Federal Legislation, should have level of detail of draft. The level of deepening of the draft, according to the Manual, will depend on the nature and complexity of the object and its context. According to the document, the greater depth of the preliminary draft allows for greater uniformity of PPP proposals, in addition to ensuring the minimum levels of quality expected by the Government. On the other hand, he argues, such deepening "will tend to reduce the business freedom of the Concessionaire ..., besides allocating to the Public Power the risks arising from possible design errors. Despite the considerations on the risks of excessive preparation of the draft, the Manual highlights:

In cases where engineering and architecture works are specifically relevant, due to their complexity or volume, the deepening of the modeling studies may represent a crucial element for (i) quantifying the risks to be incurred by the future concessionaire; (ii) consequently, to allow greater transparency, seriousness and uniformity in the proposals to be presented in the bidding, and (iii) to guarantee the most efficient allocation of risks in the concession modeling (SÃO PAULO, 2015, p. 64).

The Manual also presents an analytical framework that details the level of deepening of engineering and architecture studies for each stage of the PPP: technical feasibility studies, basic design and executive project (SÃO PAULO, 2015). There are no references, in the Manual, to the use of the contest as an instrument for the selection of Architecture and Urbanism projects.

An example of PPP carried out by the State of São Paulo is the PPP Housing Center. In May 2012, Public Call Notice 004/2012 was published for the presentation, by interested parties of the private initiative, of technical studies and modeling of Public-Private Partnership (PPP) projects for Housing of Social Interest. The preliminary proposal of PPP that subsidized the public call has as scope the offer of 50,000 new housing units in the metropolitan regions of the State of São Paulo, having as priority focus of action (SÃO PAULO, 2012):

1. Housing in the central region of São Paulo;
2. Provision of housing for the eradication of risk areas;
3. Housing for the sustainable development of the Paulista Coast.

Notice 004/2012 refers to the offer of 10,000 social housing units in the central region of São Paulo (Item 1) and is based on the large number of underutilized properties in the region. It is observed, from the scope of the call, that it is a complex object that goes beyond the simple offer of housing units. Through a partnership strategy, it is proposed - in an integrated way to offer housing - the improvement of spaces, public facilities and mobility in a region that, despite the great potential, is marked by problems of underutilization of real estate, irregular occupations and social problems.

As a result of the public appeal 004, as well as subsequent public hearings and discussions, in September 2014, the International Competition Notice 001/2014 was launched with the purpose of "selecting the best proposal for the administrative concession for the implementation of housing units of social interest, popular market housing and related service provision" This is the competition notice of PPP Housing Center, of the State of São Paulo. Annex II of the edict contains the Urbanistic Guidelines to be followed by the winning consortium, in the implementation of the projects. It is a consolidation of the contributions resulting from Public Call 004. The purpose of the document is to

[...] to ensure that the projects to be implemented present urban qualities and buildings capable of guaranteeing their economic and social sustainability and, at the same time, act as an instrument of public policy for the urban renewal of the EXPANDED CENTER (SÃO PAULO, 2014, p. 2).

The content of the document is divided into (1) General Guidelines and (2) Specific Technical Guidelines. The General Guidelines include the main qualitative issues to be observed in the project and are presented in specific topics, often accompanied by conceptual diagrams: urban unit; architectural diversity; avoid urban segregation and contextualize interventions; avoid the gated community to the city; improvement of public space; city of mixed use; concentration of interventions around subway stations; favor the emergence of poles of opportunity; promote the transposition of barriers; residential use on the ground floor, among other guidelines and constructive technical specifications.

It is observed, judging by the technical documentation made available and the public participation provided by the Call, hearings and debates, that it was the public authority's interest in discussing the guidelines of the enterprises and qualitatively defining the scope of the project, a fact uncommon in traditional PPPs.

The general proposal of the PPP was criticized, in particular by universities and social movements, not with regard to urban planning but social inclusion issues. In the text entitled "Contribution to the public consultation on housing PPP in São Paulo", with recommendations presented to public call 004/2012, the urban planner Raquel Rolnik publishes in June 2013 part of the document, which highlights the following recommendations: (1) Need to prioritize care to the lowest income population (up to 3 minimum wages); (2) Inclusion of social leasing as another



modality to be foreseen in the PPP; (3) To guarantee the permanence of the people who currently inhabit the central region in precarious conditions. In summary, the document:

[...] there is no point in attracting 20,000 new homes to the center if more than 20,000 households, now inhabited by people who work in the center and live in precarious conditions, are relocated to the periphery. If this happens, the objectives of the PPP will be contradicted (ROLNIK, 2013).

In March 2016, information about the projects for one of the four lots of the Competition 001/2014, related to the PPP for social interest housing on two lots in the Luz region, was published in the press (HABITAÇÃO, 2016; ANTUNES, 2016) from Sao Paulo. According to information published in the press, the Architecture projects that integrate the winning proposal resulted from a closed contest held by the winning consortium. The preliminary images of the proposal seem to suggest that some urban planning guidelines related to the quality of the housing units, as well as public facilities and spaces are met: integration of the block with the surroundings; commercial units on the ground floor (active facades); combination of housing use with other activities (trade, services and culture); pedestrian circulation spaces; public spaces and equipment integrated into the housing areas; green areas and new cultural facilities. The project foresees 1,200 housing units, of which 90% for social housing (income of up to six minimum salaries), as well as nursery, commercial areas, green spaces and public facilities. Despite the alleged closed contest, informed by the winning consortium, the documents of the contest were not made available to the public. The few public information about this project is limited to some images and diagrams published by the press. There is no detailed data on the proposals, nor on the evaluation and selection process, which according to press reports had the joint participation of the concessionaire and the State Department of Housing.

### **3 International Overview of PPPs**

In the international arena, the countries of Europe have extensive experience in the deployment and critical studies of PPPs, with emphasis on the United Kingdom and France. In the Americas, the United States and Canada have less experience in partnerships compared to Europe. In this article, only a few studies produced by researchers and professional representations in these countries were approached. Experiences from other countries in South America beyond Brazil were not included, since they did not fit the scope of the original research. The in-depth study on the subject in Latin America should be the object of specific study.

#### **3.1 United Kingdom and France**

The UK is one of the main references in the adoption of Public-Private Partnerships (PPPs), where such contracting models have been applied under the justification of maximizing efficiency in the management of public services since the 1990s. PPPs in the United Kingdom

have proved to be inefficient and have resulted in poor public buildings or public spaces with high operating costs for the public sector, which has cast doubt on the viability of the traditional model. In the early 2000s, the French government was under political and administrative pressure to reduce the structure of the state, driven by the ideas of efficiency and optimization propagated by advocates of public-private partnerships. In this context, the French government, through the Interministerial Mission for the Quality of Public Construction (MIQCP), carried out a study on the British experience in the subject, with the objective of evaluating the limits of the potential of applying PPPs in France. In November 2003, MIQCP (2003) published a document entitled "Development of PPP / PFI procedures in Great Britain" (*Le développement de la procédure de PPP / PFI en Grande Bretagne*), which addresses the origins and development of PPP in the region, in addition to evaluating the PFIs (Private Finance Initiative) policy. The first MIQCP report on UK PPP / PFIs is structured in two parts: (1) The PFI process - origins and development; (2) PFI Policy Reviews.

In the second part, devoted to the analysis of the process, one of the main criticisms regarding contracts involving buildings is the excessive focus on legal and financial aspects and the lack of attention devoted to design and construction quality issues. An example of this problem of lack of quality of design and construction are the schools run in the context of IPPs, which according to the report "concentrate the greatest number of criticisms on architectural and constructive quality." In the last section we present some recommendations to be considered in the eventual adaptation of the UK model to France. Among the indications are those related to the importance of the design process and the role of the architect in the process prior to the signing of the public-private partnership agreement (MIQCP, 2003, p.78).

Nesse primeiro relatório da MIQCP observou-se que, devido a diversas críticas sobre o sistema, o processo de PPP no Reino Unido estava em processo de avaliação e revisão, o que levou à realização de um novo estudo, mais específico, com enfoque no impacto das PPPs sobre a qualidade das construções públicas. Esse novo estudo resultou no documento "Evolução e adaptação da política de PFI em relação às edificações públicas na Grã-Bretanha" (*Evolution et adaptation de la politique PFI concernant les bâtiments publics en Grande-Bretagne*), publicado em setembro de 2006 (MIQCP, 2006).

The 2006 report gives an overview of the main advantages and difficulties faced by Great Britain, where around 15% of public procurement was conducted through PPPs, in particular in the management of schools, hospitals and security systems. The target for 2010 in the area of education was that about 30,000 primary schools and 3,000 secondary schools were managed through PPPs. Some of the aspects considered critical or important in PPP processes in the United Kingdom, which involve the construction and maintenance of public buildings:

- The need to account, in the PPP contract, for the specificities, constraints and costs of operating the building or equipment in the long term;
- The set of requirements and the great difficulty and complexity of the PPP selection procedure;
- The PPP process tends to reduce competitiveness: "competition in which dominant market players remain dominant";
- The risk of conditioning the management of public collectivity to market conditions;
- The process between the design and preparation of the public call for PPP and the effective contracting is long (three years in average);
- The difficulty of ensuring the quality of design of the equipment or buildings, which in the cases of PPPs are generally oriented according to economic, legal and administrative rationalities.

Among the developments presented in the 2006 MIQCP report on the PPP / PFI system in Great Britain are:

- Changes in control and management strategies - strengthening and multiplication of the central control and knowledge structures on the subject and the revision of the contractual and financial models of the partnerships;
- Learning - evolution of practices accompanied by constant research on the subject.

One of the major concerns observed in revisions of PPP models is the difficulty of ensuring effective competition, seeking the necessary balance between public demand and market supply.

Some professional entities interested in project quality and public constructions expressed their views on the limitations of the traditional IPP and presented proposals for reformulation and adaptation. This is the case of the Royal Institute of British Architects (RIBA), which in 2005 published the document "Introduction to Smart PFI" (Introducing Smart PFI). In this document, the institute warns of concerns related to the lack of quality of the constructions in the context of the PFIs and proposes a new system (Smart PFI), which would be characterized by the quality of the project and the agility of the process:

If we do not change the procedures we will waste a unique opportunity to obtain the best value for money, through the excellence of the project and the construction of the equipment that have the objective of the benefit of all. (RIBA, 2005, s.p)<sup>1</sup>

RIBA cites audit reports, published in 2003, that address issues related to project quality, flexibility, environmental standards and maintenance in PPP-managed school projects.

The RIBA proposal to improve the UK partnership system is based on the following points: (1) Greater user participation in the early stages of project design and definition of the scope of the partnership; (2) Improvement of the project selection procedure to ensure more innovation, effectiveness and efficiency; (3) Broad discussion and evaluation of the project

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<sup>1</sup> The excerpts from foreign documents were translated by the authors.

program; (4) Reduction of the time and cost of the selection process and contracting of the partnership; (5) Need to maintain focus on project quality during partnership management.

It is worth mentioning that in the British model, the projects are usually contracted by the consortium, not by the public client. What is observed, in this case, is that during the management of the contract by the consortium the quality of the buildings ends up being sacrificed, in the face of cost minimization strategies in order to guarantee the "financial viability" of the contract. This is one of RIBA's main criticisms of PPPs in the UK. In summary, with regard to the quality of constructions and projects, the objectives of the consortium contracted in PPPs generally do not coincide with the objectives of the community (the public client).

In the context of debates on the implementation of PPP systems in France, a number of professional entities, especially those interested in the quality of design and construction, including the Order of Architects of France, published in December 2006 the document "O Architecture Project in the contracts of public-private partnership "(La maîtrise d'oeuvre dans les contrats de partenariat). The main objective of this text is to highlight the importance of unlinking the design process of equipment and buildings from the PPP contract scope in order to preserve the quality of the project and the constructions:

Public-private partnership (PPP) is a legally and technically complex procedure, which risks weakening the transparency of public decisions and restricting competition. While PPP may have short-term economic advantages on the one hand, it may be uneconomic and may offer financial risks to public management (ORDRE DES ARCHITECTES, 2006, s.p).

According to the document, the design and management of the Project should always be under the responsibility of Public Management, and should not be included as part of the scope of the PPP:

Project selection should be a fundamental prerogative of the public manager, who acts in the public interest and can not, and should not, delegate the design of the project to a private interest group whose main objective is the profitability of the contract (ORDRE DES ARCHITECTES, 2006, s.p)

The MIQCP, in its portal, published the document and publicly adhered to the proposals of the professional entities, defending the autonomy of the public management in the decision on the design of public building projects.

In March 2011 the French government, through the Ministry of Economy, Finance and Industry, published the document entitled "Contracts of partnership: methodological guide" (Les contrats de partenariat: guide méthodologique). This guide provides guidance on procedures and justifications for the implementation of PPPs in the country, based on Ordonnance 2004-559, law published on 17/06/2004 (FRANCE, 2004), which regulates PPP contracts in France. One of the articles of the law, also highlighted in the guide, deals with the architecture project in the context of partnerships:

Public equipment and, in particular, public buildings, contribute to the formation of the identity of cities, including as reference elements that ensure a symbolic function in the life of our societies, constituting themselves as cultural heritage. Architecture is an object of public interest. The values of use and patrimonial of the public buildings depend directly on the quality of the design and are constituted as fundamental interest of every construction operation. For these reasons, those responsible for public management, when they choose to carry out Public-Private Partnerships (PPP) for the construction or operation of their equipment, can preserve their freedom of choice over the design of the architectural project. The managers, in this sense, will be able to define the architectural project before signing the PPP contract, in order to guarantee the quality of the project and at the same time favoring the transparency of the process (FRANCE, 2011, s.p).

This guide presents two possibilities with regard to the Architecture Project in the context of a PPP (according to Art. 12 of Ordonnance 2004-559, 06/17/2004): (1) Inclusion of design as part of the scope of the PPP; (2) Concept prior to PPP as a result of specific process.

In summary, French law leaves the manager the decision to contract the architectural project in advance or include it as part of the scope of the PPP, but emphasizes the importance of the autonomy of the public manager in the choice of the project, as a way of "guaranteeing the quality of the project and the transparency of the process" (FRANCE, 2011, page 66). According to Article 12 of the French Law (FRANCE, 2004, page 559), the guide emphasizes that in cases where the architecture project is part of the scope of the PPP, "architectural quality should be considered as a criterion for evaluating the contract".

With regard to the quality of public buildings in the context of PPPs, it can be seen that France's public management is now divided between the two paths: inclusion of design in PPPs and autonomy of design in relation to PPP. The first approach is defended by the sectors most closely linked to the economic, financial and legal vision of the partnerships and who consider that the constructions are only means to obtain an objective, that is the provision of the service. The second approach is defended by sectors concerned with the quality of public buildings, as they defend the Interministerial Mission for the Quality of Public Buildings and the professional entities related to the technical services of design and construction.

In July 2011 the British Parliament published a report criticizing the IPPs and questioning their cost-effectiveness and cost-effectiveness. According to the report, the financial cost of IPPs has been greater than traditional forms of public investment:

There is no clear evidence on the advantages and benefits of IPPs that justify paying such high funding costs. The studies suggest that (besides the higher financial cost) the final cost of construction and provision of services in PFIs are equivalent to the traditional forms of contracting, although in some areas the performance and quality of services in PFIs are worse. As far as buildings are concerned, there are records that there is a lack of innovation in PFI architecture projects and the quality of construction is worse (UNITED KINGDOM, 2011, s.p).

The British Parliament concludes the report by alerting the PFI to risks and recommending that its model be reviewed and enforced until the viability and cost-effectiveness of the operations are proven.

In December 2012, the British government published the document entitled "A New Approach to Public Private Partnerships", which points out some limitations of the original model (PFI), such as high cost of the process, lack of flexibility and lack of transparency (UNITED KINGDOM, 2012).

According to the document, there are serious concerns about the cost-effectiveness of these partnerships, especially in long-term contracts, which have proved to be more costly and of worse quality than traditional contracts. The lack of transparency is another aspect criticized in the process, which has provoked tensions between the partner companies, the government and the general public. The recent economic crisis, according to the document, showed several fragilities of the system.

The PFI was originally conceived in order for the private sector to take responsibility for the design, construction, financing and operation of public infrastructure, with the aim of providing better quality services with a good level of maintenance and cost effectiveness to the taxpayer. However, the experience of the British government has revealed a number of weaknesses of the system:

- High cost of the process, both for the public sector and for the private sector;
- Lack of flexibility of contracts during the period of operation, which makes it difficult to adapt existing contracts to public demands;
- Lack of transparency on the effectiveness of investments.

It was observed that in many cases the IPP was misused, in situations where the model should not have been applied, generating a management contract in which efficiency and cost-effectiveness have been sacrificed. The theoretical advantages of IPPs, such as the management skills of the private sector, industry experience in risk management and innovation, the assurance of quality buildings and the maintenance of their high standard in the long term have in many cases not been confirmed. In the face of criticism and evidence of failure of the PFIs system, some revisions were made, according to the British government:

- Publication of reports on the effectiveness of IPPs in order to increase the level of transparency of the process;
- Launching of programs to improve the cost-effectiveness of PFIs (Operational PFI Savings Program).

The "new approach" to PPP proposed by the British government was called PF2 and aims to: improve value for money; increase the transparency of processes; streamline and reduce the cost of contracting PPPs; and make the provision of services more flexible.

In the document published in 2012, the UK government highlights major renovations and revisions to its public-private partnership program, after harsh criticism of the system over the past few years. According to the document:

The PFI (Private Finance Initiative), the most commonly used PPP in the UK, has become a process of waste, inflexibility and lack of transparency (UNITED KINGDOM, 2012, s.p).

In March 2013, the article entitled "PPP: a delayed-effect bomb" (Les PPP? Une bombe à retardement!) Was published in Le Moniteur, a news portal dedicated to the subject of construction in France. In the article the authors denounce PPPs, which they classify as "disastrous tools for public finances, used for the benefit of the few, to the detriment of the general interest and Architecture." According to the authors:

PPPs do not produce catastrophic effects on public finances alone; they have serious consequences for the production system of buildings and for urban and architectural quality. [...] In the face of limited architectural competition, usually left to the discretion of the private partner, the quality of the project and the service become secondary aspects (CONRAD; DESSUS, 2013).

The article emphasizes that by subordinating the project team to private partner determinations, the public interest is sacrificed in the name of maximizing profit. They also point out that in many cases, under the illusion of an immediate return, the State contracts long-term debt, jeopardizing future investment capacity.

### **3.2 Canada and the United States**

As mentioned earlier, the analysis proposed in the research that gave rise to this article focused on the United Kingdom and France, based on the experience, research and discussions established in recent years in those countries on the relationship between public-private partnerships and quality of architecture. However, in order to complement the picture, the following are the views of the American Institute of Architects (AIA), and a study presented at a seminar promoted by the University of Toronto, Canada. More detailed studies on the realities of these countries should be the subject of specific research.

According to a report by the American Institute of Architects (AIA, 2016) entitled "Public-Private Partnerships: What Architects Need to Know", PPPs are very complex procedures and require attention and should not be applied unless the public interest is established. This is because the traditional PPP system displaces the function of the project team, which ceases to act as a direct consultant serving the public authority and becomes a subcontractor to the private partner. Displacement of function and responsibility has the potential to diminish not only the role of the architect in the process, but can have negative consequences on the quality of projects and user satisfaction. In the report, the EIA argues that the direct relationship between the architect and the public authority ensures that the project is developed in order to serve the public interest,

not the private interest. There are, however, no references of the EIA to the application of Architecture contests in the context of PPPs.

A series of conferences on Public-Private Partnerships was held in June 2013 at the University of Toronto, Canada. One of the conferences, entitled "Is There a Special Canadian PPP Model?" Is reflecting on the past 20 years of the country's experiences in this type of public contract. According to the study, between 1990 and 2012 about 195 projects were built or planned in the context of PPPs. Until the early 2000s the partnerships were conducted under a model that suffered serious criticism:

[...] the PPPs resulted from political motivations as instruments for the privatization of public infrastructure and the weakening of organized labor; the costs of private financing were considerably higher than in the public sphere; decisions about contracts did not result from careful evaluations of the appropriate business model; hiring processes were poorly transparent; the State had little experience in the management and evaluation of contracts (SIEMIATYCKI, 2013, p.8-9).

The criticisms forced revisions, which resulted in a new wave of PPPs in Canada beginning in the mid-2000s. One of the major changes was the search for a balance between transferring risks and responsibilities to the private sector on the one hand, and the need to maintain control of public authority. Despite the evolution, one of the critical points of the new wave of PPPs is still the quality of the buildings and public works resulting from the contracts:

Contracts and PPP models are not guaranteed to achieve the desired excellence of the project and Architecture, fundamental questions regarding the guarantee of public benefit in large infrastructure projects that will be part of the life of the communities for generations. The PPP process [...] ultimately reduces the creativity and quality of the project by focusing on minimizing costs. [...] Few projects resulting from PPPs had their qualities recognized in prizes related to the quality of Architecture (SIEMIATYCKI, 2013, p.28-29).

The criticisms of PPPs regarding the quality of architecture in both Canada and the United States are the same as in European countries: the possible autonomy of decision of the private partner in PPP contracts on the design and design of buildings and spaces result in conflicting relationships between the design team, the private partner, the public authority and the end user, which will have a negative impact on the quality of the built environment.

#### **4 Contests and Quality of Architecture**

One way to ensure the quality of the environment built by the public authority is are the contests. In France, after the Revolution of 1789 and the consolidation of the universal principles of the Declaration of the Rights of Man and of the Citizen, various changes were necessary in the structure of the State that was being formed. Among them, the affirmation of the contest as a preferential way of contracting projects for public works, as Quatremère de Quincy suggested in his *Encyclopédie Méthodique*, published in 1801, two years after the French Revolution:



[It is necessary] a system of contracting public works that allows to reward the independent talent of favors and that can guarantee to the people, under the principle of morality, public investments in the arts and monuments that increase the public wealth, by the price that the aesthetic quality add to need work (QUINCY, 1801).

The design contests, and more specifically the Architecture and Urbanism contests, are processes that aim to select the best solution or idealization for a public space or equipment, from the confrontation of diverse ideas presented in a transparent, democratic and simultaneous way for the same program and context:

The first justification presented to the manager (public or private) who opts for an architectural competition is the possibility of expanding the universe of choice in the search for the best answer - among several - for the same problem. In other words, qualitative judgment is prioritized. In addition, the competition may be justified by other reasons not always related to Architecture itself, such as the maintenance of impersonality, transparency, publicity (of projects, cities, institutions) and political legitimation (mainly in the face of problems of difficult resolution and where there are potentially conflicts of interest) (SOBREIRA, 2014, p. 132).

The following is a brief overview of the architecture contests in Brazil and in the European context.

#### **4.1 Architecture Contests in Brazil**

In spite of the obvious advantages that the project contests present to public management, such as the strengthening of the project as an instrument of control and quality management, the public contracting of architectural projects through competitions in the Brazilian Public Administration is an exception. The contracting of projects has been the subject of important debates in the Brazilian Legislature, in the Public Administration, in the control bodies and among civil society actors related to the theme. One of the main points of controversy concerns the weakening of the "qualitative judgment" of projects and the loss of autonomy between project and execution activities - resulting in potential conflicts of interest. Critical reading of legislation, technical and academic publications, and the observation of recent public debates related to the theme reveal significant differences between the approach of Brazilian and European legislation and important changes in the recent panorama in both contexts (SOBREIRA, 2010).

Until December 2016, the tender was cited as the preferred bidding modality for the contracting of projects, based on Article 13 of Law 8,666 of 1993:

Subject to cases of non-compulsory bidding, contracts for the provision of specialized professional technical services should preferably be concluded by means of a tender, with prior stipulation of award or remuneration (BRAZIL, 1993).

In addition to giving preference to tenders for contracting projects, Law 8.666 / 1993 defined some guidelines on the performance of these procedures. Paragraph 5 of article 51 stipulated that in the case of competitions, "the judgment shall be made by a special commission

composed of persons of unimpeachable repute and acknowledged to have knowledge of the matter under examination, public servants or not".

Despite this legal preference, the tender was not the main modality used by Brazilian managers for the contracting of public works projects, which generally used other resources, such as lower price tenders or unenforceability for notorious specialization, among other instruments in which quality of the project is not the main criterion. Each year, on average, there are only 10 public competitions of Architecture of national scope in Brazil, while in France there are around 1,000 and in Germany there are 200 events every year (SURIRA; WANDERLEY, 2015).

In Brazil, in addition to being a modality practiced by managers, in recent years there has been a series of initiatives that tend to make tender procedures even more scarce and that threaten the qualitative, transparent and democratic judgment of projects. These are proposals for changes in legislation that, in parallel with privatization and the precariousness of the State, advocate the inclusion of the project as the responsibility of builders and entrepreneurs, which tends to aggravate conflicts of interest and threaten the quality of Public Architecture.

A recent example of a legislative proposal that weakens the project and reduces the participation of the State as the decision-maker on Public Architecture is Law 13,303, approved in June 2016, known as the State Responsibility Law, which among other measures authorizes companies in the various spheres, to contract engineering works and services without project, through "integrated contracting" (BRAZIL, 2016, Art. 42, Section VI).

More profound change in the legislation in it can result from Bill 559/2013, of the Federal Senate (BRAZIL, 2013), which proposes changes in the Law of Tenders (BRASIL, 1993). One of the main points of controversy over the project is the non-requirement of complete projects as a condition for conducting public works tenders in general. This proposal was questioned by representatives of civil society, among them the Council of Architecture and Urbanism (CAU / BR), which in August 2016 published a manifesto entitled "Architects and Urbanists for Ethics in Public Works." According to the CAU / BR:

Public administration can not relinquish its duty to plan the country's infrastructure and its public spaces. Therefore, the execution of the projects must be coordinated by the State, preferably through competitions, with broad social participation. (CAU / BR, 2016)

One of the main criticisms presented by CAU / BR is the proposed extension of the Differentiated Public Procurement Regime (Law 12.462 / 2011) (BRAZIL, 2011), created under the pretext of speeding up works for the 2014 World Cup and Olympics in 2016 and later extended to other government programs, and whose main point was the hiring of public works without complete projects. Proponents of PL 559/2013 argue that the inclusion of the project as part of the scope of work accelerates the construction and reduces bureaucratic barriers by offering more autonomy to the companies responsible for the execution of public works. According to the CAU / BR argument, such autonomy

generates conflicts of interest (the public interest for quality, in this case, conflicts with the private interest, for profit) and opens the way for overbilling and corruption in public works contracts. According to the version approved by the Federal Senate and submitted to the Chamber of Deputies in December 2016, PL 559/2013, in addition to weakening the project as a condition for executing public works, excluded the preference previously given by Law 8.666 / 1993 to the tender, as modality of hiring projects.

These initiatives are in line with other recent proposals in Brazil, which have in common the reduction of state participation in the control and decision-making of projects and public works.

#### **4.2 Architecture Contests in Europe**

As regards the European context, the main reference for legislation on public procurement of projects is Directive 2004/18 / EC of the European Parliament, published on 31 March 2004, which deals with the regulation of the contracting of public services by the countries members and devotes Chapter IV to the design contests and its regulations. Article 67 defines the obligation to tender from a certain value of service, according to the nature of the sponsoring institution. In the Central Public Administration of the member countries the tender is obligatory for the contracting of projects whose values are superior to 162,000 euros. Regarding the composition of the jury, the regulation defines in Article 73 that at least one-third of the members must have a qualification equivalent to that required of the competitors and understands that two-thirds can have a hybrid composition, with the participation of diverse institutions and individuals, that try to synthesize the interests at stake. The regulation, in Article 74, highlights the decision-making autonomy of the jury, and defines that the judgment must be made on the basis of anonymity and exclusively in the criteria defined in the contest notice (Sobreira, 2014).

In addition to the general regulations of the European Parliament, details of country-specific procedures are observed, generally based on the guidelines of professional associations. We highlight here some aspects of the regulations in practice in some of the Scandinavian countries, which have stood out for the quality of the contemporary architecture, largely due to contests.

The regulation in Sweden (1998) distinguishes between ideas contests (concepts without clear objective of execution) and design contests (design in order to run) and admits the realization of open and closed competitions in one or two stages. But according to Swedish public procurement legislation, every competition must be held with a limited number of participants. As far as the trial is concerned, technical advisors are available to support the jury's work and the competition must be based on anonymity. As regards the composition of the selection board, the recommendation of the European Parliament shall be followed by a minimum guarantee of 1/3 of the members with the same technical qualification required of the competitors.

In Denmark contests Regulation (2007) is worth mentioning the initial comments of the document, they emphasize: "the competition should be organized to the satisfaction of all parties involved." This introduction makes clear a seemingly obvious question, but little remembered in competitions in general on the need to manage any conflicts of interest that are implicit or explicit in the public works design process. In addition to the contests of ideas and design, the Norwegian regulation admits the existence of contests that combine design and price of the service and also competitions not based on anonymity, where there can be dialogue between participants and promoters.

The competitions in Spain follow the fundamental principles of European regulation. They are mandatory above a certain contract value (which vary according to the nature of the sponsoring institution) and are regulated by the Public Sector Contracts Law.

France conducts about 1200 design contests each year, since the architectural design of all public works above a stated minimum value must be submitted to a design competition. The current panorama is the result of a public policy related to Architecture as an object of public interest, begun in the 1970s and implemented more intensively from the 1980s onwards. The contracting of projects for public works in France is regulated by the Contracting Law (Law 2006-975, Art. 38, 70, 74, 167) (FRANCE, 2006), which defines: architectural projects whose estimated value is equal to or greater than 133,000 euros must be contracted through a tender. The MIQCP recommends that the tender be used, regardless of the value or scale of the project, whenever architectural or patrimonial issues of great public interest are involved.

## **5. Architecture and Public-Private Partnerships**

In spite of the tradition with regard to Architecture contests, in recent years a relative threat in the tradition of the qualitative judgment of the projects has been observed in Europe, especially after the advent and popularization of the PPPs. This weakening, on the other hand, has stimulated some sectors of the Public Administration to deepen in the discussion of the quality of the Architecture in the contracts, especially in the context of the partnerships. This is the case of the study published by the Federal Institute for Research on Building, Urban Affairs and Spatial Development, in 2011 entitled "Quality of Architecture in Projects resulting from Public-Private Partnerships" (Architectural Quality of Projects Established in Public Private Partnership / Architekturqualität für ÖPP). It is a research institution that is part of Germany's Ministry of Environment, Natural Conservation, Construction and Nuclear Safety (Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety - BMUB).

The document highlights Britain's pioneering work in this type of contracting, starting from the mistakes and successes already experienced by the country to elaborate its own analytical method, whose purpose is to identify the instruments that guarantee the quality of the built public elements, fruits of PPPs. The report makes an assessment of 17 examples within a universe of 92

buildings. For the analysis, two main criteria were elaborated. The first, corresponding to the stage of contraction and project management; the second, referring to the built object and its architectural quality (functionality, building quality and impact and other 98 subcategories) evaluated by independent architects. Finally, the authorities involved in each project were consulted to complement information specific to the evaluation.

From the evaluations, recommendations were presented for project contracting processes. At first it was pointed out the need to highlight the importance of architectural design in the process. In traditional PPP processes, where project quality is just one more item within the extensive list of process judgment variables (involving construction, financing, operation, etc.), the result is predictable: project quality ends up being overlooked in favor of seemingly more attractive business proposals from the point of view of the operation, financing and profit of the private partner. Also according to information presented in the report, the premise that the private partner would be better able than the state to promote architectural quality most of the time does not correspond to reality. The solution presented in the report is the inclusion of Architecture contests as part of the PPP bidding process. Competitions would also be a way of adding greater transparency and allowing the involvement of the public sector and other agents involved in the project. Demands and decisions related to architectural and functional qualities, according to the report, should remain under the control of the public authority. The responsibility for the project, whether by the Public Administration itself or contracted through a public tender, must have a direct relationship with the public authority and must have autonomy in relation to the private partner, so that quality decisions are not compromised by interest conflicts. According to the report:

Neither a project or building, in isolation, can guarantee the architectural quality in a PPP process. Only the involvement of the contracting authority [the public sector] and its consistent and continuous perception of the project as a whole can lead to buildings that are not only cost-effective but actually in the expected quality (BMVBS, 2011, p. 9).

For this reason, the report proposes that tendering procedures aimed at establishing PPPs related to interventions in the built environment (buildings or public spaces) should be preceded by calls for tenders, so as to offer the public authority the greatest possible diversity of high quality, design solutions. In this way, architectural quality (also associated with cost, functionality, durability, etc.) can be evaluated independently, without the pressure of market interests and with a focus on the public interest. Finally, the document proposes a way of implementing the proposal based on possible legal conflicts with the current PPP procedures practiced in the country.

## Conclusions

In summary, we have seen that the United Kingdom, a benchmark in Public-Private Partnerships, recognizes the poor quality of many of the constructions resulting from the model implemented in the country since the 1990s. Despite criticism in the British Parliament report on poor constructions and the lack of innovation of the projects in the context of the partnerships, there still do not seem to be any relevant innovations about the process, which guarantee the quality of the design and the public works. At the same time, France, after a critical analysis of the British experience, has sought instruments to guarantee the quality of constructions in the partnership contracts.

Meanwhile, in Brazil, the model of partnership that has predominated in the legislation and the edicts is mirrored, with rare exceptions, in the European experiences already overcome, based on the weakening and lack of state control, especially with regard to the conception of projects. At the same time, the project and the tender, as instruments for the qualification of public works, have been weakened in Brazilian legislation. In summary, if in the European context there is a critical evolution in the system for quality, in the Brazilian context the recent history and the prospects are involution and precariousness, a common situation in developing countries, whose political and administrative structures suffer from the pressure of global markets (WEZEMAEL; PAISIOU, 2014).

In this context of weakening of regulatory instruments and public control, the fragility of the State, accompanied by the increasing interference of private interest in issues of collective interest, it is worth mentioning, as it was discussed, the role of the tender as a public instrument of project selection directly associated to the qualitative judgment, based on premises such as transparency and the Democratic State. In this sense, it is understood as fundamental the role of the Legislative - in the various spheres - in the discussion and approval of laws that highlight the role of qualitative judgment and the tender, as a public instrument of project contracting, inside or outside the context of PPPs.

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Article received on: 09/02/2017

Article accepted for publication on: 27/04/2017