11TH CONFERENCE ON COMPETITION AND OWNERSHIP IN LAND PASSENGER TRANSPORT

Delft University of Technology (The Netherlands)
20-25 September 2009

TRUST BUILDING IN PASSENGER TRANSPORT CONCESSION CONTRACTS AND PROCUREMENT PROCEDURES: THE CASE OF BRAZILIAN URBAN BUS TRANSPORT

Anísio Brasileiro

Claudia Guerra

Universidade Federal de Pernambuco
anisiobfd@hotmail.com

Enilson Santos
Universidade Federal do Rio Grande do Norte
enilson@interjato.com.br

ABSTRACT

According to the Federal Constitution the transport of passengers in municipalities is an essential public service and should be rendered directly by the State or through delegated private operators selected by means of previous public tender. Regardless of the existence of these legal requirements, in the great majority of towns and cities, public tender does not occur or is just very slow. This study aims to analyse factors which hinder tender processes in Brazil and in particular, the case of Recife. The research found that there is a relationship of constant competition and a lack of trust between those involved in rendering this public service: public power, private operators and users. The results of this research point to the need to establish an institute to mediate as a modern instrument, consistent and effective in nurturing trust between parties, favouring reciprocal cooperation among those involved in serving the public interest. The conclusions point to the regulatory agency as having the role of mediator. It is hoped that this new mediator can contribute to undertaking public tender processes so that quality public transport services may be offered to the population.

TRANSPORT AS A PUBLIC SERVICE AND THE IMPORTANCE OF PUBLIC TENDER

In Brazil the concept of public service(s) was introduced by the 1937 Federal Constitution, which established citizen rights, attributing the obligation of guaranteeing or rendering them to the State, in accordance with municipal, state or federal

competencies. In the 1980's the notion of public service was redefined with State developed activities being driven by the private sector based on the argument of increased Public Power efficiency. It was in this context and with the adoption of the 1988 Federal Constitution that collective transport was defined as an essential public service, under municipal competence and whose rendering is delegated by public power to the private operator by means of a public tender process (Brasileiro et al, 2007, Aragão, 1999).

The publishing of article 175, which attributes public power with having the mission to guarantee the offer of public services, generated the Law of Concessions – 8.987, 13 February 1995, and established that competing for entrance into the public transport market must be through private operators participating in a public tender process.

Through tender it is possible to establish relationship rules among the agents involved in rendering public services, as well as defining the role of the conceding authority so that it guarantees public transport users' rights. According to Santos and Orrico Filho (1996), the conceding authority can perform a regulatory role, substituting impossible self-regulation of urban transport markets, stimulating efficiency through introducing competition to the sector. Through adopting public tender processes operating companies can be induced into reducing costs and increasing the quality of services, passing these benefits on to society. Undertaking public tender processes could be constituted as redefining and building a public transport network in such a way as to cover urban and metropolitan territories in terms of time and space.

Unfortunately, public tenders in Brazil have only occurred in a few state capitals. As such, this absence constitutes a lost opportunity in improving the quality of transport services in cities. The main issue discussed in this paper is: if there is a constitutional decree, why are there not public tenders? We believe that the answer to this question lies in the political realm. In other words, in the interests and relationships among the agents involved especially the private companies, public power and users. We defend the hypothesis that conflicting relationships among the agents have been, in general, stronger than collaborative and cooperative relationships, making it more difficult to put tender processes into practice (Steiner, P.2005). Additionally, the absence of mediation mechanisms among agents also contributes to making it difficult for cooperative interests to predominate over competitive interests. Next we look at the concept of conflict and the need to mediate it.

PRESENT CONFLICT IN RELATIONSHIPS AMONG AGENTS

To understand what is involved in conflicting relationships among parties involved in providing public services it is necessary to comment on the concept of conflict, highlighting its importance in relationships that involve both public and private interests. Conflict does not always mean misunderstanding. Conflict is closer to the concept of discordance or distrust, originating out of distinct views on the same situation where there are common interests, but not always convergent, and the parties face them constantly.

According to Vasconcellos (2008), “conflict makes no sense. It comes from expectations, values and opposing interests, but when well managed can result in positive changes and new opportunities for large gains. In conflict there are parties who dispute in order that their interests prevail unilaterally.” Conflict is inherent in human relationships. It should not be tackled negatively. It comes from divergent perceptions related to facts and conduct, values and expectations or common interests. This awareness of conflict being an inherent phenomenon in the human condition is fundamental, as, without it, the trend is to ignore it. Once tackled, there is the possibility of developing self-compositional solutions.

The Importance of Cooperation in Relationships Among Agents

Economic activity represents a fundamental part of social life and is intertwined with a large variety of norms, rules, moral obligations and other habits, which, when coming together mould society. According to Fukuyama (1996, p.35), “One of the most important lessons that we learn when examining economic life is that the well-being of a nation, in addition to its ability to compete, is conditioned one unique wide-ranging cultural characteristic: the level of confidence inherent in society.

To Fukuyama contracts make it possible for strangers who cannot have mutual trust for each other to work together. However, the process is much more efficient when there is trust. We almost always consider a minimal level of trust and loyalty to be right and we forget that they are ever-present in daily economic life and that they are also crucial in order for it to work harmoniously.

Trust breads trust when the community shares a set of moral values in such a way as to create balanced and honest behavioural expectations. The more demanding the ethical values of a community, the higher the levels of solidarity and trust among its components. The relationship among interested parties involved in [achieving] the same objective becomes easier as long as the parties believe in reciprocal honesty. This behaviour translates into the social value of trust. With this comes a lesser need to detail specifications in lengthy contracts, a lesser need for precautions against unexpected actions and lawsuits in the event controversy appears. But for this rules and sanctions are of fundamental importance in validating respect for those ethical rules in force, established for the smooth sociability of the community.

In contrast, people who do not trust one another only end up cooperating within a system of rules which have to be established. The performance of activities within these rules will be undertaken automatically, always considering the other possibility of being deceived, spending all ones energy on trying to discover what the other intends to do in order not to be unpleasantly surprised. As such, to build trust among agents (an essential condition for a project such as a public tender to go ahead), it is necessary that

there be someone from an organ to establish mediation among the agents involved. This is the focus of the next part of this study.

MEDIATION AS AN INSTRUMENT IN RESOLVING CONFLICTS AMONG AGENTS

Mediation currently constitutes a new scientific paradigm in managing conflict(s). It is a powerful tool in understanding the dynamics in interpersonal relationships which have developed over time, from the seventies and eighties in countries like Canada, Australia, New Zealand, The United States of America and France. Through mediation it is possible to increase the room for conflict solutions outside of the judiciary by establishing dialogue between parties involved in the conflicting relationship.

According to Haynes, "Mediation is a process by which a third person – a mediator – assists participants in finding a solution to a dispute. The final agreement resolves the problem with a mutually acceptable solution and will be structured in a way so as to maintain the continuity of the relationship of those involved in the conflict." (Haynes, J.M & Marodin, M 1999). It is a non-hierarchical means to solving disputes in which two or more people, with the collaboration of a third; a mediator who must be freely chosen and accepted by the parties involved, lay out the problem, are heard, questioned, and discuss the issues in order to identify common interests so that a solution to the dispute can be reached. Therefore, mediation aims to recuperate a cooperative posture between parties, providing a transformation of the people as well as relationships involving them.

Special attention must be paid to the work of the mediator. The mediator deals with the unknown side of the conflict: the unspoken intention of each party. The mediator must have the talent and intuition to be able to make this intention of the parties flow, and to encourage them to find a solution to the stalemate. To be successful in this task the mediator needs not only knowledge of the laws, norms and applicable precedents to the case, but they also need to have the sensibility necessary to be able to extract contributions to building a new proposal which meets their hopes and expectations.

The Role of the Regulating Agency in Mediating Conflicts

In the Masters Dissertation which gave rise to this study, research into the controlling institutions involved in the issue of public tender processes in the transport sector was conducted (Guerra, 2009). The objective was to identify which institutions were most apt to exercise the role of mediator among the companies, public power and the users involved in transport tenders. The Prosecutors Office, The Court of Auditors and the Regulatory Agency were analysed. The Regulatory Agency was chose as mediator.

Public Services Regulatory Agencies were created during a time of Brazilian State reform with the aim of conciliating diverging interests which existed among consumers, governing officials and companies rendering public services, in such a way as to guarantee that services provided would be of quality and be accessible to the population. The concept behind the regulatory agency is that it is independent and has full technical,

administrative and financial autonomy. Additionally, it has means of intervening in cases of conflicting interests, seeking to guarantee solutions and overcome divergences so that an objective or project may be implanted. As such, its role is to promote dialogue among the agents involved in activities which it regulates.

Justen Filho (2002) defines the independent regulatory agency as, "A special autocracy, created by law for state intervention in the economic realm, endowed with the competency to regulate a specific sector, in addition to having powers to regulate and arbitrate conflicts between agents, and subject to the judiciary which assures its autonomy before direct Administration". Regulatory Agencies have the competence to edit norms, promote gathering of facts, evaluate if the rules are being abided by, and still, to act in conflicts. The agency also has the competency to issue rulings in concrete cases as well as to verify if its rulings are being heeded, in addition to also having punitive powers. (Justen Filho, 2002, p. 63).

In Brazil, from the mid nineties, the laws which created the Regulatory Agencies started being edited: National Electric Agency – ANEEL (9.427, 26 December 1996); National Oil Agency – ANP (Law 9.478, 6 August 1997); National Health Inspection Agency – ANVISA (Law 9.782, 26 January 1999); National Agency of Supplementary Health – ANS (Law 9.961, 28 January 2000); National Water Agency – ANA (Law 9.984, 17 July 2000); National Ground Transport Agency - ANTT, National Waterway Transport Agency - ANTAC and the National Department of Transport Infrastructure – DNIT (Law 10.233, 5 June 2001); National Civil Aviation Agency – ANAC (Law 11.182, 27 September 2005).

In Pernambuco State the Pernambuco State Delegated Public Services Regulatory Agency was created – ARPE (State Law 11.742, 14 January 2000, regulated by Decree 22.184, 12 April 2000, altered by Law 12. 524, 30 December 2003, and Law 13.461, 9 June 2008). ARPE has the competency to moderate and arbitrate on conflicts of interest relating to the services under its authority, among which transport is included, in addition to acting in defending the rights of users, reprimanding infractions, composing and arbitrating on conflicts of interest and promoting the coordination of services delegated.

The legal provision for regulatory agencies utilising arbitration to settle conflicts constitutes an open door for dialogue and agreement, the possibility of establishing a climate of trust which leads to cooperation between agents. It is a change of mentality assisted by development in the midst of society, a culture of dialogue, which makes it possible for parties to act as responsible agents in seeking solutions to their differences in a dispute. (Sales, 2007)

To illustrate the role of regulatory agencies in conflict resolution we present an extract of an interview with Professor Carlos Eduardo Vasconcellos who states: "In fact, in my view regulatory agencies are above all else conflict mediation agencies. Awareness of

this should be more strongly consolidated and knowledge of these techniques and practices should be better developed in the realm of these regulatory agencies so that they become effectively capable of more effective preventive measures. It is clear that the law providing for arbitration is a formal indication towards this.

Additionally, in an interview with Professor César Cavalcanti he stated that agencies have an important role to fulfill in the Brazilian public transport sector. He says: "In reality we cannot imagine that administrative organs are also responsible for regulating transport services because it would be self-regulation, which tends not to work and loses effectiveness. Regulation is here to stay in Brazil and the agencies only need to explicitly and adequately define their functions so that they can plainly exercise their regulatory role. Regarding the function as a mediator in conflict the Professor says: "I find this role to be fundamental, central to a regulatory agency. I believe that if it is well structured, created intelligently, objectively, it should fulfill this role above all else, and by fulfilling it will make a significant contribution to improving the transport system."

RECIFE'S CONSOCIATE TRANSPORT: HOPE OF PUBLIC TENDER

All over the world transport constitutes a privileged field for the existence of conflicts. This is because its main agents – public power, companies and users – have conflicting interests and objectives. Henry and Figueroa (1987) studied the strengths and weaknesses of these agents, mostly in Latin America. As such, the strength of public power is in its role defined by the Constitution of that country to act in defining, coordinating and inspecting services offered to the population. However, its weakness lies in being unable to render services directly (public companies went extinct in the 1990s). The strength in private companies is in having know-how and the expertise to provide services as they own the vehicles and know the market. Their weakness comes from the fact that they need the State to regulate and organise the market. The users are strong because through their associations they can apply political pressure in order to improve services; but their weakness resides in their dependence on the services.

As such, the theory defended in this paper is that public tenders in Brazil do not occur very slowly, although there is well-defined legislation, because conflict among the agents described above is stronger than agreement. To overcome this stalemate an external agent is needed to exercise the role as mediator. We have already shown that this mediator can be a regulatory agency.

On this line of thought, what lessons can we extract from the Recife Metropolitan Region's (RMR) historical experience of organising transport? The Recife Metropolitan Region's Public Transport System of Passengers - STTP/RMR - was created in 1979, with the Urban Metropolitan Transport Company as its administrative organ - (EMTU/Recife) (Brasileiro A. & Santos E. (1998). Over more than thirty years EMTU/Recife has developed and implanted original projects which have had strong, positive impacts on metropolitan transport. We can cite: the conception and progressive

implantation of the Integrated Structural System; the fare compensation chamber; the model of evaluating private companies operating services; electronic ticketing and; fare zoning, among others. Nevertheless, although an array of regulations and decrees establishing operational parameters for this activity have been implanted; no success has been obtained regarding the undertaking of public tenders (Brasileiro, A. & Henry E, 1998).

Recently EMTU/Recife was made extinct and replaced by the Recife Metropolitan Region Consociate of Transports – CTM, created by State Law 13.235, 24 May 2007, which ratifies the Protocol of Understanding celebrated among the State of Pernambuco and the Municipalities of Recife and Olinda, to promote the plain associated management of the Recife Metropolitan Region's Public Transport System - STPP/RMR. CTM is a non-profit-making public company, with administrative and financial autonomy regarding State and local government.

On being set up CTM was in a context where the Metropolitan Region of Recife measured an area of 2,742.4 km2, comprised of 14 municipalities and had a population of 3,731,719 (IBGE, 2008). The municipality of Recife concentrates more than 1.55 million inhabitants in an area of 217.8km2. Economic, demographic and spatial influences dictate that there is an urban / metropolitan market divided between the segment in the capital and those located in important municipalities (Olinda, Jaboatão, Paulista).

In and around Recife and in seeking to meet a diversified demand there is the coexistence of a range of transport technologies: diesel buses, conventional buses, articulated buses, double-decker buses, trolleybuses (up until 2000); suburban trains; metropolitan trains; sprinters, vans and the like. Disputing this limited road area is a significant fleet of privately owned cars. In 2005 the Public Transport System was operated by 18 companies, 17 being private and one state owned (the metropolitan train system). The 306 lines, excluding night routs, undertook, on average, 24,000 trips, using 2,465 buses, which ran approximately 730,000 km and transported 1.6 million people per day (Ferreira, 2006).

Within this context CTM inherits all of the experience and technical competence of those professionals from the EMTU and will have the role of promoting competitive tenders for the concession of services rendered in collective transport. Today CTM finds a much more favourable context for the implantation of measures needed to promote tenders. This is because there has already been a successful experiment. In 2003 there was a transport operator tender for small vehicles, the so-called informal, unregulated transport. This tender led to the Supplementary Passenger Transport System being created in 3 areas within the city of Recife (van type vehicles seating 22 passengers). This was only possible because there was cooperation and collaboration between the Recife Town Hall and The State Government, supported by society as a whole and the private bus companies in particular.

This had large-scale positive repercussions on the population and serves as a reference for a new awareness by public powers that cooperation and union in efforts can only contribute to achieving further objectives, among which include those of public interest and, to serving the basic needs of the population through a quality public transport system.

Public tender as a means to conceding transport services is politically decisive in character and as such it is the duty of public entities to promote it. Further still, it is the Constitution itself which attributes this competency to public entities like the Union, and respectively the edition of general norms to incumbent States and Municipalities within their realms, to promote competition for delegating rendered public services to private companies, when they do not provide the services themselves directly.

CONCLUSION IN DEFENSE OF TENDER BASED ON COOPERATIVE PROCESSES

The study aims to show that the undertaking of competitive public tenders in Brazil depends on building negotiating processes among agents. For this to happen it is necessary to overcome possible barriers to the implementation of tenders originating from the lack of confidence in the process on the part of the companies, above all else, but also on the part of public power and organisations within society.

In the case of the companies these barriers come from: i) the possibility of companies making a joint decision not to present any costing proposal for any line and thus creating a gap in services or a political stalemate; ii) the difficulties in companies not being able to understand the costs involved in each line and thus being unable to present acceptable proposals; iii) the possibility of companies presenting proposals only for the most lucrative lines, leaving a certain number of lines which will not be attractive to anyone; iv) the difficulty in companies not being able to understand the costs involved in each line and, after having their proposals accepted find them to be unworkable, thus causing problems to the continuity of providing the service; v) the difficulty of the administrative organ - the Metropolitan Consociate – in establishing specific unitary costs and the global cost of each line given that costs are currently calculated by the companies; vi) the difficulty in the administrative organ being able to establish a reduction pattern for each line.

The following are cited as possible facilitators in implanting competitive public tenders: i) the existence of internal rivalry within the sector, with more modern and competitive companies seeking to increase their market share; ii) the threat of new companies entering urban/metropolitan markets, originating from other markets or economic activities; iii) the current existence of a favourable economic scenario in the country and a pro-competition culture and; iv) clear leadership and determination from the Administrative Organ (Metropolitan Consociate).

Two aspects from this conclusion must be emphasised: 1) public officials' political decision to undertake public tenders as a pre-condition to developing a metropolitan transport network that can meet the population's mobility needs with quality; 2) a marketing and communications action plan to show that everyone wins with public tenders being undertaken through negotiating processes among agents.

In this process of building trust and cooperation among agents conflict mediation is essential. The results of this study show that the task of mediating conflicts among agents must be exercised by the state's Regulatory Agency, which must structure itself in material terms and which must also and above all else, incorporate human resources able to lead with themes of economics of regulation and contracting, once it is really relevant for the successful undertaking of tendering bus services.

REFERENCES

Aragão J, Santos E (1999): Sustainable Compounded Regulatory Systems for Urban Passenger Transport: In the search for a conceptual framework. 6th International Conference on Competition and Ownership in Land Passenger Transport (Thredbo 6). Cape Town.

Accountability, United Nations Environment Programme, Stakeholders Research Associates Canadá Inc. (2006) El compromise con los stakeholders, Manual para la práctica de las relaciones con los grupos de interés, primera edición castellana. Brasileiro, A; Guerra, Claudia; Aragão, J.J.G., Regulatory Reform of the urban bus system in Recife (Brazil): Stakenholders and the constituency building process. In Thredbo 10-10th International Conference on Competition and ownership in Land Passenger Transport, 2007, Hamilton Island. Sidney – Austrália: Thredbo 10, 2007. v.1.p.1-16.

Brasileiro, A. e Henry E. (orgs.) (1999) Viação Ilimitada. Ônibus das Cidades Brasileiras. Cultura, SP.

Brasileiro A. e Santos E. (1999) Sucesso metropolitano no Recife e influência estatal e empresarial no Nordeste, in Brasileiro, A. e Henry E. (1999) Viação Ilimitada. Ônibus das Cidades Brasileiras Cultura, SP.

Fukuyama F.(1996) Confiança. As virtudes sociais e a criação da prosperidade, Rocco, Rio de Janeiro

Haynes, J.M & Marodin, M (1999) Fundamentos da mediação familiar. Porto Alegre: Artes Médicas

Guerra, C. (2009), licitações nos transportes públicos de passageiros: uma abordagem baseada na mediação entre atores, Dissertação de mestrado, UFPE, Recife

Justen Fº. Marçal. 2003. Teoria Geral das Concessões de Serviço Público. Dialética,SP

Guerra, Claudia; Brasileiro, Anísio; Aragão, J.J.G. e Santos, E.M. - Licitações em transportes públicos no Brasil: avanços e limites a partir da análise dos interesses dos stakenholders. In XV Congresso Panamericano de Ingenería de Trânsito Y Transporte, 2008, Cartagena das Índias.

Orrico Filho R Brasileiro A Santos E Aragão J (1996) Ônibus urbano, Regulamentação e Mercados, Ed. L.G.E., Brasília, 1996, 304 p.

Sales, Lília Maia de Morais. 2007. Mediação de conflitos: Família, Escola e Comunidade. Conceito Editorial. Florianópolis/SC

Steiner, P. (2005) La Sociologie économique, Éditions La Découverte, Repères, Paris