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**ANALYSIS OF THE PRINCIPLE OF  
ADMINISTRATIVE EFFICIENCY  
APPLIED TO PUBLIC  
PROCUREMENT IN BRAZIL**

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## **INTRODUCTION**

The purpose of this paper is to critically assess the public procurement procedures in Brazil under the principle of administrative efficiency, identifying weaknesses and opportunities for improvement.

In first place, it is undertaken a general analysis of public procurement processes showing some of their economic, political and social implications. Moreover, in order to achieve its goals, the public procurement must be conducted accordingly to what has been defined by the law, which determines the several ways used to buy goods, contract services or execute works.

The second chapter addresses an overview of the constitutional and legal principles governing the procurement activities in Brazil. The Brazilian Constitution establishes in its article 37 the principles that shall be obeyed by all the Public Administration, direct or indirect, and for any of the powers of Union, the states, the Federal District and the municipalities: legality, impersonality, morality, publicity and efficiency.

But besides the constitutional principles, there are specific legal principles that apply to public procurement, which serve as guidelines for complying with the legal rules and non-statutory provisions of the various laws on contracting.

From this framework, the third chapter faces up to the constitutional principle of administrative efficiency and its relation to other important principles, concepts and ideas.

The principle of efficiency deserves to be stressed and studied more carefully, not only because its relevance for the implementation of a good management of public affairs, in which the public officials must strive for using the public resources in the best possible way, but due to the difficulty related to the definition and evaluation of efficiency, or inefficiency, reached for public agencies in the process of accomplishing their functions and objectives. Of particular interest, it is the relation between the principles of legality and efficiency and the possible connections among this latter and

the concepts of efficacy and effectiveness. Besides that, the principal-agent theory and the economic approach to transaction costs provide a useful background for better understanding the possibilities and limits of efficiency.

Finally, in the last chapter, it is presented the current scenario of public contracts in Brazil, with emphasis on the main achievements and shortcomings over the last years, and one makes a few suggestions to increase administrative efficiency in public procurement.

## **1. GENERAL ANALYSIS OF PUBLIC PROCUREMENT PROCESSES IN BRAZIL.**

### ***A. Main aspects of public procurement and contracting system in Brazil – economic, political and social importance.***

For any angle or perspective of analysis, one can imagine, deduce and realize the importance, relevance and potential impact brought about by public procurement in any country randomly chosen.

In Brazil, such an importance permeates different aspects and dimensions, not only in the economic field - certainly the most straightforward and obvious - but also in political, social, environmental aspects and so forth.

In fact, the goods, works and services purchased, hired or contracted by the government bodies represent a significant volume of public expenditures made both for the maintenance of the public agencies and for the provision of public services.

Based on this fact, one can insinuate the large multiplier effect generated by the public contracting, likely to affect positively the economy in national, regional and local level, enabling and encouraging the entry of new competitors, contributing to the consolidation of economic sectors (such as those focused on major public works infrastructure) and enabling the setup of a whole chain of businesses that go beyond the provision of goods or services to the public sector – a demonstration of a virtuous spillover effect.

The relevance of public contracts, and their economic effects, is particularly noticeable in small towns, where, given the restrictive private market, scarcity of resources of different nature (capital, human, technological etc.) and, in many cases, the lack of economic dynamism, there is an almost total dependence towards government spending in general, and public procurement in particular, for the viability of small private businesses. Naturally, this extreme reliance of private business in relation to government is not healthy, both in macroeconomic and microeconomic terms, but it is an occurring fact, derived from Brazilian reality, which cannot be neglected. It should be noted that there are 5,564 municipalities in Brazil, from which the most majority are small towns with small population.

When it comes to the political arena, the volume of budget resources dedicated to public contracts require discussion and debate about the very formulation of objectives, strategies and actions in various areas of government activities - health, education, security, etc. – that are essential for the implementation and effectiveness of public policies. The government plans and programs outlined and proposed by the Executive, expressed and reflected in national budget, must be submitted to the Legislative, which will examine the proposals and make their own changes and amendments to the original bill. This process of political negotiation between the Executive and Legislative Powers, though it often seems merely a game of bargaining interests around complex and relatively opaque issues, which visible and explicit face is reduced to economic figures, provides direct and genuine consequences for the implementation and degree of success of each public policy. It is at stake here not only the amount of money to be expended, but the need and quality of the public expenditure.

From this scenario, it is not difficult to realize beforehand that a flawed, untimely or superficial decision can induce harmful economic and social effects, causing waste of public resources or ineffectiveness of government policy, ideally planned in order to accomplish the satisfaction of collective interests and achieving the common wellbeing. In turn, the anticipated social effect can become, therefore, a mere chimera, frustrating legitimate expectations of society for a government action that be more efficient and for

better delivered public services. The opposite is also true: well-targeted spending and well-developed contracting meet the public interest and lead to a virtuous circle of good governance and social progress.

Similarly, inefficient contracting processes or contaminated by the evil of corruption will cause serious damage not only to the economic and financial order, but leave their stain on the political and social environment, affecting the way Brazilians evaluate themselves and how they view their own country and its possibilities as a nation.

In addition to the more general and immediate economic, political and social impacts and consequences produced by public contracting, there is a tendency, already noticed by the OECD itself in several other countries, to use such contracts to achieve specific, special or mediate goals and purposes.

For example, it is very common that public agencies in their procurement procedures place requirements related to environment protection to be followed by potential bidders. Therefore, the procurement no longer has only one immediate economic goal - obtaining the most advantageous offer for the government, usually expressed as the least financial outlay – but also functions as an instrument of public policy devoted to the achievement of other types of results.

In the strictly economic field, public procurement laws are changed in order to achieve specific results, usually with a bias to protect or encourage certain economic sectors. In Brazil, the most explicit example of this trend is given by the publication of the Complementary Law No. 123/2006, called National Statute of Micro and Small Businesses. Parts of this Law altered the Law no 8.666/1993, which is the General Act on Public Procurement and Contracting in Brazil, particularly in the way of dealing with the choosing criterion of the price proposals submitted by the participants of a particular bidding process. Under LC No. 123/2006, micro and small enterprises (defined by the Act) shall have some advantages compared to other companies taking part in the procurement.

Even if one can argue and disagree, to a greater or lesser degree, about the use of public contracts to achieve goals that transcend the immediateness of the purpose of contracting (buying a product, hiring a service or having a work executed in the most advantageous way for the public administration), the fact is that they constitute a worldwide trend. Understanding this context, assess their implications and seek to influence the adoption of corrective actions, if deemed necessary, is an obligation both to the scholar of government contracting as to managers and public officials who, in one way or another, deal with this important area of public administration.

***B. The ways of accomplishing a public procurement in Brazil.***

Under the constitutional provisions governing the functioning of public administration in Brazil, the contracts undertaken by any agency or entity within the Union, States, Municipalities and Federal District shall comply with the principles, forms, rites and procedures previously established by the legal system.

In the exclusive private contracts, the contracting parties have a wide extent of freedom to agree, negotiate and establish reciprocal obligations, since they are subjected to the legal regime of private law. This means that they can do anything not prohibited by law and that, as a rule, prevail the principle of "pacta sunt servanda" (albeit mitigated by the influence of modern legal doctrine and jurisprudence dealing with contracts).

When the government, through their agencies, is a contracting party and wants or needs to purchase a product, hire a service or have a work to be executed, the Federal Constitution, promulgated in 1988, requires that, in general, the award of the contract shall be preceded by a formal procedure to guarantee competition and equality of conditions among potential bidders. The Constitution acknowledges the dismissing or exemption of the competitive process in certain cases, provided they are properly specified in law. Therefore, unlike the private sphere - of individuals and companies - public administration can only do or not do according to what is settled by the law (the law here shall be understood in a broad sense, it might be a constitutional provision, law *strictu sensu* or regulation).

From this assumption, the Constitution empowers the ordinary law the prerogative to set up the rules, parameters and minimum and indispensable conditions which must be followed by a public authority when conducting a procurement procedure.

So, in order to regulate and detail the constitutional provisions on public procurement, it was enacted the Law No. 8.666/1993, which constitutes the General National Brazilian Act on Procurement and Contracts. Its rules must be followed and complied with by all levels of government and respective powers. Specific situations that are not considered general and valid for all may be regulated by specific laws to be enacted by each federal level of government (a state, municipality or the Federal District).

The Law No. 8.666/1993 or, as often is called, the Law of Procurement and Contracts, is a general, comprehensive and detailed act which addresses the key issues relating to public procurement and contracts in Brazil. This law sets up the procedures to be followed by the public agencies both when carrying out their procurement processes or awarding their contracts. Although it is not the only act dealing with public procurement - we have, for instance, the Law No. 10.520/2000, which created the so-called Reverse Auction as a new form of bidding - the Law No. 8.666/1993 stands out precisely because of its character of a general rule, valid nationally, and for the detailed description of the procedures that shall be obeyed by the Public Administration to accomplish a given procurement.

With regard specifically to the procurement procedures or processes, two themes, or topics, are worth mentioning, because they remain at the heart of the conduction of any procurement process. The first is related to the modalities, or ways of procuring, and the second refers to the choosing criteria to be used by the public officials when evaluating the offers delivered by the bidders. Besides them, one could mention as well that is extremely important to discuss the legal hypotheses that allow the public agencies to skip the procurement process.

### ***Procurement modalities***



Basically, the Law No. 8.666/1993 and later the Law No. 10.520/2000 enact in a precise and exhaustive way the procurement methods or forms (designated as modalities) that can be used by public officials at the time of obtaining a certain good, service or work.

One can define procurement modality as the form or manner in which a bidding procedure shall be developed by the public administration. Marçal Justen Filho, a leading Brazilian scholar in the area of procurement, refers to modality as a “type of procurement”. The law points out the criteria for choosing the modality and also set forth their specific procedures.

According to the law, and at the present time, the procurement modalities are: a) Invitation; b) Price comparison; c) Competition; d) Bid contest; e) Auction; and f) Reverse auction (instituted by the Law No. 10.520/2000).

Below one makes some considerations on the reverse auction modality, for it permits to address some questions related to efficiency.

### **Reverse auction**

The reverse auction was instituted by the Law No. 10.520/2000, and was subsequently regulated by decrees of the federal government in order to comply with the legal provisions. Although the law is valid and mandatory for all of the entities of the federation, the decrees contain provisions that apply only to the Federal Public Administration. The States, the Federal District and Municipalities should enact their own regulatory decrees.

The reverse auction is a procurement modality for acquisition or providing of common goods or services, which is essentially characterized by the existence of a period of dispute among the bidders who successively submit price offers, called bids, and that ultimately, will lead to a winner, to whom the public administration will award the contract for the supplying of the goods or providing of the service previously advertised in the bid notice.

The reverse auction might be accomplished in a session with the presence of the interested bidders or conducted remotely via internet. In the first case, bidders attend the opening session of price offers and the bid phase. In the remote or electronic reverse auction, the whole process - from registration, through the submission of initial price offers to the bidding phase and choosing of the winner - is accomplished through the Internet.

One of the most important innovations introduced by the reverse auction, besides the existence of a bidding phase, consisted precisely in the inversion between the phases of bidder qualification and the opening of the price offers. In the other procurement modalities (invitation, price and competition), there is a phase that precedes the opening of price offers, called of qualification phase or qualification of bidders. At this stage, the public officials in charge of the procurement process shall analyze all the documents submitted by the bidders to verify if they fulfill all the requirements for participation previously defined by the bid notice (like legal, economic, financial and technical requirements). If a bidder does not meet some requirements, it shall be declared disqualified by the public administration and therefore is unable to continue in the dispute. Only the envelopes containing the price offers of those bidders considered qualified or able to contract with the public administration will be opened in order to access the winner of the procuring process. In the reverse auction, in turn, there is a logical inversion of phases: the public officials will conduct the procuring procedures until they get a price winner and just after that they will check the qualification credentials of the winner. If the winner meets the bid notice requirements, it will be able to engage in a contract with the public administration, otherwise it will be disqualified, and the public officials will negotiate the price (and check the qualification conditions) with the bidder who provided the second best offer and so on until they find a bidder who meets the both criteria of the best economic offer and as of the qualification requirements. In short, while in other modalities, during the qualification phase, the public officials must to analyze often an extensive documentation of dozens of bidders, in the reverse auction they must examine critically only the documentation

presented by the winner of the bid phase. Clearly this phase inversion turns the procuring process more efficient.

### ***Types of procurement***

The types of procurement mentioned in the Law No. 8.666/1993 refer to the procedure of evaluating the price offers or bids delivered by the participants of a procurement process according to certain criteria established by the law. The public officials in charge of the procuring procedures must use these criteria to get to the most advantageous offer to the public administration. The law fixes exhaustively the types or ways of evaluating the bidders' offers that can be used in the procurement processes, which are: lowest price, better technique, technical and price and highest bid or offer.

The lowest price procurement procedures are the most common, for, as well explained by Marçal Justen Filho (2009, p. 595), the price usually represents the most relevant factor for the selection of any procuring offer. The public procurement aims to achieve the best offer at the lowest possible cost. The requirements regarding quality of the goods or services, delivery time and so on may vary from case to case, but this is not what happens when it comes to price, because the public administration has an inner duty in seeking the least disbursement of financial resources. Any other solution would offend the most basic principles of public management.

In establishing the lowest price (per unit or aggregate) as a criterion for evaluating the procuring offers, the law aims to achieve the most advantageous offer to the public administration. In other words, the public agencies expect to pay the lowest price (and thus incur the lowest cost) for a particular good, service or work. Of course the public officials must assure that the bidder winner meets the quality requirements (which must be sound and clear) fixed by the bid notice.

It is not correct therefore to assume that the law does not care about quality, but is concerned only with the cost of the object to be acquired. The concern with quality is in the need, reinforced in the legal text, that the procuring object must be correct and sufficient specified. On the other hand, it is true that, in some situations, the elaboration

of an appropriate specification is presented as a challenge to the public administration, especially when it involves the procurement of a complex, distinct or difficult to characterize object. One could infer that in such cases there is a challenge to achieve a higher level of efficiency.

***Bid exemption and bid waiver***

In order to understand the procurement procedures in Brazil, one must also be aware of the cases instituted by the law that overrides the need to carry on the bidding by the public administration.

As it was previously mentioned, the Brazilian Constitution states that, in general, the public administration must undertake a competitive process in order to obtain goods, services or works. However, exceptionally, the law may provide hypotheses that remove this requirement. These hypotheses are described in the Law No. 8.666/1993.

Foremost, the Law no 8.666/1993 sets out the situations or circumstances in which, although it is possible to procure via a competitive process, the execution of the procedure would possibly be inconvenient to fulfill the public interest. These situations are thoroughly described and listed in the art. 24 of the Law. As of the beginning of 2011, there are 31 (thirty-one) bid exemptions and the public agencies are forbidden to create new hypotheses - except by law (*strictu sensu*), which shall be passed before the Federal Congress.

The most common bid exemption hypothesis settled by the law refers to contracts of low financial value regardless of the kind of object to be acquired, hired or executed. Thus, the Law No. 8.666/1993 fixes that the procuring procedure will not be needed when the estimated value of goods and general services is less than U\$ 4.800,00 (four thousand and eight hundred dollars) or when the estimated value of works and engineering services is less U\$ 9,000.00 (nine thousand dollars).

Other examples of bid exemption situations covered by the law would be: the irruption of war or serious disorder; emergency or public calamity; when it may

compromise national security; for acquisition or restoration of works of art and historical objects; for purchasing material for use by Armed Forces, etc.

Besides the bid exemptions, the law also provided bid waiver hypotheses. While in the bid exemption it is possible to procure by means of a competitive process, although if doing so it might be not convenient to accomplish the public interest, in the bid waiver the procuring process will not occur due to the impossibility of competition, which seems quite logical: if there is no way of guarantying competition or there are no competitors in a given market able to supply a particular product or service, there is no reason to conduct a bidding process, since this aims precisely to establish a competitive process among potentially interested bidders in contracting with the public administration. The law also mentions some hypotheses (illustrative, not exhaustive) that characterize the bid waiver situations, which are: the supplying of goods or services that can only be undertaken by producer, company or exclusive trade representative; for obtaining distinct technical services to be provided by professionals duly recognized by their expertise; and to hire artists, since some requirements be observed.

From a teleological interpretation of the law, one of the main criteria underlying the assumptions that allow the public administration to override, in some cases, the obligation of procuring via a competitive procedure, can be found precisely in the principle of administrative efficiency. This is very evident in the most common cases of bid exemptions: when the estimated value of contracting is low or due to emergency situations. In the first case, it would be uneconomical, unproductive and offensive to the public interest to go through competiive bidding - with all their procedures and formal requirements – in order to obtain objects of low financial value. It is likely that the cost of the procedure, especially considering the time spent and resources used to process the procurement, would exceed the expected value and benefit of the acquisition. In the case of emergency situations, when an unpredictable and unexpected fact occurs, and this might put in risk the safety or welfare of the population, is fully justified that the public administration can do a direct contracting without the need to go through the procurement procedures. Exceptional circumstances require exceptional measures. A situation of public calamity, impossible to predict and to which the public authority did

not contributed - by sloth or negligence - requires fast and accurate response from the public administration. The efficient action in this case asks for a rapid solution to prevent the worsening of the situation and controls the risks, otherwise it might increase even more the hazards of damaging to public properties or citizens.

On the other hand, there are hypotheses of bid exemption in which the main factor for their legal adoption is not because they'll lead to more efficiency, but because they'll provide the achievement of other objectives such as protecting the national security or stimulating small businesses.

At this point, one is able to realize, therefore, that direct contracting may lead in some situations to greater administrative efficiency and, as a result, better serving the public interest. The problem springs up when the public authority uses the bid exemptions and bid waivers against the law assumptions with the sole aim of skipping the procurement procedures and increase, improperly, his discretionary power. When this power is artificially inflated, the public interest is no longer the driving force behind the administrative action, and private interests are about to prevail. The last concern of the dishonest or incompetent public official is with administrative efficiency. In such a situation, apart from the harm to the principles ruling the activity of the government (such as legality, morality and efficiency), there will be social and economic losses, direct or indirect, depending on the level of wasting or misusing of public resources.

## **2. AN OVERVIEW OF THE CONSTITUTIONAL AND LEGAL PRINCIPLES GOVERNING THE PUBLIC PROCUREMENT ACTIVITIES.**

### ***A. Constitutional principles that govern the activity of public administration in Brazil.***

Brazil, as a Democratic Law State, is submitted to the fundamental assumption of the "rule of law", which means that the government, based on the power delegation given by the people, institutes but at the same time submits itself to the law. In the country's legal system one can access the parameters that guide the action of the state.

This legal framework has been specially designed to ensure a balance between government and society.

Particularly in regard to the administrative action, less comprehensive than the overall state action, there are a series of guiding principles in our Constitution that are compulsory and must be followed by public officials and government authorities in the exercise of the administrative function. Obviously that, given the size of the state and the variety and complexity of their functions, there are numerous laws and infra-legal provisions (which derive directly from the laws), that also serve as guidance to the performing of the public administration. However, no law or provision in particular may disregard the Constitutional principles, given their extraordinary importance and superior juridical value.

Preliminarily, before examining the principles that govern the performance of public administration in Brazil, it is important to discuss briefly the legal concept of "Principles".

### **Principles**

In a common, generic, not legal, or simply logic sense, as explained by the jurisconsult Miguel Reale (2000, p. 305), the principles can be understood as “foundational truths” of a system of knowledge. Normally the principles will orient the setup and development of the scientific or knowledge systems, functioning like paradigms.

In a legal connotation, there are different understandings of the meaning of principles, depending on the authors' doctrinal schools or historical periods. Under the Brazilian law system, and which can also be found in international jurisprudence and doctrine, there are, for example, the so-called “general principles of law” that normally act as integrating elements of the law, because they fill in occasional gaps in the legal system. Miguel Reale (2000, p. 306) however, points out that their function is not only integrative, since these general principles of law must be understood as normative

enunciations of generic value, that influence and guide the understanding of the legal system as a whole.

One of the main authors who looked deeply into the problem of the principles was the German professor Robert Alexy for whom both the principles and the legal rules are juridical norms. Accordingly to Alexy (MARCELLINO JÚNIOR, 2009, p. 77), the principles are juridical norms that require that something shall be carried out to the greatest possible extension given the real and existing juridical possibilities. This indicates that the principles operate as optimizing commands, being characterized by the fact that they can be fulfilled in different degrees. This points out to another important aspect of his theory with respect to normative tensions. On the interrelation among legal rules may emerge a conflict of rules, which shall be resolved by the prevalence of one rule over the other - in other words, the rules are supposed to be valid or not valid, they shall be obeyed or not obeyed. In the case of principles, a collision may occur (not exactly a conflict), which is resolved not by means of an equation of "all or nothing" (as in the case of conflicting legal rules), but by weighting or assigning relative weights to each one of the colliding principles.

Although one might often be fooled by the immediacy and high operational degree of the rules, which is naturally very important in the process of understanding and applying the law, one cannot forget that the principles are juridical norms and therefore have cogent legal force. And their importance is well emphasized by Emerson Gabardo (2002, p. 79) who states that a hypothetical juridical system composed only of rules, without principles, even though could seem safer (in juridical terms), in reality would have a limiting "practical rationality". On the other hand it would be hard to conceive how functioning and operational a juridical model could be if supported exclusively by principles, which because their low level of determinability would lead the legal system to an increasing and exponential degree of complexity. In short, as the author concludes, the rules provide security and concreteness to the juridical system whereas the principles grant it with openness and axiological strength.

### **Constitutional Principles of the Public Administration in Brazil**



In the Brazilian Constitution, there is a whole chapter devoted to the subject of Public Administration. The *caput* of the first article of this chapter (Article 37 of the Constitution) establishes that the direct and indirect administration of all levels and powers of government, which includes the Union, the states, the Federal District and the municipalities, should follow the principles of legality, impersonality, morality, publicity and efficiency. These are the constitutional principles, though there are some other ones which are implicit or scattered throughout the legal system. The meaning and limits of the constitutional principles are discussed as follows.

### **1. Principle of legality**

Undoubtedly this is the most straightforward and ordinary principle, and, in theory, the easiest one to understand and implement, especially for its close link to the legal rules comprised in the numerous laws and normative provisions related to the public administration.

The principle of legality constitutes the main foundation and bulwark of the Democratic Law State, so it not only ensures that the people are subject to the law but also the State itself. As summarized by Maria Sylvia Zanella Di Pietro (2002, p. 67), the will of the public administration follows what has been fixed by law. Or as José Carvalho dos Santos Filho (2004, p. 14) explains, the functions developed by the public officials should be considered legitimate only if they are compatible with the law provisions.

### **2. Principle of impersonality**

According to some important Brazilian jurists, this principle assumes two distinct connotations. On one hand it means that in order to achieve their public purposes, the public administration cannot focus on particular interests but, quite the contrary, the public officials and authorities must assume a behavior in which they can formally assure a fair equality among people. As Di Pietro (2002, p. 71) points out, the government may not act in order to harm or benefit specific individuals, since that the public interest must guide its behavior. In short, one can say that the public administration shall pursue the public interest.

### **3. Principle of morality**

This principle reveals the idea that the administrative act, i.e. the action taken or decision made by the public administration through their agents (authorities, public officials), shall comply not only with the legal requirements but also must meet and respect the parameters of morality, which are defined, in a certain time and place, in accordance to the public ethics.

Sometimes the actions taken by the public administration might be compatible with the legality, but at the same time they can cause hurt to the moral, the good customs, the rules of good governance, the principles of justice and fairness and the common idea of honesty (DI PIETRO, 2002, p. 79). If this is the case, there will be an offense against the principle of administrative morality.

### **4. Principle of publicity**

According to the principle of publicity, the acts carried out by the public administration must be disclosed, published, which will grant them not only efficacy (capacity to produce juridical effects), but will allow their control, either by the public agencies in charge of this function or by the overall society.

It is part of the nature of a Democratic Law State the preponderance of the right of accessing public information and public data by the citizens and, like the other side of the same coin, there is the state's duty to disclose them. The acts, decisions and the rationale behind them shall be available for examination and evaluation by the public control agencies and society in general. Secrecy and confidentiality are justified only in situations where the disclosure of certain information could endanger either the State security or the citizens.

### **5. Principle of efficiency**

The principle of efficiency was not fixed on the original list of principles enumerated by the Brazilian Constitution, on the occasion of its promulgation in 1988. It

was subsequently inserted by means of the Constitutional Amendment (EC) No. 19 of 1998.

For being the focus of this paper, this principle will be further discussed in the next chapter.

***B. The legal principles governing the procurement procedures.***

The Law No. 8.666/1993 sets out in its art. 3<sup>o</sup> the principles to be observed by the public officials in order to do the procurement procedures, namely: legality, impersonality, morality, equality, publicity, administrative probity, adherence to the bid notice, objective offer evaluation, and other correlates. The law, as it was published in 1993, does not explicitly mention the principle of efficiency, which naturally also governs the bidding activity under the Constitution. From these principles, it is convenient to consider some aspects regarding the principle of adherence to the bid notice.

➤ **Adherence to the bid notice**

This principle is very specific of public procurement and it is closely linked to the principle of legality. By binding itself to the bid notice, the public administration must closely follow the provisions, conditions and requirements it has established and published in the instrument of convocation of the procurement (usually called of bid notice).

The principle is mentioned in both the art. 3 and in the art. 41 of the Law No. 8.666/1993: the public administration cannot disobey the rules and conditions of the bid notice, to which it is strictly bound. But Di Pietro (2002, p. 307) comments that also the bidders are not supposed to fail in meeting the requirements settled in the bid notice.

In case of offense to this principle, it might jeopardizes the entire procurement procedure and even lead to its nullification, if there is also a negative spillover effect on other principles such as the equality and the fair competition.

The analysis of the principle of adherence to the bid notice leads up into another discussion, of paramount importance to get a meaningful approach to the principle of

efficiency, relating to the limits or constrains of the administrative action, or one could think in the relationship between administrative discretion powers and efficiency.

Although the theme administrative discretion, in itself, is not object of this study, one has to address the concept and its implications for the conduct of the public agent in charge of a procuring process.

Under the administrative activity, there are actions or decisions taken by the public agents that are strictly linked to the requirements and limits of the law, while there are other actions that permit a greater degree of discretion or power of choice by the government officials.

When it comes to public procurement, these two realities coexist, because if on one hand, the conduct of public officials responsible for executing the procuring procedures is restricted by the law boundaries, on the other, there is also an open space in which the public officials can exercise broadly their sense of convenience or opportunity in order to make proper choices and decisions towards the best way of achieving the public interest. The discretion degree will depend on the moment or stage of the procuring process.

The principle of the adherence to the bid notice reflects the strictly bound aspect of the conduct of the public officials, who has their potential actions narrowed by the obligation to comply with all conditions and provisions inserted in the procurement process. The disclosure of the bid notice coincides with the start of the external phase of the bidding. However, the flip side of that coin is the fact that, before the publishing of the bid notice, there is a large open space to the discretion of public officials, in which they are able to plan and define every and each step of the procurement, assess the alternative actions available and exercise their value judgments regarding the convenience and opportunity of each of them. The purpose here is to evaluate the options and make the best decision concerning the overall procuring process. This is the so-called internal phase of procurement. At this stage, before the publishing of the bid notice, the choices available to the public officials are wide and extensive, even if one observe that their discretion is ultimately bounded by the law, because here they

have the power to settle the essential elements of a given procurement: the object to be purchased, hired or executed, contracting conditions, qualification requirements, guarantees and all other elements deemed necessary and essential so the interested bidders can elaborate their proposals.

In fact, the legal discipline of procurement is characterized by progressive reduction of discretion (JUSTEN FILHO, 2009, p. 70). In the early stages of the procurement process, the law grants the public officials a great deal of decision power (discretion), but, as the procurement continues, the public agents become themselves tied to their previous decisions, meaning that further administrative actions must be coherent with the decisions taken at earlier stages. And, as one can easily realize, this binding effect diminishes the discretion and the possible choices that the public agents can make in the future steps of the procedure. So, to conclude, the initial stages coincide with the so-called internal phase of the procurement, in which the discretion is higher, while the later stages coincide with the external phase (after the disclosure of the bid notice), when the discretion is lower (than before).

From this analysis, one can gather with absolute clearness and logic that, concerning procurement, the crucial moment for pursuing and improving the administrative efficiency takes place during the internal phase of the procedure, because that is when the discretion of the public agent is greater.

### **Other important principles for public procurement**

In addition to the principles already discussed, there are other principles expressed or implicit in the law system (Constitution and laws) that deserve to mention because of their importance both for the administrative activity as a whole and as for public procurement in particular, as such reasonableness and proportionality.

The principle of reasonableness carries the idea that the administrative actions and decisions must be oriented by criteria of acceptability, logical coherence and common sense. This principle operates precisely in the area of the administrative discretion, in which the broader freedom of the public official shall be counterbalanced

by the use of decision criteria that one might consider acceptable, reasonable and proportional. Such a use of these criteria should be able to lead to the accomplishment of the purposes of the law and ultimately to the public interest. In this sense, a decision which deviates from the reasonableness should be considered illegitimate, as it probably would not lead to the best decision regarding the satisfaction of the public interest.

### **3. THE CONSTITUTIONAL PRINCIPLE OF ADMINISTRATIVE EFFICIENCY**

#### ***A. The constitutional principle of administrative efficiency and the legal doctrine.***

As previously noted, the principle of efficiency was inserted in the Brazilian Constitution of 1988 ten years after its enactment, through a Constitutional Amendment - Amendment No. 19 of 1998. This addition opened up a large and lively discussion about the meaning, problems and limits of this principle.

In fact, the doctrine of administrative law started up a hot discussion on the need, desirability, relevance and motivation to include this principle in the list of principles governing the activity of public administration in Brazil.

To a large extent, the debate reflected, and still does, distinct ideological opinions and worldviews about the role of state in general and the public administration in particular. When the principle was included in 1998, the Brazilian government was attempting, particularly within the Federal Executive branch, to implement the so-called New Public Administration in opposition to the bureaucratic model of administration, evaluated for some people at that time as inefficient and inadequate to the dynamic challenges of the contemporary world. According to the managerial model proposed, one can say that the public administration should be more oriented to the results of the government actions and extricate itself from the bonds brought about by an excessive concern with the means, with the process, with a mere compliance to the routines and standard rules that often would not lead to the desired goal.

In the middle of this process, there were those who denounced the new public management model as an attempt to permanently implement the neoliberalism in Brazil, in detriment of the gains offered and expected with the implementation of the Democratic Law State, fruit of the re-democratization of Brazil, with a series of new rights and guarantees embodied in the Constitution of 1988. For these authors, the accomplishing of this model would be only a subterfuge to bend the Brazilian State to private interests, with consequent risk to fundamental rights, which were eventually conquered at a great cost by the Brazilian people.

For some authors (MARCELLINO JÚNIOR, 2009, p. 140), the neoliberalism would be incompatible with the legal, economic, and social structure of the Democratic Law State (which is identified, in this sense, with the Welfare State). Marcellino Júnior (2009, p. 182) has the opinion that this new logic, with the consequent and inevitable subordination of the law to the economical, is that the constitutional provisions that declare and guarantee fundamental rights come to be interpreted under the cost-benefit aegis. The principle of efficiency would be one of the tools to bend the law to economics. Quite differently from what officially states the new model, the inclusion of efficiency as a cornerstone of administrative action would lead to the complete submission of the public purposes to the employed means. In order to achieve the maximum efficiency one has to care of the means, no matter the purpose. The author goes even further by asserting that the principle of efficiency would become the main and paradigmatic principle that eventually will interconnect all the others, forging itself into a dangerous supra-norm. This interpretation of the principle of efficiency goes too far and it seems inadequate both under juridical and administrative standpoints.

On the other hand, there are authors who, while disagreeing with the reductionist bias brought about by the New Public Administration philosophy towards the principle of efficiency, try to rescue its usefulness from an interpretation of the principle according to the Brazilian Constitution. Emerson Gabardo (2002, p. 97, 100), for example, hold the idea that the principle of efficiency is not supposed to be reduced to simple mathematical cost-benefit calculations. The pursuing for efficiency must take into account and be compatible with the other principles and constitutional values.

A number of other important authors (MARCELLINO JÚNIOR, 2009, p. 183, 184), such as Celso Antônio Bandeira de Mello, Diogenes Gasparini, Celso Ribeiro Bastos, Jesse Torres Pereira Júnior, José dos Santos Carvalho Filho, Alexandre de Moraes, among others, assert the importance of the principle as a directing guide for the administrative function, which should try to achieve the public interest as effectively as possible.

***B. Concept and applicability of the principle of administrative efficiency***

The first point about efficiency is that this word or expression conveys a certain conceptual vagueness (GABARDO, 2002, p. 23, 24), which would encompass different definitions, limits and constituent features. However, for the purpose of this study, the efficiency is defined as the ability to generate a result (efficacy) from the rational and optimal use of the available means. Being efficient, in this sense, refers to the use of the available means and adequate resources to produce a determined result in the best possible way - which means, in the most expeditious, economical, responsive and less costly and stressful manner. The efficiency concept should be used both in its axiological sense, as concerned with the means, and teleological, as oriented to the production of an outcome. The rationale for this assumption is that it makes no sense to undertake an efficient action if this action is not committed to the production of a useful result.

From the public administration standpoint, the government works efficiently when using all available public resources (economic, financial, human, material, etc.) rationally, committing itself to the pursuing of the best results or public endings and imposing the lowest possible burden to society. Clearly, if one takes into account that usually any government aim many and different purposes and shall be committed with fundamental rights and guarantees, with human dignity and democratic values, which are irremovable assumptions in a Democratic Law State, it becomes evident that the reasoning and calculation of efficiency cannot be realized in a simplistic way and disconnected from the other principles and values of society engraved in the Constitution.



However, beyond ideological differences and, in some cases, artificial opposition between a Neoliberal State and a Democratic Law State (or Welfare State), it is perfectly possible to understand that the principle of efficiency is not only compatible with the Brazilian Constitution, but is important for the consolidation of a responsible government, concerned with public affairs and devoted entirely to the satisfaction of the public interest. In terms of administrative efficiency, the dispute between the liberal ideology and the ideology of the Social Welfare (if one can call it that way) seems perfunctory, anachronistic and meaningless. The State must develop the public activities with a duty of efficiency, regardless of their ideological, political, economic and social inclination. Under a democratic point of view, however, one must be cautious and should think in efficiency as a principle for guiding the state administrative action and which implementation must be done without neglecting other principles and values chosen by people as ideals of wellbeing.

This pursuing of the optimum, the good organization and good governance of the Italian and Portuguese doctrines (GABARDO, 2002, p. 100, 101) interact perfectly with the ideals of democracy, in which the government acts on behalf of the community and the common good. One cannot think of achieving the public interest when the state is wasteful, incompetent, inefficient and incapable of accomplishing the desired outcomes fixed by the public policies. Any given State might have more or less active role before the society or be more or less interventionist, but it will always have to commit itself with the duty of efficiency.

This "duty of efficiency" it is, according to Gabardo (2002, p. 103), based on Diogenes Gasparini, the absolute need of quick, responsible, maximized, comprehensive and perfect achieving of the administrative tasks and functions, avoiding spending beyond the necessary, within the appropriate institutional structure. And, mentioning Paulo Modesto, adds that the regular exercise of the administrative functions in a representative democracy not only repels the caprice and arbitrariness, but also the negligence and inefficiency, because both violate the interests protected by law.

The constitutionalist Alexandre de Moraes (CORREA DOS SANTOS, 2003, p. 194) summarizes the central idea of the principle of efficiency in asserting that it requires the whole public administration and their agents to pursuing the common good through the exercise of their powers in an impartial, neutral, transparent, participatory, effective, non-bureaucratic way and it must always be in the pursuing of quality, striving for the adoption of legal and moral criteria necessary for the optimal use of public resources so as to avoid waste and to ensure a greater social return.

In short, even though being a motive for loud uproar and tough discussion, the principle of efficiency is extremely relevant and it means that the public administration must conduct their work according to criteria of good governance and administration. It is the duty of the Administration to use the best possible means available to achieve the public purposes. Efficiency implies the optimization of resources, means and instruments available in aiming to reach desired outcomes, established and fixed by law. Efficiency requires combating to waste and it demands care with the assets and all the public resources.

***C. The principle of legality as the basis for the activities conducted by the Public Administration.***

The principle of legality is the cornerstone of the Democratic Law State. Under the point of view of the citizens and thinking in the administrative functions exercised by the State, this principle underpins the system of guarantees, protecting people against abusive decisions, unreasonable actions and any government's temptation of pursuing unlimited discretionary power. Everyone, in a democratic regime, must obey and respect the law, citizens and state. The laws are supposed to be good, given their high and noble endings and the fact that they are created according to the democratic will of the people, so the uncountable interests originated from the different groups that mold a society are represented in the "will of the law". Under democratic systems, these assumptions not only sustain the legal system as they have a strong symbolic role.

In reality, as the laws are products of the human inventive mind, one can realize that not all the laws are good. But, for any purpose, if a law exists, is valid (not

unconstitutional) and produce effects, it must be obeyed, because there is some aims in the law that shall be achieved. Some objectives spread out among so many laws might be contradictory or demand some sort of compromising and any effort for more efficiency on one side might represent an efficiency loss on the other. And there is still one more important point: the laws approved by the legislators are usually succinct and have to be unfolded in further regulations. In the subsequent norms originated from the primary law the means (to achieve the purposes of the law) will be discussed and this process might lead either to efficiency gains as to efficiency losses. So far this reasoning simply shows that it is possible that, depending on the circumstances, legality and efficiency don't always go together, hand in hand, sometimes they divert from each other.

Here, one might finally ask, considering that in the Brazilian Constitution coexist the principles of legality and the principle of efficiency: if determined law or legal rule prove itself to be inefficient, in the sense of causing financial, operational, or any other kind of losses in their process of implementation, it might be put away in the name of the principle of efficiency? This is a tricky question, but, as a rule, the answer will be no, it is not possible. The juridical doctrine and the Brazilian judicial courts will interpret this and formulate an answer that will try to turn compatible both principles: the efficiency must meet the legality; the efficiency must be pursued considering the limits imposed by the law.

This is the understanding of Jesus Leguina Villa (DI PIETRO, 2002, p. 84) who clearly affirms that the efficiency to be strived by the public administration is not the same efficiency of the private sector nor it is an absolute value. If the legal system is not suitable to accomplish high levels of efficiency, the law must be changed, but in any case it is admissible that in the name of efficiency one can disobey the law commands. The conclusion is that the principle of efficiency is not supposed to put itself upon the other principles, under the risk of causing damage to the juridical certainty.

Some authors (CORREA DOS SANTOS, 2003, p. 204) mention that efficiency is simply, given the objectives established by the law, employ the necessary means to

achieve these objectives in an optimum way, whereas there are others who poses that, as the optimum is impossible to accomplish, the efficient administrative action is the best possible one. The reasoning behind these arguments increases the vagueness and malleability of the efficiency concept. In this train of thought there wouldn't have possibility of contradiction between the law and the efficiency, for the latter would adjust to the limits and aspects of the former.

In theory it is easy to mention the need of compatibility among the principles; in practice, things are more complicated. For the time being, it has become evident that discuss efficiency is, in fact, much more consider what limits it, the obstacles in the way to achieving it.

In the specific field of procurement, the efficiency constrains, besides the complex equations of the principles which must be combined in any procuring process, are also posed by the many interests represented in the several objectives to be accomplished: economic, political, social, environmental, of reallocation of benefits among different groups and many others.

At this point, it comes along the principal-agent model or agency theory, which can help to better understand the scenario and the challenges presented by this complex scenario in the area of procurement.

In the principal-agent model, a principal engages an agent to carry on a function or activity in order to achieve a goal on behalf of the principal. As explained by Prof. Christopher R. Yukins (2010, p. 64), this relationship is not as simple and free of trouble as one might think, because sometimes a conflict of interest might occur and the agent will divert from the principal's goals. And one could add that, not only that, the principal's goals themselves might become illegitimate sometimes if the principal tries to accomplish, through the agent, illegal objectives. This is the classical situation of conflict of interests.

Still according to Prof. Yukins (2010, p. 65), in order to sustain the fidelity of the agent to the principal's objectives (considering that they are legitimate), and to overpass

the problem of asymmetry of information, supervisory measures are required, such as monitoring and bonding (in the case of procurement, this would be better named as “sanction” or punishment. However, independently of how good are these controls, “residual losses” will ever exist. As Prof. Yukins points out (2010, p. 66): “That residual loss might, on its face, suggests that using an agent is always a losing proposition – or, put in the language of procurement, that no function should ever be contracted out. The intuitive illogic of that extreme solution points out the other costs (the opportunity costs of not engaging a highly qualified agent, for example) that also must be considered when weighing the costs and benefits of using an agent”. One should add that usually, in very many situations, it is advantageous for the public administration to contract out because the benefits exceed the costs. And the opportunity cost is not only related to alternative use of a very well trained and capable procuring official, but to the costs direct and indirect, visible and hidden, that the public administration would have to burden in case it decided not to contract out and take care itself of each and every of its functions and duties. That is why procurement is a very relevant and strategic tool available to the public administration.

The problem increases in complexity if one think that, in the case of procurement, the principal is not one but many. In order to access the principal’s will one can look primarily at the law, where the multiple interests are represented. Among the main principals, it is easy to notice the voice of the legislators, of the executive branch, of the citizens, of the users of public services, of the taxpayers and other sectors of society who also have expectations about what it should be accomplished by procurement. More than that, each group, if they were in charge of the procuring process, probably would execute the law in a more broadly or slightly different way in order to fulfill their particular interests to the most. And there is the other side of the coin: the agents who have the main responsibility of acting in a manner that shall balance all the interests in play, fulfilling the principal’s goals and, at the same time, being able to achieve the declared and explicit goal of the procuring process that is to obtain the best possible offer to the public administration. As if all these aspects weren’t enough, the agents have their own goals and preferences and, for one reason or another, might divert from

the principals' goals. And as Prof. Yukins makes it clear (2010, p. 67), the agents, which, directly and immediately, are the procuring officials, can be subdivided in subagents, which would be the contractors. And these subagents might act in a way that divert both from the agents' orders and the principals' goals, given their own priorities and asymmetry of information.

From all these comments and analysis, one can conclude that there are many ways and aspects on the procuring process in which efficiency is in jeopardy. With so many voices and so many opportunities to efficiency losses, it is really very difficult to get to the summit of efficiency, what doesn't mean that, because of these limits and constrains, it shouldn't be pursued at all. Actually what all this reasoning shows is that the public administration must be aware of the obstacles on the way to the best efficiency so it can take actions to achieve not the maximum but the best possible level of efficiency.

When it comes to the goals of a procurement system, the mosaic of different purposes is sometimes astonishing and, as Professor Steven L. Schooner (2002) explains, contradictory. In his paper called "Desiderata: Objectives for a System of Government Contract Law", he sets down nine objectives that are usually entailed in the procuring systems, which would be: competition, integrity and transparency (considered by him as the overarching principles of the system), efficiency, customer satisfaction, best value, wealth distribution, risk avoidance and uniformity. Other objectives could be added to this not exhaustive list, but these really seem to be the more important ones. Some of these goals (especially the three "pillar" of the system) can be perfectly matched with the Brazilian constitutional and legal principles that govern procurement as such impersonality, publicity and equality.

Regarding the goal of efficiency, Prof. Schooner says that "a procurement system is efficient when it spends the least amount of resources in the process of purchasing what is needed". The author gives a good example of system contradiction that one must to face which is the relation among the goals of best value (or value for money), efficiency and customer satisfaction. Normally the best value does not match

precisely the expectations of the customers who, if there weren't budget constraints, would require the best product or service, not matter the cost. Moreover, if one intends to get the best value, this usually will require the use of more resources, affecting the equation of the maximum efficiency.

When it comes to the objective of "wealth distribution", Prof. Schooner says that he particularly "...does not believe that wealth distribution is one of the procurement systems' primary goals." This occurs, for example, when laws that grant benefits to small business in participating of procurement processes are enacted and have to be applied by procuring officials (this phenomenon has occurred both in Brazil and United States, for instance). As the author poses, "...wealth distribution is merely a subset of the larger phenomenon of burdening the procurement process (or, for that matter, the process of governing) with efforts to promote social policies." One could think that even admitting that positive aspects can be found in this tendency of aggregating the most varied types of goals to procurement, there must be a reasonable limit to it, otherwise the primary goal of public procuring, which is obtaining the most advantageous bid offer to the public administration, will become a secondary one. Maybe governments are going too far with this tendency and it is time to give a stop and reevaluate the gains and losses, the positive and negative aspects, in order to address some rationality to this propensity.

But, as it has been emphasized throughout this work, to strive the efficiency it is need to cope with the challenges of a complex and multifaceted system. Maybe, it requires an understanding that sometimes, or maybe many times, "the excellent is the worst enemy of the good", or said in the efficiency language, even if aiming the maximum efficiency, one might have to feel satisfied with a good level of efficiency, or the best possible efficiency. In any way, and as far as efficiency is concerned, one must be aware that any choice will bring about impacts on it, for there are opportunity costs involved and, more than that, transaction costs that must be taken into account in the making of political, social and economic decisions.

***D. Possible relations among the concepts of efficiency, efficacy and effectiveness***

It was said before that the concept of efficiency is vague, sometimes ambiguous. Usually one can access the general idea (about the optimal use of the available means to achieve a determined result), but in the moment of evaluating or measuring the efficiency, in order to access if it was achieved and in which degree, things are much more complicated. This happens especially because the criteria used might not be clear and there might be a lack of good and appropriate efficiency indicators related to a government activity or function.

On the other hand, the idea or concept of efficiency usually is coordinated with other concepts. This occurs because efficiency should not be an objective in itself, but serve as a path to the achievements of more teleological objectives. Even though one can work separately in the process of improving system efficiency, this will be no good if the final result doesn't contribute to the final objective of the system. At this point, it comes up the additional concepts of efficacy and effectiveness.

The common concept of efficacy is related to the idea of simply achieving a goal but without any particular care with the optimal or best use of the available resources. If one set up an objective or goal and is able to fulfill it, independent of doing it in an efficient way, will have been efficacious.

And finally, as presented by Stuart S. Nagel (1986, p. 1), in his article on evaluating public policies (that might be applied to other government activities), effectiveness "...can be defined as the extent to which the policies are achieving the benefits they are supposed to achieve plus any anticipated side benefits."

So, when it comes to efficiency the focus is on the use of the means; in the case of efficacy, the concern is with the goal itself; and at last, if one mentions effectiveness, the emphasis is put on the benefits of the government action or public policy.

The author proposes a list with at least 10 optimizing objectives normally related to public policies evaluation, which would be:

- Maximize benefits.
- Minimize costs.



- Minimize costs subject to a minimum benefit level.
- Maximize benefits subject to a maximum cost level.
- Maximize benefits divided by costs.
- Minimize costs divided by benefits.
- Maximize benefits minus costs.
- Maximize benefits minus costs divided by costs.
- Maximize change in benefits divided by change in costs.
- Maximize percentage change in benefits divided by percentage change in costs.

After reasoning on these criteria, the author concludes that, in his opinion, the best way of evaluating public policies should be in terms of net benefits (or benefits minus costs), because in doing so it would be possible access not only the efficiency part of the equation (the costs term) as the effectiveness (the benefits term).

If one thinks in procurement, a process should be considered efficacious if at its end the procuring object (here it might be a good, service or work) is obtained successfully; it will be efficient if the available means were rationally and productively used (in the best possible way) to get the object; and finally, the process will be considered effective if the object acquired is able to fulfill its purposes and endings.

There are other approaches to the interconnection among efficiency, efficacy and effectiveness. An interesting one is brought about by Helen Dickinson *et. al.* (2010, p. 170) who deal with these concepts in the following way:

- Efficiency: it is a “means to utilize the minimum inputs to obtain a required quantity and quality of outputs”. Or as it is often described, efficiency is simply “doing things right”;
- Effectiveness: it is depicted as “doing the right thing”, which means to achieve results that are connected with their expected utility;
- Efficacy: for this concept, the authors propose a different idea (based on Mackenzie), for them efficacy is related to “cultural performance”, or “...the extent to which an organization is perceived to be achieving outcomes that are

valued by its major stakeholders. Thus efficacy is about “putting on the right performance”.

Regarding the concept of efficacy, it becomes clear that, also in this sense, it is perfectly possible to be efficacious without being efficient. From the standpoint of the stakeholders (or principals), some of them might be more interested in the efficacy itself than in the efficiency, for this might be dysfunctional to their ultimate goals or particular interests. Moreover, one can perfectly figure out that the so-called “right performance” doesn’t necessarily fit the efficiency frame. The right performance is given by the principals’ expectations and purposes, which implies that is a “malleable” concept, so the term “cultural” that has been attached to it.

From all this discussion, what seems very clear is that the concept of efficiency, and, consequently, its practical use, is related to other important notions and shall be put in context with them.

### ***E. Transaction costs and procurement.***

Professor Chris Yukins (2010, p. 79) properly highlights that any political goal or socioeconomic requirements will entail the procurement with additional transactions costs.

Any decision, administrative or operational process or system involves a certain amount of transactions costs, implicit or explicit, that will affect their level of efficiency. In procurement, for instance, in each step of the way, in each phase of the procedure, public officials have to execute different kinds of actions, some simple, some more complexes, but any of them will be tied to some transaction costs.

It was Oliver E. Williamson (1985), with his seminal book “The economic institutions of capitalism”, who treated the concept of transaction costs (though the term is older) in a broader and systemic way. The author (1985, p. 18) quotes Kenneth Arrow, who defined transactions costs as the “costs of running the economic system”. Although Williamson focuses in firms, markets and private businesses, his work is

useful, and can be applied, in a vast array of situations, even when the transactions are not specifically economic. In short, Williamson (1985, p. 41) proposes that any “problem that can be posed directly or indirectly as a contracting problem is usefully investigated in transaction costs economizing terms.”

Williamson (1985, p. 20) also explains that what is in the core of the transactions costs economics is the problem of contracting. In any system or process in which are exchanges among interrelated parts there will be also transactions costs. These costs refer to the one’s need in negotiating, dealing, interacting or solving problems with third parts. And these contracting costs might be *ex-ante* or *ex-post* types. And, as the author explains, while the former regards the costs of drafting, negotiating and safeguarding a contract or agreement, the latter addresses questions such as the costs of contracting misalignments, costs of governance structures (particularly to resolve disputes) and costs of assuring secure commitments.

What this breaking up of *ex-ante* and *ex-post* transaction costs shows is that it is impossible in any contractual relation to anticipate all the issues and address all the problems that might further occur involving the interrelated parties. This is particularly important in regarding procurement, in which there are two distinct blocks of actions, one before and other after the contract is award to the bid winner. Even when there are well prepared contractual drafts and the procuring officials try to anticipate essential questions that might appear during the execution of the contract, which would decrease transaction costs with respect to the contract follow-up, still then there will be a broad space for costs involving unpredicted facts and situations. This might become even more relevant if a dispute between the public administration and a contractor has to be resolved before a judicial court, in which case the transaction costs might increase substantially due all the legal and guaranteeing procedures that the State, as the judge, and the litigating parts (public administration and contractor) shall comply with.

At this point, it is important elucidate two fundamental assumptions taken from the transaction costs economics: the bounded rationality and opportunism (Williamson, 1985, p.44). The first notion signifies that the cognitive or rational capacity of the human

beings are limited, or in the words of Hebert Simon (WILLIAMSON, 1985, p. 45) the economic actors are pretended to be “*intendedly* rational, but only *limitedly* so”. Accordingly to Williamson (1985, p. 46), this means that this tight rationality has to be taken into account when making decisions and setting up structures devoted on how to address the costs associated with “planning, adapting and monitoring transactions.”

The second aspect, on human opportunism (Williamson, 1985, p. 47), denotes the existence of a self-interest seeking oriented behavior and it may assume aggressive or subtle forms (this is more often to happen). In the origin, opportunism is nourished by adverse selection and moral hazard, which in turn arises due the problem of information asymmetry. From this point, one can connect this situation to the principal-agent theory and, from there, to procurement. In fact, opportunistic behavior is more likely to appear when the information asymmetry between principal and agent is higher. And one must remember that, in procurement, the agent might be split up in the figure of the procuring official and the contractor. Many times the contractual balance unfairly bends in favor of the contractor because he has relevant information that is ignored either by the principal or by the procuring official agent. And sometimes there might be some sort of collusive conduct between the procuring official agent and the contractor at the expense of the principal. That’s why Williamson (1985, p. 48) recommends that transactions “that are subject to *ex post* opportunism will benefit if appropriate safeguards can be devised *ex ante*.” Once more, it implies that the designed structures of procurement implemented by the public agencies have to be aware of this issue in order to address possible solutions, like incrementing the monitoring system, demanding self-disclosure responsibility from the contractors and setting up rules regulating conflict of interests. Even then, one must be cautious, for there are measures which might rise the system integrity and, at the same time, help diminishing the transactions costs, whereas it can happen that some actions may not considerably contribute to a better performance of the system integrity, but can cause a great deal of increase in the transaction costs.

If efficiency is one of the constitutional principles that inform the functioning of the Brazilian Public Administration, the public agencies and authorities must make legal,

managerial and organizational efforts with the purpose to frame the transaction costs involving procurement within reasonable limits. The procurement system must allow that the principals' goals be fulfilled and, at the same time, that this be made with rationality, supported by clear-sighted criteria and aiming the minimization of costs and the least dissipation of resources (economic, technical, human and so forth).

The approach of Justen Filho (2009, p. 64) to this issue is very persuasive, as he asseverates that the advantage pursued by the public administration has a close relation to economical savings. This means that the bid offer evaluation, in a great extent, is conducted according to cost benefit criteria of a cost-benefit relation, in which the objective is to combine the appropriate levels and requirements of quality and price in an optimizing equation. As Justen Filho points out, the public resources are scarce, so the public administration has a duty of efficiency. And this duty falls on the public officials, as agents who act on behalf of the principals.

An important aspect is that, as the legislators don't have conditions of anticipating all the facts that may occur in real situations with respect to a specific procurement process, the law itself opens a discretionary space for acting of the public agent (JUSTEN FILHO, 2009, p. 65), even though one can argue that this space should be broader or narrower. In this manner, the freedom attributed to the public agent must be exercised in order to get the best and efficient solution to the concrete case. Anyway, the procurement is an instrument, so the starting point in the pursuing of efficiency is to set up clearly what exactly is the purpose of a determined procuring process. Only in doing so, the public administration will gather the necessary conditions to establish the advantages that it will strive for. The further steps of the process, and the respective results, if successful or not, are consequence of what has been decided and chosen at the beginning of the procedure.

When it comes to the transaction costs in procurement, the awareness of their existence is crucial so the public administration can address more efficient ways of structuring and conducting the procuring process (JUSTEN FILHO, 2009, p. 66). This means that any condition, special clauses, exceptions and privileges represent an

economical cost that will have to be paid in one way or another. Although these conditions are previously guaranteed or warranted by law, the public officials must be conscious of them in order to cope with such limitations so they can make better use of the discretionary space they have.

All this reasoning serves as a conclusion for what has been discussed on efficiency, principal-agent theory, diversity of goals of the modern procuring processes and transactions costs. As Marçal Justen Filho (2009, p. 67) finishes off, when the public administration is devising a procuring process, which is materialized in the working up of a bid notice, it must know that any extraordinary, anomalous or privilege in favor of the administration will increase the transactions costs and, as a result, this will be reflected in the bid offers and consequently in the price to be paid to the bid winner. And this is simply part of the mechanism of price formation.

#### **4. SOME PROPOSALS TO INCREASE ADMINISTRATIVE EFFICIENCY IN PUBLIC PROCUREMENT IN BRAZIL.**

##### ***A. The current scenario of public contracts in Brazil: a summary of main achievements and shortcomings.***

A comprehensive report about the current situation of public contracts in Brazil would demand a more complete approach, probably with support in other studies, which is not the main purpose of this paper. But, in any case, it is important to think about some of the improvements, difficulties and obstacles with respect to procurement over the last years.

The first point to be considered is that the Law 8.666/1993, or General Procurement Law, has nearly 18 years of existence. Since then it has been changed, with exclusion or modifications of some rules and inclusion of others. Noteworthy is the increasing of the roll of hypothesis of procurement exemptions (art. 24 of the Law) which may in certain cases be attached to the idea of improving the procurement efficiency and in other cases can be clearly connected to the achievement of new procurement goals. But no comprehensive changes have occurred in the core of the

Law 8.666/1993, which is precisely the regulation on the procedures that shall be followed by the public officials in charge of a specific procuring process. There are some bills in progress in the National Congress (like the PL no 32/2007) that try to make some deeper modifications in the legal system regarding procurement.

Moreover, in the legal background arena, the great and substantial improvement was the promulgation of the Law 10.520 in the year 2000, which instituted the so-called “reverse auction”. This not only created a new procurement modality but allowed that, in the case of reverse auction, there could be modifications in the sequence of procedures, with inversions in the phases of qualification of bidders and evaluation of the bidder offers. This means that the reverse auction turned out to be more simple, agile and rapid than the other modalities, in other words, more efficient. At the same time, especially with the “e-reverse auction”, there was an increasing in the competitiveness due the participation of more interested bidders and, as a consequence, more aggressive price disputes. At the end, with the reverse auction, the public administration has saved a lot of money, buying more goods or hiring more services for better prices.

But some drawbacks have been reported also. The massive use of reverse auction has been followed sometimes by complains with regards the general low quality of the products and services acquired. Some people say that this has occurred because the public administration is concerned only with the purpose of obtaining the lowest price whatever the quality of the product, and that the poor quality and reduced product utility would offset some of the economic gains. According to the legal system, it is not correct the assumption that the public administration is concerned only with the price, even though it is true that it has to strive to be economical and efficient. In fact, these problems really exist which turns them in an issue that must be addressed properly. There is a need of more studies focused on the weak points of the reverse auction, particularly this issue of poor product quality, in order to think and address possible solutions.

In the operational or technical background, a decisive improvement was brought about with the uprising of the internet. Actually, the internet has revolutionized the way of making business (among many other things) and the procurement area would not be immune to this progress. The use of internet in procurement has provided very important achievements in publicity, transparency, controlling, data records, competitiveness, contract follow up and many others. Under the Federal Executive branch, it was created the “Portal da Transparência” (Transparency Portal) and “Comprasnet”, a procurement internet portal which makes available to society information regarding procurement and contracts promoted by the Federal Government and also provide the structure for the realization of electronic acquisition processes.

All these changes and improvements have led to the obtaining of economic, administrative, social and, why not to say, cultural gains (in the sense that people, particularly the public officials, are more prepared to deal with technological changes, influence this process and contribute to its enhancement). Although there are not accessible and easy quantitative estimates on these gains, one can realize that, despite the investment cost and current expenses to maintain the infrastructure, the overall efficiency is expected to be increased.

With respect to human resources, there have also been improvements, particularly in the Federal Government. As a result of career restructuring measures, better wages being paid in the public sector and the entrance of more qualified public servants, in this day and age, the Federal Public Administration is better prepared to deal with some challenges resulting from a world that moves and changes increasingly fast. In the Executive branch of the Federal Government, the career denominated of “Especialista em Políticas Públicas e Gestão Governamental” (Specialist in Public Policies and Government Management), or simply known as “Gestor” (Manager) was restructured and reinforced. This professional is responsible for conducting activities regarding the planning, implementation and evaluation of public policies and also being designated for positions of advisement and command in the upper echelons of the Federal Government. This public function may take in important role in the process of



modernizing and striving for efficiency in the public administration as whole and in procurement, in particular.

The other side of the coin is that these mentioned technical, operational and personnel developments are not spread out uniformly throughout the public administration and its respective agencies, if one thinks in all the existent branches, levels and powers. This observation is more pertinent and severe in the case of the small municipalities, which make up the great majority of government in Brazil. Even if one consider that some and, and in certain cases, relevant progress has reached the small cities in Brazil, a lot of them struggle with difficulties to conduct efficient procuring processes due to a lack of money, technical infrastructure and human capital. For instance, many of them have not implemented yet the e-reverse auction, putting themselves away of the benefits proportioned by this procurement modality. In addition, it seems that there is not been had sufficient cooperation among the small cities in trying to overcome some of their problems together, which might be a good way of getting better off instead of acting individually.

Finally, under an operational standpoint, although there has been an accumulated knowledge on the legal framework regarding procurement, which is essential to properly conduct the procuring process, on the other hand, there is a lack of expertise in market issues. The focus along the years has been very concentrated in understanding the law (and even this is not balanced for a lot of emphasizes is put on specific legal rules, but not on principles) without a correspondent effort in comprehending the functioning of the market. This creates an information asymmetry which puts the public administration in an unfavorable position in the moment of developing a procuring process, awarding contracts and negotiating post-contracting events.

So, considering this scenario, one can summarize some of the main achievements and shortcomings as follows:

**Main achievements**

- The advent of internet and development of procurement tools supported by it.
- Under the Federal Government, the creation of the Comprasnet and some other technical and structural initiatives.
- The institution of the reverse auctions and electronic reverse auctions.
- More transparency and interest of society in procurement issues.
- Improvement in public officials management capabilities (new careers, better wages, new public servants with better background and so forth).

### **Some shortcomings**

- Absence of more profound changes in the General Procurement Law (Law no 8.666/1993), particularly with regards the procedures or processing rite.
- The knowledge of the legal framework being very focused on specific legal rules rather than in a more comprehensive understanding of the system, as on the practical use of the principles that regulate both the public administration and the procuring processes.
- Some of the shortcomings or negative effects of the reverse auction have not been properly addressed (particularly the issues referring to the quality of the products and adequate ways of enforcing the law compliance).
- Misbalanced improvements throughout the country, which affects more severely the small municipalities, due to scarcity of resources (financial, human capital etc.).
- Lack of more technical cooperation in procurement, especially among the small cities.

### ***B. Proposals for legislative and administrative actions to increase efficiency in public procurement in Brazil.***

Based on what has been discussed, particularly considering the scenario of improvements and shortcomings regarding the procurement system in Brazil, it is possible to address a few general and broad suggestions to enhance public procurement. As general ideas, the purpose here is not to approach in details each of

them, which would require deeper studies, diagnoses and discussions, but to contribute to the debate and reflection on such an important theme. Here they are:

### **A – Improving procuring officials’ capabilities**

As it was said before, over the years the procuring officials in Brazil have been generally trained in understanding the law in order to better apply it in procuring processes, but the instruction programs are very focused with the law compliance, under a strict juridical standpoint. There is no concentration on the market side of procurement.

So any strategy regarding the enhancing of efficiency in public procurement shall to readdress this question, changing the training priorities and looking for increasing the procuring officials’ apprehension on market issues, so that the knowledge gap between the public administration and the private sector (market) can lessen, due to a decreasing in the information asymmetry. This is particularly needed in case of products or services that are complex, sophisticated or have high added market value.

There are some good indications (“Efficiency programme: releasing resources to the front line”, n.d., p. 7) on what should be some points of interest to the public administration regarding very important market issues, such as: “size and planned growth of the supply and demand side; past and likely future price trends; the degree of fragmentation of overall public sector purchasing; the degree of professionalization and involvement of the procurement function; the degree to which the market was effectively being managed, for example to ensure efficient supply chain management; and the make-up of the supplier base”.

Moreover, the procuring officials shall be prepared to deal more effectively with the legal system principles. In critic and complex procuring events, when an unpredictable problem arises (for instance, during the development of a contract), the solution is more likely to be found in the higher principles rather than in a specific rule.

These questions can only be properly handled with professionalization and continuous investment in training and recycling of the procuring officials. The

investment, if well managed, is supposed to be overcompensated by efficiency gains, especially due to reductions in transactions costs.

## **B – Increasing transparency and information disclosure**

Transparency is one of the major world tendencies regarding public affairs. Although it should not be seen as a panacea for all the evil, it is really necessary in the overall process of enhancing democracy, curbing corruption, increasing awareness and participation of society in the public business and contributing for better public practices.

Naturally, the implementation of transparency has a cost which should be offset by its benefits, direct and indirect, economic or not. And, more than that, any transparency action shall be carry out with support in thoughtful rationale.

In the case of disclosure of public expenditures and procurement transparency, several improvements have been accomplished over the last years (Portal da Transparência, Comprasnet) and others are on their way, like the enacting of the Complementary Law no 131/2009, which requires higher levels of compliance with transparency and information disclosure on the part of the Federal, State and Local governments.

In the specific case of procurement, there is still space for increasing the transparency, maybe with the implementation of a complete electronic process (like it has been made in some judicial courts in Brazil) that would allow the tracking and following up of the procedures by society, interest bidders, controlling agencies and so on. Nowadays, it is possible to have access to a lot of information in the Comprasnet, especially regarding the e-reverse auctions, but the portal does not include relevant data and documents regarding the procurement processes, such as the original proposals presented by the bidders or the invoices issued during the contract execution.

In order to comply with efficiency requirements, this comprehensive electronic filing process could be implemented to the more expressive and important contracts, according to their economic or social relevance.

### **C – Changing publicity requirements**

This is a punctual suggestion. In the present, the Law no 8.666/1993 requires that the bid notices and contracts be published in official gazettes and major state and local newspapers. The publication in leading newspapers, for being expensive, usually represents a great deal of money which may be bigger if the public agency has to republish the procuring document for one reason or another.

It seems today that this requirement could be withdrawn without causing any damage to publicity, transparency or public interest. All of these values would be assured as long as the bid notices and contracts were published and disclosed in the internet. In the case of Federal Government, the Comprasnet already fulfills this function and purpose. Actually, at present, there is no better way to announce, publicize or disclose facts and figures than in the internet.

If, for any particular reason, the procuring authority felt the need of publishing the bid notice or the contract in a major newspaper, this would be possible, since the rationale for this decision was inserted in the procuring process.

In regarding the municipalities, which are in great number, one could think in developing publishing portals by state levels of government.

### **D – Enhancing cooperation among municipalities**

As it was mentioned, maybe one of the greatest obstacles to achieving a higher degree of efficiency particularly in the small municipalities is their lack of resources and inadequate infrastructure. Although there has been some progress, the improvements are not well distributed, so there are huge differences in performance among municipal governments.

A good way of overcoming these difficulties is to look for ways of increasing the cooperation among them. If they are willing to share their common problems and exchange their experiences and impressions, it might be easier to learn something in this process and think in more viable solutions for their strains.

An instrument that can be used by the cities is the setup of public consortium. Although there is an act regulating the constitution of public consortium (Law no 11.107/2005), this form of organization could be more broadly used by the municipalities, in order to obtain collective gains that otherwise they would not manage to achieve alone.

The public consortium might be a means not only to provide services to their members, like executing a procuring process, but also it might facilitate the exchange of technical information and improvement in human capital.

It goes without saying that in order to be a successful experience, the constitution of a public consortium in any area (also when it involves procurement) should be preceded of comprehensive studies with respect to its advantageous, disadvantageous, objectives, required structure and resources to become fully operational, the contribution demanded from each of its members and last, but not least, the related opportunity costs and transactions costs involved.

### **E – Modifying the system of sanctions of the General Procurement Law (Law no 8.666/1993)**

The Law no 8.666/1993 establishes a series of administrative and criminal sanctions in case of no compliance with its provisions. While the administrative sanctions or penalties might be applied directly by the public agency's authorities, the criminal sanctions can be imposed only by the courts following a lawsuit.

This part of the law is often subject to criticism by the administrative juridical doctrine, because the law provisions would be very generic, granting an inadmissible discretionary power to the public authority with regards the applying of sanctions (example: in case of breaching a contractual obligation by a contractor).

In reality it seems to be the case, for the law poses the sanctions but without attaching them to specific behavior or misconduct, which maybe provides the procuring authorities with disproportional and unpredictable power to impose sanctions to one who might arguably have not complied with both the law or contract provisions.

This creates two kinds of problems. First, it causes juridical uncertainty to the related parts and turns the procedure of applying penalties to bidders or contractors more difficult, because the public officials in charge of a procuring process or a contract might have doubts about what kind of sanction to apply while facing a determined misconduct. On the other hand, this uncertainty may create an incentive to bidders or contractors to go to the courts in case they disagree with the sanction applied by the public administration.

A possible solution for this issue could be the modification of the procurement law, so it starts predicting in a more detailed way what sanctions must be imposed by the public officials in case of no compliance with specific and determined acting on the part of bidders, contracts and so forth.

As altering the law usually is not so rapid and simple, one must to consider that, independent of this legal modification, public officials must be prepared to deal with misbehavior and, in order to do that, they have to be trained in how to establish, monitoring, enforcing and applying sanctions to uncomplying parts.

## **5. FINAL REMARKS**

From the foregoing, one can realize that the process of public contracting in Brazil is complex and that, while advances have taken place in recent years, there is still opportunities for enhancements and improvements, particularly with regard to the increasing of efficiency in management of procurement and contracts. One might think that it is needed to create adequate environment so this can happen. The government, legislators and juridical scholars should act together in order to figure changes out on legal provisions so the procurement processes can become more rational, agile and predictable. However, major changes should strive to improve and develop the capacity and management skills of the procuring officials in charge of public procurement.

The efficiency issue presents nontrivial aspects and challenges regarding definition, interconnection with other constitutional and legal principles and similarities and differences in relation to other concepts such as efficacy and effectiveness.

Regarding definition, efficiency is an ambiguous term that carries different possibilities of interpretation and practical applying, which leads to difficulties in evaluating it. In addition to that, the pursuing of efficiency must be undertaken in conformity with other principles, from which stands the principle of legality. And the message here is clear: the efficiency must be tackled and accomplished by the public officials, on behalf of the public administration, independent of the legal framework. It means that, as a rule, it is not allowed to a procuring official, for instance, to neglect some procurement legal provisions in the name of efficiency. It becomes also clear that the concept shall not be isolated from other notions, for it is not self-sufficient. Besides being efficient, one must also be efficacious, in the sense of achieving a result socially valued, and effective, so the action generates the expected benefits.

The principal-agent theory provides a good support and some useful insights regarding the possibilities and limits for accomplishing efficiency. The interesting point here is that discussing efficiency is, actually, referring to inefficiency. If one must strive for different procurement goals, while complying with legal principles and rules and having to cope with transaction costs, the path to being efficient becomes a kind of obstacle race. This is the arid scenario in which the procuring officials must strive for the best possible way of conducting a procurement process, so efficiency becomes more tangible and reachable.

If one considers the actual legal structure of public procurement, the proper moment for trying to achieve the highest degree of efficiency coincides with the so-called internal phase of procurement. During this stage, the procuring officials have the maximum possible discretion power so they must think carefully about their decisions, which will cause impact in the sequence of the procurement procedure. Good and proper *ex-ante* decisions and provisions will avoid undesirable *ex-post* consequences, not eliminating uncertainties because this would be impossible, but attenuating them.

Finally, that's why the main suggestion for improving public procurement in Brazil goes through the fundamental question of preparing, training and recycling the procuring officials to tackle the complex, dynamic and tough situations that they have to



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face day-to-day, especially when it comes to better understand the supplying market. Without this investment, any other measure will seem perfunctory, will not long last or will not be effective.

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