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ARTIGO ORIGINAL

# Governance of public contracts: the materialization of efficiency and planning principles in law 14,133/2021

## *Governança de contratos públicos: a materialização dos princípios da eficiência e do planejamento na Lei nº 14.133/2021*

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**Abstract:** This article seeks to elucidate the Governance of public contracts provided for in article 11, sole paragraph, of Law 14,133/2021, as the formalization of the efficiency and planning principles. Thus, it presents the historical search for professionalization, planning and efficiency in the Brazilian Public Administration, from the bureaucratic reform until the advent of the law 14,133/2021, with emphasis on the management reform from the 1990s. Afterwards, the subsequent approximation of private management mechanisms to public management is presented, with emphasis on corporate Governance, which, based on the agency theories, resulted in the concept of the organizational public Governance, based on the notions of leadership, strategy and control, widely present in the 2021 law through various instruments. The methodology used was that of bibliographic research.

**Keywords:** Biddings. Governance of Public Contracts. Law 14,133/2021. Efficiency. Planning.

**Resumo:** Este artigo busca elucidar a governança dos contratos públicos prevista no artigo 11, parágrafo único, da Lei nº 14.133/2021, como a formalização dos princípios da eficiência e do planejamento. Assim, apresenta a busca histórica pela profissionalização, planejamento e eficiência na Administração Pública brasileira, desde a reforma burocrática até o advento da Lei nº 14.133/2021, com ênfase na

reforma gerencial a partir da década de 1990. Posteriormente, apresenta-se a posterior aproximação dos mecanismos de gestão privada à gestão pública, com destaque para a governança corporativa, que, com base nas teorias de agência, resultou no conceito de governança pública organizacional, fundamentado nas noções de liderança, estratégia e controle, amplamente presentes na lei de 2021 por meio de diversos instrumentos. A metodologia utilizada foi a de pesquisa bibliográfica.

**Palavras-chave:** Licitações. Governança das Contratações Públicas. Lei 14.133/2021. Eficiência. Planejamento.

## 1 PROFESSIONALIZATION, PLANNING AND EFFICIENCY IN PUBLIC ADMINISTRATION: FROM THE BUREAUCRATIC REFORM TO LAW 14,133/2021

Article 5 of Law Nº 14,133/2021, Law of Biddings and Administrative Contracts, contemplating extensivily the principles to be observed within the scope of national public contracts, with emphasis on efficiency and on planning.

The reality is that the search for the professionalization of Public Administration through efficient and planned management, despite not being a new issue on the national scenario, it still remains current.

In Brazil, there were three significant movements of Administrative Reform throughout the 20th century, aiming at obtaining greater efficiency in the public sector management, namely: the Dasp reform, in the 1930s, attempting to professionalize public workers in order to replace the estate management model by the bureaucratic; the reform of the late 1960s, led by Hélio Beltrão, with "de-bureaucratizing" aspirations, but which, in practice under the military regime, proved to be statist and centralist; and the reform at the end of the 1990s, led by Bresser Pereira, which incorporated notions of the managerial model into Brazilian bureaucracy (Nohara, 2012, p. 225).

Thus, the first reformist movement in national public management took place in the 1930s, during the "Estado Novo" (New State) created by Getúlio Vargas, through the Administrative Department of

the Public Service (Dasp), created by the Decree-Law Nº 579/1938, which objective was to rationalize and bring efficiency to the public workers´ production, in consideration of the so-called bureaucratic management model (Nohara, 2012, p. 22), which emerged as a response to the patrimonialist management model[1], at the time of the transition from the Absolutist State to the Liberal one and had as its main exponent Max Weber.

Christian Mendez Alcantara (2009, p. 26) clarifies that the Weberian concept of bureaucracy is related to rationality regarding state action, through competencies duly provided by laws or regulations, division of public workers into hierarchies and careers, guarantee to lifetime tenure for all public employees, specialized training and workload distribution[2]. Due to this, Irene Nohara (2012, p. 28) highlights that bureaucratic rationality contemplates, par excellence, the adequacy of means in search of maximizing efficiency in solving social problems.

Therefore, the Weberian bureaucracy proposed the attribution of formal rules which aimed at greater efficiency and professionalization

[1] On the topic, Luiz Carlos Bresser Pereira clarifies that the "Bureaucratic public administration was adopted to replace patrimonialistic administration, which defined absolute monarchies, in which public and private propriety were confused. In this type of administration, the State was understood as the property of the king. Nepotism and employability, if not corruption, were the norm. This type of administration proves to be incompatible with industrial capitalism and parliamentary democracies, which emerged in the 19th century. A clear separation between the State and the private sector is essential for capitalism; Democracy can only exist when civil society, comprised of citizens, distinguishes itself from the State while controlling it. It therefore became necessary to develop a type of administration that started not only from the clear distinction between public and private, but also from the separation between the political and the public administrator. Thus, the modern rational-legal bureaucratic administration emerges". (1996, p. 10). The patrimonial public management model prevailed in Brazil until the 1930s, when the bureaucratic reform occurred.

[2] Within these lines are the lessons of Max Weber: "Among the factors of undeniable importance are the rational structures of laws and of the administration, since modern rational capitalism not only needs the technical means of production, but also a calculable legal system and of administration based on formal rules (WEBER, 2009, p. 31).

of Public Administration, in order to eliminate informality, nepotism and corrupt practices typical of the patrimonial management model.

However, despite the ability to provide optimal results for public management, its practical implementation (mainly in the transition from the small Liberal State of the 19th century to the large Social State of the 20th century[3]) began to demonstrate problems related to excessive formalism, resulting in sluggishness of state action and collapse in administrative action[4].

Therefore, the bureaucratic management model, with the implementation of various means of control aimed at greater professionalization and efficiency of the state workforce, culminating in the need to provide human and financial resources for the maintenance of the bureaucracy itself (Castro, 2007, p. 72), in a model that becomes focused on preserving its own formalism to the detriment of the purposes of achieving the public interest.

Thus, even though the bureaucratic model has promoted positive changes, especially when compared to the patrimonialism in force until then, inefficiency was pointed out as its main flaw (Nohara, 2012,

[3] In this sense, Bresser Pereira teaches that "Classical bureaucratic public administration was adopted because it was a far superior alternative to the patrimonial administration of the State. However, the assumption of efficiency on which it was based did not prove to be real. At that moment when the small liberal State of the 19th century definitively gave way to the large social and economic State of the 20th century, it was found that bureaucratic administration did not guarantee speed, nor good quality or low cost for services provided to the public. In fact, bureaucratic administration is slow, expensive, self-referred, and to a small or inexistent degree oriented towards meeting citizens' demands." (1996, p. 10-11)

[4] On the subject, Rodrigo Pironti Aguirre de Castro teaches: "bureaucracy as idealized by Max Weber and his countless procedural rules to achieve the optimal result, in practice, faced some difficulties, mainly regarding the volume of forms (formalism) and the delay in carrying out the State's material activity. There was, therefore, a kind of justified collapse in administrative procedure, in which the administrator was faced with countless formalities to achieve the common good – within strict legality and complying exactly with what the regulations determined – and the private good, even as a legitimate holder of the right to the satisfaction of their interests, where nothing could be done in the face of the bureaucratic process." (2007, p. 70-71).

p. 80), hence why the proposition of a new Public Administration model began to gain strength, complementary to bureaucracy, with a view to efficiency and flexibility in public management (Castro, 2007, p. 73), which is known as the managerial model and arises from the State crisis, which occurred between the 1970s and 1980s[5].

Rodrigo Pironti Aguirre de Castro (2007, p. 55-56) notes that, in this crisis scenario, the doctrine of neoliberalism rose, which, in addition to social criticism, imposed on the Public Administration ro reexam its performance, given tge risk of obsolescence when compared to the evolution of the market and the private sector.

Fernando Luiz Abrucio (1997, p. 10) also highlights that this neoliberal ideology, strongly inspired by Friedrich Hayek's doctrine, enabled the advancement of the managerial model in the public sector in the late 1970s and early 1980s, especially in England of Margaret Thatcher, and, with less success, in the government of Ronald Reagan, in the United States.

José Matias-Pereira (2010, p. 47) adds that this movement, known as "New Public Administration"[6], sought to bring greater efficiency to the Public Power, in favor of maximizing results.

In Brazil, after the bureaucratic reform promoted by Dasp, in the 1930s, the first notions of managerialism were presented by Hélio Beltrão, still at the end of the 1960s, through the Decree-Law

[5] In this regard, Fernando Luiz Abrucio observes that "In the mid-1970s, especially after the oil crisis in 1973, a major global economic crisis put an end to the era of prosperity that began after the Second World War" (1997, p. 6). Abrucio highlights four economic factors that contributed to the crisis of the contemporary State: the global economic crisis, which began in 1973 with the first oil crisis and expanded in 1979, with the second oil crisis; the fiscal crisis, due to the "revolt of taxpayers against the collection of more taxes, mainly because they did not see a direct relationship between the increase in government resources and the improvement of public services" (ABRUCIO, 1997, p. 9); the situation of "ungovernability" in which "governments were unable to solve their problems (ABRUCIO, 1997, p. 9); and globalization and technological updates, affecting the logic of the productive market, and, also, the management of the State.

[6] The movement is also referred to as managerialism, new public management and public management by the jurists.

200/1967[7], which expands the scope of Indirect Administration and brings planning among the administrative principles (art. 6, item I, and art. 7).

However, in spite of the advances in the theoretical field, the context of the military regime did not allow the practical adoption of these changes, maintaining the centralizing role of the Public Administration.

With the end of the military regime, the 1988 Constitution of the Republic reaffirmed bureaucracy (Coelho, 2000, p. 258), which consisted of a response to patrimonial practices that were once again adopted in the period leading up to the inauguration of the President of the Republic, in 1985[8]. Thus, the constitutional text reintroduced principles and rules of a rational-bureaucratic nature, as in to regularize the conduct of public workforce and reduce the established clientelist panorama (Castro, 2007, p. 83).

Consequently, only at the end of the 1990s, resuming the ideals of Hélio Beltrão and in compliance with the global scenario of New Public Administration, a new management reform was carried out in Brazil, in search of maximum achievement of administrative efficiency, through adoption of results-based controls, focusing on quality and user-citizen satisfaction (Castro, 2007, p. 73-74).

Matias-Pereira (2010, p. 129) teaches that managerial Public Administration, or new public management, consists of the post-

[7] Rodrigo Pironti Aguirre de Castro observes that "Decree-Law Nº. 200/67 is considered the first milestone of Managerial Public Administration in Brazil" (2007, p. 83). And Bresser Pereira adds: "The reform initiated by the Decree-Law 200 was an attempt to overcome bureaucratic rigidity and can be considered as a first moment of managerial administration in Brazil. All emphasis was given to decentralization through the autonomy of indirect administration, based on the assumption of the rigidity of direct administration and the greater efficiency of decentralized administration" (1996, p. 12).

[8] "And after a long period under the ruling of the military regime, with the re-democratization of the Brazilian State, federal public positions were allocated in the period that preceded the inauguration of the President of the Republic (1985), making the clientelism established in the State evident." (CASTRO, 2007, p. 83)

-bureaucratic model of structuring state management, based on the values of efficiency, effectiveness and competitiveness.

In this scenario, Constitutional Amendment Nº 19/98 adds to the caput of article 37 the principle of efficiency as governing Public Administration[9]. Thus, as Diogo de Figueiredo Moreira Neto (1998, p. 41) observes, the idea of simple effectiveness in public management is abandoned, according to which the production of satisfactory results would be enough, and the idea of efficiency is incorporated, aiming to producing the result at the lowest cost, in the shortest amount of time and with the best quality possible, considering the processes used.[10]

After the constitutional provision of the principle of efficiency, other further lawsnnbegan to adopt it, as is the case of Law Nº 9,784/1999, which provides for the federal administrative process[11], and Law Nº 14,129/2021, which provides for principles, rules and instruments for Digital Government and increase of public efficiency[12].

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[9] Maria Sylvia Zanella Di Pietro and Thiago Marrara observe that "the consecration of efficiency in the Constitution represented, in 1998, a hallmark of the managerial public administration movement, whose roots were found in the Director Plan for Reform of the State Apparatus of 1995. Among other purposes, the afore-mentioned federal plan aimed to reduce the size and cost of the State, improve the organization and performance of public agents, as well as generate a more harmonious and positive relationship between the State and society. It aimed, among other things, to combat the culture of self-absorbed administration, focused inward, merely concerned with procedures and forms, slow, negligent, alienated and indifferent to meeting the needs of the community". (2022, p. 31)

[10] José dos Santos Carvalho Filho adds that "The core of the principle is the search for productivity and economy and what is more important, the requirement to reduce public Money waste, which requires the execution of public services with promptness, perfection and functional income." (2022, p. 70)

[11] Article 2: The Public Administration will obey, among others, the principles of legality, purpose, motivation, reasonableness, proportionality, morality, broad defense, contradictory, legal certainty, public interest and efficiency.

[12] Article 1, caput: This Law provides for principles, rules and instruments to increase the efficiency of public administration, especially through de-bureaucratization, innovation, digital transformation and participation of the citizens.

In the scope of public contracts, Law Nº 14,133/2021 started to incorporate efficiency as a principle, aiming to satisfy the public interest through contracts in an optimal way, with the best use of financial and human resources, speed and production of lower impacts.

Regarding the application of the principle of efficiency in public contracts, Joel de Menezes Niebuhr (2022, p. 91) states that efficiency relates the results sought to the means to obtain them, to achieve the optimal relationship between costs and benefits, evaluating qualitative (selectivity), economic-financial (economy) and time-related (speed) aspects in its achievement.

Furthermore, Maria Sylvia Zanella Di Pietro and Thiago Marrara (2022, p. 31) highlight that, unlike Law 8,666/1993, the 2021 standard raises efficiency to the level of principle and breaks it down into several sub-principles, especially speed, economy, effectiveness and planning.

Along these lines, the new legal diploma incorporates the principle of efficiency into public contracts, also encompassing sub-principles which from the efficiency principle, such as the principle of planning, which had already been observed within the scope of Public Administration through Decree-Law Nº 200/ 67 and was resumed in the bidding and contractual scope by the 2021 legislation.

Furthermore, in order to make both principles established legally, Law Nº 14,133/2021 provides that the high management of the public sector or entity will be responsible for implementing contracting governance, aiming to evaluate, guide and monitor bidding processes and respective contracts, aiming to achieve the objectives of the process and promote efficiency, effectiveness and effectiveness in hiring, in accordance with its article 11, sole paragraph.

Within these aspects, it is worth highlighting that governance in the public sphere is also a concept originating from the managerial Public Administration movement which, by prioritizing the efficiency in state management, resulted in applying management instruments utilized in the private sector into the public management, as is the

case of corporate governance, directly connected to organizational public governance and contracting governance, as outlined below.

## 2 CORPORATIVE GOVERNANCE AND ORGANIZATIONAL PUBLIC GORVENANCE: A CONCEPTUAL ANALYSIS

As noted, with the expansion of the search for efficiency in Public Administration through the managerial model, private management instruments began to be incorporated into public management.

In this sense, Alcantara (2009, p. 95) observes that management reform is referred to as such since it sought inspiration in private organizations, aiming to enable greater efficiency in Public Administration.

Furthermore, Daniela Mello Coelho (2000, p. 260) adds that approximation to the private sector aims to provide public management with a progressive structure based on performance and results.[13]

In this process, the notion of corporate governance begins to be incorporated by the Public Administration, so as to provide the State with greater efficiency and planning in its practice, under the notions of organizational public governance.

Therefore, it is necessary to analyze both concepts and the resulting application of governance in the context of bidding and administrative contracts.

[13] With the same view, Matias-Pereira adds: "It can be observed, therefore, that the adoption of the management model initially adopted by the private sector of the economy as a standard of managerial intervention in the search for profits through efficiency, effectiveness and business/private rationality, when transported to the public sector, is oriented towards achieving several other objectives, such as, for example, the search for efficiency, effectiveness and economy in adjusting public and public finances, the improvement in performance and greater effectiveness of public organizations, and, in particular, the elaboration, implementation and evaluation of public policies". (2010, p. 97)

## 2.1 Corporate governance: inception and concepts

The topic of corporate governance became an object of study in the 1980s[14] and gained prominence on the world stage in the early 1990s, with the development of a series of principles (Silveira, 2021, p. 2).

However, it is important to highlight the fact that there is no single concept for governance (Altounian; Souza; Lapa, 2017, p. 246), which is why the term is used in different contexts, with different meanings (Matias-Pereira, 2010, p. 90).

For this reason, Alexandre Di Miceli da Silveira (2021, p. 6) highlights the existence of numerous definitions for "corporate governance", some more restrictive, with an emphasis on relations between executives and shareholders, others of a more inclusive nature, encompassing the company's relationship with other stakeholders.

Despite the different concepts that exist today regarding the expression, the fact is that the theoretical origins of the emergence of governance date back to the moment when the separation between ownership and management of companies occurred, causing the so-called agency conflicts, which was pioneeringly observed as early as the 1930s, but became the subject of in-depth studies from the 1970s onwards.

With the evolution of the economic market and capitalist foundations, organizations achieved rapid growth under the command of large businessmen who had control and administration of the enterprises.[15]

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[14] As Alexandre Di Miceli da Silveira analyzes, "Great part of the literature on corporate governance is modelled on the North American business environment, the birthplace of the corporate governance movement in the 1980s". (2021, p. 11)

[15] Silveira observes that "The increase in the size of companies led to an increasingly greater concentration of power and income in the country. This was the time of the emergence of "robber barons", an expression created to designate tycoons who created business empires through not only good business acumen, but also intimidation, exploitative

However, gradually, from the end of the 19th century and the beginning of the 20th century, large companies began to be managed by professional managers, hired for this purpose and who were not owners of the organization, which also began to have a very dispersed and pulverized shareholder base, after the creation of modern joint--stock companies (Rossetti; Andrade, 2014, p. 71[16].

This separation between ownership and control was pioneeringly documented by the jurist Adolf-Berle and the economist Gardiner Means, in the work "The Modern Corporation and Private Property", released in 1932 (Silveira, 2021, p. 30)[17].

Rossetti and Andrade (2014, p. 72) highlight that Berle and Means addressed three key aspects in the evolution of the corporate world: the segregation between ownership and control in large corporations; the divergences caused between owners and managers resulting from changes in company command; and the inadequacy

practices and other ruthless methods. Two characters symbolized the robber barons of this era: John D. Rockefeller (1839-1937) and John Pierpont (J.P.) Morgan (1837-1913)." (2021, p. 29)

[16] Vanice Regina Lírio do Valle and Marcelo Pereira dos Santos also observe that "The effects of the 1929 economic crisis had a strong impact on the way in which business activities were managed, initially structured in corporate groups, composed of family groups of a concentrated and autonomous nature. From this time frame onwards, there was a wave of dispersion of corporations, forced to establish new management arrangements, as a result of economic, political and social changes. The decentralization of power of the majority shareholders and the opening of capital would allow the expansion of companies, with resizing and distribution of powers, as well as a greater flow of investments, better financial results, structural development, incorporation of advanced technology, acquisition of differentiated expertise, cost optimization and profit maximization. (2019, p. 163-164)

[17] It is interesting to note that Adam Smith, in his work The Wealth of Nations, 1776, already highlighted the evils of the separation between ownership and management, when stating that "Being the administrators of these companies [listed on the stock exchange], managers of other people's money instead of their own, they cannot be expected to oversee its use with the same vigilance with which the partners of a closed capital entity would supervise its resources... Negligence and excessive expenditure, therefore, always tend to prevail, to a greater or lesser extent in the management of open capital companies." (SMITH apud SILVEIRA, 2021, p. 26)

of traditional conceptions about the control of open capital societies and the classic objective of maximizing profit.

Thus, they observed that the dispersion of capital in company shares led to the constitution of two categories: passive owners and usufructuary non-owners, contemplating two distinct groups with imperfectly symmetrical interests: the owners, who do not have control, and the controllers, who do not have appreciable property (Rossetti; Andrade, 2014, p. 73-75).

The pioneering study by Berle and Means, the first major milestone in corporate governance[18], resumed in the 1970s, moment When the agency theory emerged, through the work of economists Michael Jensen and Wiliam Meckling, in 1976[19], considered the main theoretical approach of corporate governance[20].

According to the agency theory, the evolution of the economic market led to the growth of organizations, which meant that the owners of companies, called "principals", no longer had control over the direction of business activities, which were delegated to professional administrators, called "agents", giving rise to the so-called "agency relationship"[21].

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[18] According to Rossetti and Andrade, "the pioneering approach of Berle and Means fertilized a new field of knowledge, which in the last 20 years has been translated into the expression corporate governance." (2014, p. 78). However, other authors also had great relevance for the development of corporate governance, such as Ronald Coase. In this sense, José Matias-Pereira highlights that "The governance theme is based on the seminal study by Ronald Coase published in 1937, entitled The Nature of the Firm." (2010, p. 115)

[19] Entitled "*Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*".

[20] In this regard, José Matias-Pereira notes that "Agency theory or principal agent theory is one of the main theories in finance and is considered the main formal approach to corporate governance. It was formalized in the seminal article by Jensen and Meckling" (2010, p. 17). Furthermore, Rossetti and Andrade add that "For a long time, since Berle and Means, in the early 1930s, pointed out to the dispersion of corporate capital and the rupture between ownership and management, the crucial problem of what today is known as corporate governance centered on agency conflict." (2014, p. 87)

[21] Jensen and Meckling, when portraying agency costs, conceptualize the "agency relationship" as "a contract under which one or more people (the principal(s)) employs

Around the agency relationship opposite decisions are established: those that maximize the total return to the principals, and those that enhance the agents' interests, generating agency conflicts (Rossetti; Andrade, 2014, p. 84-85).

In this way, the separation of the concepts of ownership and management enabled the emergence of conflicts of interest, also called agency conflicts, which occur between principals and agents.

In this sense, the Federal Audit Court (2020, p. 26) states that agency conflict occurs when the interests of the principal are not adequately served by the agents who were entrusted with the task of complying with them.

In this scenario, it was necessary to establish mechanisms so that the agents, who make decisions, but are not the owners, act driven by corporate interests and not personal ones (Altounian; Cavalcante; Coelho, 2019, p. 34).

Thus, Cláudio Sarian Altounian, Rafael Jardim Cavalcante and Sylvio Kelsen Coelho (2017, p. 247) highlight that, from the perspective of the agency theory, governance is related to the best ways to minimize the organization's agency conflicts, so to align the interests of agents and principals, reducing the costs of conflict and maximizing the institution's results.

However, it is crucial to note that the agency theory is not limited to the relationship between owners and managers, where agency relationships can be established between different types of principals and agents (Matias-Pereira, 2010, p. 17), as it is the case of the relationship between majority and minority shareholders[22], and,

another person (agent) to perform on their behalf name a service that involves the delegation of some decision-making power to the agent." (2008, p. 89).

[22] "Another category, which prevails in most countries, is ownership concentrated in the hands of a few majority shareholders, which can lead to ownership-management juxtaposition. In this case, the central question of agency shifts from the owner-manager conflict to the majority-minority conflict. It is then not the owner who seeks protection against the manager's opportunism, but the minority shareholders who see

in the case of organizational public governance, between society and public agents, as described below.

Therefore, based on the need to resolve agency conflicts within companies, the concept of corporate governance was developed, emerging in countries of Anglo-Saxon origin throughout the 1980s, as a result from the changes in the macroeconomic environment and political, corporate and academic scenarios, as an aftereffect from the transformations of the previous decade (Silveira, 2021, p. 34), as it is the case with the oil crises in 1973 and 1979, and the political changes derived from the rise of neoliberalism.

Due to this, Rossetti and Andrade (2014, p. 89) highlight that agency conflicts are the fundamental reasons for the development of corporate governance. However, in spite of the birth of corporate governance finding its origin in agency conflicts, the change in relations between companies and society began to expand the scope of good governance (Rossetti; Andrade, 2014, p. 132), moment when it begins to encompass the way corporations interact with interested third parties, namely stakeholders, such as suppliers and consumers (Fortini; Sherman, 2016, p. 176).

Nowadays, there is a great diversity of concepts on the subject, which go beyond agency conflicts and also encircle the four values of corporate governance (fairness, disclosure, accountability and compliance), which emerged from the constructive frameworks of corporate governance: the pioneering activism of Robert Monks, the Cadbury Report (1992), the OECD Principles (1999) and the Sarbanes-Oxley Act (2002), which were developed as a result of the financial market crises of the 1990s and the bad practices of several

their rights, their wealth and their return being undermined by the majority. This second agency conflict is the one that occurs most frequently in countries where ownership in the corporate system is concentrated and the capital market is immature, with little expression in relation to other sources of company capitalization. This is the case in most emerging countries. In Latin America, as in Brazil, this is one of the central issues of good governance". (ROSSETTI; ANDRADE, 2014, p. 89)

companies[23], which required the formalization of global governance standards, aiming to protect stakeholders, transparency and ethics in the corporate environment, so that companies could achieve their institutional objectives efficiently and with integrity[24].

Thus, based on the values listed, the Brazilian Institute of Corporate Governance (IBGC) (2023, p. 17) conceptualizes corporate governance as a system formed by principles, rules, structures and processes of direction and monitoring of institutions, aiming to generate sustainable value for the entity, its owners and the society in general, with the purpose of balancing the interests of all parties, in order to contribute to society and the natural environment.

Presenting a different concept, Alexandre Di Miceli da Silveira (2021, p. 6) defines corporate governance as the set of unequivocal and tacit principles, practices and rules that, from an internal point of view,

[23] The relationship between values and the constructive frameworks of corporate governance are briefly summarized by Rossetti and Andrade: "Robert Monks was a pioneering activist who changed the course of corporate governance in the United States. He focused his attention on shareholder rights and mobilized them to play an active role in corporations. Centered on two fundamental values of good governance – fairness (sense of justice) and compliance (legal compliance, especially that related to the rights of passive minorities) – this activist was one of the first to highlight the importance of good governance for the prosperity of the entire society. On the other hand, The Cadbury Report focused on the two other values of good governance – accountability (responsible rendering of accounts) and disclosure (more transparency) –, focusing on financial aspects and the roles of shareholders, boards, auditors and executives. The OECD has expanded the spectrum of good governance, highlighting its strong links with the economic development process of nations. By justifying the institution's involvement with the proposition of good governance principles, the OECD showed that the adoption, by corporations, of reliable management practices attracts investors to the capital market, reduces fundraising costs and leverages the development of the economy. And the Sarbanes-Oxley Act defined stricter criteria for internal controls, auditing, accountability and corporate management based on ethical standards, establishing strict penalties in cases of violation of an extensive list of new rules, both for the Administration Sector and the Board of Directors of the company". (2014, p. 158)

[24] At the national legal level, the concern with corporate governance grew, with regulations on the subject being found in the Securities Market Law (Law Nº 6,385/1976), in the Law on Open Market Companies (Law Nº 6,404/1976), in the Consumer Protection Code (Law Nº 8,078/1990), in the Anti-Corruption Law (Law nº 12,846/2013) and in the Law on Government-Owned Companies (Law Nº 13,303/2016).

govern the relationship between shareholders, managers, executives and employees, creating an ethical environment of voluntary compliance with rules and decision-making aligned with the institution's purpose; and, from an external point of view, it ensures that the owner exercises their rights in an equitable manner, ensuring that the organization is transparent, fair, sustainable and responsible toward its stakeholders.

Vanice Regina Lírio do Valle and Marcelo Pereira dos Santos (2019, p. 165) highlight that the concept of corporate governance comprises a model of business action endowed with transparency, objectivity and equity in the treatment of shareholders, but with responsibility regarding stakeholders.

The terminology, even though originated within the private business domain, reached the public action domain, through the initial influence of the World Bank, managerial ideals and the transposition of the application of agency theory to the public sphere, in what today is known as organizational public governance, as explained below.

## 2.2 Organizational public governence: concepts, principles and norms tendencies

As aforementioned, after the State crisis in the 1970s and 1980s, the managerial Public Administration model rose, aiming to make the State more efficient and capable of meeting social demands with strong inspiration from the private management model.

In similar circumstances, especially in the early 1990s, when scandals occurred in the financial market, corporate governance stood out as a mechanism capable of resolving agency conflicts, protecting stakeholders and making private companies more transparent and upright to achieve its institutional objectives in an ethical and efficient manner.

This context enabled a broad discussion on public governance, with new proposals for state management models (TCU, 2020, p. 29), resulting from the incorporation of governance into the public sphere.

In this scenario, in 1994, the World Bank conveyed the concept of public governance as an expression of the modus operandi for the

resource management power for countries worldwide (Valle; Santos, 2019, p. 166).

It is worth noting that, despite the concept of agency theory originated in private relations, it is fully extendable to the public domain, as observed by Matias-Pereira (2010, p. 11), when stating that governance in the state environment contemplates the administration of public sector agencies, through the application of corporate governance principles which originated in the public sector, remaining fully applicable to the State context.

With the same spirit, the Federal Audit Court (2020, p. 38) highlights that organizational public governance also originates from the agent-principal conflict, observed in the corporate governance environment.

Therefore, agency relationships are also observed in the public sector, in which society occupies the position of "principal" and the public workers, that of "agents" (Altounian; Souza; Lapa, 2017, p. 243).[25]

In the case of the Brazilian State, the sole paragraph of article 1st of the Constitution of the Republic highlights that all power emanates from the people, where such power is commonly exercised through elected representatives.

In this way, society assumes the role of principal, since they hold social power by emanated from the constitutional provision, while all those who make up the structure of the State occupy the role of

[25] In equal terms, Rossetti and Andrade highlight that "In this case, in the place of shareholders, taxpayers stand as the main agents and grantors of the public governance model. After all, the contributing citizens are the ones who channel resources to the State, capitalizing it, so that it can produce goods and services of public interest. The expectation is that public sector administrators will ensure the effective allocation of these resources and, consequently, the maximum total return on taxes paid, expressed by social dividends provided by goods and services of diffuse interest. However, as in the case of corporations, the decisions of public managers may conflict with the interests of taxpayers, especially because, as an agent allocating resources, the government tends to be less perfect than private agents, either due to the high dispersion of taxpayers and the subsequent difficulty in in-person and direct control of the public administration, or because representatives are also granted participation in decision-making processes involving the allocation of their provisions." (2014, p. 569-570)

agents, since they manage the public workforce at the service of the people (TCU, 2020, p. 38).

However, agency conflicts are also observed in relations between public agents and society, when they fail to act in the interests of society, which legitimizes the incorporation of governance into the public environment with the aim of reconciling both interests, in favor of development and serving the public interest. in a wholesome and efficient manner, the ultimate goal of Public Administration.

From the same perspective, the Federal Audit Court (2020, p. 36) establishes the concept of organizational public governance as the leadership, strategy and control mechanisms used to evaluate, direct and monitor State action, aiming to conduct public policies and the provision of services to fulfill the social interest.

Thus, governance establishes the direction to be followed, based on evidence and taking into account the interests of interested parties (TCU, 2020, p. 16).

To this end, organizational public governance involves three basic activities: i) evaluating current scenarios and results with the goal of achieving the desired ends; ii) direct, prioritize and guide policies and plans, aligning organizational functions with the needs of interested parties (service users, citizens and society in general); and iii) monitor the results, comparing them to the established goals and expectations of interested parties. Such activities are to be implemented through leadership, strategy and control practices (TCU, 2020).

The Decree-Law Nº 9,203/2017, which provides for the governance policy of direct, autonomous and foundational federal public administration, presents the same concept of public governance, as provided for in article 2, item I[26]. Furthermore, article 3 of the law

[26] Article 2: For the purposes of the provisions of this Decree, the following are considered: I - public governance - set of leadership, strategy and control mechanisms put into practice to evaluate, direct and monitor management, seeking to conduct public policies and provision of services of interest to society; [...]

provides for the principles of public governance, namely: responsiveness; integrity; reliability; regulatory improvement; accountability and responsibility; and transparency[27].

Based on the concept and principles listed, it is possible to observe several laws and administrative acts that address issues related to improving public governance, where the following are of great significance: the Code of Professional Ethics for Public Workers of the Federal Executive Branch (Decree Nº 1,171/1994), the Fiscal Responsibility Law (Complementary Law Nº 101/2000), the Decree that establishes the Ethics Management System of the Federal Executive Branch (Decree Nº. 7,203/2010), the Access to Information Law (Law Nº 12,527/2001), the Law on Conflict of Interest in the Federal Executive Branch (Law Nº 12,813/2013), the Government-Owned Companies Law (Law Nº 13,303/2016), the Decree Nº 9,203/2017 itself and other regulations that formalize the principles of public governance, aiming for more efficient and integral action in Brazilian Public Administration.

Recently, with the publication of Law 14,133, on April 1st, 2021, the concept and principles of public governance were incorporated into the public contracting environment through contracting governance, aiming for greater efficiency, effectiveness and economy in State spending, to the benefit of the public interest, as demonstrated below.

## 3 GOVERNANCE IN THE BRAZILIAN PUBLIC CONTRACTING ENVIRONMENT: MAIN NEWS IN LAW 14,133/2021

Governance in the Brazilian public contracting environment is not new brought by Law 14,133/2021. The Federal Court of Auditors, for example, in decisions and audits, already dealt with the

[27] As can be seen, these principles are directly related to the values of corporate governance: fairness, disclosure, accountability and compliance.

topic[28], as it is the case with TCU Ruling Nº 2,622/2015 – Plenary, court-opinion by Minister Augusto Nardes, in which he presents the concept of Acquisition Governance[29], which is quite similar to the concept formalized in the new 2021 Law.

However, the new legislation innovates by bringing the governance of contracting as the general rule[30], and, therefore, a federal standard for the public contracting process, with mandatory observance by all bodies and entities of the direct Public Administration, governmental agencies and foundational, being Federal, of States, of the Federal District and Municipalities, as provided in its article 1.

This is the duty of the office's or entity's high management, which must implement processes and structures, including risk management and internal controls, to evaluate, direct and monitor the processes and respective contracts, with the aim of achieving the objectives of the bidding process, promote an honest and reliable

[28] Court Decision Nº 2,622/2015 – Plenary is one that stands out, for example, which consists of an examination of the survey carried out with the aim of systematizing information on the stage of governance and management of acquisitions in a sample of Federal Public Administration organizations; the Court Decision Nº 2,681/2018 – Plenary, which deals with the consolidating audit report of the centralized guidance inspection (FOC) carried out to verify the existence of mechanisms for good governance and management of public acquisitions in universities and federal institutes; as well as Court Decisions Nº 588/2018 – Plenary, which consists of a survey carried out in bodies and entities of the Federal Public Administration aiming to systematize information on the situation of public governance and management of information technology, hiring, people and results.

[29] "Acquisition governance can be understood as the set of guidelines, organizational structures, processes and control mechanisms that aim to ensure that decisions and actions related to acquisition management are aligned with the organization's needs, contributing to the achievement of its goals." (TCU. Decision Nº 2,622/2015 – Plenary)

[30] In this regard, Rafael Carvalho Rezende Oliveira teaches that "Aside from the impossibility of establishing a precise concept and without the intention of establishing an exhaustive list of scenarios, it is possible to say that general regulations have a reasonable degree of abstraction that guarantee uniformity to the process of bidding in all federated spheres, without interfering with the regional and local peculiarities of each Federated Entity." (2022, p. 11).

environment, ensure the alignment of contracts with strategic planning and budgetary laws and promote efficiency, effectiveness and economy in their contracts, as provided for in article 11, sole paragraph, of the referred Law.

It is perceived that the concept of contracting governance exposed by the Law on Biddings and Administrative Contracts is based on evaluation, direction and monitoring, just as is the concept of public governance provided for by Federal Decree Nº 9,203/2017 and by the TCU, but focused on bidding processes and contracts, seeking to promoting efficiency, the principle of public contracting provided for in article 5 of the Law, as aforesaid.

Furthermore, the notions of leadership, strategy and control, in spite of not having been formally portrayed in the concept provided for in the law, were also widely regulated in several provisions throughout the Law, establishing the governance of contracting as an important mechanism for materializing the principles of efficiency and planning in public contracts, provided for through various legal instruments, as presented below.

## 3.1 Leadership in contracting: the duty of high management in implementing governance

The sole paragraph of article 11 of the Law provides that the implementation of contracting governance mechanisms is a duty of the senior management of the body or entity. In turn, the article 169, §1º, provides that the implementation of contracting control practices is of the responsibility of the senior (high) management, considering the costs and benefits and opting for measures that promote honest and reliable relationships, which demonstrate the importance of leadership in the contracting process.

It is crucial to highlight that one of the most important responsibilities of senior management provided for by Law 14,133/2021 is

to regulate its provisions, making them applicable according to the reality of each of the national Public Administration structures.[31]

In this regard, the governance of contracting itself also demands appropriate regulation for its effective implementation in national Public Administration bodies and entities.

Within the Federal scope, Ordinance SEGES/ME Nº 8,678, of July 19, 2021, provides for the governance of public contracts within the scope of direct, government-owned companies and foundational federal Public Administration, already aligned with Law Nº 14,133/2021.

On the other hand, Resolution Nº 347, of October 13th, 2020, of the National Council of Justice (CNJ), provides for the Public Contracting Governance Policy in the Judiciary, but in accordance with the previous bidding microsystem, since edited prior to the promulgation of the 2021 Law, in compliance with the TCU's position.

The afore-mentioned regulation will make this mechanism applicable to the actual reality of the structure, integrating the duty of the senior management to implement governance in contracting, which must be done under penalty of liability for any irregularities and damages to the treasury suffered by the body or entity resulting from the omission of senior management, as established by the TCU through Ruling Nº 1270/2023 – Plenary.[32]

Furthermore, Paulo Alves (2022, p. 19) highlights that senior management also has the duty to incorporate high standards of ethical

[31] The need to regulate Law 14,133/2021 arises from two factors: the existence of regulations of contained effectiveness and, mainly, the lack of technical infrastructure on the part of the national Public Administration to truly apply its normative provisions, especially when observing the reality of small towns, which also follows from the principle of the primacy of reality provided for in article 22 of the Introduction Law to the regulations of Brazilian Law (LINDB – Decree-law Nº 4,657-1942).

[32] "9.4.3. the failure to resolve the recurring weaknesses observed over the years in the governance of contracts [...] directly brings responsibility to the body's senior management for irregularities and possible damage to the treasury that may be found. (TCU, Court Decision Nº 1270/2023, p. 1)

conduct, in order to guide and influence the performance of public agents under their guidance.

This is the materialization of the principles of morality and administrative probity in the public contracting environment through the so-called tone at the top, since, as highlighted by the General Controller organ of the Union (CGU) (2017, p. 10), the leaderships occupy a natural prominent position in institutions, receiving greater attention from subordinates, who reproduce the leaders' actions, whether out of admiration, respect or any other reason.

In this way, the importance of the role of leaderships in implementing the governance of public contracts at all levels of national public administration is demonstrated, which is characterized as a legal duty whose non-compliance will result in liability, as per the legal understanding established by the TCU through Ruling 1270/2023 – Plenary.

## 3.2 Contracting strategy: annual hiring plan, preparatory phase and strategic planning for acquisitions

Law 14,133/2021, in its article 5, elevates planning to the level of principle, formally incorporating the provisions already provided for in article 6, item I and article 7 of Decree-Law No. 201/1967, within the scope of public contracts.

Di Pietro and Marrara (2022, p. 34-35), despite understanding that the planning principle is a sub-principle of efficiency, highlight its importance for public contracting, stating that planning is essential, as it enables carrying out a reality diagnosis and of the current situation so that it is possible to define the ideal scenario, establishing the desired results and effective measures to achieve this end (such as the objects to be contracted which will enable the achievement of the expected result), combined with the means of monitoring and evaluation.[33]

[33] According to Edgar Guimarães, "In a broad sense, it is possible to say that planning is a process that aims to determine the direction to be followed to achieve a certain result.

In this context, contracting governance has the power to materialize the principle of planning, ensuring the alignment of contracting with strategic planning and budgetary laws, as determined in the sole paragraph of article 11.

The strategic planning observes the results to be achieved by the organization (Leonez, 2022, p. 40), requiring the implementation of controls, which consist, according to Angelina Leonez (2022, p. 40), of a process that guides the activity to the end previously determined, to achieve the results, verifying whether the strategy is effective in achieving the intended institutional objectives.

In the context of public contracts, control occurs by monitoring contracts and analyzing their contributions to the implementation of the institution's strategic planning, in accordance with established priorities (Leonez, 2022, p. 41).

Thus, strategic contracting planning will enable the body or entity to achieve its mission, vision and values, in order to meet its institutional objectives. In this way, public purchases must be linked to the organization's priorities, requiring the existence of resources available to do so (Leonez, 2022, p. 44), highlighting their interconnection with budget planning.

To achieve the organization's strategic and budgetary planning, Law 14,133/2021 provides, in its article 12, item VII, the annual contracting plan (PCA), a planning and governance tool that consolidates all purchases and contracts that the body or entity intends to carry out or extend it into the following year, regardless of the object to be contracted, in a true strategic schedule of contracts, in order to rationalize public purchases, reduce the number of processes carried out annually, and, as a result, obtain better prices, in addition to increasing the organization's level of transparency.

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It enables the perception of the factual reality of a certain situation, the evaluation of alternatives and possible paths to be taken. It is, therefore, a process of evaluation and prior deliberation which organizes and rationalizes actions, anticipates results, and which aims to achieve, in the best possible way, the predefined objectives". (2022, p. 82)

For this reason, Leonez (2022, p. 44) states that the PCA is a true governance instrument, which aims to previously analyze the contracts that will be carried out or extended into the subsequent year in order to rationalize them, aligning planning with budget proposal.

This governance instrument is not new in the national legal system, as it has already been adopted in the direct, government-owned company and foundational federal Public Administration since 2019, through the Normative Instruction SEGES/ME Nº 01/2019, as well as in the Judiciary since 2017, currently provided for in Resolution Nº 347/2020, of the CNJ, and in Resolution Nº 701/2021 of the Federal Justice Council.

The novelty of Law 14,133/2021 is to enable bodies and entities of other federated entities to structure the annual contracting plan[34], in order to expand the contracting governance throughout the country.

In this sense, article 18, caput, of the Law provides that the preparatory phase of the bidding process must be compatible with the PCA, whenever prepared, and with budgetary laws, highlighting the importance of the institute for the strategic and budgetary planning of the public body or entity.[35]

Furthermore, the article mentions that the preparatory phase of the process is characterized by planning, being extensively examined

[34] Pursuant to article 12, item VII, and article 18, caput, of Law 14,133/2021, the preparation of the annual hiring plan is not mandatory, but a legal option provided for by federated entities. At the federal level, currently the obligation to adopt the PCA arises from the provisions of decree Nº 10,947, of January 25th, 2022, which provides for the duty to prepare the document by the first fortnight of May of each year, containing the contracts to be carried out in the subsequent year, in accordance with article 6 and 7 of the administrative act.

[35] In this regard, Angelina Leonez teaches that "Law Nº 14,133/2021, in article 18, presents the need to make contracting compatible with the PCA, so that its alignment with the administration's strategic planning and the budget can be identified. In this context, the PCA, with this compatibility, enables a more simplified and effective planning process" (2022, p. 49).

in Chapter II of Title II of the law, which gives great importance to the strategic planning of contracting.[36]

Among the planning mechanisms in the preparatory stage, also stand out the preliminary technical study (article 18, item I), the term of reference or basic project (article 18, item II) and risk analysis (article 18, item X) which, despite not being new to the legal system, once already provided for in normative instructions from the Federal Government[37], began to contain provisions in the general bidding law (not just in federal administrative acts), expanding the scope of incidence and the importance of strategic planning at national level.

Thus, the strategic pillar of contracting governance is verified in Law 14,133/2021 through the principle of planning and the duty of senior management to align contracting with the strategic and budgetary planning of the public body or entity, which is materialized through the contracting annual plan and preparatory phase of the contracting process, which was largely reinforced in the new legislation.

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[36] In this sense, Rafael Oliveira observes that "The preparatory phase, which was not detailed in Law 8,666/1993, receives more emphasis in the new Biddings Law, which reveals the healthy concern with the preparatory acts for the bidding, since the description of the object, the definition of the rules of the public notice, the price research and other initial acts directly impact the efficiency of the bidding and the contract itself. In fact, countless problems can be avoided by properly carrying out the preparatory acts for the bidding." (2022, p. 120)

[37] Federal direta, autárquica e fundacional. Normative Instruction SEGES/ME Nº 05/2017, which provides for the contracting of services in the direct, government-owned companies and foundational Federal Public Administration, requires detailed planning of the contracting, with provision for the need for a demand formalization document, preliminary technical study, terms of reference and risk analysis of the object to be contracted. The Preliminary Technical Study was the subject of Normative Instruction SEGES/ME Nº 40/2020, which also provides for the existence of the document, but, initially, only within the scope of the direct, autonomous and foundational Federal Public Administration.

### 3.3 Contracting control: segregation of roles, 3-line model and risk management

As noted by Renata Puccetti and Felipe Estefam (2021, p. 136), the governance measures referred to in article 11, sole paragraph, must be implemented and improved in accordance with the contracting control mechanisms, described in articles 169 to 171 of the Law.

The reason is that control is the third pillar of public governance, which received significant attention from the legislator in the edition of Law 14,133/2021 when compared to Law 8,666/1993.[38]

Among the various provisions of the 2021 Law regarding contracting control aspects, the segregation of roles (functions) stands out, being elevated to the category of principle, as provided in article 5, and has an intrinsic relationship with the principles of morality and efficiency.

With this in mind, Rafael Oliveira (2022, p. 26) teaches that the principle of segregation of roles consists of the distribution and specialization of functions among the public agents involved in the process, in order to reduce the risks of conflicts of interest in carrying out the task, in attention to the principles of morality and efficiency.

Thus, the segregation of roles (functions) prevents a single agent from monitoring and controlling their own actions (Motta, 2021), mitigating the occurrence of fraud, conflicts of interest, disregard of failures and perpetuation of errors in the contracting process.

[38] In this sense, Marcia Pelegrini observes that "The theme of control in Law 14,133/21, provided for in Title IV of Chapter III, called "Control of Contracts", found no similarity in the legislation in force at the date of its publication, with the exception of § 4 of article 170, which authorizes any person, natural or legal, to represent the internal control bodies or the Court of Auditors against irregularities in the application of the law. Similar provisions are present in article 113, § 1, of Law 8,666/93, and article 46 of Law 12,462/2011, which authorizes us to state that the legislator, on the topic related to contracting control, has made significant progress, increasing to the category of law several aspects previously developed and treated by the jurists, jurisprudence and infra-legal regulations. (2021, p. 707)

Related to the segregation of functions, article 7 of the Law highlights management by competencies in the designation of public agents to perform roles essential to the implementation of the norm, which consists of valuing the merit and specific competencies of each agent for certain tasks within the contracting process, designating them according to their specialties, promoting systemic improvement of the process, and, combined with the segregation of functions, better controls over public contracting.

The sole paragraph of article 11 and the caput of article 169 also highlight risk management in public purchases, a topic of utmost importance for good governance.

Matheus Lourenço Rodrigues da Cunha (2020, p. 235) observes the analysis and management of risks in public contracts as an instrument for preventing corruption, portraying compliance risk management (pillar of good governance) in two distinct moments: analysis and evaluation of risks; and risk management.

The first stage will allow the mapping of risk factors, the consequences of their materialization, the internal processes related to them, and the key people responsible for the risk. From this, a diagnosis of the situation will be carried out in order to quantify the chances of these events materializing. The second stage arises from the implementation of decision-making strategies in relation to the mapped risks, such as accepting, eliminating, sharing or mitigating their manifestation (Cunha, 2020, p. 235).

It should be noted that, in addition to the management of integrity risks inherent to the public contracting process (the implementation of which, in itself, will allow the materialization of the principles of morality and administrative probity provided for in article 5 of the Law), it is also possible for the management of other types of risks, such as financial and economic risks, for example.

Thus, the analysis and assessment of risks will enable the mapping of risk factors inherent to the process, enabling their allocation in a risk matrix and classification of these according to the scale of

probability and impact of their occurrence, so that structuring and prioritization of action plans to mitigate these future and uncertain events are possible, according to the strategy and risk appetite of the public body or entity.

Through action plans, the implementation of internal controls are to become more efficient and effective, so that the institution fulfills its strategic planning and achieves the objectives of the bidding process (article 11, caput).

Therefore, risk management has an intrinsic relationship with the efficiency and effectiveness of internal controls which, according to the literal meaning of aricle 169 of the law, began to adopt the 3 (three) lines methodology, in compliance with the guidelines of the Institute of Internal Auditors (IIA, 2020).

The first line is made up of bidding agents and authorities who work in the governance structure of the body or entity, being the so-called "risk owners", responsible for its identification, evaluation and mitigation, according to the internal controls implemented. (Pelegrini, 2021).

The second line will be integrated by the legal department and the internal control unit of the body or entity, with the execution advisory line being responsible for supervising and contributing to the development and monitoring of the controls implemented by the first line. (Pelegrini, 2021, p. 716).

As for the third line, item III of article 169 is flawed in its legislation technique, as it provides that it will be integrated by the Administration's central internal control body and the Court of Auditors, as it incorporates typical external control bodies (such as the Court of Auditors) into the notion of internal control lines of defense.[39]

Thus, the third line, according to the IIA methodology, will be of the responsibility of the internal audit of the body or

[39] In this regard, Marcia Pelegrini highlights that "it cannot go unnoticed the strangeness caused by the inclusion of the Court of Auditors in this line of defense, since the chapter commented is concerning internal control." (2021, p. 718).

entity, which will perform its functions with independence and impartiality.[40]

Based on this internal control structure, it will be possible for the public body or entity to achieve the bidding objectives set out in article 11, through good contracting governance.

## 4 CONCLUSION

The search for efficiency in public contracts reflects a historical pursuit, which began, on Brazilian soil, with the bureaucratic reform at the end of the 1930s and was accentuated with the incorporation of managerial notions through the Decree-Law nº 200/1967 and the State reform in the 1990s, culminating in the constitutional amendment 19/98, which raised efficiency to the level of a constitutional principle of Public Administration.

Thus, notions of private management began to be incorporated into public management, as it is the case of corporate governance which, based on agency theories, resulted in the concept of organizational public governance, aiming to promote a more efficient public administration in meeting public interests.

In the public contracting environment, based on organizational public governance and on TCU's jurisprudence, contracting governance was incorporated into Law 14,133/2021 as a duty to be implemented by the high management of the public body or entity,

[40] were within the hierarchical structuring scope of the Administration." (2021, p. 523). Luciano Ferraz and Fabrício Motta hence clarify that "in the original design of the three lines, the third line of defense is comprised of na internal audit, which in a certain way could lead to the escalation of the Administration's central internal control body to this line, as provided for in article 169, item III, but not of the competent Court of Auditors, which, as stated, are formally allocated within the scope of the Legislative Power, being within the scope of the hierarchical structuring of the Administration". (2021, p. 523)

under penalty of liability, as per legal understanding adopted by the TCU in ruling 1270/2023 – Plenary.

To this end, based on the notions of leadership, strategy and control, the Law provides mechanisms for carrying out contracting governance, as it is the case with strategic planning (article 11, sole paragraph), with the annual contracting plan (article 12, item VII), with the preliminary technical study (article 18, item I), with the term of reference or basic project (article 18, item II), with the risk analysis (article 18, item X), with the segregation of functions or roles (article 5), with the management by competencies (article 7), with the risk management (article 11, sole paragraph, and, article 169, caput) and with the internal controls, under the methodology of the three lines of the IIA (article 169).

These legal instruments comprise the governance of contracts and will enable the Public Administration to achieve the objectives of the bidding process, listed in the caput of article 11, in an efficient and effective manner, taking into account the strategic and budgetary planning of the public institution, materializing the principles of efficiency and planning in public contracts, according to the principles listed in article 5 and in attention to the historic movement in favor of good public administration.

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