Open Contracting: an analysis of the New Law on Bidding and Administrative Contracts (nº 14.133/2021) in light of the principles of Open Government

Contratações Abertas: uma análise da Nova Lei de Licitações e Contratos Administrativos (nº 14.133/2021) à luz dos princípios de Governo Aberto

Contratación Abierta: un análisis de la Nueva Ley de Licitaciones Públicas y Contratos Administrativos (nº 14.133/2021) a la luz de los principios del Gobierno Abierto

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Abstract: The New Law on Bidding and Administrative Contracts (nº 14.133/2021) was sanctioned in April 2021. The new Brazilian legal framework regarding the bidding procedure is considered a merger of previous legislation, with few effective innovations that promote the fight against corruption. One of the possible ways to improve anti-corruption mechanisms in procedures or public policies is the adoption of the principles of the international agenda named Open Government, through the Open Contracting movement. Thus, the effort of this work is to analyze the new framework, with the purpose of recognising which mechanisms the new law has in light of the Open Government principles. For this purpose, the maturity levels of the four principles of Open Government, developed by César Nicandro Cruz-Rubio (2014) with the enlargement by Fernanda Campagnucci (2020), will be used as an analysis standard. One of the objectives of this maturity model is to guide the adoption of more open public policies or procedures, allowing the monitoring of the evolution of these actions. Based on this model, the analysis showed that the new regulation of bidding procedures and administrative contracts (i) innovated on the transparency' principle, with the launch of the National Public Procurement Portal predicting open data, enabling the most advanced level of transparency; (ii) remained at the intermediate level in the principles of citizen participation; (iii) consolidated at the advanced level in *accountability* and (iii) still has the basic level in the principle of technological innovation. The evaluation of the new legislation revealed that not all possible mechanisms to fight corruption are being used, but the normative is moving towards greater transparency in the procedure.

Keywords: public procurement; open government; open contracting; new law on bidding and administrative contracts; public policies

Resumo: A Nova Lei de Licitações e Contratos Administrativos (nº 14.133/2021) foi sancionada em abril de 2021. O novo marco jurídico brasileiro referente ao procedimento licitatório é considerado uma fusão das legislações anteriores, com poucas inovações efetivas que promovam o combate à corrupção. Um dos possíveis caminhos para o aprimoramento dos mecanismos anticorrupção em procedimentos ou políticas públicas é a adoção dos princípios da agenda internacional intitulada Governo Aberto, por meio do movimento Contratações Abertas. Dessa forma, o esforço deste trabalho se encontra em analisar a nova legislação, com o propósito de compreender os mecanismos da nova lei à luz dos princípios de Governo Aberto. Utiliza-se como critério de análise os níveis de maturidade dos quatro princípios de Governo Aberto, desenvolvido por César Nicandro Cruz-Rubio

(2014) com ampliação de Fernanda Campagnucci (2020). Esse modelo de maturidade tem como um de seus objetivos nortear a adoção de políticas públicas ou procedimentos mais abertos, facilitando o monitoramento da evolução dessas ações. A partir desse modelo, a análise revela que a nova regulamentação dos procedimentos licitatórios e dos contratos administrativos: (i) inovou no princípio de transparência, com o lançamento do Portal Nacional de Contratações Públicas prevendo a abertura dos dados, possibilitando o nível mais avançado de transparência; (ii) se manteve no nível intermediário nos princípios da participação cidadã; (iii) se consolidou no nível avançado em *accountability* e (iii) possui ainda o nível básico no princípio de inovação tecnológica. A avaliação da nova legislação aponta que não estão sendo utilizados todos os mecanismos possíveis de combate à corrupção, mas que a mesma avança em direção à maior transparência dos procedimentos.

Palavras-chave: contratações públicas; governo aberto; contratações abertas; nova lei de licitações e contratos administrativos; políticas públicas.

Resumen: En abril de 2021 se sancionó la nueva Ley de Licitaciones Públicas y Contratos Administrativos (nº 14.133/2021). El nuevo marco legal brasileño referente al procedimiento de licitación se considera una fusión de legislaciones anteriores, con pocas innovaciones efectivas que promuevan la lucha contra la corrupción. Una de las posibles formas de mejorar los mecanismos anticorrupción en los procedimientos o políticas públicas es la adopción de los principios de la agenda internacional titulada Gobierno Abierto, a través del movimiento de Contratos Abiertos. Así, el esfuerzo de este trabajo es analizar la nueva legislación, con el propósito de entender los mecanismos de la nueva ley a la luz de los principios del Gobierno Abierto. Se utiliza como criterio de análisis los niveles de madurez de los cuatro principios de Gobierno Abierto, desarrollados por César Nicandro Cruz-Rubio (2014) con la ampliación de Fernanda Campagnucci (2020). Este modelo de madurez tiene como uno de sus objetivos orientar la adopción de políticas públicas o procedimientos más abiertos, facilitando el seguimiento de la evolución de estas acciones. A partir de este modelo, el análisis revela que la nueva regulación de los procedimientos de licitación y los contratos administrativos: (i) innovó en el principio de transparencia, con la puesta en marcha del Portal Nacional de Contratación Pública que permite la apertura de datos, posibilitando el nivel más avanzado de transparencia; (ii) se mantuvo en el nivel intermedio en los principios de participación ciudadana; (iii) se consolidó en el nivel avanzado en la rendición de cuentas y (iii) sigue teniendo el nivel básico en el principio de innovación tecnológica. La evaluación de la nueva legislación señala que no se están utilizando todos los mecanismos posibles para luchar contra la corrupción, pero que avanza hacia una mayor transparencia de los procedimientos.

Palavras-clave: contratación pública; gobierno abierto; contratación abierta; nueva ley de licitaciones y contratos administrativos; políticas públicas

INTRODUCTION

The public contracting process is essential to understand how part of public money is spent. In this way, a significant part of the use of the public budget is materialized in the acquisition of goods, services and works from public contracting procedures. Therefore, an open procedure with the possibility of social control is essential, since the risk of corrupt practices and waste of public money increases due to the amount of money invested.

The new Law No. 14.133 – Law on Bidding and Administrative Contracts (NLLC) –, came into force on April 1, 2021. It regulates public contracting and contracts in Brazil based on procedures aimed at acquiring goods and services of collective interest. According to the NLLC, a two-year period is necessary for it to be effectively implemented. In this way, it opens a space for the debate on the integrity in public procurement, since the opportunities for using corrupt practices in the bidding procedure represent one of the significant points when dealing with public contracting. In view of this, it is possible to avoid irregularities and preventing corruption by adopting the Open Contracts movement, which aims to promote reforms so that fair and efficient public contracting is carried out. This movement is based on the four Open Government principles (transparency,

social participation, accountability, and technological innovation), defined by the Open Government Partnership, which emerge as possible tools for an administrative reform that seeks better delivery of public goods and services to the population.

In this sense, Cruz-Rubio (2014) and Campagnucci (2020) defined criteria for evaluating the open government principles as instruments of reform in public management, building a model that contains levels of maturity, so that it is possible to analyze the progress of these principles in public policies. Therefore, this work aims to analyze the New Law on Bidding and Administrative Contracts in the light of Open Government principles, using the criteria and maturity levels defined by the aforementioned authors.

This work is structured into three sections, in addition to this introduction and final considerations: i) Brazilian public contracting and corruption; ii) the concept of open government, its principles and open contracting, and iii) analysis of the new legislation.

BRAZILIAN PUBLIC CONTRACTING AND CORRUPTION

Public procurement is an important component when it comes to government finances. Public contracts stimulate income generation through the purchase of goods, contracting of services, issuance of licenses to operate public services, extraction of natural resources, and infrastructure contracting. Thus, when we talk about the allocation of public resources, all levels of government enter into contracts to provide citizens with quality goods, works, and services.

For the private sector, public procurement is an important source of income, in which companies compete for contracts and are accountable for their performance (Marchessault, 2013). Public contracting is also important for citizens, since contracting is one of the main means by which the population receives the maintenance of public hospitals and schools, for example (OCP, 2016).

Public contracts must be signed fairly and offer an advantageous proposal to the Public Administration. However, in both developed and developing countries, public contracting has been recognized as the government activity most vulnerable to wasting public money, mismanagement, inefficiency and corruption, according to surveys carried out by the World Bank and the Organization for and Economic Cooperation and Development (Marchessault, 2013).

This article will address public contracting resulting from a bidding process or waiver of bidding. The 1988 Federal Constitution, in its art. 37, XXI, determines that administrative contracts have to be preceded by a bidding procedure, not counting the exceptions provided for by law.[1] In general, it can be said that "bidding refers to the practice of an orderly series of legal acts, forming the bidding procedure, which allows individuals to offer their services to the Public Administration" (Santos e Silva, 2021, p. 03), generating an administrative contract.

In Brazil, public contracting has as a general rule[2] the New Law on Bidding and Administrative Contracts (Law No. 14.133/2021). Previously, Law nº 8.666/1993 was used, together with a series of subsequent documents (Di Pietro, 2020). Nester (2020, p. 01) states that the new legislation "does not contain effective innovative mechanisms to combat the main issues of the public contracting process and the execution of public contracts," especially because it is considered a compilation of previous laws. One of the real existing issues is the use of the bidding procedure as a platform for corrupt practices (Júnior, 2018).

The Organization for Economic Cooperation and Development (OECD) defines corruption as the abuse by public and private agents to obtain personal advantages, referring not only to the receipt of bribes, but also to practices such as nepotism, fraud, and state capture (Fortini and Motta, 2016). In Brazil, the practice was typified as illegal by articles 317 and 333 of Decree-Law No. 2.848/40 (Criminal Code), which refer to active and passive corruption. Furthermore, the Anti-Corruption Law (nº 12.846/2013) and the Administrative Misconduct Law (nº 8.429/1992, amended by Law No. 14.230/2021), are directed at repelling corrupt practices by public agents or others involved that harm the Public Administration, such as fraud in bidding procedures.

In this sense, Júnior (2018) analyzes the main frauds in the bidding procedure, raising concrete cases in which it allowed the occurrence of corrupt

1. The current exceptions to the bidding procedure are present in Chapter VIII – Direct Contracting, Section III – Waiver of Bidding, of Law No. 14.133/2021.

2. When legislation is considered a general rule, it must be followed by states and municipalities (Di Pietro, 2020).

acts. The main governmental-responsibility frauds identified by the author occur in: Preparation of the Terms of Reference or Basic Project,[3] with generic expressions or with too much detail; Price Survey,[4] with receipt of overpriced prices and fraudulent quotes; addition of bidding restrictions,[5] which compromise the character of competition, and absence or little publicity about the event.

Fortini and Motta (2016), based on reports presented by the OECD and Transparency International, state that the costs of corruption in the bidding procedure reach large amounts of public money, affecting the economy and the citizens' social rights. According to the OECD (2014, qt. in Fortini and Motta, 2016), corruption adds a cost of 25% to public contracts in developing countries, values that affect directly the economy and public services. Thus, it is important to consider which reforms and which practices should be implemented in the Brazilian bidding procedure to avoid these irregularities.

OPEN GOVERNMENT AS A PUBLIC MANAGEMENT REFORM TOOL

The demand of Brazilian society for new forms of public management is manifested in a context in which, after successive fiscal and political crises, there is no longer any legitimacy in government actions, and the State has to undergo a process of transformation to regain citizens' trust (Bergue, 2011). Open government emerges as a way to initiate an administrative reform that proposes bringing the government and the population closer together, better delivery of public goods and services and, consequently, the possibility of recovery of trust in the State.

According to Cruz-Rubio (2015, p. 145), open government can be considered a "political-administrative philosophy, based on the values and principles of transparency, participatory democracy and citizen empowerment, accountability, open data, and the use of technological innovations." This concept is not consensual in the academic literature, and it is just one of the possibilities of interpretation (Bellix, Guimarães and Machado, 2017). Thus, there are different views on government openness, from different international organizations and governments (Oliveira, 2020), and the Open Government Partnership (OGP) is one of the main references.

The OGP is a voluntary multilateral international platform that aims to ensure government openness commitments from several countries and subnational governments (Peixoto, 2019). The platform defines four principles for open government, in line with the concept of Cruz-Rubio (2015): transparency, citizen participation, accountability, and technological innovation (OGP, 2015). Based on these principles, governments and non-state actors have the autonomy to implement their actions according to the local context and government priorities, because the partnership does not establish a specific agenda (Peixoto, 2019).

After a decade of its launch, more than 70 countries and 20 subnational governments have gone into the partnership, developing and implementing their action plans in collaboration with civil society[6] (Peixoto, 2019; Oliveira, 2020). Three Brazilian subnational governments are also part of the partnership: the city of São Paulo; the city of Osasco, and the state of Santa Catarina.

In the Brazilian case, there were other initiatives prior to joining the OGP that can be considered open government (Peixoto, 2019). However, the concept of governmental openness spread in the country from the elaboration of its first national action plan. In this sense, the principles to be considered in the analysis of the new legislation will be the same as on the platform, in an effort to align with the other Brazilian open government initiatives fostered by these Action Plans.

The four defined principles are related and many times one stands out from the other. For Zárate (2019), there is a logical line that starts with the disclosure of data and access to information, produ-

3. The Terms of Reference (in the case of goods or services) or Basic Project (in the case of works) must contain the set of necessary and sufficient elements, with adequate precision, that characterize the goods, service, or work to be contracted or provided (Di Pietro, 2020).

4. The Price Survey is an existing step to raise the estimated value of the contract, calculated based on the values practiced by the market, amounts paid by the Administration in services, goods or similar works, or in the evaluation of the global cost of the work from predictions (Di Pietro, 2020).

5. The Public Notice is the instrument used by the Administration to publicize the opening of the bidding, which has the conditions for carrying out the procedure and invites interested parties to submit their proposals (Meirelles, 2015).

6. The elaboration and implementation of an Action Plan aims to make governments assume concrete and ambitious commitments that go beyond current development practices, based on a multi-stakeholder process, that is, with the active participation of civil society organizations (CSOs) (OGP, 2015).

cing government transparency, which is placed as a subsidy for rendering of accounts and a reliable government posture (accountability). The possibility of social control over governmental acts creates space for social participation that strengthens trust for the fruitful collaboration between society and government. Technological innovation emerges as a catalyst to this process, expanding the possibilities of transparency and communication between the actors. Although there is a relationship between the principles at some level, many open public and open government policies emphasize one or the other.

Transparency has been widely discussed as a tool to solve government issues such as inefficiency and corruption, and it is materialized in the availability and access to information of public interest in State actions and decisions (Peixoto, 2019). In public policy studies, transparency is defined as the government's willingness and ability to disseminate relevant policy data, including decisions, results, and processes (Heald, 2006; Oliveira, 2020).

There are some ways of classifying transparency, such as active and passive. Active transparency refers to the publication of information of general interest by public organizations, whether motivated or not by legal obligations and without the need for a request from society (Darbishire, 2010; Oliveira, 2020). On the other hand, passive transparency boils down to the availability of requested information that meets the requester's particular interest (Oliveira, 2020).

In Brazil, both forms of transparency are regulated by the Law on Access to Information (LAI), in articles 8 to 14. LAI has become the main legal framework for Brazilian public transparency.[7] The legislation regulated the constitutional right provided for in art. 5, which addresses the right to access public information, at the three federative levels and in the three powers, defining access as a rule and secrecy as an exception.

Transparency is closely related to the concept of accountability, since it is a necessary dimension – even if not sufficient –, for its effectiveness (Rodrigues et al, 2021). For the OGP (2015), accountability corresponds to a set of rules and mechanisms that oblige the government to justify its actions, act in the face of criticism or demands and take accountability in the face of non-compliance with laws or commitments.

O'Donnell (1998) defines that democratic accountability seeks to combine two typologies: horizontal accountability and vertical accountability. The first is defined as the existence of state institutions, such as the National Congress and the Courts of Accounts, which have the right, legal power, and autonomy to carry out supervisory actions regarding the acts or omissions of public agents, and also apply punishments. The latter refers to the relationship between citizens and governments, that is, plebiscites, freedom to make social demands, and media coverage of these demands and of unlawful acts by state authorities and agents.

Barros (2008) presents accountability mechanisms based on the two typologies presented for Brazil. Horizontal accountability, according to the author, emphasizes provisions expressed in the 1988 Federal Constitution, such as: possibility of questioning ministers in relation to a given subject (art. 50); provision for the constitution of parliamentary inquiry commissions (art. 58, para. 3); provision, by the Chamber of Deputies, for rendering of accounts by the President of the Republic (art. 51, II); provision for evaluation, control and inspection of budget execution by the Legislative Branch, and the obligation of public agents and others who have a relationship with public goods and values to render accounts (art. 70). As mechanisms of vertical accountability, Barros (2008) indicates the holding of free and periodic elections, freedom of the press and the social control exercised by civil society over public power.

Thus, for transparency and accountability to be effective, the OGP (2015) defines a third principle: citizen participation – that is, society's participation in public debates encouraged by governments and, therefore, associated with representative democracy (Peixoto, 2019). In short, citizen participation consists of the inclusion of different actors in political decisions and in the process of formulating, implementing, and evaluating public policies (Milani, 2008). Citizen participation, therefore, differs from political participation, in which the operating environment restricts participation to electoral activities (Carneiro and Brasil, 2016).

7. Before the LAI sanction, there were other infra-constitutional regulations that addressed the issue of government transparency in Brazil, namely: Fiscal Responsibility Law (Supplementary Law No. 101/2000, of May 4, 2000); Decree No. 5.482/2005, of June 30, 2005; Decree No. 5.687/2006, of January 31, 2006; Complementary Law No. 131/2009, of May 27, 2009, and Decree No. 7.185, of May 27, 2010.

As presented by Santos and Gugliano (2015), citizen participation aims to include citizens in the process of deliberation on public policies, to fill the gap between state decisions and the real demands of the population, which until then were measured only through electoral majorities. Thus, citizen participation is made possible through some mechanisms, such as: public hearings, public policy councils, deliberative consultations, advisory committees, public forums, and digital platforms (Oliveira, 2020).

In the same way that the Internet enabled different forms of participation through digital platforms, "technological innovation" is also considered by the OGP (2015), an Open Government principle. According to Ramírez-Alujas and Dassen (2012), technologies and digital culture have played an important role in the dissemination of the concept of open government.

Technology provides a basic infrastructure that enables simpler access to information, mainly governmental, as well as promoting environments that provide new types of interaction, leading to more open and collaborative practices (Ramírez-Alujas and Dassen, 2012). For Cruz-Rubio (2014) and Campagnucci (2020), this principle has a more instrumental nature, as an incentive for the other principles.

It is important to emphasize that the principle of technological innovation is embedded within this broader umbrella called open government. Therefore, just the use of technology does not necessarily mean that it is fostering governmental openness. Thus, Cruz-Rubio (2014) and Ramírez-Alujas (2010) state that the incorporation of technologies into public management aims to impact transparency and communication with citizens positively, facilitating the distribution of data and information by the government. Campagnucci (2020) also reinforces the importance of more open technologies[8] being an objective of open government.

As exposed by Peixoto (2019), the use of technology constituting the Electronic Government gains relevance in Brazil from the second half of the 1990s. In this sense, at least four initiatives stand out: (i) constitution of the Electronic Government Executive Committee and the edition of the Electronic Government Policy; (ii) adoption of the Transparency Portal for all federative entities; (iii) the Civil Rights Framework for the Internet (Law No. 12.965/2014), and (iv) Digital Government Law (No. 14.129/2021). The four initiatives demonstrate how the principle of technological innovation can be used as a tool for governmental openness.

Thus, it is noted that the principles of transparency, accountability, citizen participation, and technological innovation have a wide range of definitions and applications within an open government. In order to make it possible to assess the progress of Open Government in public administration, Cruz-Rubio (2014) develops a maturity model based on his understanding of these principles that can be used as guidelines in the adoption of open public policies, facilitating their evolution.

For the elaboration of this model, the author aimed to present the conceptual and practical elements that allow identifying, designing, and proposing alternatives for public action to enhance or promote the Open Government principles (Cruz-Rubio, 2014). Bello de Carvalho (2020), based on the initial model by Cruz-Rubio (2014) and the considerations presented by Campagnucci (2020) regarding the principle of technological innovation, composes a table presenting the three levels of maturity in the four Open Government principles. Thus, the authors define the criteria used to assess the development status of these principles, which can be seen in the table below.

8. Open technologies enhance and enable participation and collaboration in the design of tools and digital infrastructure, in addition to promoting transparency and protecting citizens' privacy (CAMPAGNUCCI, 2020).

TABLE 1 - OPEN GOVERNMENT PRINCIPLES AND THEIR MATURITY

	TRANSPARENCY CRITERIA	CITIZEN PARTICIPATION CRITERIA	*ACCOUNTABILITY CRITERIA*	TECHNOLOGICAL INNOVATION CRITERIA
Basic level	Passive transparency: the citizen's right to request and receive public information from the government	Information: provide the population with clear and objective information about the situation	Procedural information: disclose of clear information about procedures	Digital tools and services: implementation of free technology to promote transparency, participation, or accountability
Intermediate level	Active transparency: Public Administration bodies must make relevant detailed and updated information available to the population	Consultation: get feedback from the public to receive alternatives and new solutions	Responsiveness and justification: existence of accountability rules and mechanisms that allow government actors to justify their actions in the event of non-compliance with rules	Open code: open-source code, promoting public investment transparency, society participation, and the system replication by other institutions
Advanced level	Collaborative transparency: way of providing data that enable collaborative work in the processing, analysis, and transformation of information	Involvement and/or Collaboration: work with the population during the process in order to understand its demands Delegation and/or Empowerment: leave the final decision in the population's hands	Duty, sanctions and rewards: transparent and open system that assigns duties and establishes sanctions in case of non-compliance	Open Innovation or Open Collaboration: interaction of society with the public and private sector in structured processes and in public repositories, such as GitHub

Source: Author's elaboration, based on Bello de Carvalho (2020), Campagnucci (2020), and Cruz-Rubio (2014).

With the development of this model, Cruz-Rubio (2014) shows that open government can be a strategy for the design of public policies in general, in which it is possible to open any public policy, as long as the four defined principles are included effectively in its design. Thus, public contracting is within the possibilities of implementing the open government agenda. According to Cruz-Rubio (2014, p. 37) "open contracting is a public management strategy based on the incorporation of the OG principles throughout the contracting process in which the public administration is involved."

Aiming at making the public procurement process more open, effective, fair and sustainable, the Open Contracting Partnership, an international platform, was created so that relevant actors can exchange experiences, besides creating a network that enables the implementation of open public procurements around the world (Gätjen, 2014). The Open Contracting movement emerges with the objective of fostering a culture that encourages an environment for disclosure of the public contracting process and contracts, in addition to expanding society's more active participation.

Transparent and participatory public procurement can cut costs, ensure better value for money, reduce fraud and corrupt practices, provide more opportunities for companies, and empower citizens to hold government accountable, developing more trust and improving contract performance (OCP, 2016).

Thus, in order to verify whether the new legislation regarding bidding and administrative contracts has the necessary tools to promote open contracting, its provisions will be analyzed based on the criteria proposed by Cruz-Rubio (2014) and Campagnucci (2020) for the open government principles. The choice as to using these authors' understanding of open government and its principles, to the detriment of other concepts, stems from the need to analyze aspects of the NLLC from an evaluation instrument that allows for a systematic assessment of how open Brazilian public contracting and which points are subject to improvement in the new legislation.

ANALYSIS OF THE NEW LAW ON BIDDING AND ADMINISTRATIVE CONTRACTS IN THE LIGHT OF OPEN GOVERNMENT PRINCIPLES

One of the main issues of the bidding procedure is the possibility of practicing corrupt acts. In turn, the enactment of the new general rule for bidding and administrative contracts creates an opportunity for the review and improvement to public procurement processes. Therefore, this analysis is aimed at recognizing the anti-corruption mechanisms of the new legislation based on the open government agenda principles, in order to understand whether all possible tools are being used to prevent corrupt practices and what improvements are possible.

For the purposes of this analysis, the provisions referring to bidding and administrative contracts (including contracts generated by waiver of bidding) applicable to all goods, services and works that meet the criteria of maturity levels will be considered, not taking into account more specific regulations, such as the disclosure on a website and on an information sign to notify the population of the reason for the work at a standstill, as provided for in art. 115, para. 6. Furthermore, the analysis has as a reference the governmental accountabilities in relation to administrative acts. Thus, the duties of the bidder or contracted party will not be addressed. That being said, the table below shows the provisions of the new legislation in light of the open government principles, according to the understanding of the concept by Cruz-Rubio (2014) and Campagnucci (2020):

TABLE 2 - ANALYSIS OF THE NEW LAW ON BIDDING AND ADMINISTRATIVE CONTRACTS (NO. 14.133/21) BASED ON THE MATURITY LEVELS OF THE OPEN GOVERNMENT PRINCIPLES

NÍVEL	TRANSPARÊNCIA	PARTICIPAÇÃO CIDADÃ	*ACCOUNTABILITY*	INOVAÇÃO TECNOLÓGICA
Basic level	- The acts performed in the bidding procedure are public (art. 13)	- The acts performed in the bidding procedure are public (art. 13)	- Orientações documentais (Art. 12) - Discriminação das fases do processo licitatório (Art. 17) - Realização da sessão em formato eletrônico ou presencial com gravação (Art. 17, § 2º)	- Criação de catálogo eletrônico de padronização de compras (Art. 19, inciso II) - Criação do Portal Nacional de Contratações Públicas (Art. 174)
Intermediate level	- Disclosure of the Annual Contracting Plan (art. 12, para. 1) - Disclosure of all elements of the public notice (Art. 25, para. 3) - Publication in the Official Gazette and a large circulation newspaper (Art. 54, para. 1) - Prior disclosure in case of waiver of bidding (Art. 75, para. 3) - Disclosure of the contract and its amendments (art. 91) - Sanctions applied by the government (art. 161) - Creation of the National Public Procurement Portal (art. 174)	- Possibility of calling a face-to-face or online public hearing (art. 21) - Possibility of submitting the bidding procedure to prior public consultation (art. 21, sole paragraph)	- Prohibition of actions that hinder competitiveness (art. 9) - Defense in administrative spheres (art. 10) - Establishment of internal control and risk management (art. 11) - Contracting control (Chapter III) - Contract Inspection (art. 117)	NO TECHNOLOGICAL INNOVATION
Advanced level	- Open data on the National Public Procurement Portal (art. 174)	NO TECHNOLOGICAL INNOVATION NO TECHNOLOGICAL INNOVATION	- Minimum requirements for public agents who work with bidding procedures (art. 7) - Public Agents (Chapter IV) - Crimes in Bidding and Administrative Contracts (Chapter II-B of the Penal Code)	NO TECHNOLOGICAL INNOVATION

Source: Author's elaboration, based on Bello de Carvalho (2020), Campagnucci (2020), and Cruz-Rubio (2014).

Analyzing the framework, it is observed that the NLLC presents relevant use of open government tools, but still not enough. The principle of transparency emerges as the greatest advance in the scope of open government, and it is included in art. 5 as a law guiding principle. In addition to including the principle as a guide, the law has the most advanced level of maturity in transparency.

The basic level, at which every citizen has the right to request and receive public information from the government, is present in the item that states that all acts performed in the bidding procedure are public (art. 13). This article has the support from the main legal framework regarding transparency in Brazil, LAI (nº 12.527/2011), which regulates passive and active transparency, in articles 5 and 8. Besides determining active transparency, the LAI establishes that public bodies and entities must disclose information concerning bidding procedures in an active manner, including the respective public notices, results, and contracts entered into.

Thus, in compliance with the legislation, in addition to the creation of the National Public Procurement Portal (PNCP) as a centralizing platform for the active availability of data referring to public procurement (art. 174), the NLLC establishes minimum information to be actively disclosed by the public bodies, such as the Annual Contracting Plan (art. 12, para. 1), all the elements of the public notice of the bidding procedure (art. 25, para. 3), and the contract and its amendments (art. 91). It also determines the prior disclosure in cases of waiver of bidding (art. 75, para. 3) and the disclosure of sanctions applied at the National Registry of Ineligible and Suspended Companies (CEIS) and at the National Registry of Punished Companies (CNEP) in the article 161. For Williams (2015), promotion of transparency and access to information is an essential measure for improving public management and strengthening democracy. Therefore, the adoption of these provisions by legislation plays an important role in governmental openness.

The law also establishes that the public notice must be published in the Official Gazette and a widely circulated newspaper (art. 54, para. 1). This paragraph had been vetoed by President Jair Bolsonaro, consenting only to the caput of this article, which regulates that the public notice must be made available on the National Public Procurement Portal (PNCP). The justification presented was that only the use of the Portal guarantees the principle of publicity of acts related to public contracting (Rocha, 2021). However, Congress overrode the president's veto.

President Jair Bolsonaro also vetoed another provision (para. 5 of article 174) that affects the transparency of information of collective interest regarding public procurement: the National Database of Electronic Invoices. Civil society organizations expressed themselves in a letter to Congress asking for the veto to be overridden (article 19, 2021); however, it has not happened, creating an obstacle to access to information.

The creation of the PNCP (art. 174) emerges as one of the greatest novelties of the new law. The objective is to develop a system that centralizes all information about public contracts of the three federative entities – Union, states, and municipalities.[9] With this platform, information about all public bidding procedures and contracts governed by Law No. 14.133/21 will be made available, aiming at giving more publicity and transparency to the procedures.

The PNCP will adopt the open data regime (art. 174, para. 4), observing the requirements of the Law on Access to Information. The inclusion of this tool elevates the new legislation to the most advanced maturity level of transparency, since the availability of public procurement data, covering all federative entities, will allow citizens to supervise the use of public money in an easier and collaborative manner. Until then, there was no provision for the use of open data in Law No. 8.666/93.

Before the creation of the Portal, in order for the population to obtain information about public contracting in general, it was necessary to access individually each website or official journal of the states and municipalities. According to the law, smaller municipalities (up to 20,000 inhabitants) will have six years to adapt to the new electronic advertising rules and adopt the PNCP. According to the Portal,[10] infor-

9. The system will be managed by the National Public Contracting Network Management Committee, chaired by the President of the Republic and composed of three Union representatives, two representatives from the States and the Federal District, and two representatives from the municipalities (art. 174, para. 1, items I , II and III).

10. National Public Procurement Portal - PNCP, "Dúvidas" [Doubts]. Available in the Portuguese language on: <https://www.gov.br/compras/pt-br/pncp/duvidas>. Access on November 4, 2021.
Application Programming Interface is a way of integrating systems in a fast and safe manner, generally communicating with a third party database (Escola de Dados, 2019).

mation is made available by the federative spheres based on the integration via API (Application Programming Interface) between the platforms and other websites that provide data on public contracting, such as the Transparency Portals.

The new legislation demonstrates great advances in the maturity level of transparency, but does not have great advances in the criteria of citizen participation, remaining at the intermediate level. For the basic maturity level of citizen participation, at which the population must obtain clear information about the procedures, the NLLC establishes, again in its article 13, that all acts performed in the bidding procedure are public. In addition to this article, the law also specifies that the PNCP will function as a means of communication between the Administration representatives and society (art. 174, para. 3, item VI, c) based on a shared information management system regarding contracts (art. 174, para. 3, item VI).

To reach the intermediate level in this principle, Cruz-Rubio (2014) affirms that the public policy or procedure should have mechanisms to obtain feedback from society with regard to alternatives and new solutions. There was only one provision in Law No. 8.666/93 establishing a mandatory public hearing at the beginning of the bidding procedure, when the estimated value for the bidding or for a set of simultaneous or successive bidding procedures was greater than one hundred times the limit provided for in its art. 23.[11]

Besides this provision, the old law did not establish the use of a public consultation mechanism, which hampered the population involvement in bidding procedures. Therefore, one of the innovations in the principle of citizen participation in the NLLC is found in provision in art. 21, sole paragraph, which establishes the possibility of convening a public hearing or public consultation. However, even though the two articles raise the possibility of consulting the population, the law makes it clear that this is only a possibility, placing the decision to open the process for public consultation to the agent conducting the bidding procedure. In this way, the NLLC has provision that allows citizen participation, so it is at the intermediate level, but it will only have practical effect from the decision of those who conduct the bidding procedure.

On the other hand, there is no provision for direct involvement with or collaboration from the population, nor for decision delegation or empowerment. At the international level, Colombia, Mexico, and the Philippines stand out as references for institutionalizing the monitoring of civil society in two legislations (Marchessault, 2013). However, beyond the legal norm, Marchessault (2013) states that there are many challenges to engage civil society in monitoring public contracting.

Two of these challenges are the lack of trust among stakeholders to cooperate, and the guarantee of civil society organizations' technical expertise and resources leading to effective participation (Marchessault, 2013). One of the possible proposals for the population's more direct involvement in public contacting, bypassing these challenges, is the use of the concept of minipublic, that is, a small group of people who voluntarily participate in a deliberation, with the purpose of aligning the collective interests with political decisions (Goodin and Dryzek, 2006).

A successful case is the Social Observatory of Brazil in the city of Piumhi (OBS-Piumhi), state of Minas Gerais, which acts primarily in the deliberation and control of public spending in the municipality, with the aim of avoiding waste of money and diversion of public resources. The OBS-Piumhi also has an online platform for exchanging experiences and making documents available, such as requirements, challenges, checklist for verification of bidding procedures, among other tools that allow the monitoring and the population's involvement in the municipality's public tenders, besides being a technical knowledge base (Martins Anacleto et al, 2021).

According to Martins Anacleto (2021, p. 13), the OBS-Piumhi is empowered, since it has the ability to influence public decisions with the results of its deliberations. Thus, the adoption of minipublics and the construction of spaces for co-creation between public servants and the population can be an alternative for advancing the maturity level of citizen participation in public contracting processes.

As for the principle of accountability in Law 14.133/21, it is at the most advanced level of maturity. The basic level proposed by Cruz-Rubio (2014) states that clear information about the procedures has to be

11. For engineering works and services, the value would be up to R$ 150,000.00 for the invitation modality; up to R$ 1,500,000.00 for price taking, and above R$ 1,500,000.00 for the competition modality. For purchases and services, the value would be up to R$ 80,000.00 for the invitation modality; up to R$ 650,000.00 for price taking, and above this value for the competition modality (Brasil, 1993).

made available to the population. Accountability is intrinsically linked to the principle of transparency (Rodrigues et al, 2021; Williams, 2015); therefore, in addition to the aforementioned provisions that meet active and passive transparencies, the law also provides guidance for the production of documents in the bidding procedure (art. 12), defines its phases (art. 17), and determines that the sessions should preferably be held electronically or, if in person, they should be recorded (art. 17, para. 2), facilitating the citizen's understanding of the procedure.

To meet the intermediate level of accountability, the NLLC has four articles (articles 9, 10, 11, and 117) and a chapter (III, in Title IV) that define the accountability rules and allow public agents and actors involved in the process to justify themselves and take responsibility for their actions.[12] For Serra, Carvalho and Carneiro (2012), the concept of accountability comprises the obligation of a party to account for their actions, while the other party has the duty to monitor and demand accountability, if necessary.

Article 9 defines the prohibitions to the designated public agent regarding acts that may hinder the competitiveness of the bidding procedure or that establish preferences among bidders. Article 10 makes public lawyers available to competent authorities and public servants to carry out their judicial or extrajudicial representation in case of need for defense in administrative spheres.

Article 11, sole paragraph, establishes as the responsibility of senior management the contracting governance, including the implementation of processes and structures, such as risk management and internal control, to monitor bidding procedures and contracts so that to promote a reliable environment of integrity. Finally, it defines in art. 117 that the inspection of the execution of the contract must be carried out by public agents, with the support from the internal control advisory bodies (art. 117, para. 3) and requirements established in art. 7. Thus, the law defines in these four articles the people responsible for the public contracting and contracts governance, and also that agents in charge will have public defense if necessary.

Law No. 14.133/21 dedicates a chapter (III) in Title IV – Irregularities, for the contracting control. In this chapter, the NLLC establishes that public contracting must be submitted to continuous and permanent practices of risk management and preventive control, with support from the information technology resources, and also subject to social control (art. 169). On the one hand, risk management aims to anticipate the greatest number of uncertain events in order to carry out preventive control (Boff and Leal, 2020). On the other, social control takes place after the decision-making process, with the aim of verifying whether the decisions taken were materialized by the public administration as established by law (Bitencourt and Reck, 2016).

The chapter also establishes that public contracting must be subject to the monitoring of public servants and employees, bidding agents and authorities that work in the governance structure (art. 169, item I), by the body's legal advisory and internal control units (art. 169, item II), and the central internal control body and the court of accounts (art. 169, item III).

According to art. 169, para. 3, items I and II, these actors must adopt measures of sanitation and mitigation of risks of simple formal improprieties when applicable, as well as necessary measures for the investigation of administrative infractions when irregularities are found. They must also send copies of the relevant documents to the competent Public Prosecutor's Office for investigation into the facts.

For the second – but also third – level of maturity in accountability, it is important to return to a fundamental aspect: that of horizontal accountability. According to O'Donnell (1998), this way of rendering accounts is related to the mechanisms of checks and balances of the State, in which its performance is delimited by the principle of legality. In the same way that the Public Ministry acts in the investigation of unlawful conduct, the Courts of Accounts also have a role in monitoring public contracting (art. 169, item III).

Also, according to art. 170, the control bodies will consider the reasons presented by the bodies and entities at fault – thus, opening space for the justification for the actions and hold the government actors involved in the procedure accountable. The presence of these articles meets the accountability criterion

12. The Law of Introduction to Brazilian Law Norms (LINDB), Decree-Law No. 4.657/1942, also establishes that in the case of compensation for undue benefits or abnormal losses, the parties will be previously heard about its appropriateness, its form and, if applicable, its value (art. 27). Moreover, the public agent must answer personally for their decisions or technical opinions in case of willful misconduct or gross error (Art. 28).

proposed by Cruz-Rubio (2014) at the intermediate level of maturity, establishing rules of accountability and spaces for justification.

Observing the proposed third level of maturity, the new law also assigns responsibilities to the Public Administration in Chapter IV, Title I – Preliminary Provisions, in which it states that the highest authority of the body or entity must designate public agents to carry out the essential functions for the execution of the Law (art. 7), making them responsible for decision-making, monitoring the bidding procedure, and carrying out any other activities necessary for the smooth running of the process.

The NLLC also adds Chapter II-B – Crimes in Bidding and Administrative Contracts to the Penal Code, inserted in Title XI of the Special Part, which deals with crimes against the Public Administration. Law nº 8.666/93 provided for sanctions and penalties in articles 89 to 99, which, with some changes made in the new law, were transferred to the Penal Code through articles 337-E to 337-P. Given these provisions, the principle of accountability meets the third level of maturity proposed by Cruz-Rubio (2014).

As shown in the table, the principle of technological innovation is the one that has the most basic level of maturity among the four analyzed principles. Although in the new law the use of digital tools and services to promote transparency and participation is an advance, in the case of the creation of the PNCP (art. 174), which contains the creation of an online procurement standardization catalog and a work monitoring computerized system (art. 19, items II and III), the law does not provides for the open source code of these platforms.

Opening the source code of the digital systems used is beneficial as it allows the platform to be understood and freely used, copied, reused, and redistributed (Campagnucci, 2020). Thus, Campagnucci (2020) states that making the open-source code available is a critical issue for democracy, since "closed" or proprietary software can privilege interested parties and prevent exchanges within and outside government settings, while the open source code can stimulate continuous dialogue to improve systems, including representing new economic opportunities and business possibilities for the private sector.

In the same way as the principle of citizen participation, there is also no provision for open collaboration in the field of technological innovation. As stated by Campagnucci (2020), a collaboration space would be the GitHub source code repository, that is, a platform that has project management and collaboration as one of its objectives.[13] However, without the legislative provision for opening the Portal, the decision on whether or not to promote open collaboration will be in the system implementers' hands.

Thus, from the main frauds in the bidding procedure indicated by Júnior (2018), related to governmental acts, the PNCP and the general advancement of the principles of transparency and technological innovation emerge as a tool to combat the absence or little publicity of bidding procedures and administrative contracts.

The possibility of holding a public consultation or public hearing prior to the bidding procedure can help in the elaboration of more consistent Terms of Reference or Basic Projects, while also preventing public agents from compromising the nature of competition through public notice restrictions. The lack of mandatory opening of these documents for public feedback can jeopardize the fight against those frauds.

In addition, the lack of provision in the legislation for spaces for public engagement and collaboration, which could sometimes include the private sector, affects the fight against fraudulent budgets and frauds during market price survey. The private sector participation in the bidding procedure could establish more precisely the real market value of the good or service to be contracted by the Public Administration.

FINAL CONSIDERATIONS

Bidding has become a space to encourage corruption, in which individuals use the bidding procedure to obtain personal advantages, since bidding, as an administrative process, instead of being able to repress institutionalized corruption, has become an instrument for the practice of illegal acts. As it is a problem common to several countries and not just to Brazil, the international agenda of administrative reform proposed by the open government can be a way to improve the legislation that rules public contracting.

Given the above, the NLLC examined in light of the principles of Open Government reveals four main conclusions: (i) it is consolidated at the most advanced

13. GitHub. Available in the Portuguese language on: <https://github.com/>. Access on November 4, 2021.

level in terms of transparency, with the creation of the National Public Procurement Portal and the provision for an open data regime for the information made available on the Portal; (ii) it is at the intermediate level in citizen participation, with the provision for public consultation and public hearing tools; (iii) it consolidates the accountability provisions that keep it at an advanced maturity level, and (iv) it is still at the most basic level in technological innovation, providing for the use of technology to promote transparency and participation, but without making the source code available and enabling open collaboration.

After analyzing the NLLC, this paper argues that despite its provision for more consolidated mechanisms of transparency and accountability and the advance in the level of technological innovation, it still does not present all the anti-corruption mechanisms possible in the general rule, complying with the precepts of open contracting in a limited manner. Besides, even if the legislation advances in the intermediate level of citizen participation according to the criteria presented, the effective provision implementation will be up to the public agent's discretion, since public consultation and public hearing are optional by the legislation.

The lack of collaboration between government and civil society, as well as of incentives for citizen empowerment, undermines effective social control over public procurement, which makes it difficult to identify illegal acts in public contracting. In order for there to be an innovative legislation regarding anti-corruption mechanisms that regulates bidding and administrative contracts, it must be debated publicly, including public administration through public servants and civil society organizations that work in the area of public procurement, and not only political and legal agents.

Furthermore, it should adopt provisions that allow the population in general to become more involved in the application of public resources, also promoting ways of educating society in an administrative-bureaucratic process that is difficult to understand. It should also promote transparency and technological innovation through the system open-source code, even if it is not disciplined by law, enabling collaboration and improvement to established processes. Nevertheless, the Brazilian government should join the Open Contracting Partnership and the Open Contracting movement.

Finally, one of the greatest challenges for the Public Administration will be to implement the new legislation provisions in a practical manner. Although the provisions promote transparency, citizen participation, accountability and technological innovation, it is important to verify how they will be implemented in the daily life of public management. As a research agenda, an evaluation of the effectiveness of these regulations at the federal, state and municipal levels is suggested, as well as of the benefits identified in the use of these anti-corruption mechanisms.

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