

NEW BIDDING LAW AND ITS SYMBIOSIS WITH PUBLIC CONTRACTING AND STRATEGIC PLANNING: THEORETICAL EVIDENCE

NOVA LEI DE LICITAÇÕES E A SIMBIOSE COM AS CONTRATAÇÕES E PLANEJAMENTO ESTRATÉGICO PÚBLICO: EVIDENCIAÇÕES TEÓRICAS

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Abstract

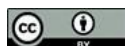
This article deals with strategic planning in public procurement. Taking into account the importance of planning for the success of an organization, on April 1, 2021, the New Public Procurement Law, Law 14,133, was sanctioned, which provides for planning as part of the process in public procurement. This article, by demonstrating the importance of planning in public procurement, aims to analyze the forecast optimization of bidding processes in public agencies and entities in the light of the New Bidding Law. For this, we used a literature review with bibliographic and documentary analysis. As a result, there is the recognition of the importance of strategic planning for public administration as an essential management technique for managers in search of efficient management and economy, with legality as the starting point of the hiring process. It is also observed that, despite the importance of making the planning, it is verified that only this factor is not enough, since the execution needs to be exercised as planned. It was also verified that, in addition to the preparation and execution of the planning, monitoring and inspection is necessary to evaluate whether the executed is in compliance with the planned, as well as the effects resulting from said execution.

Keywords: strategic planning; New Bidding Law; governance; complex process.

Resumo

Este artigo versa sobre o planejamento estratégico nas contratações públicas. Levando em consideração a importância do planejamento para o sucesso de uma organização, em 01 de abril de 2021, foi sancionada a Nova Lei de Licitações Públicas, Lei 14.133, que prevê o planejamento como parte do processo nas contratações públicas. Este artigo ao demonstrar a importância do planejamento nas contratações públicas tem por objetivo analisar a previsão da otimização dos processos licitatórios nos órgãos e entidades públicas à luz da Nova Lei de Licitações. Para isso, utilizou-se de revisão de literatura com análise bibliográfica e documental. Como resultados tem-se o reconhecimento da importância do planejamento estratégico para administração pública como técnica de gestão essencial para os gestores em busca da eficiente e economicidade tendo-se no retrovisor a legalidade como ponto de partida do processo de contratação. Observa-se ainda que, em que pese a importância da confecção do planejamento, verifica-se que só este fator não basta, pois a execução precisa ser exercida conforme o planejado. Verificou-se mais, que além da confecção e execução do planejamento, é necessário o acompanhamento e a fiscalização para avaliar se o executado está em aderência com o planejado, bem como os efeitos decorrentes da referida execução.

Palavras-chave: planejamento estratégico; Nova Lei de Licitações; governança; processo complexo.



Introduction

It is known that the State has the function of defending the interests of society, offering protection, security and services, however, for this to be possible, resources are needed so that it has the possibility of fulfilling its function of assisting the people through the implementation of public policies.

Most of the resources maintained by the State come from derived revenues, i.e. taxes. In addition, in a developing country like Brazil, it is known that resources are scarce and lack efficient management with application in what is most needed by the community.

In order to avoid waste and consequent inefficiency in the application of public money, the importance of strategic planning in the public sector is highlighted. It is noteworthy that in the last decades several planning, monitoring and evaluation tools have been implemented in public management, including provision in the legal system.

In this context, the preponderant role of governance as a guide in the management of public resources is emphasized, because through it it is possible to standardize guidelines and behaviors so that they are applied in the best possible way.

Through strategic planning, the organization is allowed to prospect for the future, as well as assisting in daily decision-making, which helps a more efficient management, and, as a consequence, allows the efficient application of resources, thus avoiding waste. According to Certo (2010, p. 60) "an efficient organization is one that, in order to achieve its objectives, wastes few resources".

The functions performed by the State are as diverse as possible and for it to fulfill its obligations it is necessary to have a structure capable of meeting the demands of the community. For this, the Public Power exercises private contracting to obtain products and services to allow the fulfillment of the basic essential demands directed to the satisfaction of the public interest, whether primary or secondary.

Unlike private individuals, the Government cannot directly hire a third party, for this it is necessary to follow an administrative process that follows certain requirements in order to ensure the most advantageous proposal, the isonomy among the participants, as well as a strict control of public spending. This administrative process is called a bidding process, which became regulated in 2021 by the New Public Procurement Law, Law 14,133.

Due to the relevance of Strategic Planning, this law focused on the importance of planning in the acquisition of products and services. Medeiros (2018, p.71) emphasizes the importance of planning in public procurement:

"In fact, it appears that the main failures in the hiring processes result from inadequate or even absent planning, resulting in several undesirable incidents, such as unfinished works, unnecessary contractual amendments, emergency hiring resulting from neglect or mismanagement, contractual terms extended exceptionally, among several other problems that can lead to accountability of the public agents involved."

This reveals the importance of Strategic Planning for the Government, which is why the New Bidding Law provided for provisions making it part of the contracting of services and products. However, the question is: in the light of the New Bidding Law, what contributions does Strategic Planning provide to the bidding processes in public agencies and entities?

Based on bibliographical and documentary research of a descriptive and exploratory nature with a qualitative approach, this article is structured in four sections summarized as follows: the first refers to this introductory part; the second concerns the theoretical foundation that evidences in its subdivisions discussions about strategy and strategic planning in public procurement; and planning as a fundamental principle in public procurement. The third section deals with the results and discussions. Finally the fourth section brings the final considerations followed by the references that support the work.

2 Theoretical basis

2.1 Planning and Strategy

There is not a single definition for planning, and it is, then, a term of open tessitura. On this the dominant doctrine understands that planning is a permanent process, whose focus is to guide a prospection, in order to guide the actions of the present, which will have repercussions in the future.

In this sense, planning consists of a fundamental tool that allows the manager to organize, structure and manage the company, business, body or entity in order to achieve certain objectives, standing as essential in decision making.

For Maximiano (2004, p.138), planning "is a process of defining goals or desired results and thus achieving them. [...] It is to decide in the present, which will have repercussions in the future, with the intention of reducing uncertainties".

Pasquale (2012, p.98) contributes by pointing out that planning is a "process of elaborating the plan, which is the written document: therefore, planning is the action, while the plan is the result", that is to say that planning constitutes the action so that a certain proposed result can be reached.

In this way, planning assumes identification, analysis, structuring, mission coordination, purposes, objectives, challenges, goals, strategies, internal and external policies, programs, projects and activities, in order to obtain more efficiently, effectively, with the best possible development and best concentration of efforts and resources (OLIVEIRA, 2004).

It is thus evident that through planning it is possible to structure, organize and guide efforts according to the goals set by an organization, and this structural mesh will lead to more effective results on the proposed objectives, with a view to prospecting the future, avoiding or minimizing uncertainties.

Adhering to planning is the strategy, which for Pasquale (2012, p.107) "are actions that allow organizations to achieve their goals. They are established according to their intended objectives and influenced by the mission, vision, beliefs and values, environment and moment of the organization".

Thus, the environment is composed of characters that shape the life of the community and that directly or indirectly influence organizations. Thus, the general environment is formed by four elements: demographic, sociopolitical, technological and economic (LOBATO, 2009). In this sense, it conceptualizes *the TCU Strategic Plan 2015-2021* (2015, p.26):

Strategy can be conceptualized as the path to be followed to ensure survival and to reinforce the legitimacy of an organization over time. We can also characterize it as the set of objectives and actions necessary for the fulfillment

of the institutional mission and the scope of the future vision. (...) This strategy aims to ensure and improve the management of material, budgetary, financial and patrimonial resources for the proper functioning and modernization of the institution, so that the proper use of these resources allows the Court to promote the improvement of its governance and the management of its strategy.

It is noticed then that the strategy defines the path to be followed, but for this it is necessary to analyze the context of the environment, the conditions, needs and possibilities so that the path chosen, to be followed, is possible and brings a favorable return.

It is a decision, but a decision that was obtained through a previous analysis, which is based on a context, and then begin its journey. In the case of the Public Power, decisions must always be taken according to the public interest and respecting the legal provisions, since public agents can only do what is listed in the law.

2.2 Strategic planning

It is up to the managers of senior management to outline the objectives of the organs and the actions that will be carried out in order to achieve the proposed objectives. In the case of the Public Power, the objectives must always be the public interest, whether primary or secondary. In order to be more successful in achieving the purpose, allowing the provision of more efficient services and with less expenditure possible, avoiding waste, a structured, streamlined organization is needed, this will be possible through the application of tools available for this purpose.

The application of a structured management activity, in an organized way, through the obedience of a methodology, whose purpose is to organize the entire structure to reach the proposed objective, is called Strategic Planning. It is an organized process, guided to achieve the purpose of an organization.

According to PADOVEZE (2003, p.28) "strategic planning is the stage of defining policies, guidelines and strategic objectives". That is, strategic planning is a meeting of elements, procedures and tools that guide the individuals responsible for guiding the management of a corporation. This tool has the power to direct the work in a strategic way, delineated, avoiding disoriented efforts (BRYSON, 1995).

In this sense, Martins (2012, p. 18) teaches that Strategic Planning is a "rational process of operationalization of strategy that is related to creativity. Strategic Planning are the steps that must be taken to achieve a goal."

Thus, it is clear that because it is a complex tool, it is necessary that public managers have the ability to draw the lines to be followed by their subordinates, through Strategic Planning, which will allow the analysis of the environment, the possibilities, needs and conditions of the respective body, in order to avoid distortions and waste, allowing a more efficient management and better results for public administration and, consequently, for the community.

Strategic planning is not a disorderly compilation of acts, this means that this tool depends on methodology for its elaboration, allowing a set of concepts and tools to assist managers in their management (BRYSON, 1988). That is, strategically planning is to elaborate a process in an organized way, through a methodology, whose purpose culminates in a final objective.

In addition, there is a good difference between the purposes of the private sector and the public sector, this means that the objectives of strategic planning are different. As

companies seek to improve their competitive advantages, while public organizations intend to improve their social objectives, for the benefit of the community, restricting themselves to the perimeter in which they operate (ALMEIDA, 2010).

Still among the various criticisms related to the application of planning techniques in the public sector, in view of the various differences found in relation to the different functions and purposes between companies and a public sector, the theme of strategic planning for the public sector should be applied with some adaptation, due to the peculiarities (ALMEIDA, 2010).

In summary, it is clear that strategic planning is a complex process, which depends on the participation of the actors involved, who will expend efforts to achieve the proposed objectives, without straying from the purpose of the organization's end, that is, its mission, which in the case of the government is the interest of the community, all this, supported by a plan.

Thus, it is not enough to only elaborate the strategic planning, it is necessary to follow it, to verify if the proposed in its formalization is being applied by its executors, as well as to verify if the execution and the budget are consistent with the purpose of the organization. It is worth saying that there is no point in planning if the process is not monitored and evaluated, because through monitoring it is possible to verify if the planning is being beneficial to the public power, thus enabling possible corrections, which, consequently, will bring better income and economy to the public administration.

3 Results and discussions

3.1 The importance of planning in public procurement

The government has highlighted the economy with the volume of acquisition of goods, products and services (EDLER, GEOGENIOU, BLIND AND UYARRA, 2012). This means that a large part of public resources are allocated to public procurement, highlighting the importance in the effectiveness of these contracts valuing the supremacy of the public interest. Thus, efficient public procurement are those that ensure that goods, products and services reach the quality-price condition (ICLEI, 2007).

Veluppillai Mohan (2010) explains that the contracting of works, goods and services should be carried out under the best possible conditions, based on parameters of price and quality. Thus, efficiency in public spending is allowed.

However, the image of public procurement is almost always tainted by society in the face of the publicizing of several examples of misrepresentation of public money *contrary* to the supremacy of the public interest. The existing criticisms involve both poor-quality hiring and poor decisions in the selection of which services and goods are priorities for public administration. This, in large part, is due to the lack of planning in the Public Power, as this absence of planning contributes to the lack of efficiency in hiring.

In this context, it is worth highlighting the positivation brought by the timeless Decree-Law 200/67, which listed planning as a fundamental principle of public administration, despite the non-specification of planning in public procurement, remembering that they are a function of management actions within the Public Administration. It should be noted, however, that in 2017, Federal Normative Instruction No. 05 was

approved by the Ministry of Planning, Budget and Management, which positive in its article 2 was the need for planning in the face of public procurement.

This prediction of planning contemplation was due to the need, already evidenced, by organs and scholars such as Mendes (2012, p-29-30) for whom "the new era of public procurement should be analyzed broadly, and planning should exist both in the internal¹ and external² phase of the bidding process".

In the wake of contractions and symbiosis with planning, on April 1, 2021, the New Bidding Law, Law 14,133 / 2021, was published, which then gave due importance to planning in public procurement, including, raising it to the level of basic principle for the contracting matter.

3.2 Planning as a fundamental principle in public procurement

The old Bidding Law 8666/93, which was in force for more than 30 years, gave space to the new Public Bidding Law, which was sanctioned on April 1, 2021. In order to provide more agility, efficiency and economy in public procurement, the new law provided for mechanisms to optimize the purchasing process that contribute to the mitigation of waste and improvement in the bureaucratic dynamics of the paperwork, steps and stages of contracting.

Regarding planning, the focus of this work, the new bidding law emphasized the importance of this subject, including raising it to the category of principle, especially in the preparatory phase. That is, the legislator not only mentioned planning in the new law, but makes it something fundamental in a bidding process. In this context, Slaibi Filho (2004, p. 65-66) describes the importance of the principle for the legal system:

every legal rule, while considered as determinant of one or many other subordinates, which presuppose it, developing and further specifying the precept in more particular directions (less general), from which determine and therefore summarize, potentially, the content: are therefore effectively put, are, on the contrary, only deductible from the respective general principle that contains it (...) the principles are to the particular rules as the most is to the least, as what is previous and antecedent is to the later and consequent.

It is then observed the importance of the principles, which are responsible for guiding the making of other norms, as well as the conduct of the individuals that make up society, including state agents. In this way, the applicability of planning by the public administration becomes a principled requirement. In addition to elevating planning to the category of principle, given its relevance in the new conception for public procurement, Law No. 14,133 / 2021 provided a complete chapter to discuss the preparatory phase and use of planning in its materialization.

With this, the purchase planning as a founding principle, is also understood as a strategic planning, whose purpose is to organize the acquisition of products and services

¹ The internal phase is intended to carry out the planning of the hiring, to define the best model, to fix the charge, to reduce possible risks and to formalize all the conditions in the public notice (MENDES, p. 30).

² The external phase aims to determine the personal conditions of the bidders and to identify the best benefit-cost ratio for the Administration. In the contractual phase, the charge is fulfilled by the contractor and the remuneration (price) is paid by the Administration (MENDES, 2012, p. 30).

of an entity, to be acquired for a reasonable price having the market value as a beacon, avoiding, thus, the reprehensible subsumed overbilling. In addition, this path also guarantees the acquisition of a quality and really necessary product, thus avoiding waste.

Although planning is an important tool, it should be exercised with caution using administrative techniques that help in the accuracy of identifying the real need supplied by the execution of the contract, with a focus on a well-defined object, actively considering its price estimate and the budget necessary for said expenditure (SANTOS, 2020).

The alignment of conditions in the preparatory phase, which depend on effective planning, is explained in art. 18 of the new bidding law, where requirements for good planning are addressed, providing necessarily from the need for contracting by the agency, the inherent risks, to means and requirements for a good contractual execution.

Still on the planning of public procurement, art. 40 of the New Bidding Law establishes that the administration must provide the expectation of annual consumption, as well as how to store the products purchased, so that there is no waste. It is observed that the law was very detailed in planning issues, so that there is no economic damage to the government. It is worth remembering, in this sense, that all this tooling apparatus provided by the new law must be guided by the senior management of the body, which is responsible for contracting the public power, as seen in the sole paragraph of art. 11 of the referenced cogent norm.

It is worth highlighting in context in the spectrum of public procurement, also the so-called annual hiring plan, positivated in the referenced new law, which is a plan that mirrors planning and allows rationing the hiring of agencies and entities, as well as providing the framework with strategic planning and support the making of budget laws. It should be noted that this plan should be published by the body / entity on the internet in order to allow transparency and publicity to society.

The Federal Government website defines the Annual Hiring Plan as "the document that consolidates all purchases and hiring that the body or entity intends to carry out or extend, in the following year, and contemplates goods, services, works **and** information technology solutions" (BRASIL, 2023).

In this context, it is noticed that there was a great evolution in relation to planning in public procurement with the presence of the new bidding law, in view of the fact that, until then, there were only infra-legal provisions dealing with the subject, which, however, were directed to the federal public administration.

3.3 Bidding process: planning in the new law and the need for a qualified, organized and structured management

It is noted that the new regulation of public procurement planning takes the lead in the preparatory phase. Thus, the bidding process is planned, organized and studied, according to the needs of the body or entity. There is due attention to the procedures that precede the effective dispute, whose purpose is to hire a quality product or service, with the lowest possible expenditure, thus avoiding waste, because, if planned, it has already been anticipated, through planning.

It is understood that the new law innovates positively by foreseeing and making planning mandatory in the bidding process, however, it is necessary that public agencies

adapt to the new system, especially the administrations of small municipalities, which, in most cases, do not have the necessary structure and qualification.

According to the new law, "senior management of the agency or entity is responsible for the governance of hiring", using planning. In this way, the senior management is responsible for making the planning, adhering it convergently to the mission, objectives and vision of the said body or entity.

4 Final considerations

Within what was proposed: to analyze the relationship that the bidding process has with planning, verifying the contributions provided by the new bidding law in relation to strategic planning in public procurement. It was found that planning is an important tool to provide greater effectiveness in public procurement.

In this sense, Law 14,133 / 2021 destined planning guidelines in the public procurement process. It was noticed that the legal norm gave relevance to planning when it destined exclusive legal provisions to strategic planning.

According to the Law, the planning begins with the Annual Hiring Plan, which establishes the forecast of hiring of the body or entity for the financial year. In the internal phase, the New Law offers guidelines for structuring future public procurement, in order to specify the correct quantity to be contracted, guarantee the price offered in the market, thus avoiding overpricing, as well as providing the best solution for the demand of the administration. It was also verified that planning is a complex theme, so that it has the desired results, it needs to be accompanied by its execution, inspection and knowledge of the actors involved.

In this sense, it is suggested in future academic works, as a contribution to the theme, research that shows how the New Bidding Law has been used, with regard to planning in public procurement, considering that monitoring the execution of the planning allows to improve the bidding process, as well as guiding the conduct of the actors involved.

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