

INTERNATIONAL JOURNAL OF OPEN GOVERNMENTS

REVUE INTERNATIONALE DES GOUVERNEMENTS OUVERTS



Vol. 12 - 2023

ISSN 2553-6869

International Journal of Open Governments
Revue internationale des gouvernements ouverts

Direction :
Irène Bouhadana & William Gilles

ISSN : 2553-6869

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À PROPOS DE NOUS

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ABOUT US

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PUBLIC PROCUREMENT GOVERNANCE AND INNOVATIVE SOLUTIONS

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The 1988 Brazilian Republic Constitution disciplines innovation and development as a way of guaranteeing well-being. It is also a major State responsibility to support and encourage companies that invest in appropriate technology creation for the country, seeking to stimulate innovation in companies.

Thus, based on the innovation understanding as one of the foundations for sustainable development, some authors emphasize that administrative activity must adapt to the reality of today's Information Society – which increasingly requires the adoption of innovative solutions, including the use of technology, hence resizing Administrative Law.

The State, therefore, must adopt new practices in Public Administration, such as technological innovation, to improve services, optimize processes, increase transparency, and reduce costs, allowing higher efficiency and social control by monitoring policies.

The article 219-A of the 1988 Brazilian Republic Constitution provides that the Public Power may sign cooperation instruments with private entities for scientific and technological development and innovation projects execution, with or without financial contribution¹.

In this scenario, Law No. 14.129, of March 29, 2021, provides principles, rules, and instruments for Digital Government and for increasing public efficiency. Concurrently, also brings innovation and digital transformation as tools to achieve this goal, in its article 1, as well as a guideline in its article 3².

That normative text, therefore, demonstrating its concern with Public Administration modernization, dealt with topics such as "government as a platform" and "innovation laboratory" (article 4, items VII and VIII), institutes reserved for the technological infrastructure implementation, that allows easy access to information, and also, safe and efficient interaction between agents, ensuring space for collaboration and ideas, innovative

¹ *Constituição da República Federativa do Brasil*, 8 October 1988, article 219-A: [https://www.planalto.gov.br/ccivil_03/constituicao/ConstituicaoCompilado.htm]. (accessed on November 2, 2022)

² *Law No. 14.129*, 29 March 2021, articles 1 et 3: [https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/l14129.htm]. (accessed on November 2, 2022)

tools and development methods for public management, granting citizen participation in the exercise of control over public services and Public Administration.

In accordance with the normative text, the Legal Landmark for startups, in its article 3, item VIII, specifies that innovative entrepreneurship must be guided by the following principle: Public Power must incentive contracting innovative solutions designed or developed by startups, recognizing the State role in fostering innovation and the potential opportunities for economy, including, solving public services problems³.

Similarly, the New Public Procurement Law (Law No. 14.133, of April 1, 2021), also expressly provides innovation as one of the objectives of public procurement in its article 11: “IV - encourage innovation and national sustainable development.”⁴

Like innovation, governance practices also gained strength with the publication of the new general rules for public procurement. That normative text brought the State’s obligation to implement processes and structures for risk management and controls to evaluate, direct and monitor the bidding processes and its respective contracts (article 11, sole paragraph). That obligation helps promoting an honest and reliable environment, as well as efficiency, and more effectiveness in public contracts. In addition, the New Public Procurement Law has raised transparency levels for a principle in its article 5, demonstrating its commitment to risk management and governance mechanisms in public procurement.

Given this scenario, the following paper aims to discuss the importance of governance practices in public procurement, especially innovative solutions, using innovation and technology as an opportunity for efficiency and solving public problems.

§1– PUBLIC PROCUREMENT GOVERNANCE PRACTICES

Governance practices are not new in Brazil, and it can be defined as a set of good leadership, strategy, and control practices, which allow those responsible to assess, direct and monitor the necessary actions to meet planned demands⁵. The Brazilian Institute of Corporate Governance - IBGC provides a code of best corporate governance practices and has defined four basic principles of governance: transparency, equity, accountability, and corporate responsibility⁶.

³ *Complementary Law No. 182*, 1 July 2021, article 3, item VIII: [https://www.planalto.gov.br/ccivil_03/leis/lcp/Lcp182.htm]. (accessed on November 2, 2022)

⁴ *Law No. 14.133*, 1 April 2021, article 11, item IV: [https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/l14133.htm]. (accessed on November 2, 2022)

⁵ The term governance has been used since ancient times, but the concept and its importance were built in the last three decades, initially with private organizations. See A. NARDES, *Da governança à esperança*, Belo Horizonte, Fórum, 2018, pp. 115 et 129.

⁶ Brazilian Institute of Corporate Governance – IBGC, *Corporate Governance*:

In the same way as the corporate scenario, public Governance has been defined by the Federal Decree No 9.203/2017, which disciplines the federal public administration governance policy, and states the public governance basic principles: i) responsiveness; ii) integrity; iii) reliability; iv) regulatory improvement; v) accountability and responsibility and vi) transparency⁷.

Thus, that Decree emphasizes that public governance is the “set of leadership, strategy and control mechanisms to evaluate, direct and monitor management, with a view to conducting public policies and providing services of interest to the society.” In this sense, public governance can be conceptualized as the institute that represents the “capacity that governments have to evaluate, direct and monitor the management of their policies or services to meet the population demands, using an adequate set of instruments and tools.”⁸

To ensure the implementation of Public Governance, Federal Decree No. 9.203/2017 highlights that the Public Administration must (i) seek results for society, finding timely and innovative solutions to deal with limited resources and changes in priorities; (ii) simplify and modernize public management and the integration of public services; (iii) monitor performance and evaluate the implementation and results of policies, priority actions and strategies adopted; (iv) coordinate institutions and processes, improving integration between the different public sector levels and spheres; (v) implement integrity systems and make them incorporated into the behavior of public agents; (vi) implement effective internal controls, with proper risk management; (vii) monitor and evaluate the implementation or improvement of public policies, assessing their efficiency; (viii) encourage the motivation and society participation in the decision-making process, guided by good regulatory practices and the national legal system legitimacy, stability and coherence; (ix) determine the roles and responsibilities of the agents involved; (x) promote open, voluntary and transparent communication of the organization's activities and results, in order to strengthen public access to information.

In this sense, Public Governance demands a “radical transparency culture”, assuming transparency as “the common thread, the catalyst, the trigger that ensures the wide dissemination of state activities in order to curb public resources waste– whether due to inefficiency or the unethical postures adoption.”⁹ In other words,

[<https://www.ibgc.org.br/conhecimento/governanca-corporativa>]. (accessed on November 2, 2022)

⁷ Federal Decree No. 9.203, 22 November 2017, article 4:

[https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/d9203.htm]. (accessed on November 2, 2022)

⁸ A. NARDES, *Da governança à esperança*, Belo Horizonte, Fórum, 2018, p. 137.

⁹ L. A. FERRAZ, A transparência como ferramenta de legitimação do agir estatal por meio do impulsionamento da eficiência e integridade governamentais, in M. ZENKNER, R. PIRONTI (coord.), *Compliance no setor público*, Belo Horizonte, Fórum, 2020, p. 109.

transparency, recognized as one of the good public administration pillars¹⁰, allows the public interest to reflect the citizen's needs, through appropriate solutions and results that positively impact society¹¹.

In the context of public procurement, however, there is no denying that Public Governance is still quite incipient, even though it is gaining strength and being increasingly demanded by society. This is because the COVID-19 Pandemic increased the technological work processes demand, as well as the need for greater budget efficiency and the inclusion of good governance practices in public procurement, situations that directly impacted the way the Public Administration works.

Not without reason, the control entities have acted actively in favor of these goals, which can be identified in the follow-up report on the governance and management indexes of the Federal Public Administration entities, prepared by the Brazilian Federal Audit Court. That Report set out to “identify systemic risks; contribute to the planning of control actions and nudging a change in the organizations behavior, encouraging the adoption of good governance and management practices”.¹² This premise, in turn, is based on the six strategic objectives of the 2019-2025 Brazilian Federal Audit Court Strategic Plan¹³.

According to these assumptions, the expected good governance practices, according to the Brazilian Federal Audit Court, are those related to the direction, monitoring, supervision and evaluation of areas; good management practices, on the other hand, are those responsible for organizational processes, which seek greater effectiveness and efficiency, increasing society's satisfaction with public services, when possible, at a lower cost¹⁴.

Considering this reality, and, especially due to the New Public Procurement Law, No 14.133/2021, and the challenges that accompany it, attention is drawn to what is sought with the

¹⁰ Freitas recognizes the fundamental right to good public administration as “the right to efficient and effective public administration, proportionally fulfilling its duties, with transparency, motivation, impartiality and respect for morality, social participation and full responsibility for its omissive conduct and commissions.” See J. FREITAS, *Discrecionalidade administrativa e o direito fundamental à boa administração pública*, São Paulo, Malheiros Editores, 2007, p. 20.

¹¹ Casa Civil da Presidência da República, *Guia da política de governança pública*, Brasília, 2018, p. 18:

[<https://www.gov.br/casacivil/pt-br/centrais-de-conteudo/downloads/guia-da-politica-de-governanca-publica>]. (accessed on November 2, 2022).

¹² Tribunal de Contas da União, *Índices de Governança e Gestão De Órgãos e Entidades da Administração Pública Federal*, Brasília, 2021 (IGG2021):

[<https://portal.tcu.gov.br/data/files/4B/62/5D/1B/8EBEB710C74E7EB7E18818A8/011.574-2021-6-BD%20-%20IGG2021.pdf>]. (accessed on November 2, 2022).

¹³ Tribunal de Contas da União, Secretaria de Planejamento, Governança e Gestão, Secretaria-Geral da Presidência (Segepres), *Plano estratégico, 2019-2025*, Brasília, 2019:

[https://portal.tcu.gov.br/data/files/9E/33/17/17/8EA1F6107AD96FE6F18818A8/Plano_estrategico_TCU_2019-2025.pdf]. (accessed on November 2, 2022).

¹⁴ Tribunal de Contas da União, *Índices de Governança e Gestão De Órgãos e Entidades da Administração Pública Federal*, Brasília, 2021 (IGG2021), p. 44:

[<https://portal.tcu.gov.br/data/files/4B/62/5D/1B/8EBEB710C74E7EB7E18818A8/011.574-2021-6-BD%20-%20IGG2021.pdf>]. (accessed on November 2, 2022)

implementation of these governance and management tools in public procurement: expected governance focused on “effective benefits delivered to stakeholders, with simultaneous risks and resources optimization”,¹⁵ which can be achieved through the implementation of risk management practices and innovation tools.

Such reflection is important, as it is one of the objectives expressly provided in the New Public Procurement Law article 11, which is side by side the seeking sustainable national development objective. And sustainable public procurement will be those that ensure, within the rule of isonomy and fair bidding scope, contracting the most advantageous proposal, objectively weighing the social, economic, and environmental costs and benefits¹⁶.

That is why it is affirmed that the public procurement sustainability test: (i) prohibits, at the same time, inefficiency and ineffectiveness of public procurement, giving priority to healthy production and consumption; (ii) imposes prevention as a rule, through the obligation of planning and anticipating results and externalities; and (iii) encourages more responsible choices, in honor of future gains; reconfiguring public contracts, moving them away from market failures, purpose deviations and fraud, thus being an instrument of cultural transformation and prevention and nudging the fight against corruption¹⁷.

In this sense, choosing prevention as a rule has driven evolution and improvement in practices related to risk management in the three contracting stages, which is: planning, supplier selection and contractual management. And this evolution in public procurement, especially in relation to the governance and contract management index analyzed in the report by the Brazilian Federal Audit Court, is in line with the new guidelines of risks, as well as with public procurement planning.

Thus, it is important to highlight that Law No 14.133/2021 provides expressly good governance practices, having introduced in its article 11, sole paragraph, an obligation to the Public Power to implement risk management processes and structures and internal controls to assess, direct and monitor the bidding processes and its respective contracts, thus promoting an honest and reliable environment, as well as efficiency, effectiveness and efficacy in its contracts.

Likewise, Law No 14.133/2021, demonstrating its concern with the planning of public procurement, expressly determined the duty of Senior Management to ensure the alignment of public procurement with strategic planning and budgetary laws, to

¹⁵ *Ibidem*, p. 24.

¹⁶ J. FREITAS, *O controle dos atos administrativos e os princípios fundamentais*, 5th ed., rev. e ampl., São Paulo, Malheiros, 2013, pp. 238-239.

¹⁷ *Ibidem*, pp. 242-243.

“ensure that public resources are planned, managed and used effectively to make a positive impact on the lives of citizens.”¹⁸

This duty, however, according to the Brazilian Federal Audit Court Report, has been presented as one of the greatest difficulties of the federal institutions, and the most significant deficiencies identified were the alignment of the budget to the strategic planning, the establishment of goals in favor of financial savings and the identification of the real priorities in the budget¹⁹.

Given this scenario, there is a clear need to include the dimension of governance and budget management in all spheres of Public Administration, with the purpose of encouraging the adoption of practices aimed at “improving the organizational budget process and establishing priorities with a view to achieving organizational goals and to accomplishing results to society.”²⁰

Therefore, public procurement is responsible for the achievement of numerous public policies, and, consequently, for delivering results to society, achieving their objectives. Notably by: (i) improving risk management and internal controls, (ii) inducing availability and reliability of information – reducing information asymmetry –, (iii) improving the contracting capacity, and, consequently, (iv) improving the mechanisms of Public Administration governance and management. Everything above: requiring the adoption of innovative practices.

Considering the outline proposed in this article, one of these innovative practices is, if not, the contracting of innovative solutions using technology, which are a way of guaranteeing the well-being of all, being, therefore, a State duty to support and encourage companies that invest in the creation of appropriate technology for the country, stimulating and strengthening innovation in companies, as will be seen in the next item.

§2 – PUBLIC PROCUREMENT INNOVATIVE SOLUTIONS

Regarding technology innovative solutions, it should be noted that one of the basic principles of the legal landmark for startups and innovative entrepreneurship is precisely to recognize the State role in promoting innovation, as an opportunity to reduce costs and solve public problems by contracting innovative solutions.

In this same sense, the innovation laboratories establishment in the Digital Government Legal Landmark takes place, providing opportunities for society's participation and collaboration in (i) the development and experimentation of innovative concepts,

¹⁸ OECD, *Recommendation of the Council on Budgetary Governance*, 2105, p. 5: [https://www.oecd.org/gov/budgeting/Recommendation-of-the-Council-on-Budgetary-Governance.pdf]. (accessed on November 2, 2022)

¹⁹ Tribunal de Contas da União, *Índices de Governança e Gestão De Órgãos e Entidades da Administração Pública Federal*, Brasília, 2021 (IGG2021), p. 54: [https://portal.tcu.gov.br/data/files/4B/62/5D/1B/8EBEB710C74E7EB7E18818A8/011.574-2021-6-BD%20-%20IGG2021.pdf]. (accessed on November 2, 2022)

²⁰ *Ibidem*, pp. 44-45.

tools and methods for public management, (ii) the provision of public services, (iii) the produced data treatment by the public power and (iv) the citizen's participation in the control of public administration. Not without reason, in its article 45, the legal regulation highlights the incentive to innovation, promotion of social participation and public transparency, as well as support innovative entrepreneurship and technological innovation ecosystem directed to the public sector promotion, as guidelines.

As a result of this aspect of promoting technological innovation, therefore, the legal landmark for startups dedicated an exclusive chapter to the subject, establishing in its article 12 that the public contracts disciplined therein have the purpose of: “I - resolve public demands that require an innovative solution with technology employment; and II - promote innovation in the productive sector through the use of the State's purchasing power.”

In this sense, a special bidding modality was even created to contract “test of innovative solutions”, according to the procedure established in startups legal landmark articles 13. Regarding the delimitation of the scope of the contract, which is, if not, what will determine the adoption of the new bidding modality provided for in the legal landmark for startups, “it may be restricted to indicating the problem to be solved and the results expected by the public administration, including the technological challenges to be overcome” (article 13, paragraph 1), and the bidders must present a proposal containing different means to solve the problem, with or without technological risk.

It is worth noting the criteria for judging the proposals, which should consider: I - the potential for solving the problem by the proposed solution and, if applicable, the likely savings for the public administration; II - the degree of development of the proposed solution; III - the viability and maturity of the solution's business model; IV - the economic viability of the proposal, considering the financial resources available for the execution of the contracts; and V - the comparative demonstration of cost and benefit of the proposal in relation to the functionally equivalent options.

As can be seen, there is a strong concern with the efficiency of contracting the innovative solution test, which is even clearer with the necessary contractual clauses of the Public Contract for Innovative Solution (CPSI), with goals to be achieved as a way of validating the success of the innovative solution, through the delivery of progress reports and final report, as a methodology for measuring success (article 14, paragraph 1, items I and II).

Corroborating the concern with efficient contracting, the referred legal landmark listed hypotheses of variable incentive remuneration as one of the contractor's remuneration criteria (article 14, paragraph 3, items II, IV and V).

Likewise, after the success of the CPSI, the conclusion of the subsequent supply contract, once again, favors the most efficient

contracting, when it disciplines that when more than one contractor satisfactorily meets the goals established in the CPSI, the supply contract will be signed, upon justification, with the one whose product, process or solution best meets public demands, in terms of cost-benefit ratio with quality and price dimensions (article 15, *caput* and paragraph 1).

Thus, in addition to efficient public procurement, there is a real joint effort to implement tools that are really proposing to solve problems, encouraging the productive sector, and, therefore, promoting improvements to Public Administration.

This regime, however, by granting greater margin of discretion and power of choice to the manager, sometimes ends up implying insecurity. Thus, as Schiefler points out, “the public administrative deficiencies in the area of technological public procurement are much more cultural, contextual and operational than normative (...) due to fear or lack of knowledge about how to conduct public procurement processes for innovation technology, in a phenomenon that causes administrative paralysis and ruins the adaptive capacity of public bodies and entities.”²¹

Faced with this uncertainties and insecurity context, the way to mitigate these risks and improve the scenario, perhaps, is to invest in a more pragmatic approach, in the sense of an interpretation concerned with the contexts, the reality and the consequences of the decision, through “intensification of institutional dialogues between control institutions, jurisdictional bodies and the legal community, so that there is the dissemination of good practices and the formation of an important cultural consensus.”²²

There is no doubt, therefore, considering the novelty and complexity that the theme carries, that the Public Administration must be prepared to conduct an adequate feasibility or impact studies to evaluate the innovation scenario, with quality risk management, to take the necessary measures and make good decisions. This is one of the great challenges facing Brazil, since crises, structural problems (such as the lack of adequate planning, the evaluative deficit of public investments and the lack of structuring of innovation policies, for example) and setbacks are often responsible for making it impossible for the government to conduct technological innovations in cooperation with private companies²³.

An instrumental evolution, therefore, is necessary, and will result from the appreciation of the culture of dialogue, which drives the

²¹ G. SCHIEFLER, « CPSI no Marco Legal das Startups: o que se vê e o que não se vê », público & pragmático, *Revista Consultor Jurídico*, 2021 [<https://www.conjur.com.br/2021-ago-08/publico-pragmatico-cpsi-marco-legal-startups-ve-nao-ve/>]. (accessed on June 4, 2022).

²² *Ibidem*.

²³ See A. KON, « Inovação nos serviços públicos: condições da implementação do governo eletrônico », *IPEA – Planejamento e Políticas Públicas*, n. 52, pp. 489-528, January/July 2019, p. 491: [<https://www.ipea.gov.br/ppp/index.php/PPP/article/view/985>] (accessed on November 2, 2022).

exclusively unilateral, imperative, and imposing States character a gradual loss process, opening the way for a more negotiation action²⁴. Likewise, this instrumental character will strengthen a vision of state action based on results. In other words: a public administration that provides concrete results to citizens, valuing the administrative management control systems and, above all, the results of this management²⁵.

Responsive action by the State, in this sense, is paramount, especially considering that State must plan properly, but must not stifle innovation management, since the best action strategy depends on the context, the regulatory culture and the country history, as highlighted by Ian Ayres and John Braithwaite. The authors further add that “responsiveness is rather an attitude that allows a wide variety of approaches to flourish.”²⁶ That is to say, the responsive activity demands the context analysis of what must be adapted, modified, as well as the new characteristics that must compose an eventual solution to the identified problems, allowing dialogue and freedom among those involved.

In other words, it can be said that one of the focuses of responsiveness in the innovation theme is to allow public administrative efficiency, which, as professor Rodrigo Paganí de Souza says, is a Public Administration commitment with an administrative management of results, seeking promptness, simplicity, rationality, productivity, cost reduction, effectiveness and efficiency; that is, fruits of a reasonable relationship between means and ends, proposing quality results: concrete utilities for citizens²⁷.

Not without reason, the Brazilian Federal Audit Court itself has mention the implementing innovative solutions in Public Administration importance, “in order to make it more efficient and effective, geared toward the rendering of better public services to citizens.” Thus, the mentioned Court Plenary highlighted that, in public procurement, Public Administration must deeply analyze the innovative solution, identifying the benefits in its use, and verifying the risks and opportunities for improvement. In addition, it stated the need to develop

²⁴ F. A. MARQUES NETO, T. M. CYMBALISTA, « Os acordos substitutivos no procedimento sancionatório e da sanção », *Revista Eletrônica de Direito Administrativo Econômico (REDAE)*, Salvador, Instituto Brasileiro de Direito Público, n. 27, 2011, p. 1. [<http://www.direitodoestado.com.br/artigo/floriano-de-azevedo-marques-neto/os-acordos-substitutivos-do-procedimento-sancionatorio-e-da-sancao>]. (Accessed on October 29, 2022). See V. R. SCHIRATO, J. B. PALMA, « Consenso e Legalidade: vinculação da atividade administrativa consensual ao Direito », *Revista Eletrônica sobre a Reforma do Estado*, Salvador, Instituto de Direito Público da Bahia, n. 24, 2011, p. 3 [<http://www.direitodoestado.com.br>]. (Accessed on October 29, 2022)

²⁵ R. P. SOUZA, Em busca de uma administração pública de resultados, in M. A. PEREZ, R. P. SOUZA, (org.), *Controle da administração pública*, Belo Horizonte, Fórum, 2016, pp. 39-61.

²⁶ I. AYRES, J. BRAITHWAITE, *Responsive Regulation: transcending the deregulation debate*, Oxford University Press, 1992, p. 5.

²⁷ R. P. SOUZA, Em busca de uma administração pública de resultados, in M. A. PEREZ, R. P. SOUZA (org.), *Controle da administração pública*, Belo Horizonte, Fórum, 2016, pp. 39-61.

“performance indicators related to this new model, with a concomitant monitoring of the results of its implementation throughout the term of the contract.”²⁸

Therefore, it will be essential to conduct an innovative solution adoption impact study that will aim to guarantee a higher quality government intervention, similarly to a regulatory impact previous analysis, presenting itself as an important mechanism for promoting solutions that enhance community well-being²⁹.

Consequently, the technology innovative solutions public procurement must be based on the assessment of the impacts that the eventual “new” may cause to the achievement of the objectives of the Republic, in particular: fundamental rights realization³⁰. Whereas, even if the result by the innovative solution adds value, may (or may not) be presented satisfactorily, implying positive or negative consequences. That is because, while solves the problem, meeting the target public demand and reducing public resources costs, innovation can do so without guaranteeing the fundamental rights involved, reducing, for example, mechanisms of transparency and social control³¹.

For that matter, this is what adequate Public Governance proposes, creating a new way of managing scarce resources, necessary for a society harmonious life (well-being), with more efficiency and greater legitimacy, through the proportional and dialogued exercise of authority³², as well as the coordinated exercise among all social actors: State, Market and Society.

§3 – THE BENEFITS OF INNOVATIVE SOLUTIONS

The main objective of applying governance practices within the scope of Public Administration is to ensure that the chosen representative’s actions do not distance themselves from the society results expectations, guaranteeing better stages control, like deviations detection in the course of actions and timely correction³³.

That is why the absence of good governance practices in public procurement, which can be better applied based on innovative solutions using technology, as highlighted in the previous topic,

²⁸ Tribunal de Contas da União, Case No 1.716/2022 – Plenary.

²⁹ C. M. RADAELLI, F. DE FRANCESCO, Regulatory Impact Assessment, in R. BALDWIN, M. CAVE, M. LODGE (eds.), *The Oxford Handbook of Regulation*, 2010, p. 281.

³⁰ Freitas asserts that “impact assessment, coupled with motivation, lends itself to purifying behavior and consolidating the transparency of good reasons in fact and in law, that is, ethical and legally sustainable reasons.” See J. FREITAS, *Sustentabilidade, Direito ao futuro*. 4th ed., Belo Horizonte, Fórum, 2019, p. 6303.

³¹ See C. FORTINI, C. CAVALCANTI, « O perigo da relativização indevida da transparência administrativa », *Conjur* [<https://www.conjur.com.br/2020-mar-26/interesse-publico-perigo-relativizacao-indevida-transparencia-administrativa>]. (Accessed on October 29, 2022)

³² A. J. C. CUNHA FILHO, « Governança Pública na Administração Contemporânea », Ph.D thesis, *Faculdade de Direito da USP*, São Paulo, 2017, p. 59 [<https://www.teses.usp.br/teses/disponiveis/2/2134/tde-19022021-181351/pt-br.php>]. (Accessed on October 29, 2022)

³³ A. NARDES, *Da governança à esperança*, Belo Horizonte, Fórum, 2018, p. 145.

can cause serious harm to society, especially to the part that demands and it needs adequate public policies and public services to guarantee its fundamental rights, since if the desired results are not received.

The lack of governance, therefore, can imply serious problems to the Public Power legitimacy. That is why the developing concept of “network governance” is important: State and society seeking integrated solutions, adopting the contribution of those who best understand a given topic, including innovative solutions public procurement proposed by the private sector.

A “network governance” example in public procurement, through onerous or non-onerous legal relations, is the Public Call for the Digital Government actions development, assuring technological services donation to the Government, upon selecting private agents interested in cooperating with the Digital Government Secretariat – SGD. The actions aimed to be developed are: (i) the Public Administration digital modernization; (ii) the digital transformation of user-centric public services; and (iii) the Information and Communication Technology - ICT solutions development and implementation, which can promote advances in terms of efficiency, reducing bureaucracy and simplifying the management and provision of public services³⁴.

As can be seen, the technological innovation tools adoption serves to consolidate the State role in promoting economy (not only reducing costs, but maintaining quality) and public services benefits, and bringing public problems solutions.

CONCLUSION

There is no doubt that the Government must adopt new practices in Public Administration, such as technological innovation, which can improve services, optimizing processes, increase transparency and reduce costs, allowing for greater efficiency and social control.

In this sense, this action must take place, as a priority, in a collaborative way among all social actors (network governance).

In other word, this action must take place by entering legal transactions with privates, which may or may not involve the disbursement or transfer of public financial or equity resources, enabling partnerships between public and private sectors for the achievement of purposes of public and reciprocal interest, in favor of network governance.

³⁴ Ministério da Economia, *Doação de serviços de tecnologia ao Poder Público* [https://www.gov.br/economia/pt-br/assuntos/noticias/2021/agosto/aberto-edital-para-doacao-de-servicos-de-tecnologia-ao-governo-federal]. (Accessed on October 29, 2022)

BIBLIOGRAPHY

BOOKS

FREITAS J., *Discrecionariedade administrativa e o direito fundamental à boa administração pública*, São Paulo, Malheiros Editores, 2007. [portuguese]

FREITAS J., *O controle dos atos administrativos e os princípios fundamentais*, 5th ed., rev. e ampl., São Paulo, Malheiros, 2013. [portuguese]

FREITAS J., *Sustentabilidade, Direito ao futuro*. 4th ed., Belo Horizonte, Fórum, 2019. [portuguese]

FERRAZ L. A., A transparência como ferramenta de legitimação do agir estatal por meio do impulsionamento da eficiência e integridade governamentais, in M. ZENKNER, R. PIRONTI (coord.), *Compliance no setor público*, Belo Horizonte, Fórum, 2020. [portuguese]

SOUZA R. P., Em busca de uma administração pública de resultados, in M. A. PEREZ, R. P. SOUZA, (org.). *Controle da administração pública*, Belo Horizonte, Fórum, 2016. [portuguese]

NARDES A., *Da governança à esperança*, Belo Horizonte, Fórum, 2018. [portuguese]

ARTICLES

AYRES I., BRAITHWAITE J., *Responsive Regulation: transcending the deregulation debate*, Oxford University Press, 1992.

RADAELLI C. M., FRANCESCO F., Regulatory Impact Assessment, in R. BALDWIN, M. CAVE, M. LODGE (eds.), *The Oxford Handbook of Regulation*, 2010.

WEB

CUNHA FILHO A. J. C., « Governança Pública na Administração Contemporânea », PhD thesis, *Faculdade de Direito da USP*, São Paulo, 2017, p. 59
[<https://www.teses.usp.br/teses/disponiveis/2/2134/tde-19022021-181351/pt-br.php>]. (Accessed on October 29, 2022) [portuguese]

FORTINI C., CAVALCANTI C., « O perigo da relativização indevida da transparência administrativa », *Conjur*
[<https://www.conjur.com.br/2020-mar-26/interesse-publico-perigo-relativizacao-indevida-transparencia-administrativa>]. (Accessed on October 29, 2022) [portuguese]

KON A., « Inovação nos serviços públicos: condições da implementação do governo eletrônico », *IPEA – Planejamento e Políticas Públicas*, n. 52, p. 489-528, january/july 2019, p. 491

[<https://www.ipea.gov.br/ppp/index.php/PPP/article/view/985>]. (accessed on November 2, 2022) [portuguese]

MARQUES NETO F. A., CYMBALISTA T. M., « Os acordos substitutivos no procedimento sancionatório e da sanção », *Revista Eletrônica de Direito Administrativo Econômico (REDAE)*, Salvador, Instituto Brasileiro de Direito Público, n. 27, 2011, p. 1.

[<http://www.direitodoestado.com.br/artigo/floriano-de-azevedo-marques-neto/os-acordos-substitutivos-do-procedimento-sancionatorio-e-da-sancao>]. (Accessed on October 29, 2022). [portuguese]

SCHIEFLER G., « CPSI no Marco Legal das Startups: o que se vê e o que não se vê », público & pragmático, *Revista Consultor Jurídico*, 2021

[<https://www.conjur.com.br/2021-ago-08/publico-pragmatico-cpsi-marco-legal-startups-ve-nao-ve>]. (accessed on June 4, 2022) [portuguese]

SCHIRATO V. R., PALMA J. B., « Consenso e Legalidade: vinculação da atividade administrativa consensual ao Direito », *Revista Eletrônica sobre a Reforma do Estado*, Salvador, Instituto de Direito Público da Bahia, n. 24, 2011, p. 3

[<http://www.direitodoestado.com.br>]. (Accessed on October 29, 2022) [portuguese]

OTHERS

Brazilian Institute of Corporate Governance - IBGC, *Corporate Governance*

[<https://www.ibgc.org.br/conhecimento/governanca-corporativa>]. (accessed on November 2, 2022) [portuguese]

Casa Civil da Presidência da República, *Guia da política de governança pública*, Brasília, 2018, p. 18 [<https://www.gov.br/casacivil/pt-br/centrais-de-conteudo/downloads/guia-da-politica-de-governanca-publica>]. (accessed on November 2, 2022) [portuguese]

Complementary Law No. 182, 1 july 2021, article 3, item VIII [https://www.planalto.gov.br/ccivil_03/leis/lcp/Lcp182.htm]. (accessed on November 2, 2022) [portuguese]

Constituição da República Federativa do Brasil, 8 october 1988, article 219-A,

[https://www.planalto.gov.br/ccivil_03/constituicao/ConstituicaoCompilado.htm]. (accessed on November 2, 2022) [portuguese]

Federal Decree No. 9,203, 22 november 2017, article 4

[https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/d9203.htm]. (accessed on November 2, 2022) [portuguese]

Law No. 14,129, 29 march 2021, articles 1 et 3 [https://www.planalto.gov.br/ccivil_03/_ato2019-

2022/2021/lei/114129.htm]. (accessed on November 2, 2022) [portuguese]

Law No. 14,133, 1 april 2021, article 11, item IV
[https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/114133.htm]. (accessed on November 2, 2022) [portuguese]

Ministério da Economia, *Doação de serviços de tecnologia ao Poder Público*

[<https://www.gov.br/economia/pt-br/assuntos/noticias/2021/agosto/aberto-edital-para-doacao-de-servicos-de-tecnologia-ao-governo-federal>]. (Accessed on October 29, 2022) [portuguese]

OECD, *Recommendation of the Council on Budgetary Governance*, 2105, p. 5

[<https://www.oecd.org/gov/budgeting/Recommendation-of-the-Council-on-Budgetary-Governance.pdf>]. (accessed on November 2, 2022)

Tribunal de Contas da União, Secretaria de Planejamento, Governança e Gestão, Secretaria-Geral da Presidência (Segepres), *Plano estratégico, 2019-2025*, Brasília, 2019

[https://portal.tcu.gov.br/data/files/9E/33/17/17/8EA1F6107AD96FE6F18818A8/Plano_estrategico_TCU_2019-2025.pdf]. (accessed on November 2, 2022) [portuguese]

Tribunal de Contas da União, *Índices de Governança e Gestão De Órgãos e Entidades da Administração Pública Federal*, 2021 (IGG2021), Brasília, p. 44

[<https://portal.tcu.gov.br/data/files/4B/62/5D/1B/8EBEB710C74E7EB7E18818A8/011.574-2021-6-BD%20-%20IGG2021.pdf>]. (accessed on November 2, 2022) [portuguese]

Tribunal de Contas da União, *Case No 1716/2022 – Plenary*. [portuguese]