Fiscalização a serviço da sociedade

REVISTA do TCU

Federal Court of Accounts Journal • Brazil • year 45 • Issue nº 127 • May/August 2013 • English version

Guy Peters, from the University of Pittsburgh, conceptualizes governance

Minister President Augusto Nardes discusses Governance and External control

Interview with Minister José Jorge, rapporteur of the Government Accounts 2012

Federative Republic of Brazil

Federal Court of Accounts

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The concepts and opinions expressed in signed doctrinal works are the sole responsibility of the authors.

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To be an institution of excellence in control and to contribute to the improvement of public administration.

Mission Statement
To oversee the public administration and contribute to its improvement, for the benefit of society.

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Letter to the Reader

It is a great pleasure to publish this new edition of the TCU Journal. This issue is a milestone in our history, because, from now on, the journal will be bilingual, published in Portuguese and English.

Our interviewee, minister José Jorge, rapporteur of the process that examine the 2012 Government Accounts, talks about legality and conformity of budgetary and financial execution. He also tells how public management was rated in the public management report, taking into consideration the perspective of inclusive growth set out in the Pluriannual Plan currently in effect (PPA 2012-2015).

The report on the 2012 Government Accounts is also discussed in the Highlights section that also carries an article on the "Public Dialogue" project that has been taking place in several Brazilian cities with the purpose of bringing the Court closer to society and contributing to improve public governance.

Incidentally, governance is being widely discussed by Public Administration and in the Articles section in which we have published four texts on the topic as seen by Court employees. We highlight the article written by TCU president, João Augusto Ribeiro Nardes, as well as the contribution by the United States academic from the University of Pittsburg, Brainard Guy Peters.

The articles also discuss topics such as accreditation in IT bids, based on TCU precedents; the role of the contract inspectors in Public Administration; and the tripartite division of powers of Government.

We hope you enjoy this publication that aims at disseminating actions related to the control and oversight of public resources as well as enabling interaction with the Brazilian Federal Court of Accounts.

Good reading to you!

Bruno Spada

Aroldo Cedraz de Oliveira
is Minister of the Federal Court of Accounts and Editorial Council Supervisor.

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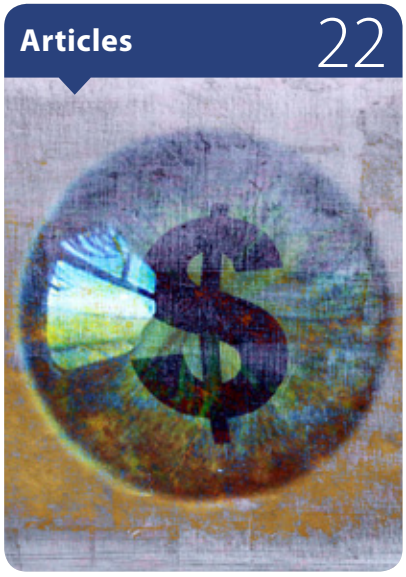

Articles

Inclusive growth

José Jorge
TCU Minister

A mechanical engineer, economist and university professor, José Jorge has been a TCU minister since 2009. In 2013 he was the rapporteur of the report and preliminary opinion regarding the accounts of the government of the Republic in fiscal year 2012. For the analysis, the minister chose inclusive growth as the keynote topic. In an interview to the TCU Journal, José Jorge speaks about the conclusions of the work and about the development perspectives of important areas for the country.

1. The 2012 accounts were approved by TCU with 22 qualifications which originated 41 recommendations. Which of those qualifications deserve special attention?

All of them are important, as they are results from a full year of work of several units of the court, mainly of the Department of Government Macro Evaluation. However, some qualifications really deserve to be highlighted. For instance, the lack of accounting records for the Specific Social Security Regime of federal public civil servants; the financial effects on the BGU (Federal Balance Sheet) derived from the BNDES (Brazilian Development Bank) net profits increase in R$ 2.38 billion after the institution did not acknowledge the permanent losses on certain securities kept in the portfolio as an expense for the period, and from the receipt, by the Federal Government, of R$ 1.3 billion as dividends from BNDES (Brazilian Development Bank), paid under conditions not contemplated by the institution's bylaws.

2. The qualifications that you pointed out have a direct relation with the federal government's fiscal management. Is this the area that concerns TCU the most?

Yes. In the field of fiscal management, the LRF (Fiscal Responsibility Law) represents a milestone for the public administration. This act defined responsibility, planning, and transparency in governmental performance as presuppositions of a diligent fiscal management. However, some operations carried

out by the federal government in 2012 challenged these pillars.

As planning and transparency measures brought by the LRF (Fiscal Responsibility Law) I can mention the attribution conferred by the LDO (Budget Guidelines Law) to define the primary result goal to be sought, corresponding to the difference between primary revenues and expenses, that is, those that affect public indebtedness. The compliance with this goal must be checked bimonthly along the fiscal year, so that corrective measures can be timely taken, especially the limitation of citations and financial movements, contemplated by Article 9th of the LRF (Fiscal Responsibility Law) and also disciplined every year by the LDO (Budget Guidelines Law).

I pointed this out because I see in the primary result an essential indicator of the government's fiscal situation.In principle, this result must essentially depend on collection and public expenditure levels. That is, it must reflect the savings made in order to defray the public debt. Obviously, the economical conjuncture effects cannot be disregarded when analyzing this indicator. Thus, fulfillment of the primary result goal will only make sense should it in fact be derived from the government's fiscal effort.

In this sense, there is always a risk when seeking help from atypical, nonstandard operations to assure the primary result goal fulfillment. This is because such measures are usually perceived and measured by the market, which begins to distrust the government's figures. It is for this reason that, as far as public finances are concerned, realism must always prevail over formalism, lest it impairs the fiscal policy credibility. In other words, it can be said that possible gains derived from the fiscal goal fulfillment are surpassed by the indicator's loss of credibility, causing losses for the country.

"In the field of fiscal management, the LRF (Fiscal Responsibility Law) represents a milestone for the public administration. This act defined responsibility, planning, and transparency in governmental performance as presuppositions of a diligent fiscal management."

3. What were these atypical operations?

They were quite complex operations, involving the Sovereign Fund of Brazil, BNDES (Brazilian Development Bank), and Caixa Econômica Federal (Federal Savings and Loans Bank), mostly carried out after December 28th, 2012. These operations basically consisted in creating primary revenues from indebtedness, combined with dividend advances from public companies and with government fund redemptions, always with the purpose of artificially increasing the primary result.

Together, these operations inflated the primary result in R$ 22.4 billion.

I must point out that along the report some opportunities to increase primary revenues were identified which would render the adoption of these operations unnecessary. In this sense, I emphasize that the primary revenues collection in 2012 was R$ 67 billion lower than the forecast contemplated by the budget. On its turn, the granting of tax and social security waivers was estimated by the Federal Revenue Service of Brazil as amounting to R$ 172.6 billion in the period. Moreover, the Federal Government ended fiscal year 2012 with R$ 2.17 trillion in tax and social security credits to recover in the long term. However, in 2012 the installment plans and book debt collection amounted to only R$ 55 billion. Therefore, it can be seen that a more adjusted gauging of allowance contingencing and revenue waivers, allied to an integrated collection strategy regarding recoverable credits – genuinely fiscal mechanisms –, might be translated into a more adequate fiscal combination to the Federal Government's primary surplus goal fulfillment. Even in case of fiscal failure of such measures, the alternative of reducing the primary surplus goal by changing the LDO (Budget Guidelines Law) would be left. This measure, which does not cause doubts as to fiscal management, was already adopted in 2009 in an attempt to attenuate the internal effects of the global financial crisis.

4. The TCU, in partnership with the World Bank, has been implementing a project aiming at strengthening financial audit, mainly concerning the audit procedures of the Federal Balance Sheet. Has the project been

bearing fruit? What was the main finding in relation to the federal government's accounting procedures?

The project is of paramount importance for the TCU. The results are excellent and could already be felt in the government accounts of fiscal year 2012, with relevant and well-fundamented findings, through the use of internationally adopted criteria and procedures.

The BGU (Federal Balance Sheet) audit sought to check the reliability of the federal government's consolidated accounting statements. After having analyzed the evidence obtained it was possible to conclude that, despite some qualifications, the statements submitted represented the Federal Government's equity situation on December 31st, 2012, as well as the budget, financial and equity results achieved in the fiscal year.

Among the verifications identified in the accounting statements analysis we can highlight those related to the failure to account for some liabilities. The most important of them is the mathematical provision regarding the federal civil servants social security regime, in the amount of 1.1 trillion Brazilian reais.

5. Inclusive growth was the keynote topic in the 2012 accounts evaluation. What is your evaluation of the PPA 2012-2015 public policies, and to which extent are they meeting the objectives of inclusion and inequality decrease in Brazil?

The PPA 2012-2015 brought innovations in its structure in relation to the previous pluriannual plans. The Plan in force aimed at approximating the planning of strategic issues involving the implementation of public policies, as well as at providing more consistency between the PPA and the sectoral plans. Despite the possible advancements of this systematic, which will only be gauged along time, limitations were identified in the model which may impair the managers', society's and fiscalization organs' control. I refer mainly to the lack of instruments to ensure the monitoring of qualitative goals, the shortage of annual goal information regarding the objectives, and the lack of final indexes for the programs indicators.

In relation to the goals of inclusion and inequality reduction, the work did not detect any significant movement. In some cases, the program devised by the government has not been yielding the desired results. Let us consider, for instance, the biodiesel program. It has been proving to be little effective. Soy continues being the most used raw material for the biodiesel production, with about 70% in December 2012. Then there is bovine fat, with approximately 20%. Why, the program is directed towards raw material diversification, based on tax benefits for biodiesel producers who buy oilseeds from family farmers. But it has not been sufficient to promote the productive inclusion of farming families from the Northern and Northeastern areas of the country. Our diagnostic is that this is due to the deficient organization of cooperatives in those regions and to higher costs of oilseeds alternative to soy, which has a better structured production, mainly in the Midwestern and Southern regions.

"In relation to the goals of inclusion and inequality reduction, the work did not detect any significant movement. In some cases, the program devised by the government has not been yielding the desired results. Let us consider, for instance, the biodiesel program. It has been proving to be little effective. Soy continues being the most used raw material for the biodiesel production, with about 70% in December 2012."

The same can be said about the São Francisco River integration project. According to the government's plans, it aims at ensuring water supply to 12 million inhabitants in 391 municipalities of the Northeastern region, in areas with lower hydric availability. The work completion deadline was December 2010 for the Eastern axis, and December 2012 for the Northern axis. Nonetheless, the project has not fulfilled its objective yet, not even partially. The work, which would cost R$ 4.8 billion in 2007, is budgeted at R$ 8.2 billion. And should the low budgetary execution continue, which last year was 15% in the Northern axis and 10% in the Eastern axis, these costs increase will be unavoidable.

However, the audit concluded that the venture management was wanton until 2012. The least delayed lots do not necessarily have any relations with a sequential order allowing at least a partial operation of the canal. This means to say that, although finalized, there are sections that will certainly remain without use for quite a long time, subject to deterioration, at a moment when the Northeast faces the worst drought in the last 50 years.

6. How do you evaluate the Country's infrastructure improvement actions?

We still face a bad situation as far as infrastructure quality is concerned. In the Global Competitivity Report drafted by the World Economic Forum, Brazil fell in terms of general infrastructure from position 84 in 2010 to position 107 in 2012. In the transports area it fell from 105 to 123. This considers a universe of approximately 140 countries.

The low budgetary execution of the actions contemplated for the sector may explain this scenario, at least partially. In 2012, in the transports area, only 65% of the amounts were allocated, and 35% were settled. In my evaluation, this performance is derived from deficiency or outdatedness of technical, economic and environmental feasibility studies and of the ventures basic and executive projects. The delay in concessions and in the definition of regulatory milestones worsens the situation.

In the railroad sector the scenario is worse. The "Railroad Transportation" program, related to the railroad network expansion, had as execution forecast the amount of R$ 2.7 billion in 2012. But only 17% of this amount was paid, employed in just two out of the six railroads contemplated by the pluriannual plan. The situation was repeated in the port sector. If you consider the Companhias Docas as a whole, the budgetary execution remained under 30%.

7. And what about the energy sector?

The Report highlighted the federal government's fuel prices policy.

The main point is the gas price, which is below the internationally practiced level. And Petrobras' costs for the production or import of oil derivatives are not reflected on their pricing, causing Petrobras to sustain huge financial losses in recent years. Although there were gas and diesel price adjustments at Petrobras refineries in 2012, the federal government, in order to avoid that this prices increase was transferred to end consumers, reduced the CIDE-Fuels rates to zero. That is, gas was twice subsidized, both through a prices systematic unaligned to Petrobras costs, and through a tax waiver.

Allied to the automotive segment tax reduction policies, this has provoked an accentuated growth in consumption, mainly of gas. As domestic refineries are not currently capable of meeting the demand of derivatives, the profile of derivatives import and export was altered. Brazil left the position of gas exporter, with revenues of almost US$ 2 billion in 2007, to the position of importer, with disbursements amounting to around US$ 3 billion in 2012.

And there is a side effect as well, inasmuch as these actions caused a direct effect on the ethanol market, which lost competitivity towards gas.

8. In view of the fact that the TCU recommendations issued to organs and entities that received qualifications are not mandatory, as the court's opinion is just preliminary, what is the work performed by the court to contribute for the effective compliance with these suggested measures, regardless of the accounts approval by the National Congress?

In fact, the Report has information and conclusions of utmost relevance, which must be examined by the National Congress when it analyzes the 2012 accounts. As the court only issues a preliminary opinion, recommendations are issued, not determinations.

Then, for the result of this work to achieve an effective result, it would be interesting that, based on the information already evaluated, the court, based on other audits or specific representations suggested by the technical units, could issue determinations to the federal public administration organs and entities. The TCU could then demand effective compliance with these determinations.

Government accounts 2012

Inclusive growth challenges are highlighted in the TCU analysis

The Federal Court of Accounts – Brazil (TCU) approved on May 29th the previous report and opinion regarding the government accounts in fiscal year 2012. The accounts analysis and opinion issuance are one of TCU's most important mandates, carried out annually as determined by the Federal Constitution.

After being analyzed by the court, the report and the previous opinion were delivered to the president of the National Congress, Senator Renan Calheiros. The congressmen are responsible for judging the accounts.

At the TCU the report and previous opinion approval occurred with 22 qualifications related to aspects of conformity of public revenues, budget execution, and accounting statements.

Due to the indicated qualifications and to the governmental performance analysis, the TCU issued 41 recommendations addressed to the Executive Office, the National Treasury Secretary, to the National Economic and Social Development Bank (BNDES), and to some ministries, among other organs and entities. According to the government accounts 2012 rapporteur, Minister José Jorge, "these recommendations aim at improving good management of public funds and ensuring transparency to the society's benefit", he pointed out.

The court will monitor the compliance with recommendations and suggestions by the inspected organs and entities. In the fiscal year 2011 accounts assessment, 12 out of the 40 recommendations issued by the court were complied with, three partially complied with, 13 are in phase of compliance, 11 were not complied with, and one compliance analysis is suspended by the TCU full court.

Besides analyzing the budgetary and financial execution legality and conformity, Minister José Jorge chose inclusive growth as a keynote topic for the 2012 accounts. In this sense, he tried to evidence the public management performance in the report, considering the inclusive growth perspective outlined in the Pluriannual Plan currently in force (PPA 2012-2015). Thus, inclusive policies were highlighted, which must be capable of promoting the productive insertion of Brazilian social groups and regions in compliance with the central proposal of the PPA in force.

For the TCU, the analyses performed considered that the policies aimed at regional development, basic education, health, digital inclusion, and other infrastructure areas are mainly directed towards inclusion, but according to Minister José Jorge, "these policies may not achieve their best results due to problems of conception, execution or follow-up". Therewith, the TCU tried to check the public policies management quality in these areas under different perspectives, with the purpose of increasing the probability of success of government actions.

EDUCATION

The TCU analyzed, among other topics, the educational situation in Brazil, from basic children's education up to higher education. Indexes display regional inequalities that impair the equalitarian development of education. Besides, permanence and access difficulties are factors that disrupt comprehensive and quality education. The decentralized execution of basic education policies in Brazil also contributes for the perpetuation of educational differences among regions.

When analyzing basic education, the TCU identified that the main hindrances are linked to quality, equity, access, and permanence. The court also observed that these factors also manifest themselves in different intensities for each phase of education, either child, elementary or high school.

HEALTH

The TCU analysis was focused on the situation of public health policies in Brazil, the Single Health System (SUS) conditions, the goals related to infrastructure improvement and to expansion of the basic assistance coverage. In spite of the investments increase, the country holds the 72nd position in the general ranking of the World Health Organization (WHO) regarding health investments, considering the government's expenditure per inhabitant.

The accounts rapporteur, Minister José Jorge, pointed out that "Brazil is the country with the smallest government participation in total health expenditures. This percentage is 44%, a little over half the amount invested by the United Kingdom (84%), Sweden (81%), or France (78%)". The TCU work verified that, from 2004 to 2012, federal expenditures with health services grew from R$ 32.7 billion to R$ 80 billion. Even so, in per capita values Brazil is behind other countries with universal assistance systems.

In relation to federal fund transfers, Minister José Jorge also pointed out that "municipalities that have low capacity of offering health actions and services receive a lower quantity of funds, which, in the end, maintains existing inequalities".

TRANSPORTS

The TCU preliminary opinion presented an analysis of the Brazilian transports matrix infrastructure (highways, railways, ports, waterways, and airways). In each transportation model there are social and economic particularities and disparities, besides integration difficulties that are a part of the systems.

When analyzing regional aviation, which caters to the air transportation connecting smaller urban centers, in comparison with larger airports, the court verified that one of the main development hindrances is the difficulty to dilute costs among the limited number of passengers, especially in lower-income locations.

In relation to railroad transportation, which represents 25% of the Country's transportation matrix, the government aims at increasing this model's share to 35%. Therefore, the Pluriannual Plan (PPA) 2012-2015 contemplates investments of R$ 17 billion in the railroad modal with federal funds, R$ 2.7 billion of which should have been used in 2012. However, the Railroad Transport Program registered effective disbursements of 17% in the period. "This happened, among other factors, due to lack of execution of budgetary funds destined to four of the six railroads contemplated: Nova Transnordestina, Pantanal, Integração Centro-Oeste, and Ferroeste", states the Accounts 2012 rapporteur, Minister José Jorge.

As to the highway system, the TCU work indicated that, taking into account the national average of 37.3% of roads ranked as good or very good, the Northern, Northeastern and Midwestern regions rated only 8.5%, 30.3% and 30.3% respectively, and that there is a minimum disparity of seven percentage points in comparison with the national indicator of over 20 percentage points in relation to the average of the Southern and Southeastern regions. For José Jorge, "The asymmetric regional pattern represents a challenge to the social and productive integration of citizens from the least developed regions, generating unequal opportunities according to where the Brazilians live", he concludes.

Social Security – The TCU evaluated social security within the three regimes: The General Social Security Regime (RGPS), the Special Social Security Regime (RPPS) for civil and military public servants, and the Complementary Social Security Regime (RPC). The court also analyzed the "Social Security" program contained in Pluriannual Plan (PPA) 2012-2015 and verified, among other items, whether the objectives of service quality and sustainability improvement are being fulfilled.

In the actions intended to improve the quality of services, the court identified that in 2012 both the national and regional goals were below those that were forecast. According to the Social Security Ministry, among the justifications for the underperformance there are the reduced number of employees, the scarcity of doctors to perform the surveys, and an increased demand for assistance. As to the sustainability of services, the RGPS nominal deficit value grew 14.8% from 2011 to 2012, reaching R$ 5.3 billion. The RGPS total deficit was equal to R$ 40.8 billion, with the urban clientele's result being positive in R$ 20.5 billion and the rural clientele's result being negative in R$ 65.4 billion.

In the civil servants regime (RPPS) it was possible to identify a negative result of R$ 36.2 billion in 2012 (4.8% higher than in 2011). Nonetheless, the deficit increase has been decreasing in the last five years. In 2012 the deficit represented 0.82% of GDP. The TCU also observed that, in relation to the military social security (RPPS), the deficit increase was more remarkable in the last five years, with a negative result of R$ 21.3 billion in 2012, a value 6.9% higher than the figures for 2011.

Digital Inclusion – The preliminary opinion analyzes the digital inclusion (DI) situation in Brazil and indicates that the regional differences and lack of governmental articulation are some of the main hindrances to the country's homogeneous development and to reach the goals established by the Ministry of Communications, which coordinates the main DI programs. Digital inclusion can be understood as the assurance of the citizen's access to the use of Information and Communication Technologies (ICTs).

Cover of the Government Accounts 2012 publication

The TCU verified that in 2011 38% of Brazilian homes had Internet access, in comparison with 62% without access. In the rural area, the proportion was 10% with access and 90% without access. In the urban area, on its turn, 43% had access, while 57% did not have. Moreover, when analyzing the regions of Brazil, the TCU verified that the Northeastern and Northern states were those with higher restrictions, with 21% and 22% of access, respectively, while the Southeastern region displayed the highest access percentage (49%).

The Pluariannual Plan (PPA) 2012-2015 establishes as a general digital inclusion goal that by 2015 70% of the Brazilian population should be able to use the Internet, with broadband or dialed access. The PPA also expects that 70% of the class C population and 40% of classes D and E populations will have access. However, the TCU verified that the scarcity of governmental resources and the need of increased articulation among the ministry, states and municipalities, in order to make planned measures more effective, are the main difficulties faced to assure fulfillment of the goals.

"Public Dialogue" project seeks to improve public governance across the country

diálogo público

para a melhoria da governança pública

In 2013, the Federal Court of Accounts - Brazil (TCU) decided to continue the "Public Dialogue" project which, in previous years, has encompassed several Brazilian cities with a view to bringing the court and society closer. In its new edition, the main topic of the project is the improvement of public governance. Talks will be held in several States, with mayors and managers of units under the jurisdiction of TCU.

The purpose of each meeting is to present the new guideline for management control governance and address issues such as bids and contracts, covenants, public works and internal control.

Without leaving aside verification of the legality of administrative actions, the court seeks to operate in a more pedagogical fashion to help managers adopt measures for the early prevention of irregularities that are consistently repeated year after year, such as overpricing, overbilling, irregular bidding, lack of basic or executive projects and inadequate environmental studies.

The first edition of the year took place in Brasilia on May 15 to discuss the improvement of public administration in human resources governance. During

the opening ceremony of the event, TCU President Minister Augusto Nardes stressed the need for good governance: "The waste of public resources in the country is ongoing and we need good governance to stop this". He also highlighted the importance of the people who work in the institutions: "People are the greatest wealth of the nation".

The event was held at the Supreme Labor Court and was attended by 700 participants, including senior managers and personnel and audit managers from federal institutions that will be assessed by TCU in the human resources governance survey.

TCU Substitute Minister Marcos Bemquerer Costa started the round of lectures with the theme "Governance applied to people management". He explained the difference between governance and management, and stressed that "transparency, integrity and accountability are principles that guide good governance practices".

PORTO ALEGRE

the first State edition of the Public Dialogue 2013 took place in Porto Alegre (RS) on May 28 and was attended by over 500 people from across the Southern Region. The event was held at the Legislative Assembly of Rio Grande do Sul (ALRS) in partnership with the State Court of Accounts (TCE-RS).

During the event, President Augusto Nardes stressed that the court's work is to require that public expenditure be made with rigor. At the same time, he emphasized the importance of preventing the most frequent irregularities that generate convictions. He emphasized that, in order to improve the performance of public managers, TCU is investing in cooperation agreements with several countries and in training courses in partnership with the State Courts of Accounts.

According to Minister Múcio José Monteiro, who also attended the event, the preparation of public managers is very important to the whole society, as is citizenship education. "This is the education that the Court of Accounts wants. We will help managers learn to use public funds".

George Cereça

Public Dialogue's opening ceremony in Porto Alegre.

ALRS president Peter Westphalen says politicians are a noble cell of society: the social transformation cell. "We have to value our activity. Make people with good intentions want to be in politics, because society's yearnings are permanently expressed in legislature, by means of debates in committees, the exercise of dialogue in congressional offices and the plenary, and voices from the stand", he concluded.

State Court of Accounts President Cezar Miola said that, as is the case for humans, institutions are not perfect. However, it is fundamental to be prepared to avoid mistakes, which, he said, is the Court of Accounts role. "We are not only here as watchdogs, but rather as partners for good practice".

Attendees to the event program were counselors of state courts of accounts from the Southern Region, deputy-counselors, members of the Accounts Public Prosecutor's Office, Rio Grande do Sul mayors, officers and civil servants of the federal, state and municipal governments of the State, Brazilian courts of accounts civil servants and civil and military authorities.

BELÉM

the second State edition of the Public Dialogue 2013 took place in Belém (PA) in partnership with the Court of Accounts of Pará (TCE-PA). The meeting addressed issues such as oversight activities coordinated between the TCU and State and municipal Courts of Accounts, as well as the contribution of government audit in the formulation of public policies.


Rodrigo Lima

Substitute-minister Marcos Bemquerer Costa speaks at the Public Dialogue in Belém.

The keynote speech was addressed by TCU Substitute Minister Marcos Bemquerer Costa on "Government audit and public policy: the dimensions of innovation and efficiency of public administration". There were 1,500 participants, of which 144 mayors of Pará municipalities, city councilmen, students and other federal and state managers.

At the time, the Substitute Minister underlined the importance of work performed in partnership with the TCE-PA, highlighting the performance of a coordinated audit in the area of education – which will include other courts of accounts – aiming to outline a diagnosis of high school education in the country. He illustrated his speech on education with impressive figures. Among them, the information that only 50% of young people aged 18 completed high school.

Bemquerer emphasized the low budget execution in several economic and social sectors of the country, which shows that there are certain management weaknesses in the implementation of programmed investment. He reported a growth of the Gross Domestic Product (GDP) in all Brazilian regions, stating, however, that inequalities persist. He then stressed the importance of social control of public expenditure.

"And how can government audit contribute to the improvement of public policies and also to an efficient and effective implementation of these policies?", the deputy minister asked the participants. The answer, Bemquerer pointed out, is through governance, a new concept that emerged in the United States of America. It is through governance that we aim to make federal public administration a safe and conducive environment to the formulation, implementation and assessment of public policies for the benefit of society, the great proprietor of public funds.

20 YEARS OF LAW 8.666/93

On June 25, an edition of the Public Dialogue was held in Brasilia in order to discuss opportunities for the advancement of Law 8.666/93, which regulates the bids and contracts of the Federal Public Administration. Efforts were made to contribute to a positive agenda in discussions about the law and the need for improved public procurement processes.

The event coordinated by Minister José Múcio Monteiro marked the 20th anniversary of the enactment of the Law and was attended by representatives from the Executive, Legislative and Judiciary, experts and members of the private sector.


Andressa Anholete

Public Dialogue's opening ceremony in celebration of 20 years of Law 8666/93.

Government audit as an inducer of governance for development

João Augusto Ribeiro Nardes is the President of the Federal Court of Accounts - Brazil

ABSTRACT

Brazil faces a series of challenges to achieve the so-desired development, conjugating economic growth and people´s life quality. Sustaining economic and financial stability and increasingly investing in education, technological innovation and infrastructure works are essential aspects always mentioned, in addition to the need of overcoming social and regional imbalances. Brazilian Government is an important development actor. That is why improving public governance represents a premise for overcoming a great part of such challenges. Attentive to this conjuncture and to its institutional mission, the Tribunal de Contas da União - TCU (Federal Court of Accounts - Brazil), without neglecting legality and conformity, has structured itself and searched for partnerships at the national and international levels to identify and disseminate the best practices of governance, so that people´s interests may always have priority over public managers' or private groups' interests. For this new challenge, a national pact for improving governance seems essential, which, in broad lines, means listening to society, planning better, coordinating better and in a coherent manner, having solid structures of internal controls and risk management, besides using measurable indicators that can be divulged in a totally transparent manner, so that results achieved are widely known and discussed by society.

Key-words: Development. External control. Governance.

1. INTRODUCTION

Economists, market analysts, investors and world leaders have repeatedly stated that the world progresses from challenge to challenge. In the particular case of Brazil, this maxim has been confirmed not only from the market's standpoint, but also from the viewpoint of government audit of the Public Administration. In the past, we focused on compliance audits, with emphasis on the legality of management actions. In the 1980s and 1990s, we started to develop performance audits, focused on the assessment of the performance of government agencies and programs. Now is the time for us to foster governance audits, without prejudice to the oversight actions consolidated by past achievements.

The term "governance", especially in the context of the term "corporate governance", is conceptually closely related to the goal of overcoming the so-called "agency conflict", which arises from diverging interests among managers (agents) and owners (principal) in different types of organizations. Within the private sector, corporate governance is intended to protect shareholders (principal), especially the minority, from the possible excesses of senior management (agents). By illustration, that is why "boards" are usually mentioned as an instrument of governance.

According to the Brazilian Institute of Corporate Governance-IBGC, "the principles and practices of good Corporate Governance apply to any organization, regardless of size, legal status or type of oversight [...] adaptable to other types of organizations, such as, for example, [...] government agencies" (IBGC, 2009). In fact, in the public sphere, society (principal) plays the role of shareholders and public managers (agents) are equivalent to the management team of companies, to the extent that they receive from society the power to manage the funds collected and give them back through services to citizens.

In this sense, we reach the understanding that public governance is linked to the purpose of establishing in Public Administration (agent) a safe and conducive environment to the formulation and implementation of public policies for the benefit of society (principal).

From the organizational viewpoint, it is interesting to note that, if governance is regarded as something essential, it is even more so when aiming at Public Administration as a whole, consisting of all the various public organizations focused on specific goals, while sharing public interest as a foundation. In this case, there is a large complex and multifaceted body that requires an enormous coordination capacity

to be well directed. In this light, Guy Peters[1] argues that good governance includes:

- definition of collective goals legitimately elected by society;
- coherence of public policies and coordination among different stakeholders for its realization;
- conditions for the implementation of public policies, considering the capacity of the state bureaucracy and institutional arrangements that promote joint action with non-governmental entities;
- monitoring and assessment to ensure continuous learning and improvement and also to create conditions for accountability, including the areas of public action transparency and accountability to society.

As a matter of fact, to improve governance is to listen to society, plan and coordinate better and consistently, to have firm internal controls and risk management structures, in addition to using measurable indicators that can be disseminated with full transparency, so that the results achieved are widely known and discussed by society.

While engaging the aspects mentioned above, governance audits also aim to create conditions that avoid unwanted occurrences such as misappropriation of funds, waste of resources and managerial or structural failure which undermine good and regular use of public funds. Thus, efforts are made to act on the root causes that give rise to various types of issues in the management of public funds, and not just to combat undesirable consequences.

Within the Federal Court of Accounts (TCU), the governance issue is part of the five-year Strategic Plan (PET) 2011-2015, in which TCU's mission was redefined to "Overseeing Public Administration to contribute to its improvement for the benefit of society". It is worth highlighting that the PET enables all servants of the organization to start "rowing in the same direction", generating synergetic forces to achieve the expected results. It is no coincidence that the existence of a strategic plan is an important governance tool.

It is noteworthy that, by contributing to the improvement of State governance, government audit also contributes to public administration having better conditions to promote national development, complying with one of the fundamental objectives of the Republic recorded in Article 3 of the 1988 Constitution. This is one of the main challenges which the TCU plans to deal with now: to help public institutions to become more reliable and able to foster national development.

Which direction will help us achieve this development? What governance actions do we take? "**You must know for which harbor you are headed if you are to catch the right wind to take you there**", emphasized Seneca in the First Century. Keeping a fiscal balance, ensuring monetary stability, investing more in research and technological innovation, increasing substantially the quality of public education, significantly reducing social and regional inequalities, giving highest priority to the infrastructure sector, with massive investments in transportation, energy, telecommunications, sanitation, among others, are just some examples of key development aspects which require special attention from government audit in relation to the improvement of governance in Brazil.

Also, since those goals should be coordinated in a complex decision-making environment, which involves extremely bulky public expenditure management, good governance applies here. To understand the size of public expenditure that support these goals, it is worth mentioning that, at government level alone, the 2012 Brazilian federal government budget with an authorized amount of R$ 2.4 trillion (including debt rollover) is equivalent to approximately 50% of the GDP for that year.

Of this total, in 2012, R$ 933 billion were committed to expenditure to fund the delivery of goods and services to society. Of this amount, R$ 164 billion (4% of GDP) were allocated to investments, which, in addition to having insufficient levels for the country's growth needs, have not yet materialized in the very year of budget execution through effective delivery of goods and services to society (liquidation of expenses), giving rise to the so-called "unprocessed payables", which, as evidenced by the chart below, were recorded with very high values in 2012. (Graphic 1)

The challenges surrounding the huge budgetary resources, as already noted, are of multiple and distinct nature. With regard to public education, for example, there is an undeniable urgency to foster a quality leap capable of promoting not only equal opportunity at the national level, but also allowing young Brazilians to be able to compete with other developed nations. As illustrated by the

Graphic 1
Investment expenditure – liquidated 2012 x expenses recorded under unprocessed payables

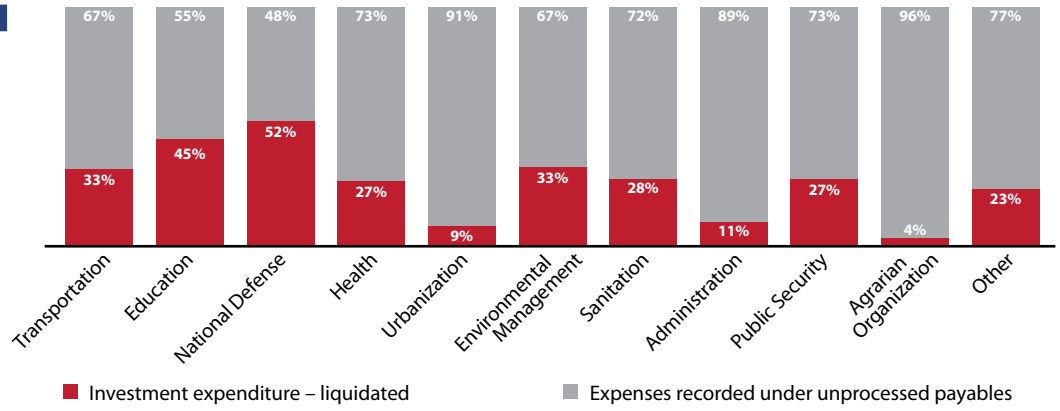

chart below, challenges in this area are immense and still require, among other factors, more economic growth to sustain a higher investment in education in absolute terms.

It is appropriate to note that, in 2013, the organizational architecture of TCU was reshaped by establishing four thematic coordination offices associated with the main areas of the public sector (social issues, infrastructure, development and essential public services). With more specialization, each new secretariat will be able to better identify its own risk and relevance situations, as well as to understand the models and tools of governance that surround them, contributing to its improvement. In addition, each one started to have identity and focus in its performance, concentrating mainly on areas which would produce sectoral reports that will inform the National Congress in their approval of multiannual plans and annual budgets where the funds necessary to national development are provided and allocated.

By the way, this focus will lead us towards the onset of an international study in 2013, to be conducted with the support of the OECD, which will identify good public governance practices adopted by the central agencies of national governments – Finance, Planning and Civil Office of the Presidency – and Supreme Audit Institutions, within the scope of a group of selected countries.

Country	Expenditure with education - 2009 (% of GDP)	PISA Ranking
Brazil	5,7	53º
Portugal	5,8	27º
UK	6,0	25º
USA	7,3	17º
Finland	6,8	3º

Source: OCDE Education at a Glance Report, OCDE/Pisa in Focus 2012
PISA (*Programme for International Student Assessment*) de Estudantes

The following will be addressed in this study: public planning and budget systems, financial management systems, internal control systems, risk management systems, public policy monitoring and assessment systems and accountability systems.

This outline aims at having a selective and systemic view of crucial areas for the consolidation of a strategic, accountable, open and responsive Public Administration which effectively induces national development.

After all, rather than seeking economic growth, what the nation needs is to ensure the credibility of public institutions and find Ariadne's thread to lead us from one challenge to the other and allows us to take safe steps ahead, nearing people's quality of life levels to those achieved by first world countries.

It is with this approach that the oversight actions aimed at improving governance propose to contribute to the improvement of the Public Administration for the benefit of society.

Therefore, it is essential to involve all – businessmen, leaders from all walks of the federation, scholars, thinkers and leaders of Brazil – a true pact for public governance towards the sustainable and longstanding development of our nation, for the benefit of all society. And may our actions serve as a solid foundation for future generations of Brazilians who are headed towards effective participation in the leadership of the renewed ongoing global governance.

Because Brazil wants the future now!

1 PETERS, B. Guy. *Governance and Sustainable Development Policies*. In: Conferência das Nações Unidas sobre Desenvolvimento Sustentável – Rio+20. Organização das Nações Unidas (ONU) – Rio de Janeiro, 2012.

Corporate Governance Practice in the Federal Public Sector

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ABSTRACT

The Brazilian Federal Constitution establishes the Government as a provider of good public services, based on citizen needs. For this, senior management in public institutions receive authority over resources, structure and personnel required and also some political power to obtain alignment of external actors that may affect institutional results. In order to achieve power balance, governance mechanisms are necessary to maximize the probability that senior management moves toward appropriate institutional service delivery, and not toward its own or others interests. The Brazilian public law defines the principles that should guide the functioning of governance mechanisms and indicates some of them, such as: popular representation by councils, call-centers and ombudsman, service portfolio, easy access to public information, planning system, internal committees, internal and external audit. These mechanisms might be used by external actors in order to evaluate, direct and monitor the performance of senior management of the institutions. By strategy, TCU stimulates the use of mechanisms like that, especially through recommendations to governance institutions, with good results.

Keywords: Citizen. Governance. Public Administration. Public interest

1. INTRODUCTION

The Brazilian Government is republican and its function is to provide services to citizens and the society. Accordingly, Article 175 of the Federal Constitution determines that the government is a services provider and has to render appropriate quality services.

> Art. 175. It is the duty of the Government [...] to **provide public services**.
>
> Sole paragraph. The law will provide for:
> [...] II – the rights of the **users**;
> [...] IV - the **duty of maintaining appropriate services**. (CF/88, with highlights made by us)

Consequently, the Government also has to evaluate the services it offers to citizens, based on high quality standards, to know if such services are appropriate or need to be improved. This line of reasoning is in Art. 37, paragraph 3, item I of the Constitution.

> Art. 37. The Government [...] will abide by the principles of [...] efficiency and also by the following: [...]
>
> Paragraph 3 The law will establish how the **user** will participate in government directly and indirectly, with special regulation of:
>
> I – the claims related to **the rendering of public services** in general, ensuring that the services offered to the **user** are **maintained** and that the **quality** of the services are **evaluated** on a regular basis, both **externally** and **internally**; (CF/88, with highlights made by us).

In this sense, Art. 70 of the Constitution sets forth that the controlling bodies oversee the activities of the Government to evaluate if legitimacy is complied with, i.e., if services are appropriately rendered according to the public interest. Moreover, the legislation must be complied with (legality) and the resources available for producing the best results possible must be appropriately allocated (cost effectiveness).

> Art. 70. The accounting, financial, budget, **operational** and asset oversight of the Government and entities of direct and indirect administration, in relation to legality, **legitimacy**, cost-effectiveness, application of grants and exemptions of revenues, will be exercised by the National Congress, by means of government audit, and of internal control of each Power. (CF/88, with highlights made by us)

1.1 GOVERNABILITY X GOVERNANCE

Therefore, it can be inferred from the constitutional text that for each public service

provided for, clear indicators and targets of efficacy, efficiency, effectiveness and cost-effectiveness must be determined and monitored by the public managers, to comply with the objectives of appropriate delivery of services.

To make this feasible, the public institutions are granted managerial power (resources, structure, personnel and legal mandates) needed to implement and maintain such services. Additionally, the heads of these institutions are also granted political power to align with (or to try to align with) the interests of external players to the institution and that may affect results. This political action is called **governability** (ARAÚJO, 2002).

This is the point in which there arises a serious setback against legitimacy, namely "conflict of agency": the powers granted to heads of institutions and the privileged access they have to institutional information may trigger in them a wish to fulfill their own interests, at the expense of serving the public interest.

Consequently, the power of a head of institution (governability) must be limited and guided by the power of those most interested in the public institution: the Brazilian citizens. This power and the mechanisms that install them are called **governance**.

Therefore, corporate governance in the public sector is the power (or the capacity) of maximizing the likelihood of having the behaviors (actions) of head managers be guided toward fulfilling the interests of the citizens and of the Brazilian society (as appropriate public services), and not toward the fulfillment of their own interests; this includes a set of external mechanisms to evaluate, steer and monitor institutions, which are needed to implement this power (or capacity) (ABNT, 2009b, 2012; BRASIL, 2012).

1.2 IMPACT OF HEAD MANAGEMENT BEHAVIOR IN THE INSTITUTIONAL RESULT

Is there any evidence showing that head management behavior is in fact very important to offering high-quality services? Yes there is.

See, for example, the Gespública model, officially launched in Brazil in 1995 with the name *Programa da Qualidade e Participação na Administração Pública* – QPAP (Program for Government Quality and Participation). Note that the current version of this model (Figure 1) points out that LEADERSHIP originates governance and management. Stated differently, institutional leadership creates bridges and commitments with citizens and the society, and transforms these commitments into strategies and plans that define how individuals and processes of institutions are organized and managed to obtain results (high-quality services) for citizens and the society.

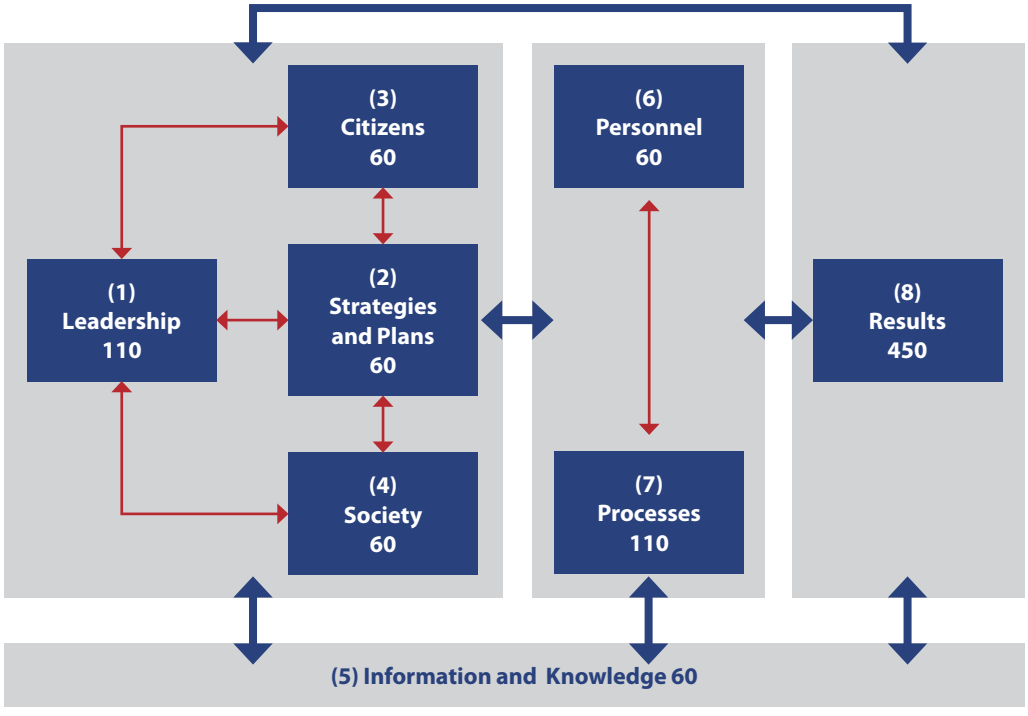

Figure 1
Gespública analysis criteria (BRASIL, 2010)

In reality, does this cause and effect relationship exist?

An IT governance and management audit conducted by the TCU in 2005 (Appellate Decision 2308/2010-TCU-Full Court) with the participation of 255 public institutions verified that institutions with greater head management participation (leadership) were the ones whose internal management processes were more efficient. On the other hand, the institutions in which the head management did not define clear guidelines (regarding policies, objectives, indicators and targets) were the ones whose processes were usually poorly managed and inefficient. They most certainly over spent and provided fewer benefits to citizens. This data can be seen in Figure 2.

The IBGC (2009) defines governance (applicable to private or public institutions) as the system under which a head management steers, monitors and encourages its institution toward delivering good results, interconnecting its owners (or citizens, in the case of public institutions), the board of directors, the executive board and the controlling bodies.

2. PRINCIPLES OF CORPORATE GOVERNANCE PRACTICE IN THE FEDERAL PUBLIC SECTOR

The IBGC (2009) understands that the governance system must be guided by four principles, which can be fully applied to the public sector:

- **TRANSPARENCY**, which means the more information is available to citizens, the more their capacity for controlling public institutions to have them comply with their role and not surrender to private interests. Therefore, public institutions should show interest in disclosing information, except for information that has been justified as being reserved or confidential;

- **EQUITY**, which means that there should be no privilege whatsoever granted to those interested in public institutions at the expense of others by reason of spurious interests;

- **ACCOUNTABILITY**, which means that the public institution should always account for its acts and for the results delivered to those interested, especially to citizens;

- **CORPORATE RESPONSIBILITY** (institutional responsibility), which means that head managements must be committed to public institution sustainability, toward it longevity, which also includes considering social and environmental elements when defining businesses and operations.

These principals have been long included in the federal public legislation, sometimes named differently but with very similar content in terms of concepts. Example:

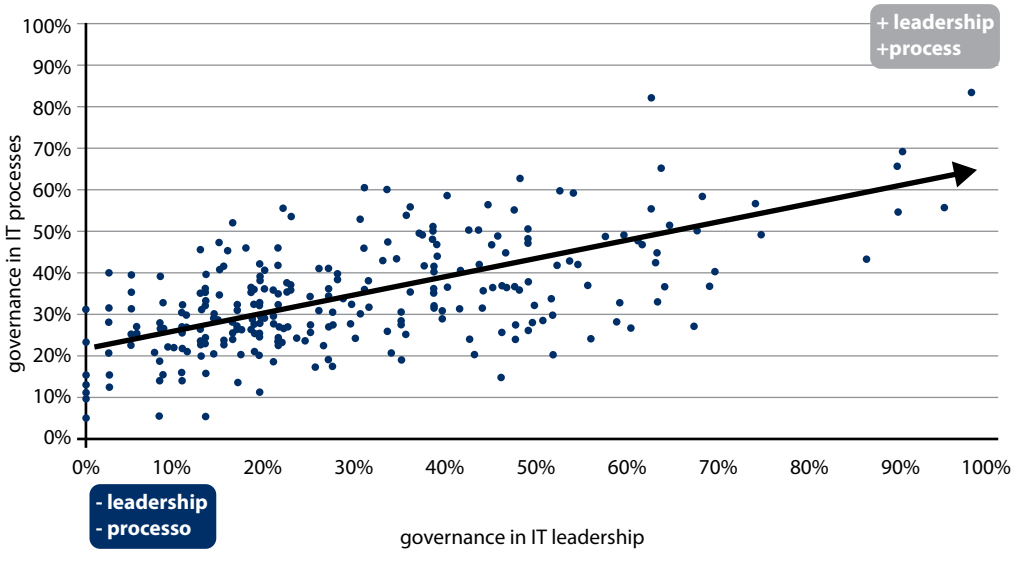

Figure 2
Correlation (0,6) between leadership and quality in IT processes (Appellate Decision 2308/2010-TCU- Full Court)

planning and control (Decree Law 200/1997, Art 6);

- transparency and publicity (Federal Constitution-CF, Art. 37 and Fiscal Responsibility Law-LRF);
- morality (CF, Art. 37);
- fairness (CF, Art. 37);
- Cost-effectiveness (CF, Art. 70);
- legality (CF, Arts. 37 and 70);
- legitimacy (CF, Art. 70);
- efficiency (CF, art. 37);
- efficacy and effectiveness (L10180/2001, Arts. 7, III, 20, II) and others.

3. CORPORATE GOVERNANCE PRACTICES IN THE FEDERAL PUBLIC SECTOR

In view of all this, how can citizens and the Brazilian society positively influence the behavior of head managers of public institutions?

There are mechanisms and governance practices provided for in our legislation. Here are the main ones:

- congressional representation or representation in **Councils** that include representatives of the civil society (e.g., National Council for Social Assistance) fosters the participation of the society in the management of public affairs as the main interested party;

- **support and relationship** services to the citizen-user and **public ombudsman office**;

- publication of **a Charter of Services to the Citizen** and the conduction of customer-satisfaction studies in relation to the offered services;

- easy, speedy and structured access to public information, which is the object of the *Lei de Acesso à Informação* (the Information Access Law);

- **institutional planning**, which contributes to the optimal allocation of the available resources and provides greater transparency, enabling the control by the interested parties. Without this planning, there is no governance;

- **internal committees** (), which make it easier to align several managers toward complex themes, thus avoiding conflicts;

- **administrative decentralization** and investments in **personnel excellence**, which are legal targets and the basis for having more effective and efficient institutions through flexible actions;

- **risk management** to reduce the negative impact of risks over institutional targets, through the employment of **internal controls**, created and implemented by the manager himself (ABNT, 2009a);

- **publication of plans**, such as the Pluriannual Plan-PPA and the *Planos de Ação Global* (Global Action Plans), **and of portfolios**, such as the Charter of Services to the Citizen , **and of results**, such as the Management Report, which are tools for providing transparency to society;

- **individual and institutional performance evaluations**, excellent tools to continuously improve institutional efficiency;

- **internal audits**, fundamental mechanisms to early detect risks that have not been adequately addressed and assure society that internal controls are effective;

- the **External Control** mechanism employed by the National Congress with the support of the TCU is how the Brazilian society can verify if the public managers acting on its behalf are in fact complying with the rules of conduct (legality), strictly toward the interest of Brazilian citizens (legitimacy) and through the use public funds with the best return possible (cost effectiveness).

This shows that there are plenty of principles and legal mechanisms to govern and manage well. All these principles and mechanisms, among others, are useful to increase investments returns, mitigate the risks of failing to achieve targets and improve the services provided to society.

Their application creates benefits to the Brazilian society, strengthen public institutions –

which become more sustainable – add value to managers and head managers, and reduce legal risks.

Nevertheless, the TCU is by no means affirming that citizens and head managers must be held accountable for conducting the activities of public institution management. This is not the point.

The point is that citizens need to effectively make use of legal mechanisms and head managers of public institutions need to focus on delivering institutional results that benefit citizens and the society. Accordingly, head managers need to define guidelines and policies for the services to be offered and define objectives, indicators and targets for such services. Finally, with the support of internal control structures and internal audit, these head managers must assure that the areas defined for the management of business process create and maintain internal controls and risk management mechanisms that guarantee the creation, performance and update of strategies and plans; they must also guarantee the management and protection of the information and knowledge needed to conduct activities and assure that the appropriate personnel and optimized processes are combined efficiently to deliver the best results at the lowest costs.

It is then a great challenge to encourage the Federal Government in a whole to effectively make use of these constitutional, legal and normative concepts. The audits to verify legal compliance are very important, but they are not enough to encourage public authorities and managers. Consequently, the TCU continuously improves its control methods to encourage the adoption of good management and corporate governance practices.

In light of this, among TCU's successful initiatives are the development-incentive actions employed within a consolidated regulatory framework and designed for the governance and management of specific topics. They result in rules that make it easier for authorities and managers to understand and enable good practices.

To implement these actions, the TCU has had excellent support from the higher governing bodies, which are the ones responsible for regulating and overseeing the Federal Government according to their expertise.

We cite as example the incentives given to the IT area by means of appellate decisions 1603 and 2471/2008-TCU-Plenário and that led to rules that organize IT bids more efficiently, such as Instructive Norm SLTI/MP 4/2010. We cite two other examples - the information security rules developed by the Institutional Security Office of the President of the Republic and resolutions 70, 90 and 99/2009 by the National Justice Council, which address institutional and IT planning.

In simple terms, the strategy adopted by the TCU is represented in Figure 3. The TCU applies control actions to the institutions with a specific function or service within the Federal Government

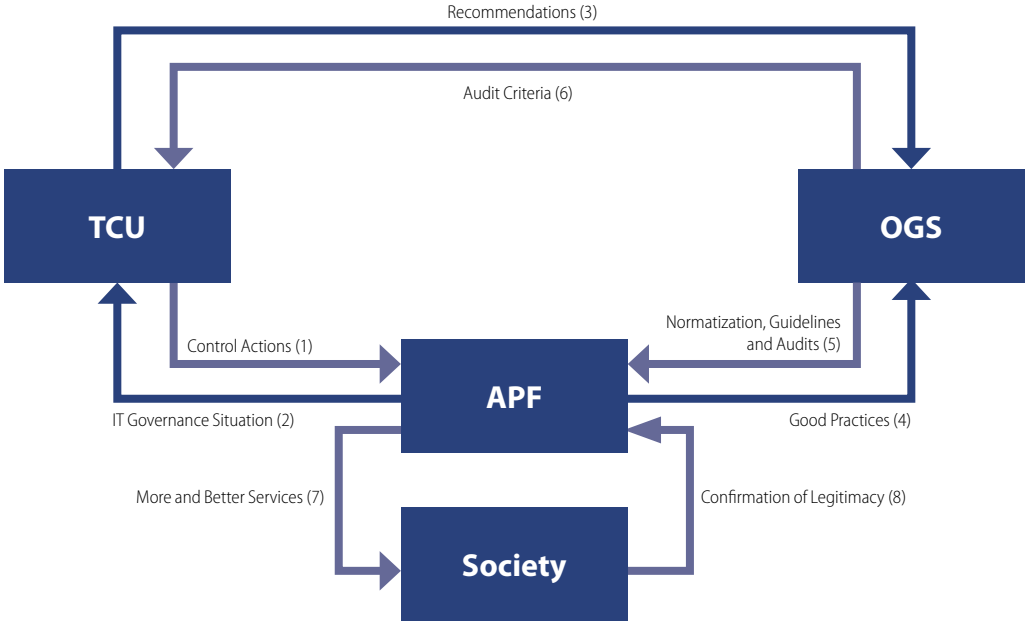

Figure 3
Strategy adopted by the TCU to oversee IT governance

– APF – and evaluates its governance, management and controls. It identifies the highest risks. The TCU interacts with the superior governing bodies – OGS – and recommends the creation of new normative provisions that will then become new parameters for audits. At the same time, these normative provisions are divulged throughout the superior governing bodies and lead the APF in adopting them as good practices. The gradual adoption of good practices results in a higher capacity of providing high-quality services.

To achieve this, the TCU has been identifying the key-players of governance, such as the head manager, its internal audit and legal counsel, the superior governing bodies, the head of government departments, the specialized councils and chambers, and even the entities representing markets that are government suppliers. And it has been acting jointly with all these players.

An example of a fundamental recommendation given to one of these players can be found in Appellate Decision 2308/2010-TCU-Plenário. In this appellate decision the TCU recommends that all superior governing bodies create rules that oblige the head management of related institutions to formally define institutional objectives, indicators and targets by means of which they will monitor management to reach their goals.

Another example is the audit object of Appellate Decision 2261/2011-TCU-Plenário on the governance of regulatory agencies. This audit showed that some Councils were not issuing strategic guidelines to the regulatory entities or establishing long-term objectives. The most serious case refers to the National Council for Integrating Transport Policies (Conit) - it was created in 2001 and spent eight years in idleness, having convened for the first time in 2009. For this reason, the TCU recommended to the Chief of Staff Office that it adopts measure to make the Council operational.

Another example refers to the submission, within the context of Appellate Decision 1233/2012-TCU-Plenário, of a study called "*Critérios gerais de controle interno na administração pública*" (General criteria for the internal government control) to the Chamber of Management, Performance and Competition Policies of the Government Council. The TCU's objective was to support the possible preparation of a rule on risk management, internal control and institutional government to the executive branch.

4. CONCLUSION

Head managers are expected to understand their fundamental role in building a governance structure that enables the delivery of results to citizens. The first step to achieve this is the establishment of policies and guidelines and afterwards the definition of objectives, indicators and institutional targets. These elements are defined by head managers and consolidated in the institutional strategic plan with the help of internal managers.

The second step is to assure that internal control systems act on institutions and that internal audits are conducted, as per the risks detected, thereby assuring that head managers are constantly aware of the key weak points of the institutions to then address such points on a timely manner.

The third step is to select managers that are effectively committed to assessing risks of failing to achieve institutional objectives and that are capable of creating and developing internal controls to address such risks, especially regarding the critical aspects of activities.

The fourth step is to have institutions define their Charter of Services to the Citizen in order to detect what needs to be focused on to provide high-quality services.

Finally, it is of utmost importance that head managers personally monitor the indicators of results

delivered to citizens, evaluating potential distortions and promptly administering their correction with institutional managers.

Additionally, head managers have to encourage the participation of the society in institutional governance. These are the main characteristics of good governance at the institutional level, and they will increasingly be more prevalent in the TCU's control actions.

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What is Governance?

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ABSTRACT

The term governance has come to be used commonly in both academic discourse and in ordinary discussions about how the public sector, and other institutions, manage themselves and their relationships with the broader society. The emphasis on governance in many ways reflects public concerns about the capacity of their political systems to act effectively and decisively to sollve public problems. In this short paper I take a generic stance on the nature of governance. Rather than assuming that one set of actors or another is the appropriate source of governance, I will advance a conception of governance that focuses on the basic functions that must be performed in order to govern. Further, rather than forcing a choice between one set of actors or another, this more general conception of governance focuses on the possible mixtures of actors which can govern most effectively.

Keywords: Governance. Public sector.

1. INTRODUCTION

The term governance has come to be used commonly in both academic discourse and in ordinary discussions about how the public sector, and other institutions, manage themselves and their

relationships with the broader society. The emphasis on governance in many ways reflects public concerns about the capacity of their political systems to act effectively and decisively to solve public problems.

Governance is a contested concept, and there are a number of competing perspectives on what governance means and how it operates. For example, there has been one prominent school of thought that has argued on behalf of "governance without government" (see Rhodes, 1997). The argument advanced by these scholars (and some practitioners) is that governments are clumsy, bureaucratic and in many ways undemocratic, and many if not most of its services could be delivered by networks of social actors. That dependence on social actors is rejected by other scholars (and many practitioners) who argue on behalf of more state-centric approaches to governing (see Bell and Hindmoor, 2009).

In this short paper I will take a more generic stance on the nature of governance. Rather than assuming that one set of actors or another is the appropriate source of governance, I will advance a conception of governance that focuses on the basic functions that must be performed in order to govern. This generic conception of governance can then be expanded to consider the alternative sets of actors involved in governance. Further, rather than forcing a choice between one set of actors or another, this more general conception of governance focuses on the possible mixtures of actors which can govern most effectively.

2. GOVERNANCE AS STEERING

The root of the word governance is a Greek word meaning steering[1]. Thus, logically the fundamental meaning of governance is steering the economy and society toward collective goals. The process of governing involves finding means of identifying goals and then identifying the means of attaining those goals. Although it is easy to identify the logic of governance, and the mechanisms for attaining those goals are rather well known in political science and public administration, governance is still not a simple task.

As mentioned above, this analysis of governance will focus on four important functions that must be performed, and performed well, if governance is to be successful. By identifying these governance functions we can assess how governance is performed in different political systems, whether they are advanced democracies, autocratic regimes, or something in between. Further, identifying these functions allows us to understand where failures in governance may arise, and therefore also to consider mechanisms for improving the quality of performance by the public sector, as well as their partners in the governance process. The four fundamental functions that we posit for governance are: goal setting, coordinating goals, implementation, and evaluation and feedback.

3. GOAL SETTING

The first stage of governance and steering is to establish the collective goals toward which the society will be steering. The crucial point here is that the goals pursued here are collective, so that some method for legitimating the selection of goals on behalf of a broad public is required. Normatively, we may hope that there is some democratic means of determining those goals, but however the goals may be determined they constitute the targets toward which governments and their partners in society will attempt to move the society and economy.

Some of the goals that are advocated by political leaders and political parties are extremely broad and perhaps not really operational in quotidian policymaking. While all or most citizens favor peace, economic growth and environmental quality, the means for achieving those goals, and the subsidiary goals necessary for achieving the broader goals, are less consensual. Further, most policy areas have goals that may not be compatible with those of other policy areas and hence there will be conflicts not only on political or ideological grounds, but also on organizational grounds within the public sector itself.

The political process through which goals are determined and then operationalized depends in large part on agenda-setting. That process, in turn, involves framing the issue in a particular manner so that it can be processed by the remainder of the "issue machine". For example, is mental illness a health issue, a social services issue, or an issue of public safety (Kall, 2011)- Depending upon how the issue is framed then one organization or another within the public sector will gain responsibility for the issue (and the resources associated with it). In addition, these definitions of the nature of policy problems may influence the capacity of governments to address the problems effectively. For example, if a problem is conceptualized as one of rights e.g. a right to clean water or an education, then it will be processed differently than if it is conceptualized as the distribution of goods and services.

The establishment of these collective goals poses potential problems for those who must later assess the success or failure of government programs. If the goals established, no matter how worthy, are excessively ambitious then there may be an enduring sense of perceived failure for governments. Further, broader policy goals tend to involve more actors of achievement, and hence impose greater strains on the second of the functions required for governance–coordination and coherence.

4. COHERENCE

A second phase of the governance process is to make the goals adopted by public organizations coherent, and thereby attempting to make the activities of the public sector, and its private sector counterparts, more coordinated. Policy coordination and coherence are important values to pursue in the process of governance. Governments may pursue any number of goals and use a range of programs to achieve those goals, and the history of government has been one of substantial difficulties in government speaking with a single voice. Individual organizations may do a wonderful job of delivering their own particular programs, and in serving their constituencies. But those individual programs may not be compatible with one another, or they may not cover the range of clients or services needed. This incoherence may impose excessive costs on the public sector (and hence on taxpayers) and it may also present the public with a sense of incompetence in government. Stated simply poor coordination may simply result in poorer quality services and more costs than a more coherent package of programs.

Although creating this coordination among different policy domains is an important goal for government[2], it is also difficult to attain. Public organizations have their own goals and pursue them to the exclusion of other needs or goals of other organizations (Goodsell, 2011). Further, public organizations want to defend their "turf" against other organizations with which they compete for budgets, staff and for legislative time and hence may be reluctant to cooperate. Political differences also intrude into attempts to produce more coherent governance solutions, as different parties controlling ministries or levels of government may inhibit cooperation.

The demands for coordination among public programs has been increasing as the goals of government become more comprehensive. For example, as globalization has increased interdependence among national and international actors, economic policy has become competitiveness

policy that includes a range of dimensions such as education and training, social policies and regulation along with more conventionally-defined economic policy. Further, as groups such as women, children and immigrants become mobilized politically they begin to demand a range of cross-cutting services from the public sector.

In short, the very organizational nature of the public sector, and the specialization associated with that organization, tends to reduce the capacity of the public sector to act coherently (see Bouckaert, Peters and Verhoest, 2010). The center of government (prime ministers, presidents and central agencies) have been increasing their capacity to overcome some of these inherent barriers (Dahlstrom, Peters and Pierre, 2011) but creating coherence within the public sector remains a major challenge for governance at the national level, and those problems are only exacerbated when moving to the international level.

5. IMPLEMENTATION

The third and perhaps most crucial element of governance is implementation, or developing the capacity of the public sector (again with the involvement of their private sector collaborators) to implement programs that pursue the goals already selected for the public sector (see Pressman and Wildavsky, 1974; Winter, 2012). Implementation has been a persistent problem for all governments. This process can be conceptualized as a principal -agent problem in which the legislature or the political executive delegates responsibility for making the program work, and then monitors that performance (Huber and Shipan, 2002).

The delegation process has become increasingly complex in contemporary governance. First, within the public sector there is an increasing use of quasi-autonomous public agencies to deliver services (Laegreid and Verhoest, 2010), and this delegation has been added to familiar delegations to sub-national governments. Further, the increasingly frequent delegation of responsibility from public bureaucracies to social actors and market actors compromises the capacity for controlling implementation. A variety of mechanisms such contracts, partnerships and co-production involve delegation to non-governmental actors and with that delegation perhaps greater "drift" during implementation[3].

Perhaps the best way to understand implementation is to consider the instruments that governments have at their disposal for implementing programs (Hood, 1974; Salamon, 2001). Most importantly in this context, there has been a shift away from command and control instruments for implementing programs and toward the use of "softer" instruments involving negotiation. While these softer instruments may appear to reduce the governance capacity of the public sector, they may be able to generate greater compliance without the alienation that may be associated with the command and control instruments (see Heritier and Lehmkuhl, 2008; Heritier and Rhodes, 2011).

6. ACCOUNTABILITY AND FEEDBACK

After there are attempts by the State, with or without the involvement of private actors, to govern it is important to assess the impact of those actions. Accountability is perhaps especially important in democratic regimes (Aucoin and Heintzman, 2000). In democratic regimes enforcing accountability for the actions of the public sector has become an increasingly central aspect for democracy, as traditional mechanisms of representative democracy have become weaker as turnout in elections continues to decline and membership in established political parties declines even more rapidly (Kriesi, 2012; Mair and Van Biezen, 2001).

Although in democratic regimes accountability is central to the democratic process, even in autocratic regimes leaders will want to assess how well their interventions, and how well their implementors, have performed. Thus, feedback may be a general requirement for governance systems, meaning that all governors will want to be able to learn from their interventions and to find means of improving their performance. At the extreme, we can think of the policy process as a cybernetic process in which the public sector is linked closely with its environment, and then responds to its previous actions to improve policies and performance (Peters, 2012)[4].

As implied above, policymaking should be conceptualized as a continuing process, in which one attempt to solve problems leads on to the next round of policymaking, and relatively few policy

problems of any consequence are actually solved. The persistence of policy issues reflect in part the complexity and "wicked" nature of many policy problems (Head, 2008). This persistence of policy also reflects the nature of the political process, and the differing political values that are manifested through the governance and policy processes. As one group (political party for example) becomes dominant it may attempt to replace the policies and practices from the previous regime. In this pattern of change and replacement of policies it is crucial to have feedback from previous actions so that the actors involved can learn and attempt to develop superior solutions to those already in place.

7. SUMMARY

The above discussion has presented a relatively generic model of governance. As presented it could be applied to almost any governance situation. While this generic attribute can be useful, to be even more useful the model should be specified and related to particular conditions. On the one hand those specifications can be country-specific and the model can be applied comparatively across countries[5]. For example, the governance challenges of transitional regimes must be understood as substantially more complex than those for other regimes.

Although the geographical foundations of governance analysis are conventional, it is also important to consider the differences among policy areas. These differences among policy areas are most apparent for "wicked problems" which pose major challenges for conventional mechanisms of governance (Head, 2008). But even more conventional policy areas do have marked differences, and there are significant analytic differences across policies (Peters and Hoornbeek, 2005) and these should must be understood.

Governing is not an easy task, and failures are common. But it is crucial to understand the sources of failure. This exercise in articulating the dimensions of governance and demonstrating some of the tasks required for each will help to identify the sources of problems in governing, and therefore also assist in improving governance. The pursuit of good governance remains a continuing challenge for all governments and for all citizens.

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8. NOTES

1 The same word is the root for cybernetics, or the science of control.

2 Aaron Wildavsky once called coordination the philosopher's stone for governance, implying that if governments can produce coordinated services then many of their governance problems would be solved. That may something of an exaggeration but not much of one iven the barriers that lack of coordination puts up for effective policies.

3 These instruments involving the private sector are central to the recommendations coming from the New Public Management that governments should "steer and not row", implying that the private sector can implement public programs more effectively than can public sector organizations.

4 The use of social partners in the governance process may facilitate the feedback process, although the social actors may themselves be coopted, so that they become less willing to provide accurate feedback to their public sector counterparts.

5 See, for example, Peters and Pierre (forthcoming). This article is based on this forthcoming book.

Technical Note - Seaud 2/2013

Understanding the governance concepts to control

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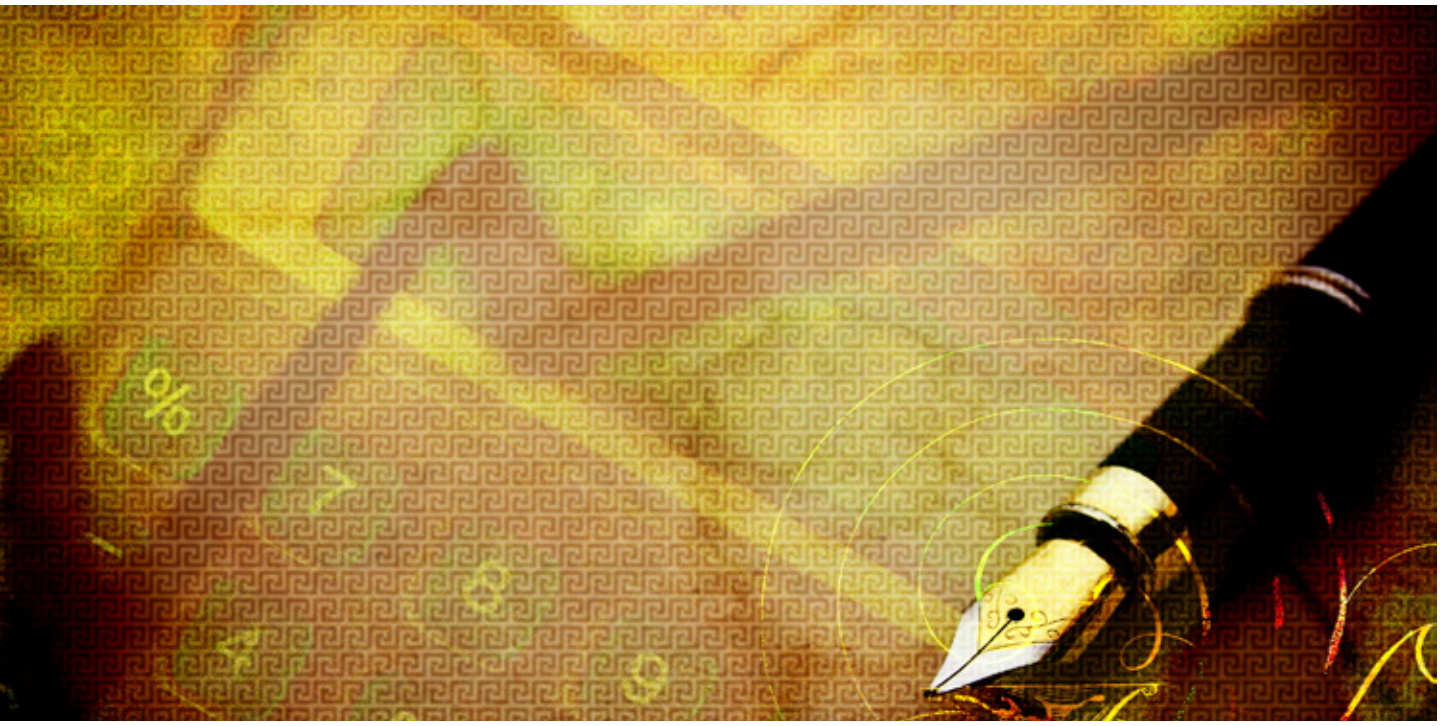
ABSTRACT

This article examines the meaning of governance and its implications for public auditing. It presents the different meanings of governance in various fields of knowledge, from its origin to the most recent approaches by the academic community. It deals with the evolution of the concept of corporate governance worldwide and in Brazil, from the perspective of the agency conflict, the principles of corporate governance and its application to the public sector, and the role of multilateral organizations for the dissemination of the principles of good governance in the public sector. Finally discusses the concept of governance in the context of complex public policy, as well as the challenges and new strategies to address the problems of public governance.

Keywords: Corporate governance. Governance. Public governance. Public sector governance.

1. INTRODUCTION

The term governance appears 11 times in the Basic Principles in Government Auditing (ISSAI 100), a 17 page document of the International Organization of Supreme Audit Institutions (INTOSAI). The Basic Principles of Compliance Auditing (ISSAI 300) affirm



that the main purpose of such audit is to promote good governance. Similar statements appear in the basic principles of compliance and financial auditing (ISSAI 400; ISSAI 200).

Despite having been promoted to the status of government auditing purpose, the term governance remains elusive for many control professionals. To avoid confusion and allow a qualified dialogue in the professional community, it is important to define the concept and explore the consequences for different levels of external control of the Public Administration. But before this, it is worth investigating the origins of the term in the field of Administration.

The term governance has been disseminated and used with different meanings in various fields of knowledge, in particular after the publication in 1979 of the article "Transaction Costs Economics: Governance of Contractual Relations" by Oliver Williamson, Nobel Prize winner in economics in 2009, which fostered increasing interest in the fields of law and economics in the corporate governance topic (Levi-Faur, 2012, p. 5).

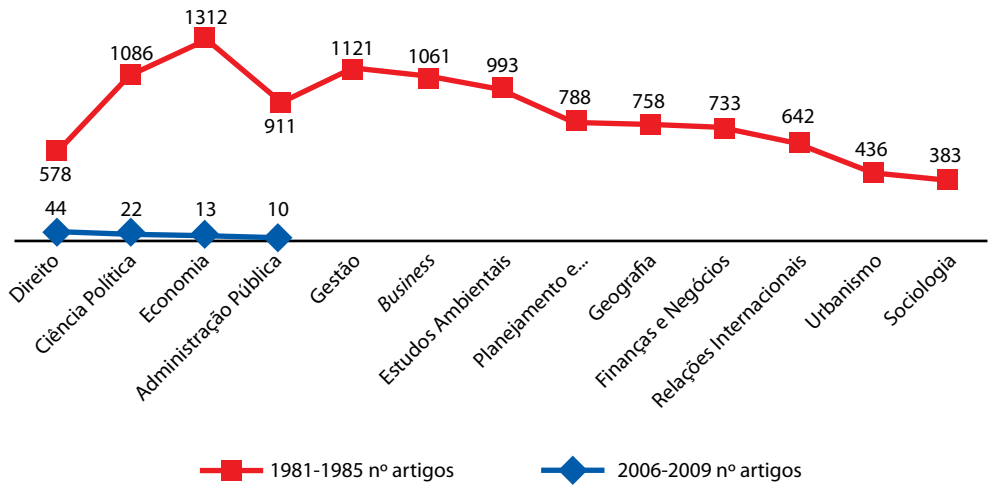
In the period of 1981-1985 the production of texts on governance was dominated by issues related to corporate governance, and in the following years (1986-1990) the concept was expanded to other areas, becoming from 1990 on a concept diffused in different areas of knowledge (Chart I). In the first decade of this century, there has been an increased interest from the academic community on governance. The number of articles citing this term went from 18,648 to 104,928 in the period (Levi-Faur, 2012). (Graph 1).

The concept of governance has become a buzzword in recent decades and, even in Political Science, it is one of the most commonly used terms, to the point of being considered a fetish. The popularity of this term can be attributed to the ambiguity of the concept of governance, which can be tailored to the preferences of the intellectual authors, putting in risk its meaning and hindering its understanding. However, if using various adjectives to describe governance facilitates its understanding, it could also trivialize its meaning (Peters, 2012).

In regard to its application in the private sector, the concept of corporate governance has gained momentum after the bankruptcy of large U.S. companies, such as Enron and later the Lehman Brothers Bank. On the other hand, in the public sector the concept of governance was introduced with the management reforms implemented in the decades from 70-90 (Peters, 2012).

In Brazil, the term gained prominence in the mid 90s, with the state reform initiated in 1995 by the Ministry of Administration and State Reform at

Graph 1
Comparison of the number of publications on governance from 1981 to 1985 and from 2006 to 2009, by area of knowledge



Source: Levi-Faur, 2012, p. 5

the time. This reform was based on a diagnosis of fiscal crisis and crisis of the model of bureaucratic administration, which had been considered obsolete before its formalistic and hierarchical character. Thus, the model referred to as Management Public Administration or New Public Management presented itself as an alternative to rebuilding the State. It was smaller and more efficient.

Thus, the Master Plan for State Reform approved in 1995 introduced new paradigms for the Brazilian public administration, seeking not only to reduce the size of the State through privatization processes, publicity and outsourcing, but also enhance the governance, i.e., the financial and administrative ability, in a broad sense, to implement policies (Brazil, 1995).

According to the Master Plan for State Reform in 1995, governance was defined as the ability of the Government to efficiently implement public policies, through the programmed transition from one type of bureaucratic administration, rigid and inefficient, facing itself and the internal control, for a managerial, flexible and efficient public administration to serve the citizen (Brazil, 1995).

Thus, with the privatization and publicity, new entities were created, such as regulatory agencies and social organizations, which now require new rules and management mechanisms beyond the Weberian hierarchy.

Direct administration activities considered as support activities, such as personnel, assets, logistics, finance, planning, budgeting and control management were centralized in their own systems, to promote greater integration of these activities and relieve agencies enforcing main object policies (such as planning and budgeting systems, financial, accounting and internal control management systems, created with the enactment of Law 10180/2001, among others).

In social policies, there was decentralization of power and responsibility for its funding and implementation to states, municipalities, non-governmental and private institutions, creating interdependent and complex structures with diffuse boundaries for implementation and provision of services to society. Moreover, new forms of articulation, coordination and control were organized. Thus, new mechanisms and management tools have been created, such as boards and committees, direct transfer of funds to beneficiaries; transfer agreement, automatic and regular transfer of funds.

In view of these changes and in addition to the definition of Bresser-Pereira,

> Eli Diniz, proposes to understand governance as a set of mechanisms and procedures that in the implementation of public policies relate to society`s participatory and pluralistic aspect, incorporating views of its various segments." (Araujo, 2003 *apud* Mendes, 2008).

Changes in the form of organization of the Public Administration and implementation of Government Policies have impacted the bodies responsible for the Control function. The Internal Control was restructured in 2000, following the

trend of centralization of support activities. On the occasion, the internal control departments existing in the ministries had their powers, people and instruments absorbed by the Federal Internal Control Department which, in turn, reorganized itself to meet the new demands that have been reinterpreted and expanded since then. The Federal Court of Accounts, likewise, has been making efforts to specialize its technical units, readjusting the structure, processes, tools and procedures to comply with its mission to control public administration, contributing to its improvement for the benefit of society.

Governance auditing in the public sector is an issue that has been highlighted among the work carried out by TCU, and it has even been a subject of major relevance in the Audit Plan 2008/2009. Among the works already carried out, there are the surveys related to governance assessment of information technology in public administration, assessment of governance structures for bodies and units of internal control and assessment of regulatory governance for regulatory agencies.

Furthermore, as an organization, TCU also applies the concept of governance, and one of its strategic objectives is to promote improved governance in the Court.

For the purposes of TCU`s Strategic Planning, "governance can be described as a system by which organizations are directed, monitored and encouraged, involving relationships between society, senior management, employees or servers and control bodies". (TCU`s Strategic Plan 2011-2015, p. 34)

In view of the range and diversity of meanings of governance, it is appropriate to present some reflections, in order to support the discussions on the subject and the role of TCU in controlling governance in the public sector.

It is possible to distinguish two schools of governance with different origins and applicability. It is fundamental to make some considerations on them, in order to identify and characterize the differences between corporate governance and public governance.

2. CORPORATE GOVERNANCE

Corporate governance is an alternative to solve the "Agency Problem" or "Agency Conflict", in the context of traditional economic theory, arising from the separation of ownership and business management. According to the Brazilian Institute of Corporate Governance (IBGC)[1], in this situation, the principal (shareholder) delegates to a specialized agent (manager) decision-making powers over the property. However, the interests of the agent will not always be aligned with those of the principal, resulting in an agency problem or principal-agent problem.

According to IBGC, the purpose of the Corporate Governance is to create an effective set of mechanisms, both incentives and monitoring, to ensure that the behavior of managers (agent) is always aligned with the interests of shareholders (principal). The main tools that ensure control of ownership over management are the board of directors, the independent audit and the audit committee, as presented by the Institute on its website (<http://www.ibgc.org.br/Secao.aspx?CodSecao=18, accessed on 02/18/2013>).

The principles of corporate governance are openness, accountability, equity and corporate responsibility. To do so, the board must exercise its role, establishing strategies for the company, electing and dismissing the chief executive, supervising and evaluating the performance of management and choosing the independent audit, as presented by IBCG (http://www.ibgc.org.br/Secao.aspx?CodSecao=18).

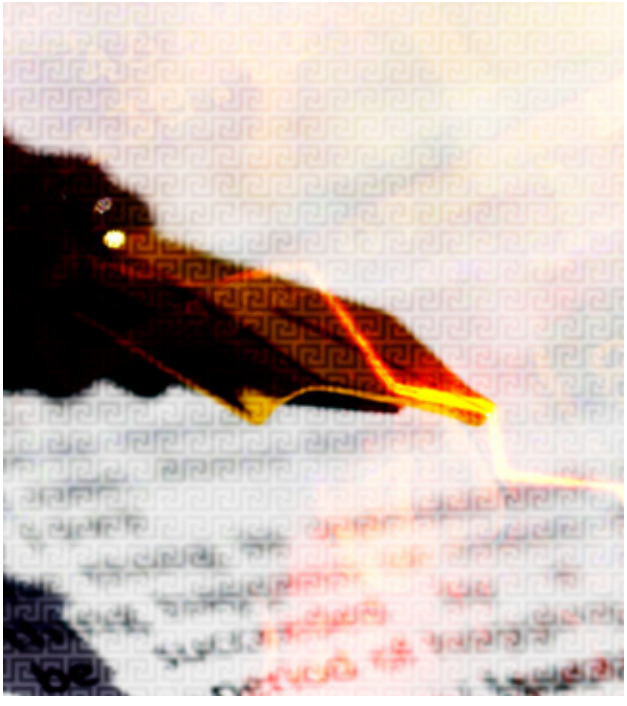
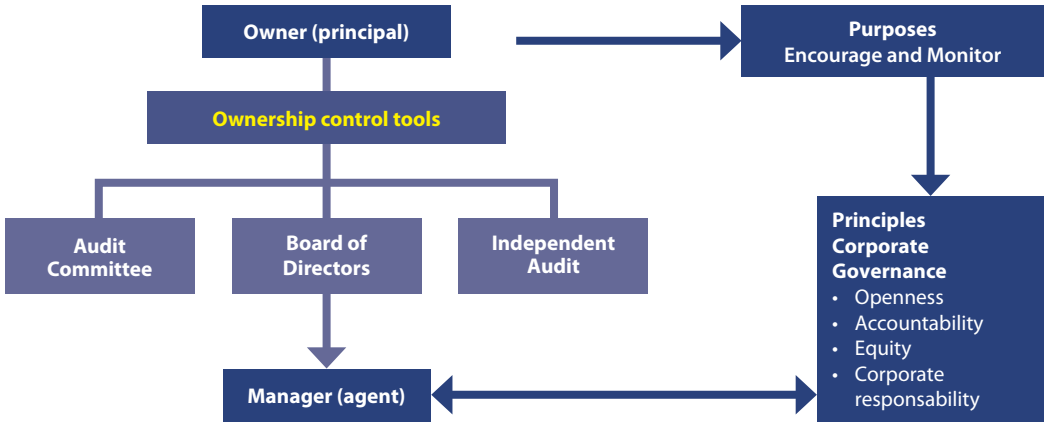


Figure 1
Dimensions of analysis
Corporate Governance



Source: own elaboration.

Corporate governance has gained visibility in many countries, in view of some major scandals in companies internationally renowned, due to fraud in the financial statements, which led the markets to seek measures to minimize the occurrence of these events. In addition, other factors are also identified as relevant in the development of corporate governance, such as the privatization of state-owned enterprises in the 1980s and 1990s, the rise of institutional investors, new shareholding structure of the companies, the integration of capital markets in a global level and the crisis in the financial markets (Berdardi, 2008).

In the United States, the alternative was to create stricter laws and rules for financial statements, from the enactment of the Sarbanes-Oxley Act in 2002. In Europe, the alternative was to prioritize the development and strengthening of the foundations of good governance principles, without establishing unique codes for application in different countries (Berdardi, 2008).

In Europe, the Cadbury Report (1992), by characterizing governance as a system by which companies are directed and controlled, was pioneer in the development of a code of good governance practices, which had the management structure of British companies as its core, prioritizing two principles: accountability and openness (Berdardi, 2008).

Other authors point out that, since its inception, governance has focused on agency problems between shareholders and managers and between majority and minority control groups of companies. However, the changing relationship between business and society incorporated new requirements that go beyond profit, causing the review of corporate goals, which somehow expanded the scope of good governance (Andrade, Rossetti, 2007 *apud* Berdardi, 2008

Several organizations have endeavored to promote, disseminate and facilitate adherence to corporate governance practices, both nationally and internationally, such as the Organisation for Economic Cooperation and Development (OECD), the World Bank, the Inter-American Development Bank, the Global Corporate Governance Forum (GCGF), the International Corporate Governance Network (ICGN), the Brazilian Securities Commission (CVM), the differentiated Corporate Governance Levels of Bovespa's New Market, and the Institute of Corporate Governance (IBGC), among other.

It is also worth noting that through Decree No. 6021/2007 the Inter-ministerial Commission on Corporate Governance and Management of the Federal Shareholdings - CGPAR was created, in order to deal with matters relating to corporate governance in state-owned, federal and administration enterprises of Federal shareholdings, formed by the Ministers in MPOG, Finance and Chief of Staff/PR.

From a macro point of view, considering the State, according to the IBGC, the international community prioritizes Corporate Governance relating it to a balanced institutional environment and to a good quality macroeconomic policy" (http://www.ibgc.org.br/Secao.aspx?CodSecao=21).

In this quote it can be observed that the corporate governance gains importance at the international level, strengthened by the impacts of the financial crises of the last decades on the economies, requiring changes in the posture of the State, ensuring greater openness, preventing

corruption in public service, promoting participation and social control, as well as accountability.

In this sense, multilateral organizations played an important role in disseminating and encouraging the application of corporate governance in the public sector.

3. CORPORATE GOVERNANCE APPLIED TO THE PUBLIC SECTOR

According to Bhatta *apud* Matias-Pereira (2010)

> governance deals with the acquisition and distribution of power in society, while the corporate governance concerns the way corporations are run. Corporate governance in the public sector, in turn, refers to the management of public sector agencies, through the principles of corporate governance in the private sector, which are **fully applicable in the general sector of the Government, in which non-public service agencies are grouped** (Bhatta, 2003, p.5-6). (our emphasis)

The notion of governance concept, in the early 1990s, for the World Bank, coincides with changes in the trajectory of the Bank, whose agenda has shifted from *strictu sensu* macroeconomic reforms to the State and public administration reforms, aiming to promote "good governance" and to strengthen civil society. (Matias-Pereira, 2010)

The dimensions of good governance for the Bank relate to public sector management, in the sense of improving the ability of economic management and the provision of social services, to the establishment of a legal framework, openness, accountability and social participation, in order to increase economic efficiency by providing information on government policies, openness in policy-making processes and the establishment of channels that allow the participation of citizens in decisions on public policy.

The OECD, in turn, developed a set of principles and guidelines for corporate governance in partnership with governments, international organizations and the private sector, aiming to guide member and non-members countries to evaluate and improve their legal, institutional and regulatory frameworks in this aspect and help the markets, investors, corporations and other stakeholders in the implementation of good corporate governance (OECD, 2004 - Principles of Corporate Governance).

The OECD's principles of corporate governance apply to both financial and non-financial publicly traded companies. However, when applicable, it can be used as a tool to improve corporate governance of both public and private non-commercial companies (OECD, 2004).

The OECD and its member countries have recognized that there must be synergy between macroeconomics and political structure so that policy objectives are achieved. Therefore, the corporate governance is a key element for both promoting growth and economic efficiency, and to increase investor confidence, despite being only one part of a broader economic context in which companies operate.

The corporate governance involves a set of relationships between entrepreneurs, their boards, shareholders and other stakeholders, but also provides the structure through which the company objectives are set, the same way both the means to achieve them and the mechanisms for monitoring performance are determined (OECD, 2004). Good governance, for the OECD should provide incentives for the board and managers to achieve the goals set for the company and favor its effective monitoring. The presence of a system of corporate governance in a company or the economy as a whole helps to increase the level of trust necessary for the proper functioning of the market. As a result, the cost of capital is lower and companies are encouraged to use resources more efficiently, supporting thus the growth (OECD, 2004).

The principles of corporate governance developed by the OECD focus on governance problems that result from the separation of ownership and control (agency problem) and concern: i) to ensure that there are the necessary requirements for an effective corporate governance framework, ii) the rights of shareholders and key functions of the owners, iii) equitable treatment of shareholders, iv) the role of stakeholders, v) disclosure and openness, and, iv) the responsibilities of the boards.

The principles of governance developed by the Public Sector Committee of the International Federation of Accountants – IFAC in Study 13 for application in public sector entities are also worth mentioning.

According to this study, effective governance of the public sector is essential to develop confidence in public authorities. It also contributes to the efficient use of resources, the accountability for the use of these resources, improvement of management, and delivery of services, thereby fostering social improvement.

The principles presented by IFAC for governance in the public sector are applicable to all public sector entities, especially those structured as economic entities, as defined in IPSAS 6, that is, economic entity means a group of entities that include a controlling entity and one or more controlled entities.

Thus, the principles of governance in the context of IFAC public sector are about openness, which is necessary to ensure the confidence of the parties involved in decision-making in government entities; integrity, comprising honest and perfect procedures, based on honesty, objectivity, property standards and probity in the use of public resources; and ultimately, accountability.

These principles should be reflected in the following dimensions, to be observed by public authorities (Matias-Pereira, 2010, p. 119):

1. behavior patterns, i.e. how the entity's management exercises leadership and determines the values and standards of the institution, as well as define the organization's culture and behavior of all involved,

2. organizational structures and processes, concerns how top management is structured and organized within the institution, how responsibilities are defined and ensured,

3. control, that is the control networks established by the organization top management to enhance the achievement of the organization's objectives, the effectiveness and efficiency of operations, reliability of internal and external reports, compliance with applicable laws, regulations and internal policies, and finally,

External reports, how the organization's top management demonstrates the accountability of the application of public money and its performance.

For each of these dimensions the IFAC Study 13 suggests a set of recommendations to support the implementation of public sector governance, as shown in Table 1.

It can be therefore inferred that corporate governance was originated and developed to meet the demands of economic and financial control of the private sector entities, through mechanisms that would ensure the owners (principal), openness,

TABLE 1
recommendations on public sector governance

IFAC Public Sector Governance Dimensions	Recomendations
Behavior patterns	Leadership
	Codes of conduct
Organizational structures and processes	Statutory accountability
	Accountability for public spending
	Communication with stakeholders
	Roles and responsibilities
Control	Risk management
	Internal audit
	Audit committees
	Internal control
	Budget
	Financial management
	Training of personnel
External reports	Annual reports
	Use of appropriate accounting standards
	Performance measurement
	External audit

Source: Mendes (2008)

integrity and accountability of senior management (agents) decisions, thereby increasing the confidence of investors and markets, favoring the improvement of economic efficiency and large-scale economic growth.

It is worth noting, however, that

> governance in public and private organizations has significant similarities. Taking into consideration that the public and private sectors have specific focus respectively, it is observed that they are similar on issues involving separation between ownership and management, responsible for the generation of agency problems, instruments defining responsibilities and power monitoring, and encouraging the implementation of policies and objectives defined, among others. In a broad sense, the basic principles that guide the direction segments in the private and public sectors are identical: openness, equity, legal compliance, accountability and ethical conduct. (Matias-Pereira, 2010, p. 112)

In this respect, it is worth highlighting the public nature of public administration organizations, whose characteristics differ from those of private organizations, in particular, regarding the supremacy of public interest and continuity in producing common good, besides the power to regulate and generate obligations and duties to society.

Nevertheless, observance of the principles of corporate governance for public sector organizations, if applicable, is relevant to contribute to the better management of public assets, with a view to more efficient use of resources to achieve effective results, with openness and accountability.

However, **the recommendations of corporate governance, as presented in Table 1 are not adequate when the dimensions of governance to be investigated are not limited to an organization, understood as an entity structured by means of a chain of command and control based on authority, and the classical functions of management - i.e. planning, organizing, advising, directing, coordinating, communicating and budgeting - are not sufficient to adequately respond to the management problems for results to be achieved.**

A significant part of public policies in Brazil are implemented in a decentralized manner, through programs in which the responsibility for providing the service is shared with various bodies at multiple levels of governmental and non-governmental entities, and there is not a single responsible party for the results. Moreover, the objectives to be achieved and the means to comply with them are not always clearly defined, nor sufficient, although they are included in the budgets.

Thus, for the analysis of governance of public policies it is necessary to consider other dimensions, as will be shown below.

4. PUBLIC GOVERNANCE

The terms public administration, public management and public governance are used as if they were interchangeable, although sometimes they have different meanings. However, according to Lynn (2006), efforts to differentiate them failed in not being able to converge to a conceptual consensus. This is due to the fact that each of these terms has gaps that hamper the formulation of a definite concept.

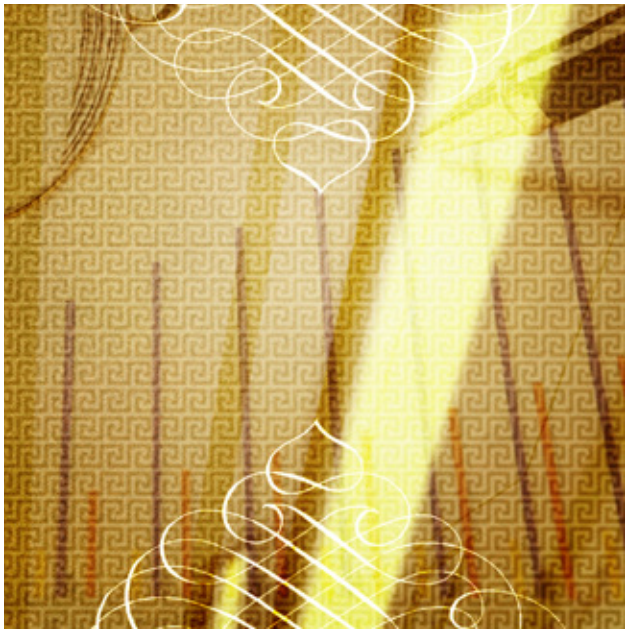
In Brazil, based on the Instrument for Assessing Public Management Cycle 2010 - GesPública (2010), public administration means in a formal sense, the "set of bodies established to develop the objectives of the government, in the material sense, is the set of functions necessary for public services in general; operationally speaking, it is the permanent and

systematic, legal and technical performance, of the services of the State or services taken on by the State on behalf of the community. In a global perspective, Public Administration is the whole apparatus of the State foreordained to carry out its services, aimed at satisfying the collective needs".

According to the instrument, public management relates to the "understanding of interdependence between the various components of an organization, both within the organization and the external environment. To be excellent, public management has to be legal, impersonal, moral, public and efficient."

One of the criteria for evaluation of management is leadership, in which public governance and governability are included[2]. The evaluation of this item seeks to examine "the implementation of management processes which aim to create openness and improve the level of trust between all stakeholders and that generate impact on the value, sustainability and governance of the organization."

According to GesPública, public governance is the system that guarantees to stakeholders the strategic governance of public organizations and the effective monitoring of senior management. The relationship between public affairs and management occurs through mediation practices, such as: independent audits, evaluation units, internal and external control units, fundamental instruments to exercise control. Public Governance guarantees to stakeholders: equity, openness, and accountability for results, in compliance with constitutional principles and policies accordingly.



Public governance, in a general sense, is part of administrative reforms, such as the meaning of change in the process of governing. In the literature on governance, this meaning is captured in the observation of its own changes and controversies on governance and its implications, being Governance understood with at least four meanings: such as structure, process, mechanism and strategy (Levi-Faur, 2012).

As a framework, governance means the architecture of formal and informal institutions, sometimes defined as "systems of rules", "regimes of laws, rules, judicial decisions and administrative practices" (Lynn, Heinrich, Hill, 2001 *apud* Levi-Faurs, 2012); or as "institutionalized models of social coordination" (Risse *apud* Levi-Faurs, 2012), or a "set of multi-level, non-hierarchical and regulatory institutions" (Hix, 1998 *apud* Levi-Faurs, 2012), or also "comparatively stable institutions, with relevant socio-economic parameters, formed by a constellation of actors". These approaches are comprehensive enough to study governance institutions such as networks or market.

Governance may not even be conceived as a set of institutions, but as a continuous orientation process, or institutional capacity strengthening to manage and coordinate (Pierre, Peters, 2000, Kooiman, 2003 *apud* Levi-Faurs, 2012). Thus, governance as a process means dynamics and performance of functions involving the processes of policy formulation.

Governance as a mechanism means the institutional procedures for decision making, control and compliance. Finally, governance as a strategy, or "governancing" means the design, creation and adaptation of governance systems

Peters (2012) considers the idea of governance as a means to conduct and obtain resources necessary to implement collective actions in contemporary societies. These choices relate to a set of questions that cannot be addressed by individual actions. In this way, it is mainly the public sector, through its institutions, that forms the collective actions. However, the implementation of these actions involves the interaction of various actors at different levels and spheres of government and outside of it as well.

According to Calmon (200?)

> issues related to collective action are key because they demonstrate that it is a context marked by a distinct set of actors with heterogeneous preferences, different asymmetrically distributed power resources, and who need to solve their coordination, cooperation and communication problems. Furthermore, as several authors point out, these problems are handled in an environment marked by ambiguity and uncertainty, which makes it even more difficult to articulate collective action. Although some models may assume that these actors are rational, in the sense that their negotiations and bargains respond to the logic of consequences, there are other perspectives that understand that they are actors that process information idiosyncratically and behave much more depending on the logic of appropriateness, than on the principles advocated in rational choice models.

Thus, the primary meaning of governance is the ability to steer[3], or guide the economy and the society (Peters, 2012a). Since the direction is offered by the State or other institutions, or set of institutions, the logic of governance is to generate a coherent set of goals, and to find ways to develop mechanisms to achieve them, as well as to monitor the effects produced by them This approach considers that a variety of actors are involved in decision making and that there are conflicting objectives, not always reconcilable. Thus, some systems of governance may involve goals often inconsistent or even incompatible.

Functions that must be performed in the governance process (Peters, 2012) may even be considered. The structural-functional approach, for example, argues that the basic functions of decision-making processes are setting rules, applying and awarding them. For political systems to work, these functions need to be performed, despite all the difficulties inherent in its operation. Thus, governance requires at least that the following activities are met:

1. Set goals - to govern and rule it takes knowledge of the path for the destination to be reached. Effective governance requires the integration of objectives between all levels of the system.

2. Reconcile and coordinate goals - each of multiple actors within the government have their own goals, so for effective governance it is necessary to establish priorities, cooperation and coordination of actions in accordance with priorities set.

3. Implement - decisions taken in the above steps should take effect and require some form of implementation, therefore we need to develop capacity in the public sector to implement programs. This step involves governmental actors and may also involve social actors.

4. Feedback and accountability - individuals and institutions involved in governance need to learn about their actions. This is important for the quality of the decisions and for democratic accountability. Thus, some forms of feedback must be developed within governmental arrangements.

According to Peters (2012a), the first stage is to establish governance of collective goals by which society will be ruled. The second is to ensure that goals adopted by public organizations are consistent in order to facilitate the coordination of activities to which they are achieved. It is difficult to create coordination between different political domains. Public organizations tend to defend their areas against other organizations with whom they compete for resources, and may be reluctant to cooperate. The third stage is implementation, which can be better understood by means of instruments that governments have to implement programs. The most important in this context has been the change of command and control instruments for the use of more flexible instruments involving trading. Finally, to govern it is necessary to learn with interventions and to find ways to improve performance, as well as to evaluate the results achieved for both feedback and accountability.

According to Kettl (2002), public governance demands new strategies for governance to be effective, efficient and without compromising accountability. For this author, the transformation of governance presents five major issues to be faced by public administration, which concern:

1. Change: governments are faced with new demands that require new strategies and tactics to address new problems.

2. Capacity: need to develop monitoring tools suited to new demands. the government should be able to calibrate the instruments of supervision of complex chains of action to implement public policies - considering that the government structures are still based on traditional techniques of command and control.

3. Legitimacy: interdependence between government and its partners, and dependence of these past programs and public resources has been increasing significantly, which may indicate important problems of legitimacy of public power.

4. Sovereignty: Governments also need to develop new strategies to ensure that their role is not just one of the other networks in public management, especially with decentralization and globalization. The government has the legal power to ensure public interest, as well as direct the functioning of the political system that formulates public programs.

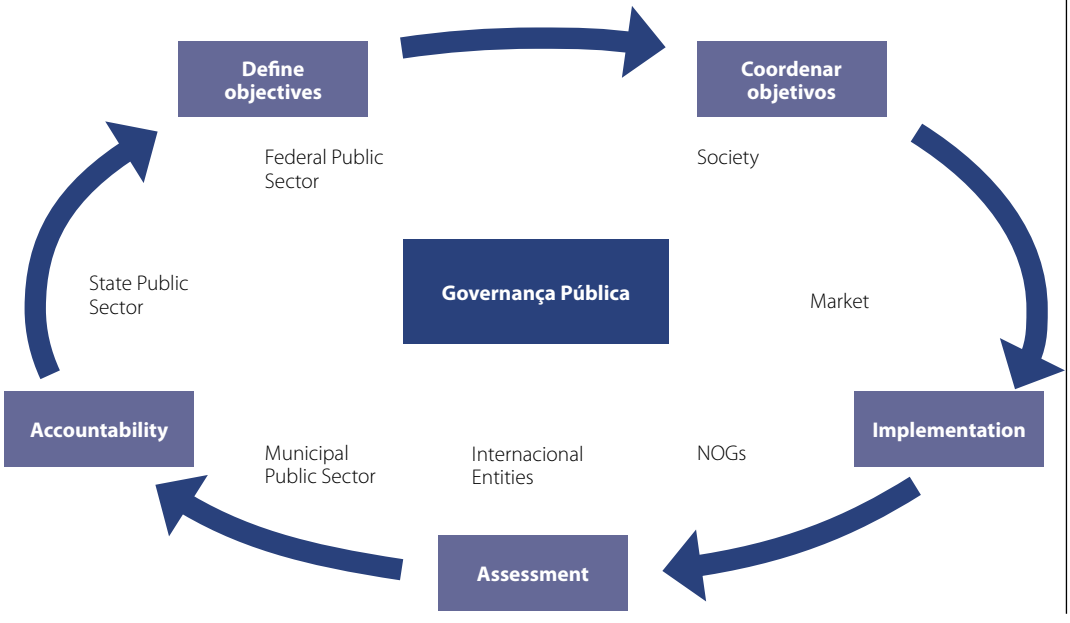
5. Public interest: public administration needs to be strong enough to allow the government to do what the citizens want done.

For Kettl, problems of governance involve: i) adaptation, in the sense of adapting vertical systems to the new challenges of globalization and decentralization, integrating horizontal systems to them, 2) ability, in terms of developing bureaucracy skills to manage effectively in a changing environment; 3) scale, that is redefinition of the roles of the different levels of governance and, in particular, of the federal government.

Therefore, governance strategies should address the following points: to adapt the traditional hierarchical systems to work more productively to manage systems providing service to develop new approaches to manage non-hierarchical systems providing indirect services, and to adjust these systems to be operated simultaneously, based on mechanisms that are not only just an authority. (Kettl, 2002)

Therefore, new skills are necessary, especially the ability to negotiate and manage information; coordination of shared responsibilities between managers from different agencies, administrative spheres and non-governmental partners, creating a link between political decisions and outcomes, where the program individual management is a part of the gear to produce the results.

Figure 2
Dimensions of Public Governance analysis



Source: own elaboration.

To understand the object of public governance is necessary to resume the discussion of collective actions mentioned by Peters, that is of public policies, in order to identify both the nature of the problem that contributed to the formulation of the policy, as well as the instruments selected for expected results to be produced. Different instruments require different management strategies so that policy objectives are achieved.

According to Peters (2000), the prospect usually adopted in the literature on instruments believes that government programs adopt certain instruments, as if they were able to produce (by itself) the expected results on the economy and society. One can cite, for example, programs to combat poverty, such as the *bolsa-família* program, whose main tool is to make direct income transfer to the beneficiary with the purpose of immediately relieving poverty and facilitate access to basic social rights in the areas of health, education and social care. Still, these tools are not self-administered. It is necessary to have mechanisms and management strategies that guide and effectively make it possible for the target audience to be contemplated and that other conditions for improvements are granted.

It is importantly to point out that instruments selected are not always sufficient and adequate to address the problems faced by the policy. Thus, issues related to instruments seek to investigate to what extent they are able to produce changes efficiently and effectively in the target population.

Therefore it is necessary to understand the mechanisms and strategies for management of instruments. In this respect, Kettl points out that to manage is to coordinate and coordination is the central problem of government for effective governance.

Thus, Kettl suggests 10 principles to be observed for the development of governance:

1. Hierarchy and authority cannot and should not be replaced, but must be better suited for the transformation of governance - these two mechanisms hinder both the strategies of coordination, as well as accountability and democratic governments.

2. Complex networks have been superimposed on top of organizations and need to be managed differently.

3. Public managers need to rely more on interpersonal and inter-organizational processes as a complement to - and sometimes as a substitute for - authority.

4. Information is a basic and necessary component for the transformation of governance.

5. Performance management can provide a valuable tool to control diffuse boundaries.

6. Openness is the basis for building trust in government operations.

7. Governments need to invest in human capital to develop the skills necessary to perform new tasks.

8. The transformation of governance requires new strategies and tactics for popular participation in public administration.

9. The non-government partners have begun to assume liability in the provision of public services, this requires the development of mechanisms to promote accountability, flexibility and efficiency of these partners, without sacrificing the performance standards that citizens expect government.

10. Develop new constitutional strategies to manage conflict (American case).

11. CONCLUSION

Based on these considerations, it is possible to draw some differences between corporate governance and public governance, which must be considered in the scope of this article.

It should be noted that in corporate governance there is an actor, or a sovereign decision level (owner), whose decisions (choices) are binding and conflicts are mediated by means of the control tools clearly identified: audit committee, board of directors and independent audit. The executive body (agent) has autonomy to change what needs to be done, but only to lead the organization (ownership) so that the objectives are achieved, showing clear hierarchy among the actors involved, with clearly defined

powers and responsibilities. Moreover, the agent may be appointed or removed at the owner's discretion. In public governance, there is an actor with sovereign power with absolute autonomy and authority.

The public sector has a structuring role in public governance, considering that it is primarily responsible for setting the rules and laws that regulate the relations and define the objectives to be achieved in order to promote the common good, besides having legitimate control of force and defined rules for decision making. However, the public sector is formed by various actors at different levels of government, each with independence and autonomy to make its own choices. Thus, there is no need to talk about hierarchy in relations between public actors, but in coordination, cooperation and coherence of purpose to implement the collective choices (Peters, 2012).

Concerning control instruments, for the corporate governance they are set (audit committee, board of directors and independent audit) and they are used to monitor and encourage agent behavior so that interests of the principal are met. In public governance, given the fuzzy boundaries between powers and responsibilities of the various actors involved, and the absence of hierarchy and sovereign power, the instruments used seek to ensure coordination and cooperation among stakeholders to guarantee the implementation of objectives. Therefore, information is essential for communication. Open communication, accessible in real time for all, increases trust in government (Kettl, 2002).

Among the different forms of information, information on performance may be the most important. When multiple organizations share the responsibility for the implementation of public programs it is difficult to identify the responsibility of each one. Thus, evaluation systems (performance-based management systems) can contribute to strengthen the administration, ensuring greater openness in results and promoting accountability.

Moreover, communication is fundamental to ensuring the sustainability and legitimacy of decisions, as well as to avoid noise and interference that can compromise the achievement of goals.

For the analysis of public governance, however, it is important to define three key issues: What will be assessed? For what purpose? For whom? These questions determine the review excerpt, from which it will be possible to establish the criteria to be used for examination.

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NOTES

1 Source: http://www.ibgc.org.br/Secao.aspx?CodSecao=18

2 This definition reverses the relationship in table 1, in which leadership is one of the governance criteria.

3 The origin of the words governance, government and cybernetics, is Greek and it means to lead/steer a boat. Thus, epistemologically, governance means governing the economy and society (original note from the article in reference).

On the requirement for the accreditation of bidders by manufacturers of information technology when participating in government bids for the purchase of goods and services in the area

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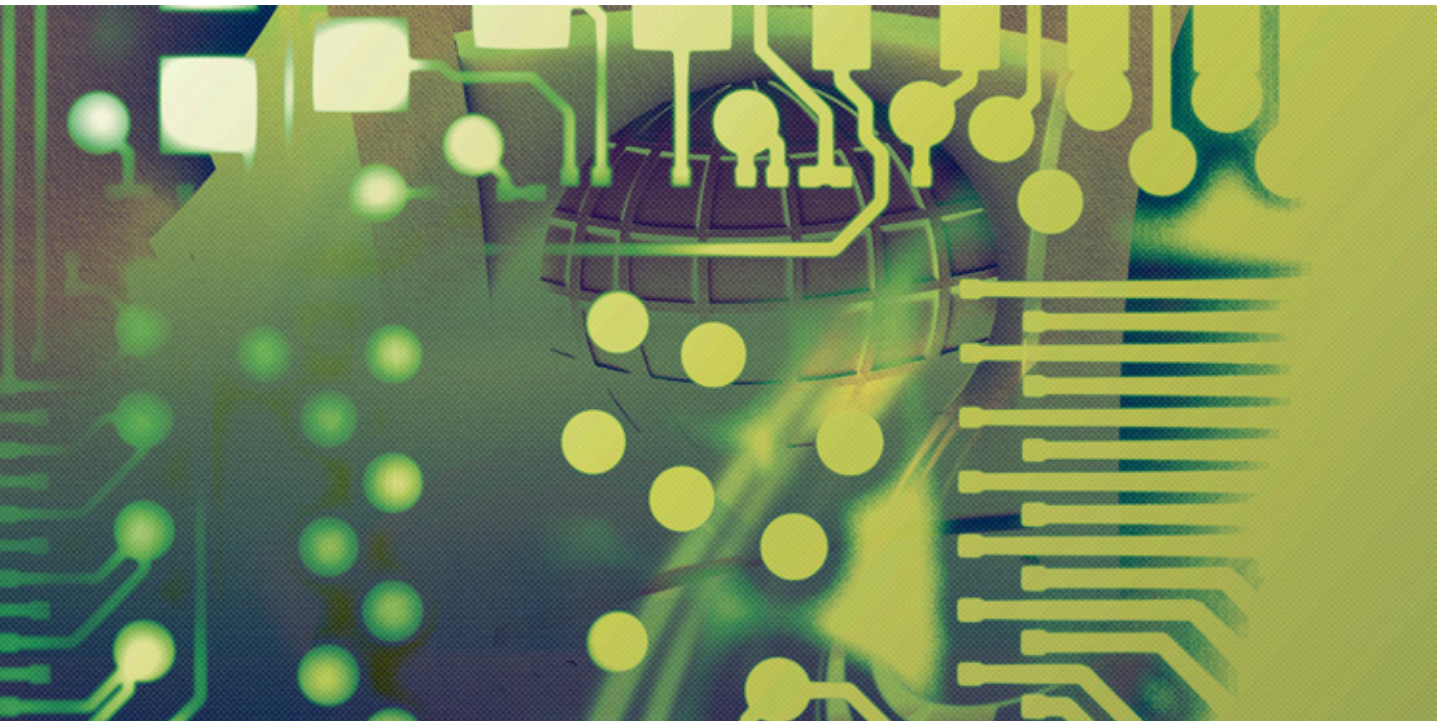
ABSTRACT

Accreditation is a mechanism by which the manufacturer (or its accredited distributor) chooses - among the companies that market its products - a few of them to represent its brand to the end consumer, in order to show the market that both have commercial and/or technical ties. It conveys more security to the consumers as to the accredited company's capacity to provide the good or to render the services related to them, making companies look forward to becoming accredited partners of the manufacturers of the products they sell in order to boost their sales. For the manufacturer, this helps to mitigate the risk of damage to the image of the product to the end consumer, because in this context, the existence of a specialized channel to provide the products and render services to the consumer is ensured, so its customers will enjoy the best support service possible, when willing to use such channel. The goal of this paper is to discuss the possibility of requiring accreditation in government procurements for Information Technology (IT) goods and services by online auction in the light of the court precedents of the Brazilian Federal Court of Accounts (TCU), and, especially, considering the effects on the contracts risks.

Keywords: Accreditation. Bidding. Court Precedents. Information Technology.



1. INTRODUCTION

The evolution of standards and court precedents regarding government procurements in the area of Information Technology (IT) and the obvious advantages to the government of conducting reverse auctions has increased such procurements for contracting IT goods and services and has also reduced the use of public procurements in which price and technical requirements are the most important aspects to be regarded.

The progressive adoption of reverse auctions, which does not allow listing scoring criteria, naturally increases the importance of the mandatory requirements of procurements, in order to select the specific market that renders the desired results with greater advantage for the government. In turn, this new context leads to questions about the necessary requirements so that the contracted solution meets the government's needs, increasing the chances of a regular implementation of the contract while not risking the competitiveness of the procurement or even harming equality among bidders.

Commonly used by public officials, the imposition of accreditation of bidders by the manufacturer of the product involved in the procurement is one of such requirements.

Hence, this paper aims to discuss the possibility of the requirement of accreditation in IT procurements by reverse auctions in the light of the court precedents of the Federal Court of Accounts of Brazil (TCU) and the risks of such contracts and its effects.

This text is divided into six sections, and this is the first one in which we briefly describe what accreditation is.

We present the main characteristics of accreditation programs we have studied in section 2.

We then question the real need of this requirement for the implementation of the purpose of the contract in section 3.

Next, we analyze the effects of accreditation on competitiveness and equality in the bidding process in section 4. We present the circumstances in which, due to their singularity, the requirement of accreditation would be legally allowed in section 5. Finally, we present our final remarks on the matter in section 6.

We would like to highlight that this article is based on the contents of the Technical Note Number 03/2009 - SEFTI[1]/TCU, of April 10, 2010, which deals with the "requirement for accreditation of bidders by manufacturers of information technology in government procurements for contracting goods and services in the area", and that the authors of this article also signed such technical note. However, the disclosure of its content was only authorized after the Appellate Decision 1.233/2012-TCU- (a decision issued by the full court) in the session that happened on May 23rd, 2012. Moreover,

we would also like to emphasize that this article has been published in the Revista Zênite[2] in January 2013.

2. CHARACTERISTICS OF ACCREDITATION PROGRAMS

Accreditation is a mechanism by which the manufacturer (or its accredited distributor) chooses, among those who market its products, some companies to represent its brand to the end consumer according to its criteria. Such "representation" does not mean that the accredited company acts on behalf of the manufacturer, or even that the manufacturer will be jointly responsible for the commitments made by the accredited company to the end consumer, but it shows the market that both have commercial and/or technical ties, as it conveys to consumers more security about the accredited company's capacity to provide the good or to provide services related to them.

So, companies seek to become accredited by the manufacturers in order to boost their sales. For the manufacturer, this helps to mitigate the risk of damage to the image of the product to the end consumer, because in this context, the existence of a specialized channel to provide the products and render services to the consumer is ensured, so its customers will enjoy the best support service possible, when willing to use such channel.

In the government procurements for the contracting of IT goods, accreditation takes place between the supplier and manufacturer of the good, and as for rendering support services, accreditation takes place between the product manufacturer directly related to the service, and not with the manufacturer of the purpose of the procurement. For example, for the database Support Services, accreditation represents the relationship between the service provider (an eventual bidder) and the manufacturer of the management system database.

We have studied a sample of a broad and comprehensive market share consisting of the major manufacturers to write this article, and also analyzed accreditation programs of about 70% of the market for IT goods and services.

According to our study, there are some manufacturers that do not even publish the characteristics of their accreditation programs on their websites. In the case of those who disclose such information, we have observed that some accreditations, depending on the manufacturer, could also be translated into benefits for the partner company, such as special technical support, contact with the manufacturer's own specialists, training programs at the factory, or even better prices. Such benefits are generally grouped into levels of membership, with different advantages and requirements, such as Member, Advanced and Premier, for example.

The manufacturers, mostly foreign companies, establish programs through which they choose partners in Brazil to market their products and/or related services. Sometimes partners are also grouped according to the market segment in which they operate, such as industry, government and others. Some programs involve costs to the partner while others do not. In most cases, the list of partners is disclosed on the manufacturer's website.

In some cases, there is the formal agreement between manufacturer and supplier. Upon signing an agreement, reciprocal rights and obligations are established between supplier and manufacturer, so in case that the accredited company meets its contractual obligations, it can enjoy the benefits offered by the manufacturer.

Legally, accreditation should not be mistaken for commercial representation, set forth in Law Nº. 4.886/1965, since in the case of commercial representation; the representative acts as a mere intermediary for subsequent sales directly between the represented company (usually the manufacturer) and the consumer. In turn, the accredited company is a company that operates on its own, makes negotiations and sales directly to its customers, and is not limited to procuring orders to the manufacturer of the product that, in general, is only part of the solution marketed.

A letter of joint and several liabilities is somewhat similar to accreditation. Such letter is a document signed by both supplier and manufacturer, with the main objective of establishing and outsourcing mutual responsibility (joint and several liability) about the good to be provided.

This letter is close to an accreditation, but with a stronger relationship between manufacturer and supplier, for it makes the other part responsible as well, but it is also transitory, since it is specific for each bidding process, where the manufacturer becomes jointly responsible for the proper implementation of the purpose of the contract. Such accountability does not occur in accreditation.

The letter of joint and several liabilities, which was already used as a mandatory requirement in government procurements, has been repeatedly condemned by the TCU (e.g., in Appellate Decisions

216/2007, 423/2007 and 539/2007 - these decisions were issued by the full court). It has also been rejected whenever used as a criterion for qualifying for government procurements, as in Appellate Decisions 1.670/2003, 1.676/2005, 223/2006, 2.056/2008, all decisions were issued by the full court and Decision 2.294/2007, issued by the 1st Chamber of TCU, for unduly restricting the competitiveness of the bidding processes.

Regarding professional certification, which is very common in IT (e.g., Microsoft Certified Professional - MCP, Sun Certified Java Programmer - SCJP), Cisco Certified Network Associate - CCNA) the technical capacity of the individual (not the company) is directly examined, with specific and pre-defined content, which makes it inherently different than accreditation.

Finally, it is also worth highlighting the difference between the accreditation under discussion here and the obtaining of certification by companies. The certification mechanism is also very common in the IT market, however, besides lasting for a determined time period, it is provided by a third party outside the business relationship of the sale, i.e., a certification body (outside the manufacturer-supplier relationship), accredited by an official institution, such as ISO (International Organization for Standardization).

Our analysis is focused on the cases where accreditation is used as a mandatory requirement and not as a scoring criterion since TCU has understood that, as a rule, IT goods and services can be contracted through reverse auctions, as provided for in Section 9.2.2 of the Appellate Decisions Nº. 2.471/2008-TCU- a decision issued by the full court, which does not allow to list scoring criteria.

3. THE (LACK OF) NECESSITY OF ACCREDITATION FOR THE PURPOSE OF THE CONTRACT

Based on the legislation (Constitution, art. 37, section XXI; Law Nº. 8.666/1993, art. 3, § 1, paragraph I, art. 6, section IX, paragraphs "c" and "d" art. 44, § 1, Law Nº. 10.520/2002, art. 3, II) and the case laws of TCU (Appellate Decision 2.437/2008 - decision issued by the full court, item 9.4.2; Decision 3.541/2008 issued by the 2nd Chamber of TCU, item 9.2 and Appellate Decision Nº. 2.717/2008 - a decision issued by the full court, item 9.2.3), we concluded that the requirements of the procurement of IT goods and services should be limited to those needed for the implementation of the purpose of the contract.

Given this premise, one should consider whether accreditation constitutes an imperative requirement for the implementation of the purpose of the contract. Public officials should always guide their decisions by the pursuit of the best bid to meet the need of the contract, but safeguarding the public interest, as it is set forth in the heading of article 3 of Law Nº. 8.666/1993. It is also necessary to seek mechanisms that ensure the smooth implementation of the purpose of the contract. Such measures should take place both when choosing the supplier and during the implementation phase of the contract, based on an effective contract management. The requirement being discussed here is part of the first group, as it happens during the bidding phase.

Initially, we would like to highlight that the contracted legal entity is the one supposed to carry out the implementation of the purpose of the contract. This burden will be borne by the supplier bidder, winner of the bidding process, and not by the manufacturer. Thus, the requirements described in the bid notice and the contractual obligations should be focused on the company responsible for the future contract. The only exception is whenever the manufacturer itself is directly involved in the bidding process, acting as both supplier and manufacturer.

Features of the solution, delivery steps and conditions of the sanctions should be thoroughly described to increase the chance of meeting the needs that led to the procurement. Thus, to participate in a bidding process, each company shall know in advance the technical-operational capability it should possess to be awarded the contract.

Some companies use contracts with the manufacturer in order to meet the demands of the purpose of the bidding process, but others may waive this relationship, or even resort to other means. However, the contracting party must not interfere in the relationship between bidder and manufacturer, establish rules for this relationship, or even predict such rules in the bid notice, including the lack of legal provision for such interference. It should just make sure to set its requirements for quality, deadline and other aspects that should be met by the contracted party.

Therefore, the bid notice requirements should not concern the manufacturer, or its relationship with the bidder, but the purpose of the contract and the legal entity to be contracted in the form of mandatory technical requirements and criteria of suitability and qualification.

As to the purposes pursued by the requirement of accreditation, it is assumed they will take place after the contracting. The problem is that public officials fear contracting a company that cannot deliver the products, install them, set them up and/or provide support, in a satisfactory manner and end up with a company that does not meet the government's needs. They are afraid that they will only discover that the company is unfit during the implementation of the contract, when public resources have already been spent, as well as time and effort, and to solve the problem, the company shall be penalized, the contract shall be terminated, a new procurement shall be conducted and they will have to manage a new contract, thus creating costs and delays for the government.

To put it simply, the intention to contract an accredited company can ensure public officials greater security as to the following aspects: (i) the supplier is not an "adventurer" and has technical and operational capacity to provide the goods or to provide the service properly, (ii) it will implement the contract according to the deadline and with the quality expected and agreed upon, (iii) the supplier will follow the standards set by the manufacturer in the installation, set-up and support to the contracting party, avoiding the loss of warranty due to improper handling, (iv) it has the competent technical staff to do so, (v) the supplier will have minimum qualification to provide support, (vi) the supplier has the manufacturer's warranty of receiving the products in order to deliver them to the body or entity, among others.

Thus, in general, public officials seek to ensure in advance that the bidder has both the technical and the supply capacity to implement the contract, minimizing the risks of contracting, including whenever reverse auctions take place.

However, given these requirements, the government has some alternatives to ensure the proper implementation of the contract, without resorting to accreditation. We list them, as follows:

- Minimum capital requirement or minimum net worth, according to article 31, § 2 of Law Nº. 8.666/1993;
- (License) requirement for certification based on article 30, § 1, of Law Nº. 8.666/1993, stating that the bidder has previously supplied the equipment they provide or has previously provided services related to such product, setting up the conditions of finding the solution and made clear that the services were provided in accordance with the criteria established in the contract, including quality standards;
- Withholding of the contractual performance guarantee provided for in art. 56 of Law Nº. 8.666/1993, throughout the duration of the contracted warranty and technical support;
- Determining the solution delivery pattern, including the obligations of both parties, with deadlines and service quality levels, as well as sanctions adjusted to each of these obligations, combined with contract management mechanisms, such as a meeting at the beginning of the contract (in accordance with art. 25, section I, paragraph "b" of IN SLTI No. 4/2010), regular meetings, reports, among others.

Thus, at first, for each of the purposes sought by the requirement of accreditation, it is possible that public officials use other legal mechanisms, such as listed above, to reduce the risk of an unsuitable implementation of the contract, without unduly restricting the competitiveness of the biding process, or even harming the equality among the parties.

In addition to the facts we have discussed so far about the focus of the requirements on the bidder, the purpose of the contract, the objectives pursued by the requirement and the alternatives available to public officials, it is noteworthy to mention than being certified by the manufacturer does not necessarily mean that the bidder possess the technical capacity to provide the equipment or render services, or even better customer service than non-accredited companies, because in many cases there is no objective technical criteria for accreditation. We give as an example some programs in which economic criteria are used, such as sales revenues of the partner (e.g., a million reals in sales per year), geographical or business segment in the market (e.g., government, industry). In other cases, the criteria are not even disclosed. In such cases, there is no evidence of technical benefits of accreditation for the government.

In addition to this, there is the fact that the enrolling of a company in the accreditation program is entirely up to the manufacturer, for the manufacturer is not bound to grant accreditation to those who meet their criteria, so that the requirement of accreditation may also undermine equality. Therefore, even in cases where the program is considered transparent, admitting that there are predefined objective technical criteria for being enrolled in the accreditation program, the criteria are public and even if the company meets these

criteria, it may not receive the seal of the manufacturer's accreditation for just any reason, without having where to appeal such arbitrary decision, due to the fact that the manufacturer is not obliged to accredit new partners.

To make matters worse, due to the nature of accreditation, there is no way to require the contracted party to remains accredited by the manufacturer during the contract implementation, because this relationship is not under its control, depending entirely on the discretion of the manufacturer.

The fact that a supplier partner, theoretically, provides a service of higher quality does not make the reverse true, i.e., one cannot state that there are no other suppliers in the market able to provide that good or to render that service with the same standard of quality, but for some reason they are not accredited by the manufacturer. Therefore, if there is not necessarily a direct, tangible relationship between accreditation by the manufacturer and the technical capacity of the bidders, there is no direct relationship between a non-accredited supplier and a poor service. The goal of ensuring a bidder that belongs to that market, and is technically capable of performing the purpose of the contract can be achieved, for example, by requiring a relevant certificate of expertise.

Thus, the technical capacity of a company to carry out the purpose of the contract and the fulfillment of its obligations as provided for in section XXI of art. 37 of the Constitution is not to be mistaken with the status of an accredited company since the accreditation is not a good enough mechanism to effectively mitigate the risk of a breach of contract, nor does it guarantee bidders the technical capacity and supply of parts to perform the purpose of the contract.

So, let's suppose a company is not accredited by the manufacturer and the bidding process requires the provision of warranty for three years after the delivery of the goods. If the factory warranty remains in force only during the first year, this does not alter the responsibility of the contracted party before the government, as the contracted party must provide the warranty. In order to meet this requirement, the contracted party , at its sole discretion, mayseek to establish a contract with the manufacturer or other suppliers in the market in accordance with the level of service required, in order to cover the entire warranty period or stock spare parts to meet future maintenance requests related to this guarantee.

Furthermore, the fact that a supplier is accredited does not change the situation because the precarious bond of accreditation does not ensure the government assistance for equipment through the warranty by the contractor after the first year, or even by the manufacturer, in case there is a breach of contract.

Setting up clear requirements regarding the object of the bid as well as effective mechanisms of contract management in the bid notice, especially regarding sanctions, may keep away companies that cannot meet them, that is, those that are technically incapable of providing the object of the bid, or if they insist in participating in the bidding process they will be subject to the sanctions laid down in articles 86-88 of Law Nº. 8.666/1993 and article 7 of Law Nº. 10.520/2002.

Indeed, the contracted party (and not the manufacturer, which is not a party to the contract) is the one responsible for ensuring the quality of services rendered to the government, as well as for the proper running of the equipment it supplied, such as performance, hardware contractual warranty (which goes beyond the manufacturer legal guarantee provided for in article 24 of the Code of Consumer Protection), support for software problems that are not solved by the government's own support service, among others. This will not characterize as a different contract to provide ongoing maintenance.

As for the deadline for the delivery of the products, which should be described in the bid notice, it actually depends on the relationship between the contracted party and the product manufacturer or its distributor. However, as seen here, accreditation does not grant the government any formal guarantees that the accredited company holds advantages over unaccredited ones, or even that the manufacturer meets the bid notice requirements, but only an expectation that commercial ties between supplier and manufacturer will mitigate possible risks of a breach of contract.

Alternatively, to prevent the possible obstacles in the supply, the government could, for example, require a certificate that the bidder has supplied similar products in a similar time frame for previous contracts based on article 30, § 1, of Law Nº. 8.666/1993.

Therefore, considering that:

- The requirements of the bidding process of IT goods and services should be limited to those contracts that cannot happen otherwise;
- The bid notice requirements should be about the purpose and the legal entity to be contracted, and not about the manufacturer, nor about the its relationship with the contracted party;

- The main purpose of the requirement of accreditation is to ensure that the bidder has both the technical capacity and the supply of spare parts to perform the purpose of the bid, thus mitigating the risks of the contract;
- Public officials have other mechanisms to ensure the fulfillment of the purpose of the procurement and achieve the same objectives sought with the requirement of accreditation;
- Accreditation is not a proper mechanism to effectively mitigate the risk of a breach of contract or even to ensure the technical capacity and the supply of spare parts of bidders to perform the purpose of the contract, nor can it be said that unaccredited companies are not fit to carry out the contract;
- We reach the conclusion that for government procurement of IT goods and services, accreditation of companies by manufacturers is generally not an indispensable technical requirement for the implementation of the purpose of the contract (Federal Constitution, article 37, section XXI; Law Nº. 8.666/1993, art. 30, II, art. 56, arts. 86-88 and Appellate Decision No. 1.281/2009-TCU- a decision issued by the full court, section 9.3).

4. ON THE COMPETITIVENESS OF THE BIDDING PROCESS AND EQUALITY AMONG STAKEHOLDERS

First, we should stress that the accreditation discussed here is not the one specific to each bidding process (as the letter of joint and several liabilities), also known as *ad-hoc* accreditation, but an accreditation by the manufacturer taking only into account the service provider according to pre-established criteria, without considering any specific bidding process in mind. The *ad-hoc* accreditation should not be allowed under any circumstances, because it results in damaging practices by manufacturers, since they become able to choose, for each bidding process, its only representative and may frustrate the competitiveness of public procurements.

Second, the requirement for accreditation of bidders by the manufacturer (though not *ad-hoc*) usually restricts the competitive nature of the bidding processes, provided for, among others, in article 3, § 1, paragraph I, of Law Nº. 8.666/1993, for it hinders the participation of companies that are not accredited, for one reason or another, but that are fully able to provide the goods and services required. Moreover, we must assume that these unaccredited companies that participate in the bidding process have already studied the market and are ready to meet the contract's obligations, assuming the risk of the penalties for breach of contract.

By analyzing accreditation programs that manufacturers provide, it appears that some of them disclose very clearly the criteria for taking on new partners while others do not do so and even state that they are not open to new partners for some areas. We would also like to highlight that some manufacturers disclose their list of partners in their websites, while others choose not to do so.

Moreover, it is not possible to require manufacturers to follow a specific program model, because even these accreditations take place at their own discretion, since they are part of corporate autonomy. Thus, there is no way to enforce that programs are open, transparent, and that they define the technical advantages of accredited companies or that they have a minimum number of partners.

Even considering all of those suppliers that disclose the information of the program, we observe that some do not have a large number of partners, while others do. In some cases the programs are so restricted, that they mention a set of accreditation programs altogether. In these, there is a specific partner for each combination of different factors such as: product line, equipment line, and market share, not to mention the geographical location.

For example, let's take a look at the combination of the following factors: partners of the manufacturer "XYZ" of laser printers, the "XPTO" product line and a company that provides equipment for the government sector. Such combination can result in a very reduced number of partners. In such cases, in a bidding process that requires accreditation and that the purpose is laser printer with the equipment features of the "XPTO" line, the number of bidders who are partners of the "XYZ" manufacturer in that market segment is even more reduced. In the case of a bidding process in which the supply of equipment for a specific brand or model is required (and needed), the problem becomes worse.

Thus, it is unreasonable that public officials request the accreditation of bidders by manufacturers in government procurements, when it is clear that these accreditations are given in a shady manner in some cases, and, in most of them, at the sole discretion of the manufacturer.

Understanding otherwise could lead manufacturers to indicate a single "representative" for bidding processes for a specific line of products in a given region, based on the previous accreditation of only one company in the government segment for the product that is the purpose of that contract. This will definitely increase the risk of harming competitiveness in bidding processes, as shown by the Secretariat of Economic Law of the Ministry of Justice, in a complaint involving IT companies that led to Appellate Decision No. 1.521/2003-TCU- a decision issued by the full court.

Therefore, accreditation by the manufacturer as a requirement to be awarded a contract with government could cause undue restriction of competition, either directly, by limiting the participation of unaccredited companies, often capable to provide goods and services, as well as for the various reasons listed above and also indirectly by creating conditions for manufacturers to start to "subdivide" the market for IT procurements.

Furthermore, in cases where the accreditation program involves costs for the accredited company, it is natural that, in a bidding process that requires accreditation, such costs will be part of the prices offered to the government, and will most probably be higher than those offered by unaccredited companies, in the case of an open bidding process. In this case, those that meet the pre-determined technical requirements could participate, thus increasing competitiveness and potentially reducing the price of the contract.

Based on the foregoing, and due to legal alternatives available to public officials, from the characteristics of the accreditation programs of manufacturers to the ineffectiveness of accreditation for the purposes sought by the public official, discussed in section 3 of this article, we come to the conclusion that the requirement of accreditation by the manufacturer in bidding processes for procurement of IT goods and services generally leads to the undue restriction of competitiveness of such bidding process (Law Nº. 8.666/1993, art. 3, § 1, paragraph I , art. 6, section IX, paragraphs «c» and «d», art. 44, § 1, Law Nº. 10.520/2002, art. 3, item II and Appellate Decision No. 1.281/2009 - TCU - a decision issued by the full court, item 9.3) .

Moreover, bidding processes aim to ensure equality for all competitors, besides selecting the most advantageous proposals to the government according to item XXI of article 37 of the Constitution. The heading of article 3 of Law Nº. 8.666/1993 also states that bidding processes guarantee the principle of equality, set forth in article 5 of the Constitution. So, we believe it is necessary to comment on the effects of accreditation requirements for those eventually interested in the bidding process and the legitimacy of the imposed restriction.

In order to better understand the limits and implications of the principle of equality in bidding processes, we looked for the opinion of jurists on the matter. We quote the thought of Marcal Justen Filho, in the work "Comentários à Lei de Licitações e Contratos Administrativos" (in English, Comments on Public Procurement Law and Administrative Contracts), 11th edition, page 44, where he quotes Professor C. A. Bandeira de Mello on the subject.

> (...) Following the reasoning of C. A. Bandeira de Mello, different treatments may be allowed if three elements are present:
>
> a) Differences in the matter of fact subject to law;
>
> b) Such different treatment shall be suitable to the differences between the matters of fact, which gave rise to the difference itself;
>
> c) The different treatment shall be in accordance with legal values enshrined by law.

Indeed, when following the above-mentioned jurist opinion for bidding processes for IT goods and services, we understand that the differences between the situations («a» element), and that interest the government are technical advantages that some companies have, distinguishing them from others, and that may be potentially translated into technical capacity to perform the purpose of the contract. So, in a bidding process of IT goods and services, there are companies capable of performing the purpose of the bidding process and other that are not. It is reasonable, therefore, that differences take place, considering element «a».

The different treatment (element «b») though represents the imposition of accreditation as a mandatory requirement of such bidding processes. So, knowing that the mechanism of accreditation does not necessarily reflect the expertise of companies (section 3 above), its imposition as discriminatory treatment among companies is not fit for these factual distinctions reported above. We conclude that element «b» is missing, so the different treatment cannot be admitted according to the opinion of the jurist. We then highlight the fact that, since item «b» is missing item «c» will not be taken into consideration, because the three elements must be present.

To sum up, accreditation, as a rule, violates equality, since unaccredited companies are prevented from participating in the bidding process while not necessarily being technically incapable, but simply because they are unaccredited, as shown above.

Therefore, we come to the conclusion that the requirement for procurement of IT goods and services of bidders accredited by the manufacturer in bid notices, as a rule, involves undue restriction of the competitiveness of the bidding process (Law Nº. 8.666/1993, art. 3, § 1, paragraph I, art. 6, section IX, paragraphs «c» and «d», art. 44, § 1, Law Nº. 10.520/2002, art. 3, item II and Appellate Decision No. 1.281/2009 - TCU - a decision issued by the full court, item 9.3) and jeopardizes equality among stakeholders (Federal Constitution, arts. 5, heading, 37, XXI and Law Nº. 8.666/1993, art. 3, heading).

5. EXCEPTIONAL CASES

Despite all the reasoning exposed here, due to the huge technological diversity of IT goods and services and the rapid innovation in this market, depending on the specific characteristics of the case, exceptionally, this requirement may be essential and therefore valid.

In such cases, it shall be crystal clear that:

- The objective demonstration of absolute requirement of the relationship between the need that motivated the contract and technical advantages offered by accreditation, and
- The inability to obtain these same advantages by other legal means.

Thus, given that the bid notice requesting accreditation is an administrative act affecting rights and interests, it is necessary that, based on section I of article. 50 of Law Nº. 9.784/1999, that such necessity be described and fully justified in the bidding process, also respecting the singularities of the market, in order not to unduly restrict competition or harm equality.

However, even in these cases, if accreditation is essential, it shall take place as a mandatory technical requirement and should not be included, even if only formally, in the list of criteria for qualification of bidders for the following reasons reported.

As stated in the report of Appellate Decision Nº 1.670/2003-TCU- a decision issued by the full court, the final part of the article 37 section XXI of the Constitution states that the public bidding process "will only allow technical and economic requirements if those present qualifications necessary to guaranteeing the implementation of the purpose of the contract." As a result, art. 27 of Law Nº. 8.666/1993 states that public bidding processes will only require stakeholder documentation relating to legal and technical qualification, economic and financial qualification, proving they have no problems with the tax authorities and also that they can fulfill the provisions of paragraph XXXIII of article 7 of the Federal Constitution.

Besides that, articles 27-31 of the Procurement and Contracts Law present the necessary documents required to demonstrate the regularity regarding these situations. Then, the systematic interpretation of such provisions leads us to understand that these are the only documents that can be requested for qualification in a public bidding process.

Decision No. 523/1997-TCU, a decision issued by the full court, determined the obligation of the government, as for the purposes of qualifying to participate in government procurements, to stick to the list of documents set forth in articles 27-31 of Law Nº. 8.666/1993 reinforces such understanding, so it is unlawful to request any other documents not therein listed.

Whereas the confirmation of accreditation (partnership or any similar instrument) is not in the wording of the abovementioned provisions, we do not see the possibility of such requirement for qualification purposes.

Thus, in bidding processes for contracting IT goods and services, the decision to request, in exceptional cases, the accreditation of bidders by the manufacturer shall be fully justified in the bidding process, respecting the particularities of the market (Law Nº. 9784/ 1999, art. 50, item I). In these situations, and considering the adoption of reverse auction, accreditation should be included as mandatory technical requirement, not as criteria for qualification (Constitution, art. 37, section XXI; Law Nº. 8.666/1993, arts. 27 to TCU 31 and Decision Nº. 523/1997).

6. FINAL REMARKS

After everything that we have presented here, we have come to the conclusion that in public bidding processes for contracting IT goods and services, as a rule, it is not a technical requirement indispensable for the implementation of the purpose of the bid that the manufacturer accredits the bidders.

Furthermore, this requirement generally implies unduly restricting the competitiveness of the

bidding process and undermines the equality among stakeholders.

However, in exceptional cases, the need of the requirement for accreditation of bidders by the manufacturer shall be fully justified in the bidding process, respecting the singularities of the market and, in these situations, specifically for reverse auctions, accreditation should be included as a mandatory technical requirement, not as criteria for qualification.

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NOTES

1 SEFTI stands for Audit Bureau of Information Technology of the Federal Court of Accounts of Brazil.

2 Revista Zênite is a publication concerning Information on Government Procurements and Contracts.

General Aspects of the Public Contracts Inspector

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ABSTRACT

The article discusses the inspector of contracts: the peculiarities involving appointments; the role in the concretization of the objectives of a public tender; relevance for the phase of settlement of expenses and delivery of works and services; importance of applying penalties to the contractor; the relation with public administration accountability with regard to labor debts and accountability due to failures in oversight.

Key words: Accountability. Contract sanctions. Inspector. Labor debts. Public Contracts. Settlement of expenses. Provisional delivery.

1. INTRODUCTION

The present work resulted from an invitation from the Army School of Complementary Training of the City of Salvador (BA) to discuss the role of the public contracts inspector. Considered in the majority of instances a mere formality to be completed during the execution of contracts, the auditing of contracts has been relegated to the sidelines, positioned as an ancillary activity together with other ordinary activities of the public servant.

It is not uncommon to appoint the inspector of contracts without releasing him from other tasks

for which he is responsible, and furthermore without considering that it will be necessary to dedicate part of his time to the labor of auditing. Many times the designating authority does not consider the technical skills of the public servant in question.

Thus these brief lines endeavor to demonstrate the relevance of the inspector of contracts for the correct execution of the aims of the public bid; the peculiarities involved in the designation of a inspector; the distinctions between inspector, manager, third party contractors providing supervisionary assistance, representative agents, and auditors.

Additionally, this study also addresses the role of the contracts inspector in applying penalties to contracted companies, the settlement of expenses, the liability of public adminstration in regards to labor debts in third party labor contracts, and in provisional delivery of services and public construction works. Finally, the accountability of the inspector for his own practices will also be addressed.

2. ENSURING THE OBJECTIVES OF THE BID

According to art. 37, XXI, of the Federal Constitution, public works, services, procurement and alienations, except in cases of waiver or non-requirement of a bidding procedure provided for in legislation, must be contracted by means of a bidding process that ensures equal conditions to all competitors. The bids should have clauses that establish payment obligations, maintaining the effective conditions contained in the proposal.

In turn, article 3 of Law 8.666/1993 establishes that bids exist in order to ensure that the constitutional principal of equality is observed and that the best proposal for the administration is selected and sustainable national development is promoted[1].

There are three objectives in the bidding process: ensuring equality among all those who want to offer goods and services to the Public Administration; selecting a proposal that is advantageous to the Administration; and promoting national sustainable development.

In order to ensure that such objectives are achieved, the bids law sets forth a series of mechanisms by listing as basic principles to guide the competition legality, impersonality, morality, equality, publicity, administrative probity, binding of proposals to the public bid notice, and objective judgment of the proposals[2].

Once the best proposal is selected in a dispute where equal treatment of all bidders is ensured, the one who is contracted has to fulfill all conditions regarding eligibility and qualification required in the

process, in compliance with the obligations accepted, while the contract is in effect[3].

If, during execution of the contract, the contracted party could alter the conditions set forth in the bid notice at his discretion, as well as the terms of the winning proposal, the guiding principles of the bid would be put to the ground. Equality, which is one of the objectives of the competition, would be being breached during execution of the contract.

Writing a basic project, that is duly approved, would be of no use if, for example, materials were replaced during execution of the project for inferior quality materials. The winning proposal, chosen for being the most advantageous to the Administration, would, in practice, lose this quality.

It is the duty of the inspector of contracts to make sure that the conditions established in the bid notice and in the winning proposal are being complied with during execution of the contract so that the objectives of the bid are actually achieved.

3. APPOINTING THE INSPECTOR

As established by article 67 of Law 8.666/1993,

> The execution of the contract must be accompanied and supervised by a specially appointed representative of the Administration, permitting the contracting of third parties to assist him with information relevant to this assignment.

The Administration has the power and duty to supervise the contract. An inspector must be formally appointed to verify the correct execution of the contract. It is not up to discretion and convenience of the manager whether or not to appoint the inspector.

The role of inspector should go to one who, within the Administration, is authorized to contract third parties to assist in providing technical information that will enable him to evaluate the correct execution of the contract.

> Maintain representative, belonging to his personal staff, specially appointed to monitor and supervise the execution of the contracts signed, the contracting of third party agents is permitted only to assist him and provide him with information relevant to the assignment, as pertains to article 67 of Law 8.666/93. [Judgement 690/2005 – TCU – Plenary sitting]

In order to avoid any interference with the activities of supervision, the contracts inspector must not be subordinate to the contract manager, and, serving the principle of separation of functions, the activities of the contract manager and the contract inspector must not be attributed to the same person. "Although the non-segration of these two attributions cannot be considered illegal, it should nonetheless be avoided." (FURTADO, 2012, p.440).

In honor of the principle of the separation of functions, furthermore, designating as inspectors individuals who are also members of the tender (FURTADO, 2012, p.440).

> It is recommended that, in naming members of the Administration to monitor and supervise contracts for the Unit, the public inspector not be directly involved in obtaining and negotiating the supply of services and / or goods, in accordance with the provisions of article 67 of Law n. 8.666/1993. [Judgement 2455/2003 – TCU – First Chamber]

The person chosen as as inspector should have sufficient technical knowledge of the object that is being supervised, since failures in supervision can

come back to the public official who appointed him, considered as a fault in election.

> The defendant was the hierarchical superior responsible for the technical team that attested to the services. As such, he could not shirk the responsibility of overseeing, monitoring and supporting his subordinates, searching for the necessary means for the effectiveness of the actions concerning the Superintendency. In refraining from this responsibility, he was at fault in the modalities **in omittance and in overseeing**. If we consider, furthermore, that the member of his team did not have the adequate training and competencies for the activity for which he was concerned, one draws the conclusion that the defended had acted at fault **in election**. [Judgement 277/2010 – TCU – Plenary sitting]

> Regarding the alleged inexperience, raised by the defendent, I bring forward the considerations of Serur the judicial understanding of this Court of Accounts regarding fault **in overseeing** attributable to those responsible for the application of public resources, embodied in the guiding vote of the Judgement 1.190/2009-TCU-Plenary sitting:"(...) Even if the former mayor invokes **posteriori as discharged** of guilt the fact that he did not directly monitor the formalization and execution of the contract, the municipal manager at the time contributed to the damaged for which he is imputed with fault **in election** and fault **in overseeing**. As is apparent from the facts, the former mayor carries civil and administrative liability for not having well selected honest agents to whom he delegated these operational tasks, as well as not having properly supervised and demanded of his subordinates correct compliance with the law." [Judgement 5.842/2010 – TCU – First Chamber]

Furthermore, for the qualifications of the public servant to be appointed as contracts inspector, one considers the necessity for an educational background in engineering in the case of monitoring construction works and services of this nature. According to the understanding of the Federal Court of Accounts, oversight of a contract occurs by virtue of the instrument of the Law of Public Tenders, whereby an education specifically in engineering is dispensable.

> Report [...] the function of a contracts inspector in monitoring the execution of an object (in this case, a construction project), also is not considered illegal exercise of the engineering profession. It is incumbent under article 67 of Law 8.666/1993, which requires no specific qualification, under penalty of making the Public Administration quotidian impossible. I vote that [...] in the appointment of the public servant to be part of the supervising team for the execution of the contract, despite his lack of training in engineering, there is nothing irregular, being that it constituted mere performance of the task as specified in article 67 of Law 8.666/1993. [Judgement 2512 – TCU – Plenary sitting]

Finally, one wonders whether a public servant may refuse to assume the role of public inspector of contracts. Under the Federal Direct Administration, the public servants statute, Law 8112/1990, in article 116, precludes the unmotivated refusal of the assignment of inspector of contracts.when listing as duties of the public servant the exercise of duties with zeal and dedication, loyalty to the institutions they serve, compliance with superior's orders that are not manifestly illegal, and the observance of legal norms and regulations,

A refusal motivated by constraint can exist when the appointed public servant has a parental relation with the contractor or is a spouse or partner of the contractor, or does not possess the technical knowledge to enable the monitoring of the contract. By the way, in this last case, the appointment of a non-qualified person to exercise the function of public inspector of contracts can cause r guilt **in election** of the appointing authority.

4. INSPECTOR, MANAGER, AGENTS, THIRD PARTIES, AUDITORS

The contracts inspector is the person from within the Administration formally appointed to monitor the execution of the contract, noting in the master record all occurrences related to the execution of the contract and determining what is necessary to address observed errors of defects[4].

The contract manager, in turn, should also come from within the Administration, and is charged with dealing with the contractor, demand fulfillment of the agreement, suggest possible contractual modifications, communicate the absence of materials, refuse services (in this case, usually supported by the inspector's notes).

> Management is the general service of managing all the contracts; supervision is punctual. In management, one takes care, for example, of the economic-financial balance of payments relating to incidents, questions related to documentation, control of deadlines and extensions, etc. It is indeed an administrative service that can be carried out by one person or a sector. Supervision on the other hand is necessarily exercised by a representative of the administration, specially appointed, as stipulated by the law, who will tend in a timely manner to each contract. (ALVES, 2011, p. 65)

Third party is an individual or legal entity contracted to assist the inspector in his task, as provided by article 67 of Law 8.666/1993. Contracting a third party is not mandatory; the Administration shall evaluate whether the complexity of the contract demands the assistance of a third party. It is a support activity, leaving the responsibility for supervision to the Public Administration.

> Article 67 of Law 8.666/1993 demands the appointment by the Administration of a representative to monitor and supervise the execution, providing for the contracting of a supervisory company to assist him. Thus, (...) the supervision contract is clearly of assistance or subsidiary, in the sense that the ultimate responsibility for monitoring the implementation does not change with its presence, remaining with the Public Administration. [Judgement 1930/2009 – TCU – Plenary sitting]

In regards to auditors, Almeida (2009, p. 54) explains that the supervision of contracts is distinguished from the auditing of contracts. The latter

> consists in the verification of administration and fiscal actions, in a manner that permits a general evaluation of the implemented procedures, both from a strictly legal point of view and from the point of view of quality of administration and supervision.

Article 113 of Law 8.666/1993 expressly submits control of costs arising from contracts and other instruments governed by the Law of Public Tenders to the respective Courts of Auccounts and the internal control bodies, which shall examine the legality and compliance of expenditure.

The agent is the representative of the contractor and must be formally designated to serve as a liaison with the Administration. Since it is infeasible that the principal responsible for the company be available at all times to deal with the Administration, he names an agent, by proxy, who will speak for the company, receive demands and complaints from the Administration, monitor and supervise the execution of the object, note occurrences, take actions for the improvement of any flaws, request measures from the Administration.

Indicating the agent is the duty of the contract, pursuant to article 68 of Law 8.666/1993:

> The contract should maintain the agent, accepted by the Administration, at the location of the construction project or service, to represent him in the execution of the contract.

In case the Administration, with motives, does not agree with the designation of a certain agent, the Administration may refuse him, requiring that the contractor designate an other agent.

5. THIRD PARTY CONTRACTED TO ASSIST WITH SUPERVISION

Pursuant to article 67 of Law 8.666/1993, the Administration may contract third parties to assist with the supervision of contracts. Some contracts have extremely complex objetives, such as engineering projects and services. In these cases, the Administration may take advantage of third parties to assist in the supervision of contracts. It is an issue for the Administration to decide, evaluating case by case.

If the Administration decides to contract a third party, they must implement the proper public bidding process, even if the case in question is the contracting of a company for the preparation of a basic or detailed project design[5].

> 1. Contracting a company to prepare a detailed plan does not bestow, by itself, the subjective right for the company to be contracted to provide the supervisionary service. 2. The contracting of coordination, supervision and construction monitoring services, does not fall under the cases of exemption and waiver under the Law of Public Tenders. [Judgement 20/2007 – TCU – Plenary sitting]

The hiring of third parties does not transfer to this party the responsibility for supervising the contract, which continues to be with the Administration, but deficient assistance may lead to making the third party accountable.

> 3. In cases where the opinion of a professional is of fundamental importance in grounding the position to be taken by decision-making bodies, an opinion contaminated by technical errors, difficult to detect, implies the civil liability of the appraiser for possible losses arises thereof. [Judgement 20/2007 – TCU – Plenary sessions]

6. IMPOSING PENALTIES

According to article 54 of Law 8.666/1993 administrative contracts shall be governed by its provisions and the principles of public law, applying to them additionally the principles of the general theory of contracts and general provisions of private law.

> Administrative contracts are governed by the rules of administrative law, which are based on the indisposability of public interest and the supremacy of the public interest over private interest.

In administrative contracts, the so-called exorbitant clauses are inserted, bestowing on the Administration privileges in the face of the private sphere, such as the obligation of the contractor to accept additions and deletions in the object of the contract, within the limits set in article 65 of Law 8.666/1993.

Imposing penalties and contract termination are also prerogatives of the administration, without the necessity of resorting to the Judiciary, which does not exempt the institution of administrative due process to guarantee full defense and counter arguments of the contractor.

The article 78 of Law 8.666/1993 lists a number of causes that give rise to the termination of the contract, such as: non-compliance or irregular compliance of contractual terms, specifications, projects or deadlines; slowness in compliance, leading the Administration to determine the impossibility of completing on schedule the construction, service or supply; undue delay in initiating the construction, service, or supply; stoppage of the construction, service, or supply, without just cause and prior notification of the Administration; full or partial subcontracting of the contracted project, assocation of the contractor with another, surrender or transfer, total or partial, as well as merger, rupture or incorporation, not allowed by the tender and in the contract; failure to attend to the regulatory determinations of the authority designated to monitor and supervise the implementation, as well as their superiors; reiterated errors committed and recorded in accordance with
§ 1° of article 67 of Law 8.666/1993.

Article 87 of the same law, in its turn, lists the sanctions that the Administration may apply to the due to partial or total default of the contract: warning; penalty; temporary suspension of participation in public tenders and barring from contracting with the Administration for a period not more than 2 (two) years and declaration of unfitness to bid or contract with the Public Administration.

To verify non-performance of the contract and other faults proper supervision and proper registration of contract failures is of paramount importance. These are the elements that will be taken to the administrative process and serve as the motivation for the application of administrative acts of contract termination or applying sanctions.

How to show partial non-implementation or a contract or failure to attend to the determinations of the contract inspector if not with the proper recording of these failures? Similarly, repeated commitment of errors can only be characterized as such if there exists a case history, a master record of these errors. Indeed, on this point Law 8.666/1993 is clear in saying that cause for the unilateral termination of a contract is the repeated commitment of errors in its implementation, noted in the master record of occurrences related to the execution of the contract (Article 67, §1°, Law 8.666/1993).

Once again we see the relevance of the activity of the contract inspector, who is tasked with noting in the master record all occurrences, such that the Administration may properly outline the reasons in a possible unilateral termination of the contract or in imposing some penalty[6].

7. SETTLEMENT OF EXPENSES

Public spending passes through three stages: commitment, settlement and payment.

> Commitment is the act emanating from the competent authority that creates for the State an obligation of pending payments, or not, of the implementation of conditions[7].

With the commitment is marked part of the budget for the determined expense, being prohibited commitments that exceed the limits of budgetary credits, as well as the execution of expenses without prior commitment[8].

Mere commitment does not authorize payment, which only occurs after a regular settlement[9].

The settlement of expenses consists in the verification of the right aquired by the creditor based on titles and supporting documents for the respective credit[10].

The objective of settlement is to certify that conditions were met on the part of the contractor and that he complied with the contract agreement. The settlement endeavors to verify the origin and objective for which payment is to be made, the exact value of the payment to be made and to whom, thus extinguishing the obligation[11].

It is at the stage of the settlement of expenses that the inspector of the contract demonstrates his importance, in attesting to the measures, in not pointing out reservations in the master record regarding the service provided, or in pointing them out and demanding disallowances in the payments. With the certification of the contract inspector, the expense can be duly settled and the payment, which is the order recorded by the competent authority determining that the expense is to be paid[12], can thus be finalized.

> The master record of supervision and inspection, in the form prescribed by the law, is not a discretionary act. It is an essential element that authorizes subsequent actions and informs the procedures of the settlement of expenses and payment of services. It is a fundamental control that the administration exercises over the contractor. It provides the administrators with information about compliance with the construction timeline and fulfillment of quality and quantity contracted and executed. In these terms, it reveals all the doctrines and jurisprudence.
>
> There is no innovation in the demands for monitoring contractual implementation. Initially prescribed in article 57 of the Law-Decree 2.300/1986, repealed by Law 8.666/1993, which maintains the requirements of article 67, this master record is an essential condition for the settlement of expenses, for verifying the right of the creditor, pursuant to article 63, § 2°, III, of Law 4.320/1964. The absence of the master record, of this pari passu oversight, is tantamount to an effective possibility for injury to the state treasury. [Judgement 767/2009 – TCU – Plenary sitting]
>
> To effect payment in installment to the contractor in strict accordance with the quantity of services and measured steps and effectively executed works, as certified by the contract inspector and in accordance with the new

> physical-financial chronogram to be established. [Judgement 1.270/2005 – TCU – Plenary sitting]

Thus, the inspector must be diligent in monitoring the execution of the contract, and not certify in an inattentive manner services provided, the delivery of a good, or the realization of a construction project, for these acts constitute the settlement of expenses, recognize the fulfillment of a condition on the part of the contractor, giving rise to a credit claim before Administration, permitting the competent authorities to effect due payment.

8. SOCIAL SECURITY AND LABOR DEBTS

According to article 71 of Law 8.666/1993, "the contractor is responsible for worker benefits, social security debts, fiscal and commercial taxes resulting from the exectuion of the contract". Thus, in a first reading of the instrument under discussion, the payment of salaries, transportation and food vouchers, vacation, 13° monthly wage (worker benefits), contributions to Social Security (INSS: social security benefits), payment of taxes resulting from the activities of the contractor, such as income taxes on profits, service taxes (fiscal taxes) or the payment to material supplies for providing cleaning services, for example, (commercial taxes) remain the responsibility of the contractor, who should include these costs in the composition of his costs comprising the proposal to the Administration.

The § 1 of the said article 71 reinforces the responsibility of the contractor regarding worker benefits, fiscal and commercial taxes, making it clear that

> the default of the contractor, in reference to worker benefits, fiscal and commercial taxes, does not transfer the responsibility for payment to the Public Administration, nor may it encumber the object of the contract or restrict the use and regulation of works and buildings, including relating to the Real Estate Registry.

In the case of outsourcing of labor – as is typical with security, cleaning, maintenance, and janitorial services,–, §2° of the same article makes it clear that

> the Public Administration is liable together with the contractor for social security benefits resulting from the execution of the contract, pursuant to article 31 of Law n° 8.212, july 24, 1991[13].

Thus, under the provisions of Law 8.666/1993, the Administration is not liable for labor debts, fiscal and commercial taxes, but is jointly liable for social security benefits in the case of outsourcing of labor, and should, in this case, withhold 11% of the invoice or receipt and withhold INSS (retirement savings) on behalf of the contractor.

However, specifically with regard to labor debts, the Superior Labor Court (TST) has a different understanding. According to the original wording of Precedent 331 of the TST, regarding the outsourcing of manpower:

> IV – the default of labor obligations on the part of the employer implies liability for those obligations on the part of the receiver of services, including with respect to government agencies, autarchies, public foundations, public companies and joint stock public-private companies, provided they have participated in the procedural relationship and appear in the judicial title.

Thus, for Labor Court, if the company providing outsourced services defaults on labor obligations, the Public Administration, provided they have participated in the procedural relationship (if registered together with the defendant) and are present in the enforcement order, assumes alternative liability for the labor debts, i.e., if the contractor does not assume these debts, the Public Administration must do so.

In the original wording of Rule 331 of the Labor Court of Appeals (TST), regarding objective liability of the Public Administration, it was enough to occur a default in labor obligations, the participation of the Administration in the proceedings, and appearing in the enforcement order for the appearance of a liability for the labor debts.

The understanding of TST was that § 1 of article 71 of Law 8.666/1993, regarding labor debts, was unconstitutional because it left the worker without recourse.

However, in Session 24/11/2010, the Supreme Court, in assessing the ADC No. 16, decided for the constitutionality of §1° of article 71 of Law

8.666/1993, the impossibility of automatic and consequent transfer of labor debts, fiscal and commercial taxes resulting from the execution of the contract for Public Administration.

As a result of the Supreme Court decision, Rule 331 of the TST was amended to read as follows:

> IV – Default of labor obligations on the part of the employer implies liability for those obligations for the receiver of the service as long as there is participation in the procedural relations and the receiver is present in the enforcement orders.
>
> V – Members of the Public Administration respond directly or indirectly with liability, in the same conditions as IV, if there is evidence of guilty conduct in compliance with Law n.° 8.666, of 06/21/1993, especially in the supervision of the fulfillment of legal and contractual obligations of the service provider as employer. The aforesaid liability does not result from mere default of labor obligations assumed by the company regularly contracted.

With the alteration in Rule 331, the liability of the Public Administration became subjective. "It does not follow from the mere default of labor obligations". In addition to being present in the procedural relations and enforcement order, there should be evidence of guilty conduct on the part of the Administration in complying with the contractual obligations, "especially in the supervision of the contractual and legal obligations of the service provider as employer".

Here lies the importance of the public inspector of contracts. An omission in the supervision of a contract may burden the Public Administration with liability for labor debts.

It is not necessary that the public inspector act with criminal intent; it is enough that fault in the strict sense (negligence, recklessness, malpractice) in the supervision of the contract be demonstrated. Thus, the public inspector should, before attesting to the good quality of third party services, confirm that the wages were paid, transportation vouchers distributed, vacation payment included, among other labor benefits.

> Rigorously monitor compliance with labor obligations and benefits related to the respective contract, demanding copies of supporting documentation and the payment of these obligations. [Judgement 1525/2007 – TCU – Second Chamber]

Under the jurisdiction of Federal Public Administration was issued Normative Act (IN) n° 02/2008, which brings forward a list of obligations that must be confirmed in outsourced labor contracts15.

9. PROVISIONARY DELIVERY OF WORKS AND SERVICES

Another responsibility of the contracts inspector is in regard to the delivery of works and services upon their completion.

Works and services, according to article 73, I, of Law 8.666/1993, are received in two stages: provisionary and definitive.

In the case of provisionary receipt, it is incumbent upon the individual responsible for monitoring and supervising the contract to receive the object (the work or service), by means of a detailed written report, signed by the parties within fifteen days, counting from the moment when the contractor communicates, in writing, the conclusion of the work or service.

Provide for provisional receipt of works via the individual responsible for its supervision, by means of a detailed written report, as determined by article 73, section I, paragraph "a", of Law nº 8.666/93. [Judgement 471/2003 – TCU – Plenary]

10. ACCOUNTABILITY OF THE CONTRACTS INSPECTOR

The public inspector of contracts is formally appointed to monitor the correct execution of the contract. It is his duty to note occurrences in the master record, suggest rectifications, suggest disallowances and other penalties, or report to his superiors regarding measures to be taken in the event those measures are not within his competency to take.

The inspector's records will guide the settlement of expenses and authorize the consequent payment. It falls to him the provisionary delivery of works and services as well as to ensure that the obligation to bear the costs of labor debts and social security benefits arising from the outsourced labor contracts do not become the liability of the Public Administration.

It appears, therefore, that a public contract inspector's deficient performance has potential to cause damage to the treasury, which attracts to itself accountability for irregularities committed.

> Negligence on the part of the Adminstration's inspector in the supervision of a construction works or monitoring of a contract attracts to itself liability for possible damages that could have been avoided, and the penalties provided in articles 57 and 58 of Law no. 8.443/92. [Judgement 859/2006 – TCU – Plenary sitting]

> In attesting to invoices pertaining to services not demonstrably rendered, the administrative agent [...] became liable for damages suffered by the public treasury and, hence assumed the obligation to reimburse it [...] [Judgement 2512/2009 – TCU – Plenary sitting]

Law 8.666/1993 makes it clear in article 82 that

> administrative agents who commit acts contrary to the precepts of the law or aim to frustrate the objectives of the tender are subject to the penalties provided for in this law and its regulations, without detriment to the civil and criminal liabilities that give rise to his act.

The administrative agent charged with the function of contracts inspector, and who acts in a harmful manner, may be required to respond legally for his actions for fault (negligence, malpractice, recklessness) or willful intention, in the civil sphere (obligation to reimburse the damage), criminal (if the conduct is typified as crime), administrative (in the terms of the submitted statute) and for administrative misconduct[16].

One should also mention accountability before the Court of Accounts, which may impute debt to the responsible party in reference to the damage caused, threaten with a fine and furthermore prohibit him from exercising a function or position of trust[17].

The article 67 of Law 8.666/1993 contains a safeguard for the contracts inspector:

> decisions and actions exceeding the competencies of the representative shall be requested of his superiors in time for the adoption of appropriate measures..

Thus, faced with an irregularity in the execution of the contract, the contracts inspector should register it in writing and, not being within his competency to solve the dispute, he should ask his superiors as to the appropriate actions.

11. CONCLUSION

It is obligatory that the competent authority appoint a public inspector of contracts. It is the duty of the inspector to monitor the correct execution of the contract, noting occurrences in his own records, taking measures possible to correct mistakes that are detected and reporting to superiors whose solutions are beyond his reach.

In the exercise of his labor the inspector may be assisted by a third party specifically hired for this purpose under the proper public bidding process, but responsibility for supervising the contract still remains with the Administration.

The activity of the contracts inspector endeavors to gurantee the realization of the objectives of the tender – equality, an advantageous proposal for the administration and the promotion of sustainable national development – such that

he should certify that the public tender's winning proposal is being duly executed in accordance with the tender and the terms of the winning bid.

The inspector of contracts also carries crucial importance in applying penalties to the contractor, since he monitors the execution of the contract and notes the errors in his own official records, notations that will in fact be the basis for the eventual application of penalties or even the eventual unilateral termination of the contract.

In testifying to the correct execution of the contract, the inspector is participating in the phase of the settlement of expenses, acknowledging due performance on the part of the contractor, enabling for the contracting the realization of a credit before the Administration and permitting the competent authorities to carry out the payment due.

With the change that occurred in the Rule nº 331 of the TST, flaws in the oversight of labor outsourced by third parties can attract to the Public Administration liabilities for the payment of labor debts, further increasing the responsibility of the inspector in verifying the correct execution of these contracts.

The contracts inspector shall also receive the provisionary delivery of construction projects and services by means of a detailed written report.

The range of activities of the contracts inspector has the potential to cause damage to the government treasury, and may be accountable for administrative improbity, called to respond in a civil, penal and administrative context, being subject to sanctions by the Audit Courts.

Given all of the above, the need to give more attention to the activity of the public contracts inspector is evident, underscoring the necessity that the public servant in question possess technical skills to verify fulfillment of the agreed-upon object, and making available sufficient time to exercise the duties of a inspector of public contracts.

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NOTES

1 The introduction of "sustainable national development" as one of the objectives of public tenders appeared recently in the law 12.349, of 2010.

2 Law 8.666/1993, article 3º.

3 Law 8.666/1993, article 55, XIII.

4 Law 8.666/1993, article 67, §1º.

5 In the terms of article 9º, I, II, of Law 8.666/1993, the author (person or legal entitity) of the project, whether basic or detailed, may not participate in the public tender or performance of the work or service, or supply of goods. This prohibition includes the company, alone or in a consortium, responsible for preparing the basic or detailed plan, or of which the author of the project, be he director, manager, or shareholder of more than 5% of the capital or voting inspector, technical manager or subcontractor. However, § 1 of the same article authorizes the hiring of the author of the basic design of the company to which he belongs, as a technical consultant in the functions of monitoring, supervision and management, exclusively in the service of the Administration concerned.

6 The motivation entails the statement of reasons of law (legal device) and the reasons for the fact (what factually occurred).

7 Law 4.320/1964, article 58.

8 Law 4.320/1964, articles 59 and 60.

9 Law 4.320/1964, article 62.

10 Law 4.320/1964, article 63.

11 Law 4.320/1964, article 63, §1º.

12 Law 4.320/1964, article 64.

13 According to the wording of article 31 of Law 8.212/1991, emended by Law nº 9.528, of 12/10/97, "The contractor of any service rendered by transfer of labor, including temporary work, is liable jointly with the executor for obligations arising from this Law in relation to services rendered, except when it comes to the disposed in article 23, not applying, by any chance, the benefit of order". Later this article was changed by Law 11.488/2007, by Department of Justice (MP) 447/2008 and, finally, by Law 11.933/2009. With the amendment of 2007, the contractor of services by transfer of labor are now required, including with temporary work, to withhold 11 per cent of the gross of the receipt or invoice for services, in the name of the company tranferring the labor. With this change, some authors argue that there was an anullment of §2º of article 71, of Law 8.666/1993, since the responsibility for the debt and payment of social security benefits was transferred to the Public Adminstration. Current wording of article 31 of Law 8.212/1991: article 31. The company contracting services performed through the assignment of labor, including temporary work, shall retain 11% (eleven percent) of the gross receipt or service invoice and collect on behalf of the company transferring the labor, the amount withheld until the twentieth (20th) day of the month following the issuing of the respective invoice or receipt, or until the business day immediately preceding if there are no banking hours on that day, subject to the provisions of § 5 of article 33 of this Law

14 Rule nº 331 of TST – SERVICE PROVIDER CONTRACTS. LEGALITY (new edition of item IV and inserted items V and VI) - Resolution 174/2011, Eletronic Newspaper of Labor Justice (DEJT) published in 27, 30 and 31.05.2011 : I – The hiring of workers via an intermediary company is illegal where there is formed a direct connection with the receiver of the service, except in the case of temporary work (Law nº 6.019, of 01/03/1974). II – Irregular hiring of a working, via an intermediary company, does not create a direct, indirect or foundational employment connection with the organs of the Public Administration (article 37, II, of CF/1988). III - The hiring of security services

does not form an employment connection with the receiver of the services (Law nº 7.102, of 06/20/1983) also maintenance and cleaning, as well as specialized serviced connected to the environment of activity of the receiver of services, provided it is not of a personal nature or with direct subordination. IV – Default of worker obligations on the part of the employer implies liability to the receiver of services long as there is participation in the procedural relationship and order of enforcement. V - The members of the Public Administration entities are alternatively liable directly and indirectly, under the same conditions in Section IV, if evidence of culpable conduct in fulfilling the obligations of the Law n. 8,666, of 21.06.1993, especially in the enforcement of contractual obligations and legal service provider and employer. The aforesaid liability does not arise from mere default of the obligations undertaken by labor regularly employed. VI - The liability of the receiver of services covers all amounts arising from condemnation for the period of provision of employment.

15 Normative Act 02/2008, article 34. The execution of contracts must be monitored and supervised by instruments of control comprising the following elements, if applicable: I - In the case of companies governed by the Consolidation of Labor Laws: a) proof of good standing with Social Security, pursuant to article 195, § 3 of the Federal Constitution under threat of contract termination, b) collection of Government Severance Indemnity Fund for Employees (FGTS), for the previous month if the Administration is not performing the deposits directly, as stated in the bid invitation c) payment of wages for the previous month within the period stipulated by Law; d) provide travel vouchers and meal allowances where applicable; e) payment of 13º monthly wage; f) granting of vacation and payment of additional holidays, as determined by the Law; g) giving of admission and termination exams and quarterly reports, where applicable; h) possible training and refresher courses as required by Law; proof of submission to the Ministry of Labour and Employment of labor information required by law, such as: Annual Social Information Report (RAIS) and General Registry of the Admitted and Laid-Off Workers (CAGED) j) compliance with the obligations contained in the collective labor convention, collective agreements, or rules of award on collective bargaining; and k) compliance with other obligations under the Labor Code in relation to employees bound by contract. Article 35. Upon termination of the contract, the inspector should verify payment by the contractor of severance pay or proof that employees will be relocated in another service activity without interruption of employment. Sole paragraph. Until the contractor proves payment of the clauses in this article, the contracting agency or entity shall retain the guarantee, and may also use it for direct payment to workers in case the company fails to make payments within 2 (two) months of the closing of term contract, as provided in the tender invitation and in article 19-A, section IV of this Instruction.

16 Law 8.429/1992 lists in its articles 9, 10, 11, three categories of acts of administrative misconduct: illicit enrichment, causing damage to the treasury, undermining the principles of Public Administration.

17 Regarding the Federal Court of Accounts, these penalties are planned in Law 8.443/1992, articles 19, 57, 58 and 60.

Revisitng the Theory of Separation of Powers

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ABSTRACT

The triple separation of powers doctrine, conceived in the 18th century, is held as a stone clause that cannot be suppressed from moderns Constitutions. But in which terms?

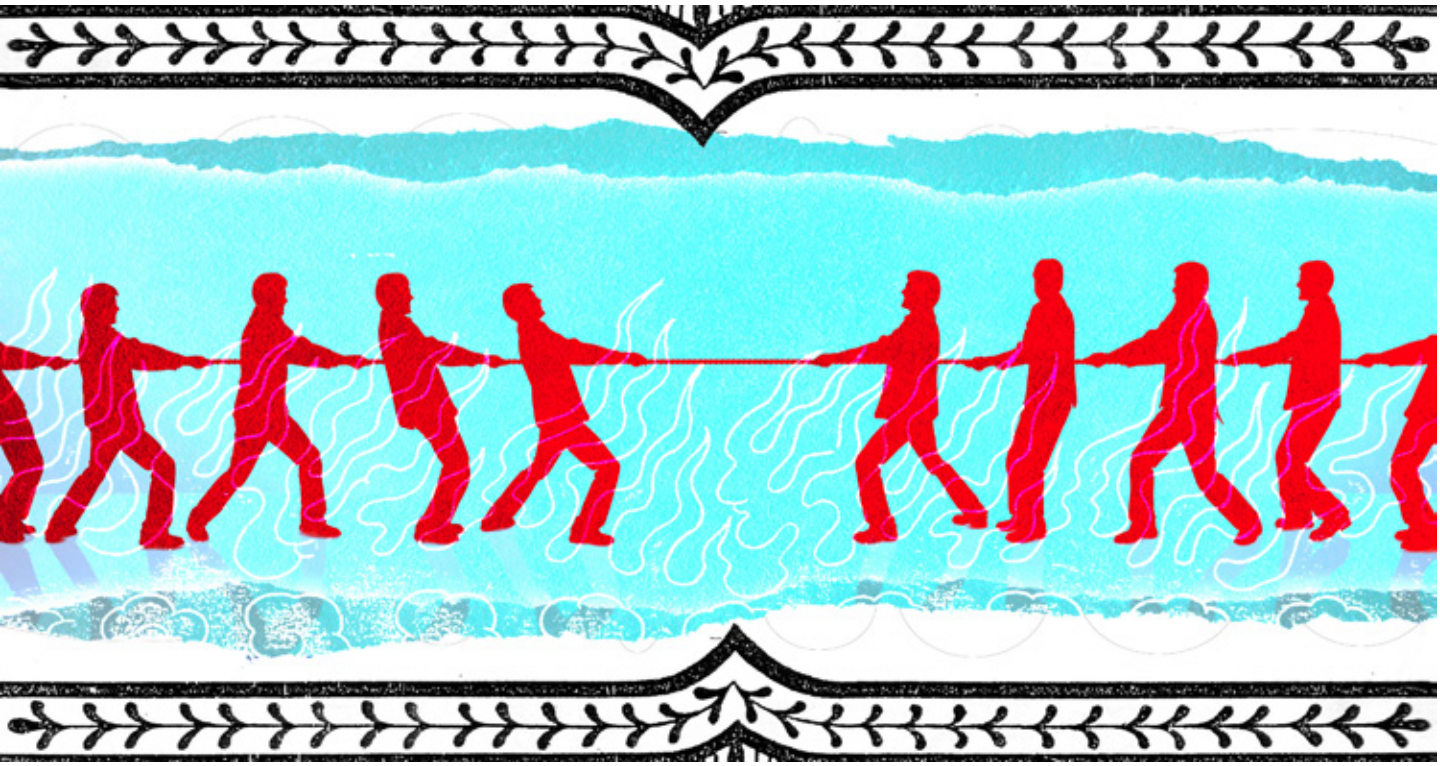
The complex contemporaneous society has already noticed that the separation of powers theory: (a) hostess a large variety of critics visions about the state functions; (b) does not scale values, nor indicative issues, able to establish priorities in case of conflicts between the goals to achieved and the powers.

The courts and parliaments tend to use the theoretical model as a value or end in itself, in order to support opposites state concepts and structures, which leads to ambiguities when the theory is pushed on practice.

Key words: State theory. Separation of powers. Stone clause. Ambiguous values.

ARTICLE

The separation of powers, as proposed by Montesquieu in the 17th century, was introduced into the New World when the English Colonies in America became independent, in the 18th



century. Words from the Constitution of Virginia (June 20, 1776): "The legislative, executive and judicial powers of government ought to be forever separate and distinct from each other." And from the Constitution of Maryland (November 11, 1776): likewise, as well as "No person exercising functions of one of said Departments shall assume or discharge duties of any other". From that moment to the creation of Articles 2 and 60, §4, III of the Brazilian Constitution of 1988, 236 years passed: "The Legislative, Executive and Judiciary powers are powers of the Union, independent and harmonious amongst themselves"; "Any proposal for an amendment intending to abolish: … III – the Separation of Powers … shall not be the subject of deliberation".

The tripartite division of powers continues to be a fundamental clause, that is, an essential, guiding value, which cannot be removed from the legal and political constitutional order.

But on what terms? The hermetic division depicted in the airtight American "departments" is obsolete. "Wherever there is a system of checks and balances there is not, nor could there be, absolute separation", ponders the current doctrine (Eoin Carolan, *The New Separation of Powers*, Oxford University Press, March 2009). Could there be a universal institutional formula/doctrine? Can political governmental power be defined and is it limited to the trinity of the legislative, executive and judicial powers?

Modern textbooks do not diverge in any relevant way when summarizing the evolution of the theory of separation, identifying seven historical objectives:

1. **Avoid tyranny**, ensuring that power is not concentrated in the hands of one individual or entity (the root of the principles of segregation and specialization, with which strategic planning and managerial interdependence must, in modern times, be harmonized);

2. **Establish a balance** between the powers in such a manner that each one supervises the actions of the others through a system of checks and balances (to be contrasted with the fundamental right to good administration, which permeates the entire state management system, blurring the old division lines);

3. **Ensure that each law serves the public interest**, the definition of which must come from the balance between the powers (notwithstanding the acknowledgment of different perspectives on what constitutes

the public interest, under a coordinated determination of time and space);

4. **Stimulate governmental efficiency** by attributing functions to the institutions most apt to perform respective duties (notwithstanding any bad results that may compromise the principle of efficiency, to which all powers are subject, in all spheres of the federation, as provided in Art. 37 of our current Constitution);

5. **Prevent the prevalence of bias** and sectarian interests, by separating the people involved in the decision-making process from the exercise of political power (to purify the legitimacy of pressure groups and counter pressure groups);

6. **Raise the level of objectivity and generality of laws** via the separation of the functions of developing and applying them (although, the law, in its strictest material sense, increasingly ceases to be the sole or main legitimizing source of just law);

7. **Impose accountability** for all state agents, who answer to each other for their actions, and all of them answer to society (to provoke tension between spaces occupied by the respective typical and atypical functions).

Complex contemporary society has come to understand the limitations of these objectives, despite being well articulated, in sustaining a universal institutional doctrine, given that the theory of the tripartite separation of powers: (a) hosts a wide variety of critical visions regarding the functions and roles of the state; (b) does not subject values to a hierarchical system, nor does it determine indicators, with the objective of establishing priorities in the case of conflict between objectives and powers.

The tripartite separation of powers suffers from ambiguities when applied to concrete cases brought before the courts or to situations that the new law intends to govern: it can be invoked to deny as well as to justify judicial or legislative intervention, depending on the commitment held to the nature of the respective functions and the objectives of the separation of powers that are deemed priority.

The courts and legislative instances tend to make use of the theoretical model as a value or an end in itself, while giving support to contrasting ideas on the state and its structures, generating contradictions when theory is put into practice.

The state of the 21st century tends to be "authoritarian, discretionary and scattered". A multiplicity of different organizations and actors participate in governmental affairs – the "business of government" -, inside and outside the state administrative structure, while receiving transfers of all different kinds of resources from it, even financial and vice-versa, that is to say, private organizations assume the management of activities that are supposedly in the public interest.

Conflicts continue to be, essentially, those that pit the collective and individual interests against each other. To preempt or resolve these conflicts, Montesquieu's tripartite separation of powers was a product of an era when power was exercised in a unilateral way: the power of the sovereign manifested itself by way of general norms, conveyed by the "statutory" political process, as if it were, concession made to Rousseau's contractualism, an irrefutable adhesion contract: the sovereign established the clauses and the people adhered to them unconditionally.

The exercise of power, now understood to be the exercise of "governability", is complex and intricate. It does not mould itself to the standards of the 17th to the 19th centuries or a good part of the 20th century. From the debate that is developing everywhere nowadays, regarding the theory of the separation of powers, premises and proposals adjusted to the new era are emerging, in particular:

- the state is a collaborative construction, the purpose of which is to enable more effective and universalistic advancements for the individual and collective interests, in a regime of mutual respect and consideration;

- citizens have political rights and obligations with regard to the state because the latter must provide the former with a series of goods and services they would be unable to obtain individually;

- the separation of powers must lead to the organization of state institutions which act

to guarantee that governmental decisions take into account both the collective and individual interests; the intention is not to propose that the "separation of powers" express a bipolar sovereignty, which is dualistic, almost schizophrenic, but rather to consider that the public interest disproves the notion that, although monolithic, the real coexistence of diverging perspectives regarding any state action must be acknowledged, and this is why institutions must be prepared to weigh up these differences and admit that no single power has the monopoly over what is, or is not, in the public interest;

- the new model of the "separation of powers" seeks to extract unity from divergence, aiming to obtain results which are to the benefit of all, based on a rational combination of the purposes of each one;

- the public interest which has been constitutionalized in public policy demands an administration that is responsive to collective and individual needs and aspirations, the effects of which stem from coordinated institutional cooperation, capable of inhibiting unilateral actions that are unsusceptible to verification and control, the latter corresponding to the republican and democratic doctrine;

- the new profile of the "separation of powers" calls for a process of participative coordination that brings together, in a transparent, organized and permanent way, estranged rivals and personal disputes for leadership, charismatic or otherwise, and concealed means of cooptation (always channels for diverting public resources to serve personal projects);

- in the democratic state, as the administrator of the constitutionalized public interest, the exercise of political power is a permanent and interminable process of coordinated collaboration between institutions, the nucleus of which must be governability committed to results that society and citizens recognize as a benefit to all; it is worth noting is that the majority and minority have the same rights before the state institutions and that these all have the same responsibilities, in the context of their respective constitutional authority, and in the identification and achievement of what must be considered the public interest.

It is clear that any similarity between the measures and countermeasures employed by the Legislative and Judiciary, in an apparent dispute for the primacy of power, as recently reported in the Brazilian news, is not merely a coincidence, and represents a challenge, on a global scale, for states and societies in the choice of their destinies. Citizens, in their dual roles of voter and governed, hope they make these choices with wisdom and prudence.

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