



Chapter 55

Thinking outside the box: How planning can revolutionize public procurement

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ABSTRACT

The objective of this article is to stimulate discussion about the planning that involves public contracting during the bid preparation stage. This is because it is during this stage that the administration will determine its needs for the acquisition of goods, services, works, and information technology solutions, as well as their respective quantification. In this article, the following problem was adopted: does planning the public contracting process mean an increase in bureaucracy, or a guarantee that the procedure will be carried out efficiently? To this end, it was defined as a general objective to analyze whether planning public hiring bureaucratizes or guarantees efficiency in the public hiring process, and as specific objectives, (i) describe

the public hiring process in the Brazilian legal system; (ii) understand the importance of the planning stages for efficient hiring; (iii) demonstrate that planning contributes to efficient hiring, but that it does not represent the ideal of sluggish bureaucracy. The hypothetical-deductive research method was used, and the research technique adopted was bibliographic, based on the reading and summarizing of works, norms, and publications on the theme. As a result, it was observed that the most essential tool to ensure the quality of public contracts is planning. However, it must be done properly, taking into account the principles of legality, efficiency, and advantage, as well as the obligations of both the public manager and all other parties governing public contracts.

Keywords: Public Procurement, Preparatory Phase, Preliminary Technical Study.

1 INTRODUCTION

Planning is part of people's lives. Planning exists because, at some point, we think of accomplishing something and, for us to accomplish it, it is necessary to put into practice the steps of what was planned. With public hiring, it doesn't happen differently!

To start a purchasing process, whether, by a public or private company, there is initially a demand for the requesting sector, and, as a rule, must be provided for in planning, ie, there must be a plan prepared in advance to direct purchases and prevent any emergency from installing.

In this context, it is worth mentioning the important function of public administration to promote the socioeconomic development of the population, through the provision of public services. Thus, objectives, methods, goals, and resources need to be established to generate responses, through public policies, efficiently and effectively, to meet the needs of society.

Therefore, public purchases constitute tools available to this purpose, in the acquisition of products and services for the public administration, with the adoption of procedures that enshrine the isonomy and impersonality in the treatment of all competitors, and the search for the greatest advantage for itself.

Therefore, it is necessary to establish formal procedures before the realization of these hires, to choose the best possible proposal. This public purchasing procedure is called public bidding.

In Public Administration, planning is so important that there is a chapter in the Fiscal Responsibility Law - Complementary Law No. 101, of May 4, 2000 (LRF) - Chapter II, Planning, arts. 3 to 10, specific to the theme. (Brazil, [2022]). Planning is the starting point of the LRF and consists of three instruments, namely, the multiannual plan, the budget guidelines law, and the annual budget law.

The public hiring process involves the following steps: the planning of the good or service that the administration intends to acquire (internal phase); the selection of the most advantageous proposal, as well as the personal conditions of the bidders (external phase); and, finally, the contractual phase, in which the obligation is fulfilled by the contractor, which, in turn, receives the approval and payment made by the Administration.

The concept of planning finds legal support in the Federal Constitution, specifically in Article 174, and Decree-Law No. 200/67, which claim that adherence to the fundamental principle of planning should be observed for better guidance and effectiveness in the achievement of goals and attributions of the public power. (Brazil, [2022a]; [2022b]).

In Law No. 14.133/21-New Law of Bidding and Administrative Contracts, concern for planning is involved in the entire legal text, and the legislator highlighted its importance in elevating it to the status of principle, and dedicated Article 18 full to the preparatory phase of bids. (Brazil, [2022c]).

According to Torres (2021), purely formal planning, which raises operating costs, without producing significant results in improving contractual claims or identifying the purpose of the bidding, is not something that should be done, because, the lack of knowledge And formal preparation of the procedures necessary for the desired hiring, the administration will be subject to unnecessary acts, causing damage to public coffers and, especially, doing inefficient management.

Thus, there is the following problem: Planning the process of public hiring is it increased bureaucracy or just a guarantee that the procedure will be performed efficiently?

This study aims to analyze whether the planning of public hiring only bureaucratizes or guarantees efficiency in the process of public hiring.

To this end, specific objectives were stipulated: (i) describe the process of public hiring in the Brazilian order; (ii) understand the importance of planning steps for efficient hiring; (iii) demonstrate that planning contributes to the efficiency of hiring, but does not represent the ideal of slow bureaucracy.

Planning the purchase of goods and hiring services is thus essential for the proper functioning of the public machine, as it is the starting point for efficient and effective administration, where the quality of

planning will dictate the directions for good or mismanagement. In the absence of well-structured planning, the public manager will therefore not be able to comply with the objectives of the law.

Disseminating the importance and responsibility of making public hiring is one way to ensure the good use of citizen and society money in general. It is possible to buy for a fair price, and buy well and with quality, as long as it is planned.

In the following sections, the theoretical contribution related to the planning of hiring, methodological procedures, analysis and discussion of the results, and the final considerations will be presented.

2 THE PUBLIC HIRING PROCESS IN THE BRAZILIAN ORDER

Public resources management has been going on in Brazil for a long time. During the colonial era, the Philippine Ordinances already dealt with the bidding process - even if rudimentary compared to the current legal framework - as can be seen in this command: "Art. 5th. Approved the plan of some of these works, immediately its construction offered to entrepreneurs through public edicts, and, if competitors, will give preference to those who offer greater advantages." ¹, (BRASIL, [2022d], p. 24).

However, it was in Decree-Law No. 200/1967, that the principle bases of public administration were contemplated, namely, the planning, coordination, decentralization, delegation of competence, and control.

According to Miranda's lesson (2021):

Decree-Law No. 200 of February 25, 1967, established guidelines for administrative reform and provided for the organization of the federal public administration, in its chapter XII, in the space between arts. 125 and 144, established "rules related to bids for purchases, works, services, and alienations". With the edition of Law No. 5,456, of June 20, 1968, the rules related to the bids provided for in Decree-Law No. 200/1967 were extended to states and municipalities. (MIRANDA, 2021, p. 46).

In the field of public administration, planning is a fundamental concept. As contracts are related to public expenses, it is impossible to separate their planning from those that correspond to them. Instead, the hiring process must monitor the development of public budgets, to which previously planned information will be added.

Planning is a constitutional duty and has as its legal basis the Federal Constitution itself, in article 174, though not political. The disrespect for the provisions of article 37 goes against the idea of efficiency. (Brazil, [2022a]).

According to Pereira Júnior (1997), in 1986, Decree-Law No. 2,300/86 was published, with the first legal status on administrative bids and contracts, containing 90 (ninety) articles, divided into 06 (six) chapters.

¹ Original Writing: "Art. 5º Aprovado o plano de alguma das referida, obras, imediatamente será a sua construção oferecida a empresarios por via de editaes publicos; e havendo concurrentes, se dará a preferencia a quem offerecer maiores vantagens."

Only from the 1988 Constitution, the procedure was imposed on the entire Public Administration at the three levels of government: Union, state, Federal District, and Municipalities. In the original text of the 1988 letter, the matter was disciplined in these terms:

Art. 22. It is privately responsible for the Union to legislate on [...] XXVII - General Rules of Bidding and Hiring, in all modalities, for the direct and indirect public administration, including the foundations established and maintained by the public power, in the various spheres of government, and companies under their control. (Brazil, [2022a]).

According to Torres (2021), Law No. 8.666/93 was published after the advent of the Federal Constitution of 1988. The normative was composed of 126 (one hundred and twenty -six) articles and extremely detailed, with an excessive bureaucratic burden, To bring greater security to public hiring, and prevent cases of favoring and collusion between companies and public agents, due to the period of political and social turbulence that Brazil was going through.

With the excessive bureaucratization of procedures, the speed and efficiency of public hiring were impaired, making clear the omission regarding planning, since the largest focus was directed to the bidding procedure, which consists of the external phase of the hiring process.

Public hiring has been constantly changing through various norms, driven by technological modernization and updating social formattings, pointing to the need for a managerial public administration, which meets the demands of more efficient, flexible, democratic, and effective public organizations in its actions, reverberating new forms of hiring, services and even needs to be met by the administrative machine.

The aforementioned Law No. 14,133 was published on April 1, 2021, and establishes a new regime of public bidding and administrative contract, with the prescription of general rules that are intended for the public administration of all federative entities, and which must replace fully Law No. 8.666/93 in two years from that date. (Brazil, [2022c]).

Public contracts have always been criticized, especially for the lack of planning. As a result, the new law sought to bring the principles of planning to a level of need in the internal bidding process.

The new law of administrative bids and contracts, therefore, expressly disciplined about the first stage of the bidding process, that is, the preparatory phase was welcomed by its article 18, reaching legal status, which demonstrates the legislator's concern with planning.

This is what highlights Oliveira (2021):

The preparatory phase, which was not detailed in Law 8.666/1993, receives more prominence in the new bidding law, which reveals a health concern with the preparatory acts of the bidding, since the description of the object, the definition of the rules of the notice, Price research and other initial acts directly impact the efficiency of the bidding and the contract itself. Numerous problems can be avoided by adequately performing preparatory acts of the bidding. (OLIVEIRA, 2021, p. 116).

The current law of public bids and hiring, thus, has provided for several provisions and guidelines for public hiring planning, causing the Public Administration to leave a scenario of improvisation, transforming planning and management into tools strong.

3 UNDERSTAND THE IMPORTANCE OF THE PLANNING STEPS FOR EFFICIENT HIRING

When managers happen to seek a hasty, hasty contract, without giving it the time necessary for proper measurement, the result is the neglect of the steps, the dilution of opinions, and the waiver of qualified technical studies. It turns out that by waiving the rules and formalities necessary to guarantee quality with proper planning, the desired contract is at a significant risk of not fully satisfying the demand, or, in other words, will no longer be the desired solution and will become one more Challenge that needs to be overcome, which compromises the efficiency of hiring.

There are several interpretations for the concept of efficiency, which can be generally understood as how to do the right thing or minimize the relationship between entries and exits, generating a final product or delivery of a final service.

According to Maximian (2021), a method is efficient when using the least amount of resources to produce a certain level of production or when it reaches the highest level of production with a certain amount of resources.

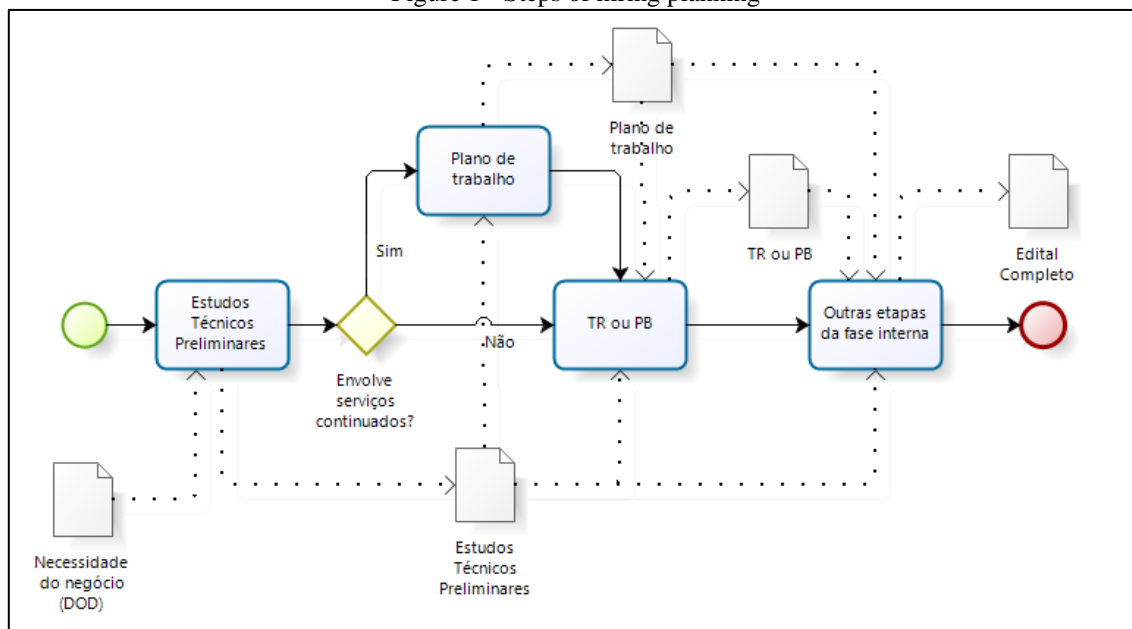
Considering this concept, in the view of Moraes (2021), Law 14.133/21, in article 5, raised as a principle, in addition to the classic principles of public administration, planning, which must be aligned with its respective strategy.

In this sense, Law No. 14.133/21 highlights in article 18 that the first phase of the public hiring process is the preparatory, characterized by planning as essential for the internal phase of the bidding procedure, and for which it has a list of requirements of Exemplary character, and in certain cases, there may be the need for other definitions, according to the nature of the object, otherwise we see:

I - the description of the need for contracting based on a preliminary technical study that characterizes the public interest involved; II - the definition of the object to meet the need, through a reference term, preliminary draft, basic project or executive project, as the case may be; III - the definition of the conditions of execution and payment, the required and offered guarantees and the conditions of receipt; IV - the estimated budget, with the compositions of the prices used for their formation; V - the elaboration of the bidding notice; VI - the elaboration of the draft contract, when necessary, which will comply with an annex of the bidding notice; VII - the regime of supply of goods, provision of services or execution of engineering works and services, observing the potentials of economy of scale; VIII - the bidding mode, the judgment criterion, the mode of dispute and the adequacy and efficiency of the way of combining these parameters, for the purpose of selecting the proposal able to generate the most advantageous hiring result for the public administration, considered the whole life cycle of the object; IX - the circumstantial motivation of the conditions of the notice, such as justification of technical qualification requirements, by indicating the installments of greater technical relevance or significant value of the object, and of economic and financial qualification, justification of the scoring and judgment criteria of the technical proposals, in bids with judgment for better technique or technique and price, and justification of the rules relevant to the participation of consortium companies; X - the analysis of the risks that may compromise the success of the bidding and the good contractual execution; XI - the motivation on the moment of disclosure of the bidding budget, observing art. 24 of this law. (Brazil, [2022c]).

In short, to build good hiring, three main steps must be traveled: i) Preparation of preliminary technical studies (item I); II) Preparation of the Reference Term/Basic Project (item II); Construction of the notice/acts before direct hiring (items III to XI).

Figure 1 - Steps of hiring planning



Source: Tribunal de Contas da União, (TCU, [2022e]).

From this presentation, it appears that the previous stage for hiring is of great relevance for the Public Administration to plan the future purchase and define its objectives and all its conditions, which must, in the end, be portrayed in the bidding notice and Documents that are annexes and integral parts, such as preliminary studies, risk management, reference term or basic design, among others. In short, it is the notice that will govern the entire bidding process.

The preliminary technical study, according to the first paragraph of article 18 of Law No. 14.133/21, began to compose the preparatory phase of contracting and expanded and should be used by all entities and powers affected by the new law. (Brazil, [2022c]).

According to Torres (2021), the objective of the preliminary technical study is not the hiring of a good or service, but to solve a problem. Therefore, this problem must be highlighted to verify the form of its resolution, so that it is evaluated technically and economically if it is concluded by the viability of hiring.

In addition, the object of the future contract is not specified at the beginning of the preliminary technical study, but in its conclusion, and may be changed according to circumstances during the creation of the draft, the basic project, the executable project, and the term of reference.

It is also pointed out, in the planning phase, that if the annual hiring plan has been adopted, this preparatory phase must demonstrate its complete compatibility. Law No. 14.133/21 does not impose the elaboration of the annual planning of hiring, but it is a very important instrument in the construction of excellence management.

In this sense, the annual hiring plan must be prepared per the guidelines of article 12, item VII, through regulation, using documents to formalize requests from federal organs and entities, to streamline the hiring, stressing that This plan must be observed in the realization of bids and the execution of contracts, ensuring alignment with the strategic plan of the organization or entity. (Brazil, [2022c]).

It is noteworthy that the annual hiring plan can contribute to the development of the Budgetary Guidelines Law (LDO), the Annual Budget Law (LOA), and the Multiannual Plan (PPA), as the case may be, also extended to the preparatory phase. To corroborate such an understanding, nohara thus argues:

As seen, planning is a principle that guides the bidding, according to the discipline of the new bidding law. Thus, determines item VII of art. 12 of the Law which, from documents of formalization of demands, the bodies responsible for the planning of each federative entity may, according to the regulation, elaborate an annual hiring plan, to rationalize the hiring of organs and entities under their competence, ensure alignment with its strategic planning and subsidize the elaboration of the respective budget laws. (Nohara, 2021, p. 127).

At this point, it increases the importance and the need to implement integrated administrative planning procedures and revise the operation of public hiring processes. This review has an impact at all levels, from the top, responsible for the general management planning, to the operational area, responsible for the purchasing needs and verification of inventories and demands.

As stated in item X, of the first paragraph of article 18 of the new Bidding and Contract Law, it is of fundamental importance that it is provided a training plan for the performance of the servants who will perform the management of bidding and management procedures and supervision of contracts. (Brazil, [2022c]).

As well noted by Miranda (2021), the planning stage can be considered the most important step in the public hiring process, since all subsequent steps of the event will consist of the implementation of the established notes, presenting as an essential tool for Effective management of public resources.

Thus, the improvement of acquisition instruments, related to planning, structuring of internal activities and processes, as well as improvement in the organizational structure, will enable better results.

4 DEMONSTRATE THAT PLANNING CONTRIBUTES TO THE EFFICIENCY OF HIRING, BUT DOES NOT REPRESENT THE IDEAL OF LENGTHY BUREAUCRACY

Public administration cannot only act to remedy the effects of poor hiring.

It must implement processes and structures, including risk management and internal controls, with the clear pretense of improving the quality of the preparatory stage of public hiring, to better evaluate, direct and monitor bidding processes and their contracts.

The administration, therefore, must work in a preventive manner, anticipating and analyzing their needs, and properly individualizing the intended object.

Quality hiring involves buying a good or service that meets administrative needs. Planning is necessary to achieve this goal.

One of the precepts of Law No. 14.133/21 is to promote planning, recognized as essential and necessary for the effective management of public resources and obtaining satisfactory and well-executed contracts. The law assumes that planning can correct the fundamental failures of administrative contracts, which are corruption and inefficiency. (Brazil, [2022c]).

It is noteworthy that government hires have a significant impact on economic activity due to the number of resources involved, and that this would have disastrous effects if they were performed without proper planning. According to Junsten Filho (2021):

One of the pillars of Law 14.133/21 is to promote planning, recognized as essential and indispensable for the efficient management of public resources and obtaining satisfactory and well-executed hiring. The law presupposes that planning can neutralize the fundamental defects of administrative hiring, which are inefficiency and corruption. (JUSTEN FILHO, 2021, p. 331).

Also according to article 18 of the same law, the preparatory phase of the public hiring process is characterized by planning and must be compatible with the annual hiring plan, if it has been adopted, by article 12, item VII, and with the budget laws. It is at this stage that all marketing, technical, and management notes that may interfere with hiring should be considered. (Brazil, [2022c]).

Several procedures, each with its formalities, are involved in the administration's acquisition cycle, and they should not be confused with the bidding process itself.

According to Niebuhr (2022), the preparatory and/or planning stage serves to mark and determine all other bidding steps and hiring. It is in planning that the hiring that will be performed happens. (NIEBUHR, 2022).

As Pietro (2017) points out, there is the assessment that Public Administration is old-fashioned, outdated, and inefficient in meeting the established goals, and that the legal requirements were not adequate in its application. This indicates failure in operational and management issues, not the lack of legal tools able to deal with public contracts. (PIETRO, 2017).

Organizational management should be better managed, focusing on specialization and the responsibility of servers, who must be aware that they are managing public resources that are intended to be used to provide services to meet the needs of the population, which pays through taxes and fees collected.

Santana (2015) understands that the best way to achieve the desired results is through the professionalization of those who work in acquisition planning; In some countries, training for these agents can take full-time for three to five years.

The planning step involves decision-making that will serve as the basis for the execution of the entire hiring process, with implications for how the contract will be executed. At this stage, the public agent must be aware of the law so that all these definitions are made based on the current legal framework.

All of these definitions aim to stimulate competition in selecting the most advantageous proposal, in terms of cost-effectiveness, for management. According to the circumstances, the definitions of the preparatory phase will be necessary for the creation of the preliminary technical study, the draft, the term

of reference, the basic and final versions of the project, and, especially, for the creation of the calling instrument and its annexes.

It is important to emphasize the preliminary preparation and analysis process of administrative needs, requiring managers to prepare and really look in the right direction for hiring, and to supply the demands of management efficiently.

5 METHODOLOGICAL PROCEDURES

The present work was performed using the hypothetical-deductive method, characterized by the formulation of hypotheses that can be confirmed or refuted, descriptive and analytical. To this end, bibliographic research was used, from the reading and selection of doctrines and legislation on the subject, to analyze whether the planning of public hiring bureaucratizes or guarantees efficiency in the process of public hiring.

According to Gil (2022), bibliographic research is observed from experiences accumulated by the authors. With this, this type of research is given by the following steps: definition of the theme, bibliographic survey, problem elaboration, elaboration of the structure of subjects, sources, didactic reading, file, concise organization, and, finally, textual writing.

In this sense, the results were presented qualitatively, from the collection of information from secondary sources that contained keywords, public hiring, preliminary technical study, and strategic planning, thus formulating the database Obtained from research on bases such as Scielo, Capes, and Google Scholar, for access to articles, periodicals, theses, dissertations, as well as institutionalized normative by the Brazilian government, among other means. In addition, the consultation of printed works as a research technique was held.

To this end, a theoretical temporal delimitation was adopted to prioritize studies conducted in the last 10 (ten) years about concepts and theories of administrative law, as well as research on procedures related to the planning process in public hiring that was adopted as Legal Framework Law No. 14,133/21.

Bibliographic research, according to Gil (2022), refers to a method consisting of phases. Its number is directly linked to the emergence of the problem, the level of knowledge that the researcher has on the subject, and confidence in the research theme. With this, the data obtained with the bibliographic review is used in the consolidation of results and the conclusion.

6 RESULTS AND DISCUSSION

Based on the survey of the theoretical contribution, and the analysis of the provisions of the new administrative bidding law, it is shown that planning is one of the most important steps in the public hiring process, as it enables more efficient contracts.

It takes a complex planning process to identify these actions and understand the scale of value, the organizational structure, the work processes, and the purpose of contracts are fundamental for the development of the subsequent steps of the creation of the formalization of contracts.

This prediction becomes more significant especially when the need for knowledge of the object is explicit, as it will guarantee the correct forecast of contract risks and its execution.

The existence of issues and needs that the acquisition of a particular good or the provision of services can raise not only directly, but also indirectly, can guarantee, in practice, the anticipation of risk and the mitigation of delays and omissions at the moment the execution of the contract.

Regarding the need for planning public acquisitions and services, Law No. 14.133/21, in its article 18, presents a list of important tools for obtaining good results. (Brazil, [2022c]).

The planning of public contracts has clearly defined steps. Improving the preparatory phase is the standardization of their steps to reduce efforts and direct hiring in a specific direction. This action can guarantee better expectations regarding the enforcement and observance of legal and regulatory rules governing public contracts.

The management of public organizations is the basis of state efficiency, as provided for in article 37 of the 1988 Constitution. (Brazil, [2022a]). Thus, the use of this principle is strengthened by the effective management of public contracts, and the production and delivery of goods and services to the organization's bodies. It should be noted that this principle represents one of the great challenges of Brazilian society today.

It is essential to develop coordinated actions to obtain a good result at the end of the process to effectively and efficiently guarantee the success of contracts. It is important to understand that public hiring processes are complex and involve a wide and varied quantitative of norms, information, and procedures.

There is no doubt that the Public Administration will have the necessary information to execute requests more effectively, efficiently, and assertively, with more favorable results, and to meet the demands necessary for the execution of public policies, using a good action plan.

7 FINAL CONSIDERATIONS

Based on the information presented, it is pointed out that the new administrative bidding law brings innovations within public hiring, as it includes a variety of mechanisms that allow better control and planning of public spending.

Often, managers seek a hasty, hasty contract, without giving it the necessary time for proper measurement, which results in the neglect of the stages, the dilution of opinions, and the absence of qualified technical studies. It turns out that by renouncing the rules and formalities necessary to guarantee quality with proper planning, the desired contract runs the significant risk of not fully satisfying the demand, or, in other words, will no longer be the desired solution and will become one more challenge that needs to be overcome.

Thus, all hiring, including direct hiring and adhesions to price registration minutes, must be preceded by adequate planning, formalized in the hiring process, and, where applicable, incorporated into the term of reference or basic project. (TCU, [2022E]).

The importance of promoting professionalization in public administration was clearer as we use various mechanisms, usually used in private administration, to ensure the success of public entities.

The development of preliminary studies, risk models, and basic projects or terms of reference, which takes into account the specific knowledge that the object of hiring is an increasingly prevalent tendency in judicial precedents, is a path without setbacks and can reduce the difficulties faced by managers in the execution phase.

In the administration of public resources, especially in the area of public contracts, well-designed hiring allows the public manager, among other things, to dimension and reduce future contract costs, to have greater negotiation power with suppliers, to have greater credibility and confidence in the market and appropriate knowledge for use in future contracts.

Consequently, planning is one of the fundamental stages in the public hiring process, as it allows the realization of more effective contracts.

It is well known that innovative proposals lack an approach focused on changes and operational practices, which undoubtedly influence decision-making.

Moreover, the reality of institutional diversity is justified by the numerous characteristics and challenges internal and external to the application, such as municipalities with limited resources and poor technical labor.

Based on this perspective, it becomes relevant to the adoption of studies and research related to the focus of governance and the ability of public institutions to adopt new rules and procedures, contributing to more planned, efficient and effective hiring, aiming at the best use of public resources.

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