

Efficiency In The Brazilian Procurement Process: Legal Aspects And Institutional Maturity*

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Abstract:

The article analyses efficiency in the public procurement process in Brazil, considering the constraints of institutional maturity under the laws governing the matter. The analysed practices include modalities established by law, such as Reverse Auction (Pregão), Competitive Bidding, and Competitive Dialogue. The article identifies the models most associated with efficiency and emphasises the importance of enhanced monitoring and greater oversight by society. It also discusses tools such as Cost-Benefit Analysis (CBA) and Technical and Economic Feasibility Studies (TEFS), which assist in reducing risks and allocating resources in more complex processes. The study emphasises the importance of these tools to reduce risks and subsidise decisions in scenarios involving procuring more complex products or services. Additionally, it addresses the impacts of oligopolistic markets and the influence of cultural factors favouring informal practices, highlighting the need to implement regulations effectively. It concludes that, while the legislative framework provides adequate mechanisms, cultural and institutional factors significantly influence the persistence of informal practices and fraud. Due to the widespread perception of impunity in the country, many individuals feel encouraged to commit fraud in public procurement processes. Ensuring that such fraud cases are penalised requires stricter enforcement by the judiciary, which would help convey that these crimes will not go unpunished. Moreover, ethics promotion campaigns can help reduce illicit practices.

Keyword: Public Procurement; Cost-Benefit Analysis (CBA); Economic Efficiency; Regulatory Framework; Institutional Maturity.

Date of Submission: 10-01-2025

Date of Acceptance: 20-01-2025

I. Introduction

Under the new Public Procurement Law (Law No. 14,133/2021), the lowest price is no longer the determining criterion for selecting procurement modalities; it is relevant only to authorise exemption from the bidding process, as provided in Article 75, sections I and II. This change modifies the previous model, allowing for greater flexibility and alignment of procurement processes with each contract's specific characteristics and requirements.

The "pregão", often described as a reverse auction, is a unique procurement modality in Brazil designed to acquire common goods and services. Its simplified process characterises it, and successive bidding rounds are used to secure the most advantageous price. While electronic reverse auction procedures are generally concluded within 17 days, other modalities, such as price-taking, require approximately 90 days, and competitive Bidding takes around four months. This structure prioritises the selection of the most advantageous price, considering factors such as quality and benefits rather than focusing solely on the lowest absolute value.

The administrative structure for public procurement processes demands breadth, organisation, and functionality. This management model requires the participation of specialised departments, the use of technologies that facilitate information integration, and the implementation of effective controls. Additionally, it is essential for departments to have the flexibility to address the specificities of procurements.

It is worth noting that procurement processes must involve a large number of participants to ensure efficiency. Competition among buyers (or sellers) helps transaction prices align more closely with costs. This increased number of participants tends to occur in auctions and reverse auctions. These observations are consistent with Musau's (2015) findings, which emphasise the role of participant numbers in achieving favourable outcomes for public administration.

It is also important to match the procurement modality to the nature of the product. To achieve this, the government provides various procurement modalities established by law, such as reverse auctions (pregão),

*The opinions expressed in this article are solely those of the authors and do not necessarily reflect the views of the institutions they are affiliated with.

competitive Bidding, and price-taking. Each method presents specific characteristics to meet the needs of each procurement, ensuring transactions are carried out effectively.

The potential for fiscal savings justifies this study by reducing government procurement and sales expenses by aligning prices more closely with costs. Such a reduction could be achieved with more efficient management of the tendering process. Public procurement covers a significant portion of public revenue, underscoring the need to enhance competitiveness in state-supplier transactions. In response, the government introduced Law No. 14,133/2021, which brought significant regulatory innovations to enhance public spending efficiency. Furthermore, the use of tools such as cost-benefit analysis and technical and economic feasibility studies can help reduce expenses in procurement procedures. But even though the law covers public procurement, more regulations could make government acquisitions and contracts more efficient.

However, the main limitation to achieving greater efficiency in public transactions is the failure of those involved in the procurement process to comply with regulations. Reports of fraud are recurrent in the media. This creates a paradox: even with modern legislation governing the procurement process, the perception and occurrence of fraud remain high. For this reason, to change this scenario, the Federal Court of Accounts (Tribunal de Contas da União, TCU) developed the Fraud and Corruption Combat Framework, applicable to public administration bodies and entities.

In light of the above, the primary aim of this study is to describe the paradox whereby, despite the evolution of procurement practices in the Brazilian public sector, their effects on costs have not been significant. Specifically, this research aims to: a) examine the various procurement modalities provided for in Brazilian legislation, such as reverse Auction, competitive Bidding, contests, auctions, and competitive dialogue, highlighting their characteristics and applications; b) assess how regulatory changes have not impacted the costs of public procurements.

II. The Role Of Reverse Auction (“Pregão”) And Cost-Benefit Analysis In Government Procurement

The public procurement process encompasses the acquisition and sale of goods. To ensure efficiency, it is important to involve a sufficient number of bidders. Their competition helps transaction prices reflect actual costs more accurately. Nevertheless, due to the characteristics of the goods being traded, auctions and reverse auctions are the most effective means of engaging a broader pool of participants. These insights align with the findings of Musau (2015), who emphasises the role of competitive methods in achieving favourable pricing outcomes.

The appropriate selection of the procurement modality is also important for the efficiency of the process. Thus, selecting the modality that aligns with the government's objectives and the nature of the goods being procured is necessary. Efficiency also requires compliance with the rules and procedures established by law. The available procurement options include reverse auctions, competitive Bidding, and price-taking. These procedures provide distinct approaches to address the specific requirements of each procurement, facilitating the selection of the most advantageous proposal.

Under the new Procurement Law (Law No. 14,133/2021), price is used only as a criterion to authorise the waiver of procurement, as outlined in Article 75, items I and II. Unlike the previous law (Law No. 8,666/1993), price is no longer a determinant for selecting procurement modalities. This change allows for greater flexibility and better alignment of procurement processes with the specific characteristics of each contract.

Although the lowest price often plays a decisive role, factors such as safety, quality, and technical capacity should also be evaluated. Over-reliance on the lowest price can lead to inefficiencies, as demonstrated in the case of Yogyakarta's City Council. Nunes and Nunes (2020) describe how a poorly structured contract for constructing a bus terminal caused losses when the selected company, PTPK, requested cancellation due to the absence of clauses addressing potential contingencies. The company was reimbursed, resulting in financial losses for the city council. Well-drafted procurement notices featuring clear and detailed specifications are vital for mitigating risks, particularly in the acquisition of complex goods with elevated technical challenges.

Cost-benefit analysis (CBA) is an indispensable instrument to enhance procurement processes, enabling the accurate estimation of associated costs and benefits, Gomes e Machado (2023). CBA identifies costs and benefits, guiding the choice of the most appropriate procurement modality to better align with governmental objectives. This approach is also adopted in other countries, where the emphasis is placed on the quality and durability of acquired goods, even when they are not the cheapest option. Such practices ensure long-term efficiency and minimise risks associated with prioritising only the lowest price.

Among the procurement methods available, the reverse Auction stands out for its straightforwardness and effectiveness, especially when acquiring common goods and services. Governed by Law No. 14,133/2021, it effectively balances transparency and practicality. Regardless of the contract value, its applicability further enhances its adaptability in public procurement.

The reverse Auction employs competitive bidding dynamics, allowing successive offers that reduce costs and ensure prices close to marginal costs. Justen Filho (2000) highlights two key features of the reverse Auction: the inversion of qualification and judgment phases and the possibility of renewed offers by all or selected bidders until the most advantageous proposal is achieved. The author compares the reverse Auction to a "reverse auction" where the competitive process aims to secure the lowest price for acquiring goods and services, rather than the highest bid for selling.

In addition to its technical efficiency, the reverse Auction's economic impact has been examined in various contexts. Casagrande (2005) analysed its implementation in the state of Espírito Santo and found that this modality reduced costs compared to others. Factors contributing to its credibility include the simplicity of the process, transparency, and the preferential use of electronic formats, as established by Decree No. 10,024/2019.

Although the reverse Auction offers significant advantages, such as cost reduction and increased transparency, not all markets provide the same competitive conditions, requiring specific adjustments. In markets dominated by oligopolies or monopolies, state intervention through regulations becomes necessary to ensure that procurement processes remain competitive. Specific protocols help to prevent overpricing and ensure that acquisitions meet public sector needs, even in markets with low competition.

Campos (1996) argues that 'bureaucratic failures are more severe than market failures because the latter are minor deviations that can be corrected, while the former are macro-decisions that are difficult to reverse. This perspective underscores the importance of addressing inefficiencies within bureaucratic systems to mitigate long-term consequences.

In these forms of procurement, market failures can often coexist with government failures. As clarified by Le Grand (1991), it is important to distinguish these concepts to understand their practical implications. Government failures, associated with the Public Choice School, result from inefficiencies caused by state intervention. On the other hand, market failures, related to welfare theory, describe situations where the market fails to function properly. This can be observed in the case of natural monopolies, such as water and sanitation services, where the absence of competition undermines efficiency and universal access.

Moreover, the lack of competition in specific sectors often exacerbates these challenges, fostering anti-competitive practices such as cartels, which further distort market dynamics. Studies conducted on cartels in Brazil highlight the negative impacts of this issue. Lucinda (2016), in analysing the peroxide cartel, estimated price increases ranging from 9.3% to 22%. In another study, Sallaberry, Quaesner, and Costa (2017) identified price increases of between 2% and 3% of the total contract value, based on statements from collaborating defendants. According to these authors, the Brazilian Federal Court of Accounts (TCU) also identified a 17.84% price increase in one of the contracts analysed, while the Federal Police found similar results in projects investigated during the Lava Jato Operation. These cases underscore the need for regulatory mechanisms and greater transparency in procurement processes.

Technology also plays an important role in modernising public procurement. The adoption of electronic public procurement platforms (e-procurement) and the centralisation of demands in a unified system can generate economies of scale, increase transparency, and reduce processing times. International experience shows that economies, where consumers demand high-quality standards, tend to achieve better conditions in public procurement. Birchler and Bütler (1999, p.1) describe information as a "*magical commodity (...) essential for economic decisions.*" The presence of more demanding consumers who prioritise high-quality products encourages innovation and improvement, benefiting both public administration and society.

III. Differentiated Products and Products from Oligopolistic Sectors

In other procurement methods, the same flexibility to promote competition as seen in the Auction method is not available. When dealing with differentiated products, it is not always possible to verify in advance whether the requirements stipulated in the tender documents will be fully met. Although a company may provide documentation demonstrating experience with the required service, the submitted material may not align with the specific needs of the contracting government entity, particularly when certain essential qualities cannot be objectively measured in the tender documents. The production of differentiated products typically occurs in oligopolistic sectors, which have the potential to form collisions. The quality of heterogeneous products is difficult to specify, requiring the use of other procurement methods. This is because the number of producers is limited. For such products, Law No. 14,133/2021 provides for Competitive Bidding, Competitions, Auctions, and Competitive Dialogue, each with distinct characteristics and purposes for heterogeneous products.

Procurement Methods for Heterogeneous and Oligopolistic Products

The procurement methods outlined in Law No. 14,133/2021 address the various needs of Public Administration, especially for the acquisition of products and services requiring specific technical or economic criteria. Competitive Bidding is the broadest method in terms of participation and is suitable for larger and more complex contracts. Any interested party may participate, provided they meet the minimum qualification

requirements set out in the tender documents. This method allows for all evaluation criteria provided in Law No. 14,133/2021, except for the highest bid, enabling the use of lowest price, technical and price-based evaluation, or best technical proposal, depending on the need. Under Law No. 14,133/2021, Competitive Bidding is no longer used to sell assets, with Auctions now being the exclusive method for this purpose. This change reinforces the suitability of Competitive Bidding for contracting goods and services of greater complexity, where Public Administration requires flexibility and specific technical criteria.

On the other hand, competitions are designed to select technical, scientific, or artistic works, with the evaluation criteria based on the best technique or artistic content. In this method, the tender documents must specify the prize or remuneration to be awarded to the winner, as provided in Article 35 of Law No. 14,133/2021. Due to the subjective nature of the works being evaluated, Competitions allow for a degree of discretion in selecting the best proposal, thus relaxing the principle of objective evaluation. The evaluation is restricted to the technical or artistic proposals presented, and the tender documents must ensure impartiality and transparency throughout the process.

Auctions are the method designated for selling surplus movable property, immovable property, and seized or foreclosed assets. Defined under Article 6, XL, of Law No. 14,133/2021, Auctions apply to all sales regardless of value, with the highest bid being the exclusive evaluation criterion. The process is based on submitting successive bids to achieve the highest sale value. Auctions follow specific rules detailed in the tender documents and do not fully adopt the standard procedural steps outlined in Article 17 of Law No. 14,133/2021. This ensures simplicity and efficiency in the process, distinguishing Auctions from other procurement methods.

The Competitive Dialogue method, introduced by Law No. 14,133/2021, is reserved for complex procurements, such as projects requiring technological or technical innovation. It is used when Public Administration cannot define technical specifications or solutions needed to meet its demands in advance. The process begins with publishing a pre-selection notice, with a minimum response period of 25 business days for expressions of interest. After pre-selecting bidders who meet the specified requirements, dialogues are conducted to identify the best solutions. A competitive phase is initiated after this stage, with a new tender document outlining the specified solution and objective evaluation criteria. This method is restricted to specific cases, such as when the procurement involves technological or technical innovation when available market solutions require adaptations, or when the complexity prevents precise definitions of technical specifications. As an exceptional method, Competitive Dialogue requires prior justification by the competent authority and allows for greater flexibility and efficiency in contracting.

Impacts of Information Symmetry in Procurement Processes

Information symmetry plays a key role in procurement processes, directly influencing the outcomes achieved by Public Administration. The disclosure of information by the buyer generally aims to restore an environment of information symmetry, enabling a reduction in the purchase price of goods and providing greater confidence to suppliers regarding expected returns. The well-known lemons model of used cars by Akerlof (1970) provides an example of how information asymmetry in transactions can disadvantage the less informed party.

This practice, in addition to fostering competition, also reduces the government's administrative costs by minimising the risk of participant disqualification due to non-compliance with documentation requirements. As Nunes (2017) highlighted, the nature and quality of available information are relevant for predicting the value and outcomes of future investments. Thus, transparency and accessibility of information strengthen the competitive environment, mitigate market distortions, and promote greater efficiency in public procurement. The well-known lemons model of used cars by Akerlof (1970) provides an example of how restricted information in transactions can harm the less informed party.

IV. Fraud In Procurement Processes And Prevention Mechanisms

The Brazilian legislative framework on public procurement provides mechanisms to prevent fraud and irregularities, such as those established in the Public Procurement and Contracts Law. Tools like cost-benefit analysis and electronic bidding systems have contributed to increased monitoring and transparency in administrative processes. However, reports of procurement fraud, including cartel formation and other illicit practices, remain frequent and widely covered by the media. These accusations highlight a limited degree of institutional maturity in the country.

This scenario reflects a disconnect between the existence of regulations and their effective enforcement. Such practices persist, indicating that the mere presence of rules is insufficient to eliminate these behaviours. As DaMatta (1979) analysed, the flexibility with which rules are interpreted and applied in Brazilian society contributes to the coexistence of formal rules and informal practices. This cultural trait, characterised by the personalisation of relationships and the relativisation of laws, often allows private interests to take precedence over the public good, creating gaps that facilitate fraud. As Oliveira and Cunha (2017, p. 275) observe:

It is common sense to state that Brazilians do not respect the law and that many laws are enacted in Brazil, but few are followed. Another common assertion is that Brazil has 'laws that stick' and 'laws that do not stick'. [...] Based on these claims, one could argue that in Brazil there is an excess of formalism, with many rules establishing standards of behaviour that, in practice, are not considered by the population. There would, therefore, be a situation of endemic disregard for the law.

Despite the legislative framework on public procurement, various fraud cases highlight the need to address the behaviour of public agents and bidders involved in procurement processes. On the one hand, bureaucrats are responsible for executing procedures; on the other, bidders engage in negotiations, evaluating costs and benefits in decisions that may overlook collective interests. This behaviour reflects a calculation in which the potential benefit of fraud is weighed against the perception of a low risk of punishment.

As DaMatta (1986) noted, the enforcement of rules in Brazil is often mediated by personal relationships, which undermines the neutrality and impartiality expected in administrative processes. This normative ambiguity exacerbates the challenges related to preventing fraudulent practices. Moreover, a culture of low trust in institutions and tolerance of impunity perpetuates unethical practices, directly affecting the integrity of the procurement process. This context underscores the need to progress in creating regulations, lengthening ethical values, and developing mechanisms that foster greater trust and transparency in administrative processes. Thus, it can be stated that institutional maturity in the country is as important, if not more so, than the rules themselves.

V. Conclusion

This study examined the evolution and practices associated with the public procurement process in Brazil, highlighting the regulatory advancements introduced by Law No. 14,133/2021 and the role of procurement methods in promoting efficiency, competitiveness, and transparency. It was observed that the Auction, due to its agility and simplicity, has become one of the primary tools for contracting common goods and services, while methods such as Competitive Bidding, Competitions, Auctions, and Competitive Dialogue address the specific demands of differentiated products and oligopolistic sectors.

The analysis underscored the importance of tools such as Cost-Benefit Analysis (CBA) and Technical and Economic Feasibility Studies (EVTE) in decision-making, particularly for more complex procurements. These instruments not only mitigate the risks of inappropriate choices but also contribute to resource rationalisation and the maximisation of social and economic benefits.

Additionally, transparency and information symmetry emerge as critical factors for the success of procurement processes. The dissemination of high-quality information strengthens bidder confidence, fosters competition, and results in more advantageous pricing for Public Administration. Conversely, anti-competitive practices, such as cartels, require stricter regulations and the technological modernisation of public procurement systems to ensure fair competition.

In conclusion, while Brazil has progressed in modernising its public procurement processes, issues such as excessive bureaucracy and inefficiencies in certain sectors persist. Addressing these matters necessitates improvements in governance mechanisms, investment in the training of public managers, and the adoption of technologies that enhance transparency and efficiency in procurement practices. Integrating digital platforms enabling real-time monitoring of public procurement could be a significant step towards improved management.

The examination of governance in Brazil's public procurement process, when based solely on the legislative framework, can lead to misleading conclusions. Although the set of rules regulating the matter includes mechanisms to prevent fraud, as outlined in Law No. 14,133/2021, its effectiveness is limited. This is evidenced by cases widely reported in the media, such as those investigated during the Lava Jato Operation, which exposed illicit practices in large-scale public contracts. Many authors attribute the persistence of these irregularities to the country's institutional immaturity, which hinders the consistent enforcement of regulations.

This scenario points out a paradox not only present in the procurement sector but also in other areas of public administration. Despite a robust legal framework, rules are not fully enforced. This reality is compounded by a culture of relativising laws. As noted in studies on Brazil, private interests frequently prevail over the public good, creating conditions conducive to fraud. This dynamic is particularly concerning in concentrated sectors, such as public works, where competition is limited and incentives for unethical practices are high.

The persistence of fraud in public procurement underscores the need for changes that directly address the behaviour of public officials and bidders. Studies indicate that these actors often prioritise personal gains over collective interests due to the perceived low risk of punishment. For instance, cases of corruption involving public works or procurement of essential goods tend to be more frequent where internal controls are weak.

For such change to occur, stricter action from authorities, supported by society, would be necessary. A concrete example is the role of the Federal Court of Accounts (TCU) in creating mechanisms such as the Fraud and Corruption Combat Framework, which aims to guide public administration in combating irregularities. Additionally, public campaigns promoting integrity in public services, combined with stricter enforcement of criminal laws, could strengthen the perception that fraud will not go unpunished.

References

- [1]. Akerlof, G. A. (1970). The Market For "Lemons": Quality Uncertainty And The Market Mechanism. *The Quarterly Journal Of Economics*, 84(3), 488-500. <https://doi.org/10.2307/1879431>
- [2]. Birchler, Urs; Büttler, Monika, (1999) *Information Economics*. Routledge.
- [3]. Campos, Roberto De Oliveira (1996). "Roberto De Oliveira Campos". In: REGO, José M. Et Alii (Org.). *Conversas Com Economistas Brasileiros* São Paulo: Editora 34.
- [4]. Casagrande, M. L. (2005). O Pregão Como Instrumento Para Otimização Da Relação Custo-Benefício Nos Contratos E Aquisições: O Caso Concreto Da Experiência De Sua Utilização No Governo Do Estado Do Espírito Santo. In IX Congresso Internacional De Custos (Pp. 1-15). Florianópolis, SC, Brasil.
- [5]. Damatta, R. (1979). *Carnavais, Malandros E Heróis: Para Uma Sociologia Do Dilema Brasileiro*. Rio De Janeiro: Zahar.
- [6]. _____. (1986). *O Que Faz O Brasil, Brasil?* Rio De Janeiro: Rocco.
- [7]. Gomes, M. F., & Machado, L. M. (2023). A Análise De Custo-Benefício Como Ferramenta De Governança E A Proteção Do Meio Ambiente. *Revista De Direito Brasileira*, 33(12), 248–262. <https://doi.org/10.26668/Indexlawjournals/2358-1352/2022.V33i12.7233>
- [8]. Le Grand, J. (1991). The Theory Of Government Failure. *British Journal Of Political Science*, 21(4), 423–442.
- [9]. Lucinda, C., & Seixas, R. (2016). Prevenção Ótima De Cartéis: O Caso Dos Peróxidos No Brasil. *Departamento De Estudos Econômicos Do CADE*. Retrieved From [Http://www.Cade.Gov.Br/](http://www.Cade.Gov.Br/)
- [10]. Musau, E. G. (2015). Determinants Of Procurement Function And Its Role In Organisational Effectiveness. *IOSR Journal Of Business And Management (IOSR-JBM)*, 17(2), 12–25. <https://doi.org/10.9790/487X-17231225>
- [11]. Nunes, R. Da C., & Nunes, S. P. (2017). Venda De Ativos Públicos Em Diferentes Formatos De Leilão. *Revista Estudos E Pesquisas Em Administração*, 1(1), 59-72. Retrieved From <https://periodicoscientificos.ufmt.br/ojs/index.php/repad/issue/view/412>
- [12]. Nunes, R. Da C., & Nunes, S. P. P. (2020). A Parceria Público-Privada – PPP: Uma Fonte Alternativa Do Crescimento Econômico No Estado De Minas Gerais? *Revista Estudos E Pesquisas Em Administração*, 4(1), 70–92. <https://doi.org/10.30781/repad.V4i1.9370>
- [13]. Oliveira, F. L., & Cunha, L. G. (2017). A Legitimidade Das Leis E Das Instituições De Justiça Na Visão Dos Brasileiros. *Contemporânea – Revista De Sociologia Da Ufscar*, 7(2), 275–296. <https://doi.org/10.4322/2316-1329.037>
- [14]. Sallaberry, J. D., Quaesner, L. S., & Costa, M. C. (2017). Escolha Pública E Custo Da Corrupção: Uma Análise Na Operação Lava Jato. Apresentado No 7º Congresso UFSC De Controladoria E Finanças, Florianópolis, Brasil. Retrieved From <https://eproc4.jfpr.jus.br/>