

THE DEVELOPMENT OF CONSTITUTIONAL BASICS OF CORRUPTION COUNTERACTION IN RUSSIA: REFLECTIONS ON THE MODERN RUSSIAN PROCUREMENT SYSTEM

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The problem of corruption counteraction in Russia in the past few years, according to the degree of its significance, without doubt may be ranked among the most important national objectives. The efforts of public authorities at all levels, which were exercised both in the normative regulations in this sphere and in the actual execution of anti-corruption programmes, should be noted in this regard. Thus, during the previous eight years in Russia a vast array of critically significant regulatory and policy acts, which are designed to form a climate of social intolerance against corruption, has been adopted, starting with the special 'Corruption Counteraction Act', which has codified the legal basics of corruption counteraction, ending with the National Anti-Corruption Plan, which was approved by the President of Russia.

The complex nature of corruption in Russia concerns the vast majority of social activities and goes beyond a "reasonable and appropriate" degree. Low efficiency of the law execution mechanisms, inconvenient application of anti-corruption techniques, habitual voluntarism of officials, significant imbalance in the social system of welfare distribution and the absence (or "blurring") of the key professional standards amongst the working people — these comprise an incomplete list of conditions that has previously led to the widespread incidence of corruption in this country.

By its very nature the public procurement system being associated with the mechanisms of the assignment and spending of budget funds is prone to corruption and so the absence of strictly regulated procurement procedures and the imperfection of technical means to ensure transparency in bidding are leading to a cascade of growth in the selfish appetites of the engaged officials.

In the Russian Federation the public procurement system is currently regulated by the special Federal law 'About the Contractual System in the Sphere of Purchasing Goods, Works and Services for Governmental and Municipal Needs', adopted 5 April 2013, as amended 21 July 2014. The previous federal law of 2005 has been repealed. Within a short period since its adoption this federal law was significantly changed three times, each time growing in volume and becoming laden with numerous details. At the same time it was difficult to definitively assess whether these amendments were good or bad; one could state only two indisputable facts: 1) the legal basis of the procurement system in Russia was constantly evolving and consequently very

unstable, and 2) the legislative acts regulating the procurement area in Russia were very far from perfect.

Conclusive evidence of such imperfections could be detected in cases of legal collisions in regulatory regimes and technical errors in the text of the federal law of 2005, also the lack of adopted by-laws and, finally, the unfavourable statistics of infringements in the procurement system, many of which took on the character of plainly scandalous situations.

For instance, the Chief-leader of the Federal Service for the Budget and Financial Supervision (RFN) Sergey Pavlenko, in an interview with the 'Russian Gazette' on 19 July, 2011, gave a detailed recounting of the situation in the road construction and the Sochi Olympic 2014 projects. The official admitted that the crimes of corruption in this country are enormous. According to Mr. Pavlenko, the price of roads in this country could easily be 40% lower, and the Olympic construction in Sochi would need much less money if construction ran according to efficient projects. Mr. Pavlenko said that the Interior Affairs Ministry's funds are spent "as the spirit lay". The official also acknowledged that the situation with the Defence Ministry's funds is not very good, but "the efforts that the Minister has made to align the internal control, are in an order of magnitude greater than the efforts of any other minister. "The official said that the medical and educational expenditures to date are almost completely out of direct legislation on the financial operations in the public sector. Currently, the RFN is engaged in testing the effectiveness of funds assigned to ministries and agencies for public scientific research, and it faces a lot of violations, including plagiarism. According to Mr. Pavlenko, the amount of misuse of budget funds (in other words, direct and meaningful fiscal violations) is ranging from 1 to 1.5%. In the area of housing and communal services "petty theft" on a large scale comprises about 6% of total expenditures.

The official also touched on the question of the Olympic Games in Sochi 2014. For construction Olympic projects were assigned from 13 up to 18 billion US dollars (to the date of interview), while other countries spent between \$2 and \$4 billion, due to the scale of construction in the southern Russian resort. Mr. Pavlenko notes that the original estimates and current estimates, which were shown to his office, vary considerably. In particular, the scientists conducted one new "expertise survey" and complained about the soil on the Sochi construction yards, so the developers have demanded additional assignments for difficult construction conditions. As the official said, in his experience, such an examination is out of one's control. "For the right expertise", in terms of development, prices can range from only \$50 to \$250 thousand", - he noted. "Profitability, construction and honesty are incompatible concepts" - the official added. According to the Chief-leader of the RFN, the real price of construction, assuming total compliance with the technical standards, is only about 60% of the actual amount.

However, the overall results of the anti-corruption activities of public authorities in 2009 - 2012 indicate the positive changes which have begun, including corruption

counteraction in the public procurement system. The relevant statistics provided by the Russian General Prosecutor Office, is as follows.

First of all, in the field of public administration, the growth trend in the number of **reported** crimes against the governance and civil service. In total in 2010 over 43 thousand corruption crimes were registered in Russia; that is 6.5% more than in 2009. And in 2012 over 49,500 corruption crimes were registered in Russia; that is 22.5% more than in 2011. Also there were 13,565 (+13%) suspects known in 2012, including more than 10,900 (-10%) of them being prosecuted, in comparison with over than 12,000 and 9,000, and 8,200 in 2011, 2010 and 2009 accordingly. So, the amount of identified damages resulting from corruption crimes showed a greater than 9-fold increase in 2010 – RUR 45.4 billion, in comparison with 2009 – RUR 4.8 billion. In 2012 it had already decreased to RUR 20.8 billion. The amount of damages reimbursed during the prosecution period has increased more than 10 times in 2010 - from RUR 0.7 billion in 2009 to RUR 7.1 billion in 2010, instead of RUR 11.2 billion in 2012.

Russian courts examined over 10,000 criminal cases of corruption in 2010 and decided over 9,700 sentences, to compare with 9,800 cases in 2012 and 10,840 cases in 2011. Today the most common corruption crime is still bribery, including both bribe-taking and bribe-giving: among the approx. 6,750 cases of corruption crimes which were sent to court, 3,480 were criminal charges of bribery. Other wide-spread corruption crimes committed in the area of public administration include (1) theft of public property through abuse of powers and (2) embezzlement of property governed by the official.

As the Russian General Prosecutor Office notes, there is still an acute problem of suppression of established corruption schemes and organised criminal groups in governmental agencies. This is commonly due to the fact that the detective offices are often focused on quantitative growth of statistics, and therefore the detectives primarily carried out those criminal cases, the investigation of which does not require much time and effort. At the same time, it should be noted that the number of criminal cases of bribery by civil servants (i.e. top managers of public administration) has increased. Over 2012 the courts sentenced 889 of these high-ranking officials, including 244 of them which were sitting as heads of municipalities, or as heads of local administrations. Changing approaches to the organisation of detective offices has allowed the quality of their activities on the investigation of long-term corruption bindings to be improved in the past year.

The Russian General Prosecutor Office is also especially responsible for the development and implementation of measures for corruption counteraction in the procurement system. Thus, it is important to note that according to official statements the prosecutors in Russia are realistic about the scale of corruption-related offences in the procurement area, and take the relevant measures for corruption counteraction. In order to identify corruption-related offences in this area, prosecutors are focused not only on strengthening surveillance activities, but also on the analysis of law-enforcement practices in order to detect the presence of corruption risks in the

legislative rules, the establishment of a real "beneficiary" of the identified violations, including the affiliation between bidders. Also, adequate measures are being taken to exclude the factors of corruption activities from the legislation in Russia and to check out the efficiency of law execution by the authorities powered to control the procurement system. For instance, in 2010 the prosecutors identified more than 19,700 offences in this area (an increase compared to 2009, 37.4%). Because of the prosecutor's official objections 756 illegal acts were changed, 414 applications were sent to the courts; the prosecutors had introduced over 4,200 submissions to rectify breaches of legislation, by the review of which 3,600 officials were exposed to a disciplinary response, over 1,500 officials were inflicted with administrative penalties and fines, and finally, 127 criminal cases were initiated (in comparison to 2009 an increase of 41%).

The avoidance of obligatory bidding procedures contains high risks of corruption. It is the widespread unlawful practice of making contracts with a single supplier by "splitting" deliveries in order to avoid the bidding procedures. The prosecutors in Russia reveal the facts of making ante-date contracts, when they had actually already been performed by the contractors. So, making the contracts without the execution of obligatory bidding procedures has been qualified as a flagrant violation of law. The prosecutors in Russia also reveal the facts of lobbying by officials making the contracts with those companies which are affiliated to them. There have been cases of obtaining bribes by officials to ensure victory in the bidding procedures.

Meanwhile, the corruption, whatever it is, of course is a systemic phenomenon; the key to a steady decrease in the level of corruption is to change the mentality of officials and the public attitude to the facts of misuse of authority powers. If we talk about the public procurement system and the anti-corruption effects, which the adoption of the procurement legislation has had, then it must be said that the accents of corruption merely shifted from the stage of the selection of the "right" supplier (contractor) to the stage of acceptance of goods (works) from the "unwanted" winners of the bidding. The detailed legal regulation of the methods to draft the technical requirements for the contracts and to state its initial (starting) prices only leads the national economic regulatory complex to become too bureaucratic and, consequently, results in a dramatic decrease of budget funds' circulation and the appearance of new mechanisms of avoiding the legal requirements due to imperfections of language means, which are being used to express the real content of numerous legislative rules.

All of this leads to the conclusion that corruption in the procurement system, obviously, cannot be completely abolished; but the adoption of measures to reduce it, to establish an economically acceptable scale – that is the problem that should be resolved by the government at the present.

Corruption in the system of procurement leads to huge losses for any country, and not just financial losses. Damages due to corrupt practices in the procurement area, which affect the governance and the whole of society, can be classified by four types:

1. Financial losses, which are on hand, when the contracts contain disadvantageous (to the budget funds) financial conditions. First of all, it is the overpricing of deliveries in comparison to the current market levels and the inclusion of prepayment terms in the contracts instead of deferred payments, etc.

2. Quantity losses, which are introduced in overstating or understating the volume of deliveries or services in comparison with the required ones, or in ordering goods and services for officials' selfish purposes and not to meet public needs, etc.

3. Quality losses, which one meets, when the contracts are made in breach of the required technical conditions, such as the supply of goods, works or services of inadequate quality, the worse conditions of warranties, insufficient quality control requirements for works and services, etc.

4. Political losses, which come with the deterioration of the investment climate in the country, the loss of public confidence to the government and undermining the economic and financial systems, the breach of the basics of fair play competition, etc.

As already mentioned, there is not yet a country in the world, which has succeeded in eliminating corruption in the public procurement area altogether, but it does not mean the measures aimed to reduce its level are hopeless and ineffective. Corruption counteraction in the procurement system, both in public and commercial sectors in the economy, is impossible without an integrated approach to solve this complex problem. In Russian and international practice four basic approaches have been devised that have already confirmed their effectiveness:

- Psychological methods;
- Techniques;
- Regulatory procedures;
- Punitive measures.

Psychological methods can affect the root cause of corruption: the desire of servants to take illegal enrichment at the expense of the employer, in our case – at the expense of the government and, consequently, of all citizens.

The *psychological methods* include:

1. Background checks, examinations of candidate biographies and reviews from previous occupations. This is the simplest and most common method, which allows one to initially avoid the hazardous activities of corrupt employees who have been convicted or dismissed from their previous jobs for corruption offences or crimes. Currently, these checks are carried out by personnel departments of all government agencies when considering candidates for vacant civil service positions.

2. Special depth testing of candidates (up to a polygraph test). Today there are a number of specific tests and computer programmes that allow one to obtain a sufficiently accurate psychological portrait of the candidate, including his traits in terms of potential addiction to illicit enrichment.

3. Periodic checks on staff loyalty, including the use of provocative techniques, are widely used in the commercial sector. A side effect of this method is team depression and high turnover of personnel.

4. Creating a system of mutual staff control (voluntary informants). This method,

as a specially created and cultivated system, is also widely spoken of in the practice of large commercial companies. For all its ugliness this method is of extremely high efficiency.

5. Effective motivation of employees. This method includes not only a material reward for officials engaged in the procurement procedures, but also special incentive programmes to stimulate their desire for long-term relations with the government agencies and for building a civil servant's career. For example, it is known that in European countries officials engaged in the public procurement area are considered a separate pool of employees, and receive higher salaries compared to their colleagues (it is the so-called "supplement for honesty"). In Russia, unfortunately, this approach is not yet in practice.

6. Rotation of employees who are the members of the commissions for bidding.

7. Forming corporate ethics of intolerance against corruption (including the development of ethical codes, codes for managing conflicts of interests and implementation of special training programmes). Abroad such a method is one of the key elements of the anti-corruption strategy. In the civil service the ethical codes that regulate, among other things, the prevention of corruption are commonly used. However, the practice is such that the ethical codes perform their function only when combined with the special training programmes providing the participation of all the civil servants of an agency.

Techniques to eliminate or significantly reduce the likelihood of collusion between the representatives of the procurement agencies and the suppliers, minimising the possibility of personal contact between the parties of an expected contract, or increasing the risk of an offender to be unmasked. Examples of such techniques are as follows:

1. Fitting out the meeting rooms and workplaces of the officials engaged in the procurement procedures with control systems and CCTV.

2. Monitoring of e-mail. However, the legal validity of this method is a subject of controversy.

3. Using up-to-date IT-tools (online shopping and electronic trade platforms), which allows one to avoid direct contact between the officials who provide the procurement procedure, and the supplier's representatives.

4. Purchasing goods or services by the use of existing commercial or specially crafted catalogues. This method is widespread in both commercial and public sectors. A striking example of it is the experience of the U.S. government, which organises centralised logistics for all the federal agencies. The administration regularly provides call-off bidding for the purchase of a different range of products/services, the results of which (price, delivery and other conditions) are generalised in the special catalogues, then sent to all the governmental agencies; if it is necessary, the U.S. federal agencies could find the required products/services in the catalogues and purchase them at the specified conditions, without any additional procedures.

Regulatory (procedural) methods are aimed to provide all the procurement stages in full compliance with the formalised internal rules and regulations that reduce the

risk of corruption. In this case, the complex anti-corruption measures are implemented in two ways:

1. Establishing an effective system of rules governing in detail the steps of procurement procedures, which are most at risk of corruption.

2. Establishing “high-definition” mechanisms to monitor the precision of procedure observance. In the very system of rules that reduces the risk of corruption, there should be checkpoints (including cooperation between the units which are not involved in the procedural part of the procurement), allowing one to perform a current or posterior independent audit of the running procurement procedures.

Punitive measures are aimed at creating an environment in which the corrupt practices of staff responsible for public procurement become unprofitable. In the Russian legislation those measures are implemented through the specific provisions of the Code of Administrative Offences (Articles 7.29-7.32) and the Criminal Code (Articles 285-286, 288-293).

It should be noted that the use of each of the discussed methods in practice is limited by its specificity and requires the use of additional governmental resources. Thus, for example:

- a). The efficiency of psychological methods is associated with:

- the qualifications of psychologists recruited to this direction, particularly for in-depth interviews, psychological testing of candidates, collecting and analysing personal information about candidates and employees, and for the use of special equipment (polygraph, etc.);

- the relativity of evaluations and conclusions: an opinion of the expert, who specialises in the relevant area, plays a leading role in assessing a particular situation or the employee, and in inventing the reaction steps. Consequently, there is a high probability of human factor and errors, including intentional;

- the rejection by the procurement staff (even quite loyal) of some of the methods, because their use violates some personal rights and freedoms.

- b). The use of techniques is limited to the properties of being purchased goods or services and the availability of adequate IT-tools to the potential suppliers:

- the methods are effective for the exchange goods and services, whose characteristics are standardised and easily measurable (these include, in particular, petroleum, coal, grain, metal);

- the methods are almost useless for goods and services with unique features and immeasurable characteristics; so, in this case it requires the direct interaction of the consumer and the supplier to clarify the parameters of the technical specifications (e.g., design services, consulting or scientific research).

- c). The performance of regulatory (procedural) methods can only be guaranteed by their total and precise execution and, therefore, depends on effective mechanisms for monitoring the compliance of running procedures with the established rules and legal requirements. And this, in turn, leads to the questions of:

- how does the "army" of procurement officials form the mini-“army” of “inspectors”? In other words, how much will it cost for the tax-payers?

- how will it be guaranteed that the "inspectors" don't take a corruption collusion with audited officials after a while?

d). The effectiveness of punitive measures is negligible in the absence of the inevitability of punishment; so, in turn, it leads directly to the question of the efficiency of law enforcement in the country.

Of course, only a comprehensive approach to reducing the corruption level in the public procurement area in Russia will lead to results: balanced and reasonable use of all the discussed methods of corruption counteraction within all the phases of public procurement. If we dispense with only specific areas or methods we can merely get a short-term effect. After a while the mechanism of extraction of illegal incomes will change and move into areas not affected by the instruments of control and resistance. As a consequence, the total losses of corruption will come back to the same scale or even surpass it.