
PARTICIPANTS' PAPERS

ANTI-CORRUPTION ENFORCEMENT MEASURES IN PUBLIC PROCUREMENT IN EGYPT

*Wael Khorshid**

I. INTRODUCTION

Public procurement is considered essential to the activities of the private sector, with the total cost of tenders for products, services, equipment, appliances and materials required for government authorities and other affiliated agencies. Clear and comprehensive regulations are essential for curbing corruption in public procurement. The passing of public funds into private hands through public procurement procedures presents enormous potential for corruption. However, public procurement agencies play a significant role in detecting and sanctioning corruption.

Egypt has taken some positive steps towards establishing a sound anti-corruption framework. Egypt has signed and ratified the United Nation Convention against Corruption (UNCAC) on 25 of February 2005. Following the revolution and the resignation of former president Mubarak, the country has undertaken a number of institutional reforms and has deepened its partnerships with the EU and the UN around anti-corruption and anti-money laundering programmes. On 2014, Egypt launched the National Anti-Corruption Strategy, which is a critical milestone for the development and implementation anti-corruption policies, aiming to create a culture that embraces justice, integrity and loyalty and rejects corruption.

II. LEGISLATION IN RELATION TO CORRUPTION IN PUBLIC PROCUREMENT IN EGYPT

A. Public Procurement System in Egypt

1. The Public Tender Law 89/ 1998

The Public Tender Law is the law which governs the process of public procurement in administrative bodies and government entities in Egypt. The law stipulates as a primary rule that all public tenders should fall under the principles of openness, equal opportunity, fairness and free competition. However, it vests the concerned Minister, the governor or an equally authorized person the right to contract by direct award within limitations, in some cases (Article 7) and with no limitations in others (Article 8).

In addition, the law offers an additional advantage to the national contractor by giving him priority if his bid does not exceed the lowest foreign bid by more than 15%. The law allows for local bidding contracts if they do not exceed EGP 400,000 (by virtue of the amendment No.191 for the year 2008), compared to 200,000 EGP before.

The concerned Minister or an equally authorized person is confined by 1,000,000 EGP for procuring transferable goods or provision of services, consultative studies, technical work or transport contracting and 3,000,000 EGP for construction work. However, the law allows the Prime Minister in extreme emergency to permit direct contracting within the limits stipulated in Article 7.

As for contracting by limited tenders, the fifth article of the law sets the following conditions: Items that are not manufactured or imported except through certain persons or companies. Items, which by nature require obtaining or buying from their certain production locations. Technical work, which requires by nature to be carried out by certain technicians, professionals or specialists. Contracts where national security dictates confidentiality.

To limit the misinterpretation of these terms, article 39 prohibits public officials who fall under this

*Chief Judge, Technical Bureau of the Court, Criminal Department, Court of Cassation, Egypt.

category of the law from participating themselves or through middlemen with offers or proposals for these authorities.

The problem with these laws lies in the following:

- (i) Lack of regulations or terms that govern the participation of the private sector, in addition to absence of evaluation criteria to match the nature of these projects.
- (ii) Lack of legal procedures to govern the means of following up on implementation of contracts and settling disputes that may arise. Lack of technical, financial and legal expertise required by the government financial entities to offer these projects to investors and to organize their participation.¹

2. Penal Code 58 /1937

Under Articles 103-112 of the Penal Code, corruption is a serious offence and falls into the category of offences against the civil service and the public interest.

3. Illicit Gain Law (Law no.62/1975)

The Illicit gains law gives the Illicit Gains Bureau (IGB), a department affiliated to the Ministry of Justice, the power to investigate any public official for unjustified increase in his wealth. If the person cannot prove the legitimate source of this increase, his assets are frozen, and they are prohibited from travel and can be prosecuted on corruption charges. The proposed amendments expand the coverage of the law as well as the scope of the crime and allow defendants to avoid prosecution if they pay back the funds of unknown origin along with interest.² The Egyptian regulatory framework obliges public officials to submit a financial disclosure form upon taking their position, at the end of their term or contract and every 2-5 years during their mandate, to the Illicit Profit Apparatus. All public officials are required to declare: (i) loans; (ii) bank deposits; (iii) real estate assets; (iv) valuable movables; and (v) securities. These declarations are, however, not available to the public for scrutiny.³

4. Conflict of Interest Law (Law no.106 /2013)

The law also includes provisions obligating public representatives (The President, The Prime Minister, governors and others stated in article 1) to remove all kinds of conflict of interest between his personal job and his public duties. Under Article 6, he /she should resign from the companies' administration council or the commercial projects if it conflicts with his original public position (absolute contradiction). Moreover, it prohibits him/ her from purchasing stocks or shares of commercial companies for the whole period of his position (with some exceptions stated in Article 9).

5. Law 16/2016

The law amended article 18 bis 2 of the law 150/1950 which stated that a felon can reconcile in crimes in chapter four of Book Two of the Penal Code (Defalcation, Encroachment on, and Peculation of Public Funds) and the conciliation should be within an expert committee formed by the Prime Minister. In addition, the conciliation can be in any level of the trial or even after the last judgement, the felon can demand conciliation to the General Prosecutor to stop implementation of the punishment. (Previously, the reconciliation was not applicable.)

6. Presidential Decree No. 307 of 2004

The decree concerns the accession by the Government of the Arab Republic of Egypt to the United Nations Convention against Corruption, which was approved by Parliament on December 20, 2004 and was ratified in 2005.

B. The Status of Criminalization of Corrupt Acts in Relation to Public Procurement.

1. Corruption of Foreign Public Officials

The Egyptian Penal Code does not explicitly recognize nor regulate the corruption of foreign public

¹Transparency in Government Procurement–Series of White Papers to Promote Transparency & Combat Corruption in Egypt, http://cipearabia.org/files/pdf/Corruption/Policy_Paper_Procurement-EN.

²<http://english.ahram.org.eg/NewsContentPrint/4/0/177401/Opinion/0/Egypt-Why-amend-the-illicit-gains-law-now.aspx>

³Transparency International, anti-corruption in Egypt helpdesk, 2015

officials. However, it recognizes the concept of extraterritoriality. According to Article 2(1) of the Law, the Egyptian Penal Code applies to “any person who commits, outside the country, an act that makes him a principal or an accessory in a crime committed wholly or partially in Egypt.” Therefore, where the elements of the crime were perpetrated, as defined in the Egyptian Penal Code, will not have any impact on its qualification as bribery.

2. Illicit Enrichment

The Egyptian regulatory framework contains an obligation for public officials to declare their assets, upon taking their position and at the end of their term or contract and every 2-5 years during their mandate, to the Illicit Profit Apparatus. All public officials are required to declare: (i) loans; (ii) bank deposits; (iii) real estate assets; (iv) valuable movables; and (v) securities. However, these declarations are not available to the public for scrutiny.⁴ Egypt also established a specialized agency for illicit enrichment called the Illegal Gains Department (IGD), which I will talk about later in this paper.

III. EFFECTIVE INVESTIGATION AND PROSECUTION OF CORRUPTION IN PUBLIC PROCUREMENT

A. Public Procurement Agencies

Public procurement agencies play a significant role in detecting, and sanctioning corruption. They can take measures to improve integrity and transparency, and prevent corruption by putting specific tools to monitor decisions and enable the identification of potential corruption and enhance transparency. However, the designated institutions need to be independent in resources and in working conditions, and have sufficient number of responsible officials well educated and trained. Egypt has two kinds of authorities in that field:

1. Administrative Auditing and Monitoring Authorities

(a) *The Central Audit Organization (CAO)*

The CAO was created in 1964 and is today a legally, technically and physically independent entity under the auspices of the president. The CAO is the external auditor of the national and local administration, local governments and public bodies.

According to article 2 and 5 of law 144/1988, the CAO role is to conduct financial audits legal and accounting perspectives and to monitor the implementation of governmental plans. The CAO holds an independent budget, as required by law. The CAO produces reports for the scrutiny of the president’s office, the prime minister’s office and the parliament.

(b) *Administrative Control Authority (ACA)*⁵

The ACA is a government agency which has been operating under the auspices of the Prime Minister by the law 54 /1964. It has very wide investigative powers for detecting and fighting against corruption by exercising a financial, administrative and technical control of the government, state-owned enterprises and private sector firms that accomplish public work. The ACA also follows up on the implementation of related legislation, plays an advisory role for the prevention of corruption and other abuses, and detects negligence and violations. The ACA has investigative powers, and it can hand over suspects to the Illicit Gains Authority.

It has been active for over fifty years in detecting and preventing administrative and financial corruption in the public sector, but its independence is limited by the fact that it must obtain the consent of the Prime Minister in order to arrest public officials suspected of corruption⁶.

In September 1999, the ACA was conducting an investigation into a suspicious relationship between a businessman and someone believed to be within the Customs Authority who had agreed to assist him in finalizing the customs procedures on the importation of 200 vehicles from Saudi Arabia. Surveillance units followed the businessman to a meeting at a desert road outside Alexandria where they also found the Head of the Customs Authority and his son. The same day the General Prosecutor issued a warrant to

⁴Transparency International forthcoming 2015.

⁵www.rekaba.com/english/english.html

⁶Transparency International forthcoming 2015.

wiretap and record the phone calls of the Head of the Customs Authority. As a result of the phone wire-tapping the ACA found out the corrupt relationship between the Head of the Customs Authority and the Minister of Finance who had been benefiting from the evasion of import duties. Investigations revealed three other businessmen, one a Saudi, the Head of the Technical Office of the Customs Authority and other minor customs officials were involved.

In October 2001, the ACA completed the prosecution of a former Minister of Finance following a trial at the Supreme State Security Court, which lasted over a year. The former Minister and the former Head of the Customs Authority received 8 years and 11 years' imprisonment respectively and were heavily fined and ordered to pay compensation to the Treasury⁷.

*(c) The General Department of Public Funds Investigation Police (GDPF)*⁸

The GDPF is affiliated to the Ministry of Interior and was established by Presidential Decree no. 10/1984. Its structure and organization are determined by Ministerial Decree No. 167/1985 (Ministry of Interior). While its missions are those of a police force, it does have a special bribery and corruption unit.

(d) Money Laundering Combating Unit (MLCU)

The MLCU is the Egyptian financial intelligence unit. It was established by the Anti-Money Laundering Law No. 80/2002. The MLCU is an independent unit functioning within the Central Bank of Egypt (CBE). The MLCU receives all reports concerning money laundering activities and offences. It is in charge of the investigation and reports any investigation results to the public prosecution body. The MLCU maintains a database gathering all received reports and information concerning money laundering and receive suspicious transaction reports from financial institutions. According to the Anti-Money Laundering Law of 2002, the MLCU personnel are nominated by minister of justice decree, upon the request of the governor of the Central Bank of Egypt.

2. Prosecuting and Judicial Authorities

In the Egyptian court system, investigation and prosecution are both carried out by public prosecutors. Public prosecutors and magistrates with responsibilities in the fight against corruption are part of the judiciary.

The Attorney-General is responsible for investigating for public prosecutions cases related to public funds and bribery under the terms of Law No. 46/1972 (on judicial authority). The powers of prosecutors are set out in Law No. 150/1950 in accordance with criminal procedural law. In seeking to uncover bribery, prosecutors enjoy wide-ranging investigative powers⁹.

(a) Illegal Gains Department (IGD)

The IGD is governed by laws No. 11/1968, No. 2/1975 and No. 95/1980. Its mandate is to examine suspected illegal revenues and analyse asset disclosure forms. Public officials are required to disclose their assets and those of their spouses and children upon gaining office. The IGA does not enjoy investigative power, but it receives reports concerning corruption from the public as well as from private and public employees. In situations where asset disclosures are proven to be fraudulent, the IGD transfers the case to criminal courts.

(b) Administrative Prosecution Authority (APA)

The Administrative Prosecution Authority was founded in 1958 as an agency to monitor and investigate civil servants in all ministries and agencies at all levels. The Administrative Prosecution Authority is supported by professional staff to investigate administrative and financial corruption. The APA has a full-time staff and, despite being placed under the authority of the Ministry of Justice and being staffed with state investigators, the Supreme Constitutional Court decided in June 2000 that the APA was a judicial authority. Some administrations and entities have refused to be under the APA's prosecution power, making the mandate of the organization difficult to fulfil¹⁰.

⁷ Administrative Control Authority website <http://www.icac.org.hk/news/issue12eng/button4.htm>

⁸ www.moiegypt.gov.eg/english/departments%20sites/publicfunds/generaldepartment/

⁹ Business climate development strategy, December 2009, MENA-OECD Initiative.

¹⁰ Daily News Egypt 2014.

(c) The Public Funds Prosecution (PFP)

The Public Funds Prosecution (PFP) was placed under the authority of the Attorney-General; the PFP is a prosecuting agency that investigates public fund offences, including corruption. This institution, in order to play its role in a sufficient way, needs to be independent, and officials should be more familiar with sophisticated anti-corruption techniques and updated detection methods.

B. Effective Steps towards Anti-corruption

Egypt launched a National Anti-Corruption Strategy on the occasion of Anti-Corruption Day. The Egyptian Prime Minister launched the National Anti-Corruption Strategy for the period starting in December 2014 and ending in December 2018. The strategy is a critical milestone for the development and implementation of effective and coordinated anti-corruption policies in Egypt, aimed at creating a culture that rejects corruption and embraces justice, integrity and loyalty.

The Strategy was developed by members of the National Coordinating Committee for Combating Corruption which is headed by the Prime Minister and includes representatives of most of the concerned national official bodies. Its work is coordinated by a technical committee that is headed by the ACA.

The National Anti-Corruption Strategy in Egypt adopts ten main objectives, which range from short to medium term, namely:

- (1) Raising the level of performance in government,
- (2) Establishing transparency and integrity principles among public officials,
- (3) Developing and updating anti-corruption legislation,
- (4) Strengthening judicial procedures to achieve prompt justice.
- (5) Strengthening capacities of anti-corruption bodies.
- (6) Raising living standards and achieving social justice.
- (7) Raising awareness and building trust between citizens and State institutions.
- (8) Strengthening national cooperation against corruption.
- (9) Strengthening regional and international cooperation against corruption.
- (10) Strengthening civil society participation in combating corruption.

The Strategy constitutes a good and comprehensive starting point as it covers both prevention and criminalization, involves a large number of concerned agencies in combating corruption, and underlines the importance of developing national indicators to monitor actual implementation on the ground, which is emphasized by comparative experiences also calling for the need to focus on securing sufficient financial and human resources for this purpose. Such experiences also call for a greater focus on sectoral approaches so as not to be limited to overarching legal and institutional approaches and for strengthening the role of civil society through specific tools and mechanisms. In addition, they also emphasize the indispensable need for adequate frameworks that are effective in coordinating implementation and ensuring proper monitoring and evaluation.

Transparency is the main weapon against corruption. Of course, it cannot prevent corruption but it becomes a much more difficult exercise when everything that is done by the judicial authority is in the openness of court proceedings under public scrutiny — with the parties present and through the eyes and ears of the media present.

IV. ASSET RECOVERY

Regarding asset recovery of former regime leaders in foreign countries, Egypt encountered difficulties regarding what constitutes probable cause for accepting request for seizure of property, as the weight of evidence varies widely from one country to another. For instance, how circumstantial evidence weighed by the requested country. In addition, the recognition of judgements rendered in absentia is also a matter of question. Judgements rendered in Egypt in absentia have res judicata effect, unless they challenged and overruled. This leads us to think about a more efficient way of communicating with the requested country, in other words, “losing our ties” and communicating informally to overcome time and effort wasted in paperwork going back and forth, thus, preventing rejection of requests or at least becoming useless, especially when time is a vital factor. It is also recommended to have a unified template of mutual legal assis-

tance request recognized by competent authorities in different countries, thus reducing the probability of rejecting such requests. This can be either on a bilateral or multi-lateral basis.

V. INTERNATIONAL COOPERATION

A. Mutual Legal Assistance between Law Enforcement Agencies

Mutual legal assistance between law enforcement agencies is very important to fight against corruption and related crimes. Inter-agency communication through procedures of exchanging effective information, and sharing experiences in the case of corruption detection, investigation and prosecution may also be essential to enhance the understanding of all those involved in the fight against corruption.

B. Mutual Legal Assistance (MLA) in Egypt

The Arab Republic of Egypt maintains continuous contacts with various countries of the world to intensify cooperation in the area of cross-border and corruption crimes, especially through conclusion of judicial cooperation conventions and treaties, ensuring extradition, as well as, judicial and mutual assistance agreements. In this context, Egypt has signed a number of bilateral agreements with several European and African States, such as Hungary, Poland, Romania, Italy, South Africa and Ukraine, in addition to cooperation agreements with most Arab States.

Legal and judicial international cooperation is regulated by multilateral agreements, regional agreements, bilateral agreements, national laws, as well as, rules of reciprocity and international courtesy. It is, however, difficult to determine which of these agreements is best serving international cooperation in legal and judicial matters, as each is concluded to meet demands existing at the time of its conclusion.

It is worth mentioning that Agreements ratified by the Egyptian Government have supremacy over national laws by virtue of the Egyptian Constitution with no need for any further action.

The request is to be forwarded through the designated channels, i.e. the Letter Rogatory and all legal assistance required, is to be submitted through the diplomatic channels, after which it is sent to the Ministry of Justice (MOJ) as the Central Authority for review and taking necessary measures for implementation of such assistance. Nevertheless, a Letter Rogatory can be addressed directly to the central authority, as the case may be in the bilateral or multilateral agreement.

In the Ministry of Justice, the International and Cultural Cooperation Department, a key organ of the Ministry of Justice of Egypt, is the Central Authority for international cooperation in legal matters. This department comprises a sufficient number of judiciary members and justice professionals, whose role, among others, is drafting, reviewing and executing legal assistance requests. This implies that technical legal issues in international matters are handled by judges and justice professionals not civil servants with legal background, as the case may be in other jurisdictions, thus, ensuring the quality of legal service provided in this respect.

An example of procedures followed regarding cooperation in criminal matters: a judicial authority in country X, a requesting country, directs a legal request to its Central Authority which forwards it to the Central Authority in Egypt (the Department of International and Cultural Cooperation at the Ministry of Justice), either directly or via diplomatic channels, as the case may be. The request, after being checked regarding conformity with threshold requirements for a mutual legal assistance request, is then directed to the competent authority to be duly executed, and then forwarded back to the requesting country. This process runs vice versa in cases of mutual legal assistance requested by the Egyptian authorities.

Regarding obstacles hindering efficient execution of mutual legal assistance requests or Letters Rogatory in Criminal matters, criminal activities are becoming more sophisticated and transnational in nature, taking advantage of modern technology. This requires, inevitably, a more flexible and speedy process in executing MLA requests.

VI. CASE STUDY

A. Introduction

I chose this case study, which is deeply related to corruption in public procurement, as the defendants were top senior government officials in Egypt.

B. The Facts

In 2011, the public prosecution charged former Prime Minister of Egypt, former Minister of Finance and former Minister of Interior of profiteering from, and misusing their public position by, offering a third party (a Foreign Businessman) a benefit from their work; the second and third presented a report to the first to award importing metal plates for vehicles all over the country to a foreign company represented by the third party (the fourth defendant) by direct award with an overrated price. Also facilitated for a 3rd party, by abusing the power of public office, misappropriating public funds by obtaining the difference in value of similar plates' market price. They were also charged with charging citizens with undue charges to obtain licence plates.

C. The First Instance Court Judgement

The primary court sentenced the first and the fourth defendant to a year in prison with hard labour and suspended implementation of the sentence for three years, and sentenced the second "in absentia" with aggravated imprisonment for ten years, and sentenced the third with aggravated imprisonment for five years. Moreover, the court ordered the removal of the first three defendants from their public positions and fined them with 92 million pounds.

D. The Appellate Court Judgement

In 2013, the court of appeal overruled the primary court judgement on the ground that the judgement did not include evidence that the defendants misused their positions, and did not show the actions done by the defendants that shows their responsibility, and the role of the third defendant was just implementing the regulations assigned by the second one. Furthermore, the judgement did not show the criminal intention of the defendants to commit these crimes. Most importantly, the court referred to article 8 of The Public Tender Law 89/ 1998 which allows the Prime Minister in exceptional cases to permit contracting with direct award on his own discretion.

E. The Second Trial Court

The case was remanded to the primary court to be adjudicated by another circuit. In 2015, the court found the defendants not guilty based upon Article 8 of The Public Tender Law 89/ 1998 as the court found that there were extreme circumstances that forced the Prime Minister to take such a decision. Furthermore, the court did not find any premeditated intention by the first and third defendants, as they were not the ones who decided the financial terms of the contract.

VII. CONCLUSION

1. The government should seek to communicate with the public and raise the awareness of its actions to curb corruption. Awareness raising can be fulfilled by public education programmes like printed advertising, information campaigns delivered through the mass media (including schools and universities). The goal is to change public attitudes: 'there is no reason for accepting corruption as a normal way of doing business and as an inevitable evil'.
2. The government should involve the public in anti-corruption efforts to ensure transparency, by engaging the public in government plans or measures through press conferences, and respond to public inquiries by all communications means and public meetings. The maxim "Justice must not only be done, but seen to be done" is one of the core principles.
3. Establishing a circuit or more in the criminal court specialized in corruption cases managed by an expert and specialized judges, developing special mechanisms concerning cases related to corruption and activating a conciliation system for low value cases.
4. Revising the national legislation to be in alignment with the UNCAC and the international treaties to

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apply programmes for protecting whistle-blowers and obtaining statements from witnesses.

5. Supporting current initiatives to develop codes of conduct to reduce discretionary powers of officials, and to determine the rules of ethical behaviour concerning the public work whether in the judicial, administrative, political or social range.

6. Cooperating with the universities, research centres and think tanks that are concerned in Egypt and outside Egypt to provide comparative legal studies concerning combating corruption and money laundering, and translating legal studies worldwide to take advantage of the acquired experience of the other states in this field.

7. Article 8 in the Egyptian Tender Law should be amended to allow judicial review to decide whether the public procurement case deserves to be considered as an extreme circumstance or not, to prevent the misuse of the exception granted for the Prime Minister by law (as shown in the case above).