

# Financial and Administrative Aspects of Corruption in Public Procurement and Criminal Consequences: An Analytical Study in Light of the Effective Iraqi Legislation

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There is a close correlation between the extent of corruption in a country and the level of development and services in it. In a country like Iraq, which is very late in ranking the most corrupt countries in the world, this is reflected in poor services and the standard of living of its citizens. This research discusses the most important financial and administrative aspects of corruption in one of the most important aspects of executive work, which is public procurement which accounts for the largest percentage of the financial budgets of this country. This study attempts to review the most prominently applied cases that occur when government agencies exercise their activities in the field of purchasing goods and services. The study also deals with these aspects at every stage of the contract, which leads to the conclusion of contracts that are marred by imbalance and complicity. This results in sometimes being unable to achieve their purpose of providing goods and services with high efficiency and appropriate prices, as well as determining the criminal consequences of the perpetrators of the violations.

**Keywords:** *Corruption, Public procurement, Financial, Administrative, Criminal.*

## Introduction

Public procurement today occupies a great importance in meeting the requirements of economic and service needs to provide goods and services to public institutions (Jason, 2005). In a country like Iraq, the concept of the state is still based on the state's intervention

and its direct responsibility to provide a variety of services to citizens. On the other hand, there is a large proportion of money in the state's general budget increasingly looking to the private sector through the public procurement that is conducted by national and local entities (Søreide, 2002). Iraq has become one of the worst countries in the indicators of corruption, despite the efforts made by several oversight bodies to reduce corruption, however, these efforts did not rise to the required level for various reasons. The problem that this study seeks to examine is the legal controls and procedures in public procurement. It was revealed that there is an existence of many weaknesses and imbalances that caused, and are still causing, wasted money, and the transfer of the largest percentage of that money from the state budget to the pockets of corrupt officials and their accomplices (Ali, 2008). The fundamental questions that this study attempts to raise are: What are the most prominent hidden methods that corrupt employees and accomplices are using for the illicit use of public procurement? And, what are the legislative loopholes that help them? This study attempts to shed light on the practical aspects by highlighting the financial and administrative forms of corruption in the procedures of the contracting process that public procurement goes through, as well as showing the criminal consequences of violating the provisions of the law (Othman, 2015).

## Literature Review

### *Methods of Administrative Procurement and Regulatory Legislation*

Legislation governing contracting operations is represented in the Public Procurement Law No. (87) of 2004 and the general budget laws issued to the state annually. These laws regulate many cases and procedures, but private legislation that regulates this subject in a specialised, detailed manner is based on regulations for implementing public procurement No. (1) (2) for the year 2014 (Fisman, 2002) where these regulations specify the contracting methods that can be followed to implement public procurement in various ways according to the following (Ali, 2013) :

- Public tender: Advertising the general invitation to all those wishing to participate in the implementation of procurement of all kinds who meet the terms for participation, provided that the procedures are characterised by general, competitive, public fairness, clarity, and taking into account the financial ceilings of allocations and disbursements (Maher, 1996).
- Limited tender: This method is adopted when goods, consultancy services, or contracting are available with limited authorities in terms of jurisdiction, as those who meet the terms are entitled to submit their bids (Ismail, 2012).
- Public tender with technical qualification: This method is to announce the tender to all those who wish to participate to submit their technical and commercial bids with two separate envelopes (technical and commercial).

- The tender is based on two phases: The administration relies on this method in contracts that it is difficult for the contracting authority to prepare its technical specifications or designs or in contracts with an advanced technological level. The tender is conducted in two stages: the first is general and the second is a direct invitation to the bidders whose technical bid has been accepted (Ahmed, 2002).

## **Preparing for the Contract**

### ***Preparing and Organising the Basic Documents of the Contract***

Before advertising any tender, direct invitation, or any other contracting method, there are several procedures, approvals, and documents preceding this procedure that must be completed, otherwise, it is not possible to start with the specific contracting method. The contract auditor must verify the availability of these procedures, approvals, and documents required to start contracting procedures (Ali, 2008).

### ***Advertising***

After completing the procedures, documents, and approvals referred to above, the tender will be announced according to the specific terms of the contract. The advertisement is considered one of the essential terms and principles in public procurement that does not take place without it (Mahmoud, 1998). Considering the type of advertisement required according to the choice of the contracting method in the manner of bidding, whether public or after completing the procedures, documents and approvals referred to above, the tender will be announced according to the specific terms of the contract. Among the problems diagnosed in the advertising step is that some public agencies publish the advertising of the tender locally (inside Iraq) and in newspapers that are not widespread (Gaventa, 2013). The agencies also choose the shortest period required by the regulations to close the tender, as it does not publish the advertisement on its official website, which limits the opportunity for the advertising to reach the largest number of parties. In addition, some of the employees of these entities communicate with companies and people who wish to apply to participate in the tender for special interests that are far from the public interest. The general principle that tenders are subject to publicity is a way to ensure competition (OECD, 2010). It also contributes to ensuring the transparency of tenders and the assignment process, as well as it represents an important organisational means for managing contracts and tenders. Thus, access to procurement documents today has become indispensable as it must now include an Internet link where procurement documents can be accessed (Othman, 2015).

## **Forms of Corruption before the Advertising or Inviting the Public Contract**

### ***Determining the Actual Need and Feasibility Studies***

Corruption aspects are based on preparing the economic feasibility, as it is not based on an assessment of the actual need for the material to be prepared. The economic feasibility is almost merely constructive, non-scientific, and not based on documents or priorities that are compatible with scientific requirements. Many contracting agencies lack the correct way to prepare the economic feasibility, so the basis for starting the contracting process is based on the wrong foundations (Ahmed, 2002). While preparing feasibility studies for projects that do not have a material return or positive returns in different sectors, it is assumed that the positive returns on the private sector must be determined in detail based on realistic and practical studies and corroborations from the competent authorities. The supervisory authorities are satisfied with making sure of the existence of an economic feasibility study within the tender documents. This occurs without entering into its audit process and knowing the extent of the applicability of the foundations for the preparation of this topic and are approved by the Ministry of Planning according to the attached study within the project or tender documents. This includes dealing with issues that do not have to be discussed when preparing the economic feasibility, such as support and not manufacturing the material locally (Maher, 1996).

### ***Preparing and Approving the Technical Terms and Costs***

This leads to the reluctance of the discreet international foreign companies and limiting participation to the companies for which the technical terms have been prepared (Ali, 2013). In practice, some people collude in advance with specific companies to prepare technical terms with the same terms for the materials that these companies produce, so the result will be the companies to which the tender or invitation will be referred without competition. There is no real audit on the mechanisms of work of the committees to prepare the technical conditions or on the technical conditions themselves, and they are satisfied with the existence of approval within the tender documents (Mahmoud, 1998). There is no doubt that this gives the opportunity to prepare technical conditions according to the wishes of certain people or companies and not the wishes of the ministry or department concerned. Assumption committees are supposed to determine the estimated costs, especially import costs. Other important issues include transport, loading, unloading, and a competent authority that may incur customs duties in accordance with international sales terms (Gyimah, 2006). This may lead to the state bearing losses without the assistance of the expertise and staff of ministries and departments. Preparing unrealistic speculative costs for the amounts of business that are executed through taking trusts or by direct execution and using that is the most heinous

exploitation, as it does not go through the step of public procurement that is subject to regulations for implementing public procurement (Ismail, 2012).

### ***Corruption in Selecting the Contracting Method***

Choosing a contractual method that leads to an agreement or contracting with specific companies and excluding the rest of the companies. For example, it is adapted to the method of direct invitations and assigning the beneficiaries in an explicit manner that brings bids from three companies, two of which are not serious companies or an institution to apply for this contract, or that they were not included in the procurement previously. Companies may also be accredited with an actual entity but not represented in Iraq (Othman, 2015) or that their agents in Iraq do not enjoy integrity that guarantees the impartiality and competition, or they do not adhere to labour standards and ethics. Delaying approval of the estimated costs or economic feasibility and technical specifications or delaying the approval of public import companies plans until the end of the year, with the executing authorities in a state of alert. It was also noted that a choice of contractual methods was not appropriate for the nature of the material without paying attention to the need of the various sectors of this material within its terms (Ahmed, 2002). In addition to setting incorrect dates for the deadlines of the required material, which makes it impossible for the discreet companies to enter the competition under the pretext of pressing time to provide the material. Furthermore, some officials of the specialised departments use the authority to register and accredit some companies or their products and delay the registration of competing companies to prevent them indirectly entering the competition or submitting the tender for not meeting the required registration condition (Ahmed, 2002).

The powers granted to the Council of Ministers, in accordance with the constitution, allow them to consider and decide on the applications submitted to it by the contracting authorities for the purpose of excluding from submitting these regulations when entering their procurement. Although this text was established because there are logical justifications, sometimes it requires the administration to act urgently to provide some requirements in line with the necessity of continuing the public facility regularly and steadily. However, there are cases in which the contracting authorities deliberately delayed the contracting procedures to obtain an exception from the regulations (Jason, 2005). It is known that the exception to the regulations gives the administration board powers to take decisions and gives it discretion in this direction away from the restrictions of controls or requirements to rationalise and control procedures and preserve public money. Usually, legal legislation emphasises direct contracting with the public sector to provide goods and supplies. Purchasing from the private sector is not permitted unless the public sector apologises for its provision. Far from the correctness of this approach, whether it reduces opportunities for competition between the public and private sectors or not, practical experience has shown that some purchases did not

lead to the promotion and activation of public sector companies (Ali, 2008). Instead, the companies were burdened with issues that exceed their ability to manufacture within the conditions and dates specified in purchases. The contracting between the public sector entities does not imply collusion or waste of money, as these funds overlap between the public sector agencies themselves. The practical experience has proven that this type of contracting is not without flaws and corruption. As the cost of estimating and exaggerating the prices is maximised in a way that benefits the subcontractors who, in turn, pay the bribes for the purpose of obtaining these procurements. Thus, the legislator's approach to acquiring purchase from the public sector to encourage it and protect public money has been circumvented and has become a means of corrupt procurement as well (Maher, 1996).

### ***Choosing the Right Bid for the Contract***

Although the legislator, in various cases, encouraged decentralisation and the need to grant powers to the governorates, branches of ministries, and public agencies many ministries still hold the powers centrally. This affects the centralisation of decision-making about procurement and confining it to a specific number of employees (Georgy, 2003). This will lead to a single body determining the actual need for the material, its estimated cost, and its required specifications. It is responsible for forming committees to receive offers, analyse them, make a referral decision, and even decide on appeals submitted to the award decision by competitors. The expansion of the powers of sub-departments about procurement will enable them to define the actual need more accurately and will be monitored by their employees in the field of procurement. It will also allow the relevant ministry to monitor the performance of its branches, as well as allow competitors to resort to the main authority to file grievances or challenge the decisions of its employees in the sub-departments. This may lead to a failure to follow real weighting standards and balances when preparing the terms of the tender (Othman, 2015). Furthermore, the lack of financial resources for companies, including their assets or failure to declare them, may lead to the inability of the state to obtain its rights when these companies violate their contractual obligations due to the lack of resources, the seizure of which is kept as guarantees when not implemented. Noting that the Iraqi Ministry of Planning prepared a set of criteria to weigh the selection of the best offer by calculating the applicants points. These standards include a financial aspect related to price and a technical aspect related to specifications, duration, similar work, origin, and financial efficiency of the company (Ahmed, 2002). Although these criteria represent a sound basis for choosing the best appropriate bid, the practical application indicates that it is one of the most vulnerable methods of manipulation and a way to find the legitimacy required to choose the inappropriate competitor and make it more worthy to win. The purpose is to exercise some form of extortion on the party to be contracted with, or vice versa, as a means of achieving greater gains for the contractor at the expense of management. The contracts delay may lead to a decrease in the prices of the contracted materials, especially those related materials and

the demand for them on certain seasons or dates. All of this in exchange for the illegal personal benefits of the contracting officer. The defect may be the acceptance of letters of guarantee from private banks that have not been fulfilled and have many problems, including what is under guardianship (Jason, 2005).

### ***A Weakness or a Defect in Writing the Contract Form***

Serious legal errors in drafting purchases, some of which may be deliberate at times, which leads to wasting large public funds. An example of what is stipulated in paragraph (16) of the regulations relates to the regulation of the mechanism for the payment of benefits. This is attached to the regulations for the implementation of public procurement issued by the Ministry of Planning. For example, the second clause stipulates that the financial dues will be disbursed according to the terms of the agreed contract, which must comply with the regulations to implement public purchases and their controls (Othman, 2015). It is also noted that it prompts banks to release documentary credit receivables as soon as the goods arrive at the port or before approval in compliance with the specifications. Furthermore, there are many other examples, including what have been raised about some purchases (for example, the Ministry of Electricity), after which problems appear to be inconsistent or related to the duration of implementation. This can occur when preparing contractual terms that differ from the terms of the tender or the invitation announced or addressed to companies. This can be due to a lack of mastery of methods of resolving disputes (Maher, 1996). The failure to put in place a specific and detailed mechanism for resolving disputes is evident before and after the end of the contract period, when a company is late to pay the dues or other reasons. Of course, this causes prolonged conflicts to obtain rights. This can be caused by intentionally signing procurement outside Iraq and not signing them in Iraq. This leads to companies not paying tax rates inside Iraq and thus encouraging them to obtain commercial investment without having to register them inside Iraq (Georgy, 2003). Signing the contract outside Iraq may be aimed at not subjecting it to the Iraqi Income Tax Law No. 113 of 1982 as amended, the first article of which stipulates several cases for the person to be considered a resident. One of these cases is the imposition of the income tax on every legal person established under Iraqi or other laws, whose work, administration, or control is in Iraq. Usually, companies claim that they have no branch in Iraq and that their work is outside Iraq and not inside it. (Ali, 2008). The signing of these annexes requires an amendment of the terms of accreditation, and this leads to a suspension of execution for a long period, starting with the submission of the request for change or amendment, until the purpose of amending the credits and informing the supplied companies. Contracting parties are satisfied with continuing to impose late fines and continue to accept the materials, given that their need remains. Upon total processing outside the contractual period, the contracting authorities release the amount of a well-executed guarantee without confiscating it or deducting certain amounts by the amount of delay (Ahmed, 2002). This can lead to a failure to retrieve documentary credit

funds from private banks after the end of these credits without implementing their terms. Keeping the credits in banks means that banks continue to benefit from the funds deposited in them in agreement with some of the agencies responsible for the contracting process, contrary to law. Exploiting administrative obstacles to collecting bribes or obtaining gifts and money from companies, since the presence of some of the routine procedures imposed by law or imposed by the regulations may themselves be how entry to job corruption is carried out. (Mahmoud, 1998).

### ***The Crimes of Corruption in Public Procurement***

#### **The crime of benefiting from contracting and public works:**

The text for this crime is mentioned in Article 319 of the Iraqi Penal Code, which stipulates a prison sentence of no more than ten years of imprisonment for every employee or public servant who has obtained a direct or mediated benefit from works or contracting or undertakings that have a stake in preparing, transmitting, implementing or supervising them, (Jensen, 2011). The culprit shall be punished with the same penalty if he obtains a commission for himself or others on advanced matters.

#### **The crime of disturbing the freedom and safety of tenders:**

According to Article 336 of the Iraqi Penal Code, imprisonment and a fine or one of these two penalties shall be imposed on any employee or charged with a public service breach of fraud or by any other unlawful method freely or the safety of auctions and tenders related to the public or institutions and companies that contribute to the public in money by share or by official or semi-official departments (Ismail, 2012). The same penalty shall be inflicted on the one who commits the act stipulated in the preceding paragraph and decides to return the loss that resulted from the actions stipulated in this article (Othman, 2015).

#### **The crime of harming public money to obtain a benefit:**

Article 318 of the Penal Code punishes every employee or person charged with a public service charged with preserving the interests of the institution in which he works in a deal or case, harms in bad faith, or causes harm to this interest to obtain a benefit for him or others.

#### **The crime of harming public and private interests and funds:**

Iraqi law punishes this crime in Article 340 of the Penal Code, which stipulates a prison sentence of no more than seven years of imprisonment for every employee or official charged with a public service that intentionally harms the money or interests of the institution that works in it or related to it functionally or with the money entrusted to it.

**The crime of harming public money for gross negligence:**

The crime of wilful violation of the implementation of all or some of the contractual obligations: the text of this crime is mentioned in Article 174, the first paragraph that punishes imprisonment for a period not exceeding ten years (Ali, 2008). This applies to whomever deliberately breaches this article during wartime or the time of actual military movements by implementing all or some of the obligations that are prescribed under a contract for contracting, transporting, providing, committing, or public works that has been associated with the public or one of the public institutions of public interest for the needs of the armed forces or the basic needs of civilians (Mahmoud, 1998).

**The crime of fraud in the implementation of public procurement:**

This crime was mentioned in Article 174, the second paragraph of the Penal Code, which punishes by temporary imprisonment whoever deliberately committed this crime in a time of war or cheated in the implementation of one of the procurements mentioned in the previous paragraph. If the crimes of intentional breach and fraud occurred with the intent to harm the defence of the country or the operations of the armed forces, the penalty is death as stated in the third paragraph of this article (Ismail, 2012).

**Conclusion**

This research dealt with a complex topic, which is corruption in administrative procurement concluded by public agencies in Iraq. It was revealed that this country has spent billions of dollars during the past years, but it is still on the list of the twenty most corrupt countries in the world. Perhaps the most corrupt and depleting subject of public funds is procurement concluded by public departments through various contracting methods. Although legislations and legal controls are regulating the contracting process, these legislations are scattered and distributed in multiple places, and they are tainted by many gaps, which has complicated the problem of corruption. Additionally, the failure of departments to select the employees who are efficient and fair to manage the contract file. The inaccuracy in preparing the tender or procurement requirements before advertising, such as economic feasibility studies and estimated costs, the lack of appropriate timelines for the advertising and the lack of clear priorities for procurement operations have led to the failure of many public contracting operations and their failure to achieve their goals. It seems clear that there is no objective database that provides the required information in terms of quality of materials, services, good origins, and prices that enable management to make the appropriate decision regarding choosing the best and most appropriate offer. The weakening of the supervisory authorities in charge of assisting the administration in conducting efficient, difficult, and complicated contracting procedures is also one of the reasons for the spread of corruption in Iraq. Therefore, it became necessary to find clear strategies to regulate public procurement based on reconsideration to change existing methods. Instead of random individual decisions, many



of whom are accused of complicity and corruption, to modern methods of contracting based on setting priorities according to the actual need and available financial allocations and within specific plans. As well as the necessity to work with electronic contracting programs that lead to the cancellation of direct communication between the contracting employee and bidders. The process of studying these bids, analysing them and taking the appropriate decision must be without knowing the bidder. It is important to seek the assistance of competent experts who are competent and fair in this regard, to achieve equality, fair competition, transparency, and impartiality. Noting that these programs are available and require only a public decision to adopt them and a political decision to start real reform and fight corruption seriously.

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