

CONFLICT RESOLUTION PRACTICE IN PUBLIC PROCUREMENT: AN EMPIRICAL STUDY

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Public procurement today is a vital component of developed and developing economies, accounting for an average 15-20% of GDP in costs (Thai, 2001; Lewis and Bajari, 2011; OECD, 2015), and in some developing countries such as Angola and Eritrea, reaching 26% and 33% (Djankov et al., 2016). OECD countries spend about 13% of their GDP on public procurement, which on average makes up 29% of their total public expenditure (OECD, 2015). According to the Unified Information System, the total value of procurement made in Russia in 2018, including procurement by particular types of legal entities, amounted to 24.5 billion rubles (24% of the GDP in current prices).

The issue of public procurement efficiency is becoming an important reform priority in many countries, especially where there is a restricted budget. At the same time, similar to other state regulation tools, the extended use of public procurement creates conditions for manifestations of all sorts of unfair practices by the participants and leads to conflicts between them. Thus, a negative tendency towards the growth in the number of conflicts in public procurement has been registered in Russia during recent years. Official statistics of the Justice Department show that the number of public procurement-related conflicts has more than doubled during the last several years – from 8,000 in 2015 to 18,000 in 2018.

Conflicts between participants in public procurement can arise at the stage of preparation, bid evaluation, contract award, or in the post-contracting period. Complaints filed to the Russian Antimonopoly Service, seek to eliminate violations in the process of selecting suppliers or drawing up initial procurement documents (selection criteria, technical documentation, etc.). If a conflict breaks out after the conclusion of a contract, the suppliers can apply to the court (Art. 105 of the Law on the Contract System № 44-FZ) or resolve the conflict without going to court using the mechanism of negotiations with the customers.

Previous studies revealed that Russian companies do not refuse the possibility of going to court but prefer out-of-court conflict resolution methods (Hendley, Murrell and Ryterman, 2000; Dolgopyatova et al., 2004; Yakovlev, 2008). However, although there are studies identifying conflict and dispute resolution practices in contractual relations in various industrial sectors (see, e.g., Bigsten et al, 2000; Chong and Mohamad Zin, 2012; Lee et al., 2016), we could not find any research on conflict resolution practices in public procurement or empirical proof of any relation between the types of suppliers' behavior patterns and their behavior strategies in conflict situations.

A specific feature of public procurement is that one of the parties involved in the contractual relations is the state (Clause 8 Art. 3 of the Law on the Contract System), with a different set of vested rights and obligations. Previous studies have highlighted considerable differences in the estimates of the chances of having one's rights protected in court if the respondent is a public authority rather than a private organization (Frye, 2002; Dolgopyatova et al., 2004), which casts a long shadow on the efficiency of the judicial conflict resolution mechanism. From the perspective of the institutional theory, the absence of efficient conflict resolution mechanisms leads to insufficient protection of ownership rights (Tambovtsev, 2006), and therefore, is capable of reducing motivation for participation in public procurement.

At the same time, conflict resolution costs arising in the process of fulfilling contractual obligations relate to transaction costs accompanying the "post-

contract” stage of a transaction, or the so-called ex post costs (Williamson, 1985). Such post-contract transaction costs arising from disputes and litigation can be quite high (Volchik, Nechaev, 2015; Li, Arditi and Wang, 2015), which leads to the need to find an effective method of conflict resolution.

This paper is focused on conflict resolution strategies in public procurement in the post-contracting period when the parties can both apply to the court or resolve the conflict through negotiations. We based our study on the findings of a large-scale survey of suppliers conducted in 2017. We asked the respondents to assess how many times per year, on average, their companies had to apply to the court and conduct negotiations with customers after the conclusion of a contract in 2014-2015. To characterize the identified conflict resolution strategies, we additionally used respondents’ answers to questions about various problematic situations, and practices of informal relations. To identify different types of suppliers we used the typology based on the explanations of the practice of the predetermined choice of suppliers described by Yakovlev, Tkachenko and Rodionova (2019).

Building upon the available literature, we presume the following:

Hypothesis 1: in public procurement suppliers will prefer negotiation approaches to conflict resolution rather than litigation.

Hypothesis 2: suppliers strongly involved in informal relations with customers would use judicial conflict resolution approaches to protect their rights much more seldom because of already established informal relations

We suppose that previously developed informal relations lead to fewer conflicts after the conclusion of a contract or to less disclosure in the public space. Involvement in informal practices deprives the parties of the grounds for applying to the court as a formal institution, and the detection of unlawful conduct entitles the authorities to press official charges for the violation of effective regulations against the claimants themselves.

The survey results showed that the majority of suppliers prefer to resolve conflicts in public procurement using an out-of-court negotiation with customers,

while only 31% of respondents resort to judicial proceedings. In addition, 37% of respondents prefer resolving public procurement conflicts exclusively by negotiations, and just 4% use only the judicial system. Approximately one-third of the respondents abide by the “conflict-free” strategy, and a slightly lower number of suppliers (27%) use a hybrid strategy that includes both methods of conflict resolution in public procurement.

Thus, the suppliers' clear preference for out-of-court conflict resolution means that it is necessary to create a regulatory and organizational framework for the use of negotiations, mediation, arbitration (or arbitration) as alternative ways to resolve conflicts in public procurement. This conclusion is consistent with the advantages of these alternative procedures described in previous studies in relation to a more formalized and costly public trial. In particular, we believe that the first step could be to consolidate in public procurement the legal justification for the possibility of using alternative methods of pre-trial conflict resolution strategies.

We also revealed that the conflict resolution strategy in public procurement depends on their type of supplier behavior. The results of the empirical analysis showed that suppliers strongly involved in public procurement, with stable informal relations with customers, are less likely to go to court and less often use negotiations to resolve conflicts in public procurement. From our viewpoint, this can be explained by the fact that such suppliers have less cause for conflict and even less reason for its public disclosure. The existence of sustainable informal practices deprives their participants of formal grounds for applying to the court, and the detection of malpractices can result in formal charges being brought against them for a violation of effective regulations.

A lack of empirical studies of conflict resolution strategies is a problem facing most transitional economies, including Russia. Therefore, understanding the strategies of regulating conflicts in the specific sphere of public procurement, where the state is one of the parties to contractual relations in a poor institutional environment, can be useful for improving the measures of raising efficiency within public procurement systems in other developing countries.