

**QUESTIONNAIRE
ABOUT THE PROVISIONS OF THE INTER-AMERICAN CONVENTION
AGAINST CORRUPTION SELECTED DURING THE SECOND ROUND¹**

Summary²

01. Systems for hiring public officials.

In Brazil, hiring public officials requires the observation of several principles established in the 1988 Federal Constitution: the principles of legality, impersonality, morality, publicity and efficiency. For the admission in the Brazilian public administration careers, composed of public positions and jobs, the rule is to take a civil service examination by means of tests or tests and titles, according to the nature and the complexity of the position or job, according to the provisions of law.

Brazilian public administration personnel structure also depends on provisional positions, which are filled by at-will appointments and discharges. Such positions are destined to people who the authorities trust, to exercise powers of management, leadership and advisement, and they are filled transiently. Thus, an individual formal installation in such positions does not require having previously taken a civil service examination, since it occurs by the initiative of the competent authority to fill them, who may also freely exonerate their holders.

In 2007, 11,939 employees were admitted in Brazilian federal public service by means of a civil service examination and 12,523 by means of a temporary hiring system.

¹ This paper was developed in a partnership with the NGO Movimento Voto Consciente (<http://www.votoconsciente.org.br/index.php>). Staff: General Coordination: Dr. Rita de Cássia Biason; Movimento Voto Consciente Surveyor: Ms. Sérgio Praça; Law Consultants: Dr. Fernando Menezes and Ms. Carolina Motta.

² All of the recommendations described in this report are suggestions from the civil society. The law consultants and the interviewed individuals were not involved in these orientations. Movimento Voto Consciente, as the civil society representative, is liable for such orientations.

There were 75,987 hirings of positions and roles of trust and gratuities from federal public power, from which 20,187 are DAS positions (Higher Administration and Advisement), comprising board level positions and ordinary management positions, and including Presidency of the Republic advisors, Ministry Secretaries and direct administration executive officers. The main problem, pointed out by prosecuting attorneys, judges and experts, concerns misapplications when hiring public officials seen in the recent years.

Brazilian legislation covers roles of trust and provisional positions. Provisional positions should only be admissible for public policy executors – for example, state secretaries, ministers etc. – responsible for implementing the governmental policy laid down by the Head of the Executive. The 1988 Federal Constitution determined that such roles of trust must only be granted to people who pass a civil service examination. However, public administrators do not use the nomenclature “role of trust” anymore. Instead, they use “provisional positions”, in order to get more autonomy when hiring employees. This kind of hiring starts to be a strategy in use.

The difficulty observed when using the provisional positions is that the 1988 Federal Constitution did not establish the percentage of positions that can be filled without an examination. The hired employees to fill the provisional positions, without an examination, can be dismissed at any time and their labor rights are poor. Besides, the provisional positions are usually filled by criteria exclusively related to parties/politics. A report from the National Coordinating Committee for the Fight against Labor Irregularities in Public Administration, from Public Ministry of Labor, connected to Public Ministry of the Union, relating to the 2003-2007 period, shows that there are 170 administrative procedures ongoing concerning provisional positions misapplications, affecting 8,156 public officials. It is something that negatively affects transparency, equity and efficiency when hiring public officials.

Two legislative changes are recommended on this subject: 1) regulation for hiring public officials for the Union in a single legal system, so as to eliminate temporary positions and outsourcing; 2) creation of a complementary law regulating a low percentage of provisional positions.

2. Systems for procuring assets and services on the part of the State.

In Brazil, the procurement of assets and services by the State shall comply with an administrative procedure that assures equality among the competitors, and also allows for the selection of the more favorable tender for the public administration. It is the bidding process, set forth in article 37, XXI, of 1988 Federal Constitution. Federal Law no. 8,666, from June 21st 1993, corresponds to the most important legal milestone as relates bids and administrative contracts.

As well as appraising equality between competitors and the choice of the best tender for the administration, the bidding procedure established by Law No. 8,666 has legally consolidated the duty of strictly complying with the provisions indicated in the bidding invitation, the conduction of an objective judgment, the compulsory adjudication and legal defense. Besides that, the bidding procedures stages were formalized, involving essentially the bidders' qualification and the choice analysis as for the tenders submitted by those interested in working with the public power. These guidelines result from the required compliance with certain principles that lead administrative activities in Brazil, which are legality, impersonality, publicity and morality.

After the law was issued in 1993, however, the need of incorporating changes to the bidding procedure was verified. If, on the one hand, the bidding law represented the uniformization of procedures and more transparence in the expenses incurred with public resources, on the other hand, it started to be an impediment for the efficient state performance, by plastering governmental hirings. This was because all kinds of hiring were submitted to the same legal system, and the existence of situations requiring a special legal approach was disregarded. In this sense, material procurements and highly specialized service hirings started to be ruled by equivalent procedures and to be formalized by means of standardized agreements, which has not been always advantageous for Brazilian public administration.

As for the procurement of assets and services for the State, corruption practices may take place either by means of the public agent who, taking advantage of his/her position, offers advantages in exchange for the payment of briberies, or by the administrator, who may get kickbacks in exchange for choosing the winner. In the recent years in Brazil, we identified the three main modalities of corruption in bids and contracts: a) previous

agreement among participants; b) overpricing; c) autonomy of the Executive power to define subjective specifications in the bidding processes.

There are seven recommendations of changes: a) To avoid the market closing in the bidding processes, by introducing a logic similar to the electronic bid, in which the participants make offers; b) To avoid additive budget amendments that assign more resources for an already ongoing project and usually are indicative of unlawful acts; c) Standardize rules and good practices for all of the administrative areas, so as to assure effectiveness and transparency in the bidding processes; d) Develop mechanisms to encourage the proper execution bidding contracts; e) To give priority to the parties contracted which got good rates in the contract execution, by means of an unified record of information about bidders; f) To create functional incentives for good public managers, such as: promotions and salary bonus; g) To prepare a material catalogue with products specifications, in order to prevent embezzlements in the stage of asset purchase and procurement.

03. Denunciation mechanisms against corruption acts and for the protection of public officials and citizens

In Brazil, the rules that regulate the submission of denunciations against corruption acts are scattered in the legislation. This means that the reporting of corruption acts by public officials and citizens is not consistently approached by the Brazilian legal system. But there are several denunciation mechanisms, and also bodies and entities able to receive them.

Federal Constitution has devices destined to assure the reporting of acts performed by authorities or officials, such as article 58, §2nd, IV, that assures the right to submit petitions, complaints, representations or charges against acts or omissions of authorities or public entities to National Congress committees, and article 74, §2nd, which grants every citizen the right to denunciate dishonest or unlawful acts to the Audit Court. Denunciations may also be sent to the Public Ministry, against a citizen petition.

Some laws attribute to public officials the duty to make known any unlawful act, omission or misuse of authority within the scope of the public administration. However, there are no express indications of protection for those who effectively provide such

information or make these charges, except in the cases of denunciations related to inquiries and criminal procedures already ongoing.

In Brazil, we strongly depend on denunciations of members of corruption groups, something facilitated in the bids – since not every collusion can include all of the participants possible – and quite embarrassed in the typical acts of corruption (active and passive corruption, peculation, graft etc.). The program that currently is liable the protection of constrained or threatened citizens, by cooperating in police investigations or criminal procedures is Provita. This program was created in 1999 and it is a partnership between the State and the Civil Society. It provides social, psychological and legal assistance, as well as jobs scholarships and professional training courses. Provita acts in 17 states and in the Federal District. In 2007, in São Paulo, 247 people were served in 73 cases. In 10 years of operation, from December 1999 to February 2007, Provita has assisted 593 cases, adding up 1,180 people.

There are four recommendations: a) extending plea bargaining resource for all defendants and witnesses criminally involved in corruption acts; b) extending the benefit of having personal information like name and address changed, for corruption acts victims at high threat risk; c) federal law to make the victims and witnesses protection program compulsory for all Brazilian states; d) create legal provisions so that the protection program is a state program instead of a government program, unlike what occurs today, thus creating and providing stability and financial resources for the program.

4. Criminal classification of corruption acts in Brazilian legal system.

In Brazil, corruption acts are considered crimes by Article VI of the Inter-American Convention against Corruption correspond to the conducts defined in the Brazilian legislation as crimes, administrative impropriety acts and ethical nature infractions. Generally, every corruption act defined as a crime in the Article VI of the mentioned Convention is considered a crime against the public administration performed by a public official, as indicated in Title XI of Brazilian Penal Code. For these crimes, the penalties are imprisonment, detention and fine, according to the act committed.

The article 317 of Brazilian Penal Code considers as a passive corruption crime the act of “requesting or receiving, for oneself or for a third party, directly or indirectly, even if

not in one's role or before it is taken over, but due to such role, undue advantage, or the acceptance of promise of such an advantage". The penalty for this crime is imprisonment for 2 to 12 years, and fine. The Penal Code considers as an official misconduct crime defined by article 316 the act of "demanding, for oneself or for a third party, directly or indirectly, even if not in one's role or before it is taken over, but due to such role, undue advantage".

As provided by article 1st, V, of the Federal Law No. 9,613, from March 3rd 1998, about crimes of "laundering" or concealment of assets, rights, and valuables, it is a crime "to conceal or disguise the true nature, origin, location, disposition, movement, or ownership of assets, rights and valuables that result directly or indirectly from a crime against the public administration, including direct or indirect demands of benefits on behalf of oneself or third parties, as a condition or price for the performance or the omission of any administrative acts".

Brazil has two main legal mechanisms for controlling corruption acts: Administrative Impropriety Act (LIA) and the Penal Code. In the event of administrative condemnations, by LIA, evidences are usually more obvious and legally efficient. In the second case, the Penal Code, there is some vulnerability that difficult condemnation. For the criminal condemnation, it is up to the prosecuting attorney to prove that the accused act in a corrupt way. However, as it is known, corrupt acts testaments are hard to obtain – they are crimes that leave no evidences. The prosecutor looks for evidences, requests the breach of bank and telephone secrecy and other devices that help to get to effective evidences about the involvement of the accused in corruption acts. As for LIA enforcement, from the perspective of evidence valuation, the same strictness is not required. The criminal intent required for the condemnation for the condemnation of crime of official misconduct, prevarication, and passive corruption, is not required.

Another important point is that in the Penal Code, the liability is subjective: the criminal intent, that is, the intention materialized in concrete evidence, is required. In LIA, the liability is strict, which means that the burden of proof is shifted. For example, if a public official or politician displays enrichment inconsistent with his/her earnings, it is up to him/her to demonstrate the licit origin of such enrichment. Surveillance becomes more efficient, since it takes less time and resources from the controllers.

It is recommended: a) no more special venue for employees and politicians of the first and second ranks in the federal public administration, enabling the enforcement of the administrative impropriety act for all holders of public positions; b) extension of the use of virtual process and permission to electronically file summons actions and use of the digital certification device, in corruption acts processes; c) promote the integration and the approximation between the police and the Public Ministry, so as to facilitate the investigation of corruption acts; d) establish qualitative criteria to prioritize the investigation of corruption acts the most expensive and most harmful for society; e) addition of a legal provision permitting the forfeiture of assets and properties deriving from unjust enrichment and corruption acts.