

Law in transition *online*

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Strengthening public procurement

Foreword

EBRD 2010 public procurement assessment: review of remedies systems in transition countries

Sound procurement - making it happen

The reform of public procurement practices in an era of fiscal restraint

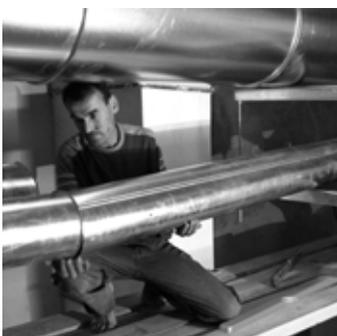
The WTO Agreement on Government Procurement: an emerging tool of global integration and good governance

Reform of the UNCITRAL Model Law on procurement

Procurement in the utilities sector

Modernising public procurement and creating an independent public procurement regulatory authority

eProcurement in a transition country: a big step towards transparency in Albania



European Bank
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In the aftermath of the global financial crisis, transition countries have placed budgetary matters high on their agendas. Reforming and upgrading legal frameworks for public procurement is a priority for many of them, as such reforms will promote transparency and efficiency in public spending. The EBRD is at the forefront of assisting transition countries in this process. This issue of *Law in transition online* provides an overview of the major topical issues regarding public procurement legal reform and best practice developments.

Chapters

- EBRD 2010 public procurement assessment: review of remedies systems in transition countries
- Sound procurement - making it happen
- The reform of public procurement practices in an era of fiscal restraint
- The WTO Agreement on Government Procurement: an emerging tool of global integration and good governance
- Reform of the UNCITRAL Model Law on procurement
- Procurement in the utilities sector
- Modernising public procurement and creating an independent public procurement regulatory authority
- eProcurement in a transition country: a big step towards transparency in Albania

Foreword

Boosting competition in public procurement

Following difficult times for the public sectors of transition countries and fiscal restraints, the reform and upgrade of the public procurement legal frameworks is back on the agenda. It is very encouraging to see that the EBRD is at the forefront of assisting them in this process.

Public procurement represents a major economic activity for all governments. The related regulation heavily influences public spending; as such, it is a sensitive component of public law and an essential supplement to public finance legislation. Outdated public procurement law can be a drain on limited public funds and can undermine fiscal reform efforts.

The public procurement framework regulates the interaction between public sector clients and the market; thus determining how governments' purchasing power is exercised and how much competition exists for public contracts. This framework has a direct bearing on the quality of goods and services provided under public contracts, as well as the value for money.

A key element is to balance the often competing considerations of competition, transparency and efficiency, and to do this in a manner which is adapted to local market conditions and the legal and business culture. Procurement best practice calls for removing elements which reduce the efficiency and economy of the public procurement process. However, we argue that anti-corruption safeguards should still be considered a critical public procurement regulatory factor, particularly in countries where the local business culture lacks integrity.

UNCITRAL has a long history of developing model laws in various areas, including procurement. In 1994 it adopted the UNCITRAL Model Law on Procurement of Goods, Construction and Services. The Model Law provides a template for national governments seeking to establish or reform public procurement legislation. In 2004 UNCITRAL's

Working Group I – Procurement was given the task to update the Model Law to reflect new procurement practices, in particular regarding electronic procurement (e-procurement) and related aspects of electronic commerce. Its work also draws on the experience gained in the use of the Model Law as a basis for public procurement legal reform.

In what we consider to be a very positive development, the EBRD has joined the UNCITRAL Working Group I – Procurement as an observer and thus contributes to developing the new primary public procurement standard for legal reform. Cooperation between the two organisations is long-standing, including mutual participation in many conferences and seminars. I am optimistic about similar opportunities in the future, particularly when the revised Model Law on Procurement of Goods, Construction and Services is adopted. As several countries in the EBRD region have enacted public procurement legislation based on the 1994 UNCITRAL Model Law, the technical cooperation potential for upgrading public procurement regulation is immense.

The current issue of *Law in transition* provides a useful overview of many topical issues regarding public procurement legal reform and best practice developments. Readers will learn from the contributions of recognised specialists in the growing community of international public procurement expertise. It is hoped that this issue of the EBRD legal journal will promote a greater understanding of public procurement policy issues and spark ideas for new projects.

Law in transition is being published at a time when the EBRD is conducting its first assessment of the public procurement sector in the region and, as mentioned above, when UNCITRAL is about to adopt a revised Model Law. I trust that these developments, together with the following articles on modern public procurement policies, will provide an impetus for governments' plans to upgrade their legislative framework.



Renaud Sorieul
Secretary
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EBRD 2010 public procurement assessment: review of remedies systems in transition countries

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In 2010 the EBRD is conducting its first assessment of the public procurement (PP) sector in its countries of operations. This article presents the initial findings of the assessment component reviewing “law on the books” and “law in practice” with respect to national public procurement remedies procedures.

Introduction

The EBRD’s PP sector assessment covers the full spectrum of PP regulation in all 29 of the Bank’s countries of operations. This article summarises the initial findings from a review of remedies procedures available under national PP legislation.

In PP regulation the concept of “remedies procedures” refers to legal measures which can rectify the alleged defects or irregularities in a PP process while it is still under way. Remedies procedures are important because they enable a procurement process to run its proper course, while simultaneously allowing disputed points to be addressed. Such procedures would include, for example, an order from a court or tribunal removing an unfair tender requirement, thereby allowing an aggrieved tenderer to participate in the tender under fair conditions.

Remedies procedures are to be contrasted with compensation (generally not covered by this article) which might be awarded to an aggrieved tenderer once the tender process has finished. Compensation awarded in such cases does not correct defects in the public procurement procedure: it compensates a tenderer for having been adversely affected by such defects.

Thus, remedies procedures are concerned with maintaining the integrity of the PP system in

the context of an ongoing tendering process, whereas compensation acknowledges mistakes that have occurred and offers financial redress, ex post facto, to the tenderer.

Remedies procedures are still a relatively new concept. Historically, governments only offered compensation as a means of resolving PP disputes. This typically involved an aggrieved party filing a compensation claim in the civil courts.

Today, remedies procedures are emerging as an important PP regulatory standard. However, governments face the challenge of deciding when and how remedies procedures should be available. Remedies come at a “cost”. They slow down the procurement process. A balance must be struck between fair remedies on the one hand, and the efficiencies of allowing the PP process to proceed expeditiously to its conclusion, on the other. This tension between fairness and efficiency pervades public policy in the PP area. In this context, compensation remains an important way to respond to those cases where remedial action is not considered feasible. For example, should a lengthy procurement process be undone because of a possible minor infraction? On the other hand, compensation accepts and leaves undisturbed the irregularities which have occurred in the PP process, and offers (public) money as financial redress.

1. Special thanks to Ozlem Barut, Natasha Naaimi, Begaim Nanaeva and Sarah Wilson for their efforts on data collection and processing, and to Alan Colman for his advice and input on this article.

As part of the EBRD's assessment, we have examined how this balance between remedies and the compensation approach is achieved in the EBRD countries of operations.

The assessment studied both PP laws "on the books" and how the law is applied in practice. The project team involved EBRD staff and 14 local law firms providing legal advice to tenderers across the region.

Discussed here are some preliminary findings on national PP remedies regulation in the EBRD region. There are three sections: a discussion of the methodology; an analysis of the PP remedies bodies structure and procedures provided for by national PP laws; and a review of the efficiency of national remedies systems assessed by local practitioners.

Section 1: Assessment methodology

Review of PP legislation on remedies procedures

The first task of the assessment was to establish the relevant benchmark for PP remedies.

There are several international legal instruments in this area. The assessment drew on principles from these and established its own standard,² in line with the EBRD Core Principles for an Efficient Public Procurement Framework. The detailed benchmark indicators were adopted from all major international legal instruments, including those which are already in force and some which have the status of "accepted drafts".³

In creating the benchmark indicators, a "legal efficiency concept" was employed. Developed originally for a separate EBRD commercial law assessment⁴ the concept of legal efficiency is "the extent to which a law and the way it is used fulfils the purpose for which it was designed and provides the benefits that it was intended to achieve".

Legal efficiency is analysed by looking at the degree to which the particular legal framework enables the stakeholders: (a) to achieve the basic function of the regulation in question; and (b) to operate in a way which maximises economic benefit.

Adopting this general framework for analysis, separate benchmark indicators were established for basic function and for efficiency (economic benefit).

(a) Basic function: indicators of a sound remedies legal framework

The assessment proceeded on the basis that an effective PP remedies legal framework should exhibit certain basic features, both in terms of remedies bodies' structure and procedures, regardless of the fundamental policy question of how to balance issues of integrity and efficiency in the PP process. "Basic function" indicators were developed as a benchmark for this purpose (see Box 1).

These basic function indicators provide a stable framework within which governments can design remedies procedures to balance policy issues such as protection of public finance and the right of tenderers to seek effective remedy – having defects in the process put right so that the best tenderer can still win the public contract.

Box 1: Basic function indicators for a sound public procurement remedies legal framework

Basic features of the public procurement remedies function, as adopted by the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services:

- ◆ right of the tenderer to seek a review
- ◆ right of the tenderer to seek remedial action as opposed to monetary compensation
- ◆ a dedicated remedies system
- ◆ an independent body, authorised to sanction remedial action
- ◆ access to judicial review
- ◆ where remedies procedures are not feasible, the right of the tenderer to seek compensation
- ◆ access to alternative dispute resolution.

2. EBRD Core Principles on an Efficient Public Procurement Framework can be accessed at www.ebrd.com/pages/sector/legal/procurement/core_principles.shtml

3. 2004-2007 EU PP Legislative Package, revised 2010 UNCITRAL PP Model Law, and revised 2007 WTO GPA

4. F. Dahan and J. Simpson (2008) "Legal efficiency of secured transactions reform: bridging the gap between economic analysis and legal reasoning," in F. Dahan and J. Simpson (eds), *Secured Transactions Reform and Access to Credit*, pp. 122-140. Edward Elgar Publishing, Cheltenham, UK.

The power of parties within the PP process is inherently unequal. The remedies procedures must be capable of balancing the competing interests of public clients and private contractors, so that the process itself is seen to be fair.

(b) Efficiency: indicators of efficient remedies procedures

If the PP legal framework is to operate in a way which maximises economic benefit, the system for reviewing the public procurement process should be efficient: reliable for all stakeholders, as well as simple, fast and reasonably inexpensive. In addition, there should be certainty as to what the law is and how it is applied. The law should function in a manner which fits both the purchase specifics and the local context.

Accordingly, five efficiency indicators were established as the benchmark for an effective remedies procedure: simplicity, speed, cost, certainty and “fit to context” (see Box 2). The certainty indicator comprised three sub-indicators, namely consistency or predictability, impartiality and resistance to corruption.

Assessing the indicators

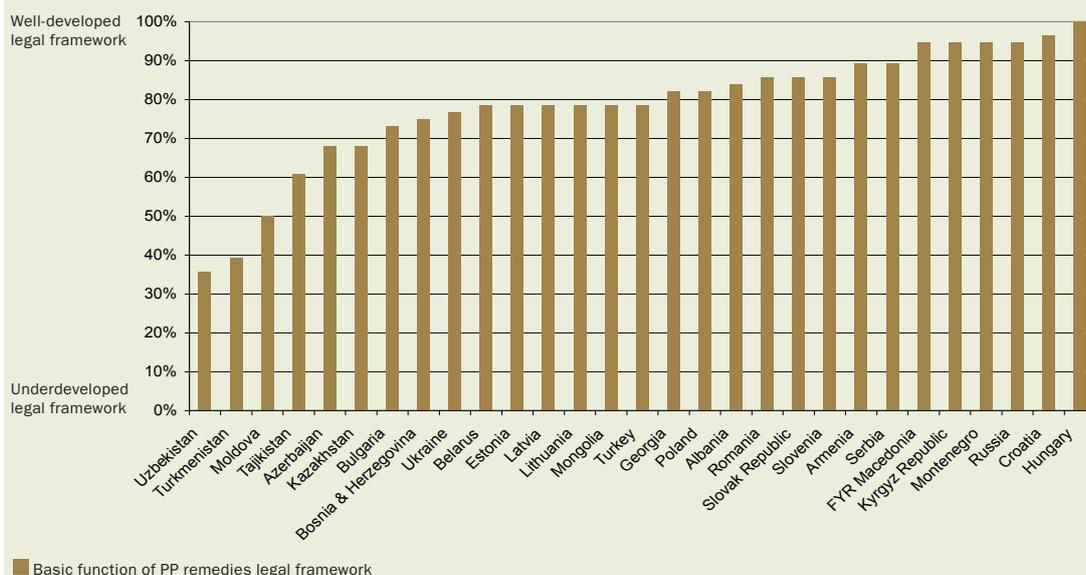
Two principal steps were followed to assess the PP remedies regulation, both in terms of basic function and the efficiency indicators.

The first was to review the PP remedies laws “on the books” to establish the extent to which it accorded with or was conducive to the above indicators.

The second was to review the PP remedies practice. A law firm in each country answered the questionnaire on PP remedies system available in their country. The questionnaire was accompanied by a case study which tested how the answers to the questionnaire would work in practice.

Opinions on the practice in the country among legal advisers can vary. Accordingly, a litmus test was employed, whereby different firms were asked to complete the questionnaire in relation to one country. The test proved positive, as the responses received were very similar in their assessments.

Chart 1:
Robustness of legislation on public procurement remedies in transition countries



Notes: The chart shows the score on basic function features of the PP remedies legislation for each country in the region. The score has been calculated on the basis of a checklist of questions regarding remedies procedures. Total scores are presented as a percentage, with 100 per cent representing optimum quality of basic functional features of the national PP remedies legal framework.

Source: EBRD Public Procurement Assessment 2010.

Box 2: Efficiency indicators for public procurement remedies legal framework

- **Simplicity** – This indicator is achieved when a reasonable balance has been struck between the user-friendly approach and the sophistication required by the local legal and business culture.
- **Speed**– This indicator recognises the costs involved in delay. For most aspects of the legal process, the less time it takes the more efficient it is.

In the PP process there are exceptions: a sufficient tender submission deadline to ensure a level playing field, an appropriate length of a standstill period and so on. However, most elements of the process should be conducted without unnecessary delay, within an original tender validity period.

- **Cost** – This indicator recognises that there are costs on both sides: a public client conducting the PP process and a private contractor participating in this process. Inevitably, higher costs have an adverse impact on the economic benefit of a transaction.

Delay in contracting entity decisions, unnecessary complexity of the technical specification and uncertainty as to the evaluation process all add to the transaction costs. There is a direct relationship with the other aspects of legal efficiency.

Some costs are, at least to some extent, within the control of the parties. The cost of legal advice on a complicated transaction may be outweighed by the benefits, but the cost of legal advice incurred because of defects in the legal framework always reduces efficiency, as do fixed costs (for example registration/participation, notary or court fees).

- **Certainty** – This indicator refers to predictability as a critical element of any sound legal system. Even an element of uncertainty in the legal position can have far-reaching consequences. Transparency can often strengthen certainty: for instance, easy access to information on the former decisions by the PP remedies body, if consistent, allows potential complainants to evaluate the merit of their complaint.

Three key components of this indicator for the PP remedies system are:

- (a) consistency or predictability
- (b) impartiality
- (c) resistance to corruption.

- **Fit-to-context** – The efficiency of the remedies depends on whether the remedies body is well adapted to the economic, social and legal context within which it is to operate.

The remedies body must: (a) achieve particular policy objectives of the PP law (that is, economic, social and environmental); (b) reach an appropriate balance between fulfilling the contract economic purpose and integrity requirements of the public client; (c) respond to purchase characteristics (business case); and (d) respond to the local market situation.

Table 1:
Independence of the public procurement remedies bodies in transition countries

Country	Is the complaint submitted to the contracting authority/entity first?	Is the remedies body independent?	Is an appeal available within the procedure?	Is a judicial review provided for?
Albania	Yes	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Armenia	Yes	No, but an alternative mechanism is provided for.	Yes	Yes
Azerbaijan	Yes	No, but an alternative mechanism is provided for.	Yes	Yes
Belarus	No	No, but an alternative mechanism is provided for.	No	Yes
Bosnia and Herzegovina	Yes	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Bulgaria	Yes	Yes	Yes	Yes
Croatia	Yes	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Estonia	Yes	No, but an alternative mechanism is provided for.	Yes	Yes
FYR Macedonia	Yes	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Georgia	No	Yes	No	Yes
Hungary	Yes	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Kazakhstan	No	The PP legal framework does not provide for recommended features	The PP legal framework does not provide for recommended features	Yes
Kyrgyz Republic	No	No, but an alternative mechanism is provided for.	Yes	Yes
Latvia	No	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Lithuania	Yes	The PP legal framework does not provide for recommended features	Yes	Yes
Moldova	No	No	No	Yes
Mongolia	Yes	No, but an alternative mechanism is provided for.	Yes	Yes
Montenegro	Yes	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Poland	No, but an alternative mechanism is provided for.	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Romania	No, but an alternative mechanism is provided for.	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Russia	No	No, but an alternative mechanism is provided for.	No	Yes
Serbia	No	No, but an alternative mechanism is provided for.	No	Yes
Slovak Republic	Yes	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Slovenia	Yes, but the regulation is lacking certain recommended features	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Tajikistan	Yes	No, but an alternative mechanism is provided for.	Yes	Yes
Turkey	Yes	No, but an alternative mechanism is provided for.	Yes	Yes
Turkmenistan	Yes	The PP legal framework does not provide for recommended features	The PP legal framework does not provide for recommended features	Yes, but the regulation is lacking certain recommended features
Ukraine	Yes	Yes, but the regulation is lacking certain recommended features	Yes	Yes
Uzbekistan	The PP legal framework does not provide for recommended features	The PP legal framework does not provide for recommended features	The PP legal framework does not provide for recommended features	Yes

■ Yes
■ Yes, but the regulation is lacking certain recommended features
■ No, but an alternative mechanism is provided for.
 ■ No
■ The PP legal framework does not provide for recommended features

Notes: The table presents desirable features of PP remedies procedures as provided for by national PP remedies legislation. Marks have been allocated on the basis of a checklist of questions regarding remedies body structure and procedures. The descriptions are graded from what is considered to be the least (marked in orange) to the most satisfactory (marked in green), representing optimum quality.

Source: EBRD Public Procurement Assessment 2010.

Section 2: Analysis of PP remedies bodies and procedures

In this section we review the results of the analysis of the basic function indicators. In essence, this considers to what extent PP remedies legislation exists in the reviewed country.

The review of basic function covered the fundamental structure of the remedies system: whether the tenderer has a right to seek review and remedial action as opposed to monetary compensation; whether the remedies procedures are administrative or judicial; and the other basic function indicators referred to in Box 1 above.

One inference that can be drawn from the results is that the influence of EU PP standards in the region is not as great as might have been expected. Of the 29 countries covered by the assessment, 22 are Member States, official or potential EU candidates, or partners in the EU Neighbourhood Policy. However, PP remedies legislation in those countries that are not EU Member States does not always fully meet EU PP remedies standards, which are very similar to the PP remedies basic function indicators.

All national PP legal frameworks in the EBRD region were also reviewed with respect to the availability of an independent body imposing remedies, in particular.

Table 1 below reflects desirable features of the remedies procedure, and in addition shows whether the procedures are completed at only one level, or, as is recommended by international standards, an appeal to a court is also available.

The research revealed that there is no consistent understanding of the “PP remedies body concept” in the countries reviewed, even among EU Member States in the EBRD region.

The discussion below examines some emerging trends in issues in relation to remedies bodies, remedies procedures and weaknesses in the implementation of the legal framework.

Emerging trends

(i) Remedies bodies

The main types of PP remedies bodies prevailing in the EBRD region are described below. The descriptions are graded from what we consider, in very broad terms, to be the least to the most efficient models.

General administration

General administration is not separated from the PP administration, and is non-judicial in character: it is a PP complaint mechanism provided by the general public administration in the country, or by a dedicated PP regulatory body integrated into the national executive administration. Complaints are resolved arbitrarily by the administrative authority, and no judicial proceedings are available. Countries following this model include Armenia, Azerbaijan, Belarus, Georgia, Kyrgyz Republic, Moldova and Mongolia.

Special administration

Special administration is a dedicated and independent, but non-judicial body: it is a PP complaint mechanism provided by a dedicated remedies authority, integrated into the national executive administration, but independent from the PP regulatory body. The complaints are resolved on a discretionary basis; no judicial proceedings are available. Often, the independence of the complaints authority is understood in terms of its separation from the PP regulatory body and no transparent selection procedure is in place to appoint members of the authority. Countries following this model include Bosnia and Herzegovina, Estonia, Hungary, Latvia, Montenegro and Serbia.

General administrative courts

Administrative courts are independent, have general administrative law jurisdiction, are presided over by professional judges, and have judicial procedures. The court is fully professional and independent in its dealings from both the contracting entity and the PP regulatory body. This model is utilised in countries where public procurement is

recognised as being a strictly administrative matter and commercial issues within PP are considered secondary, for example in Russia.

Civil courts

Civil courts are independent, have general legal jurisdiction, are professional, and employ judicial procedures. PP remedies are provided for by the general civil or commercial courts, independent from both the contracting entity and the PP regulatory body. In addition, commercial courts are fully capable of balancing public and private legal matters within public procurement proceedings. However, it is possible for civil courts to efficiently impose both PP remedies and compensation.

The research revealed that in Lithuania and Georgia, civil courts are specifically conferred with jurisdiction to act as PP review bodies and impose PP remedies. In other countries, civil courts may review the decisions of PP administrative bodies (general or special), and may in some case impose PP remedies, if the judicial proceedings are brought before the completion of the PP process. Countries in this category are Belarus, Kazakhstan, Kyrgyz Republic, Moldova and Serbia. Compensation awarded by the civil court remains the only available solution in Turkmenistan and Uzbekistan.

Specialised PP tribunals

Specialised PP tribunals are dedicated, independent, non-professional and administrative, but with elements of judicial proceedings. PP remedies are provided for by the dedicated remedies body, independent from both the contracting entity and the PP regulatory body, however they may still be integrated into the national administration. Elements of judicial proceedings are employed, such as formal hearings and the submission of evidence. Members of the remedies body are usually appointed for a fixed term, following a transparent selection procedure and cannot be removed except for misconduct. Tribunal members need not be judges or qualified lawyers; however they must possess substantial PP expertise and some legal background. This model is implemented in

Bulgaria, Croatia, FYR Macedonia, Poland and Romania, and to a lesser extent, in Albania.

(ii) Remedies procedures

Countries under the influence of EU PP remedies policy

What emerges as a distinctive feature of EU Member States in the EBRD region is that regardless of which type of remedies body the national PP system embraces, that body deals with PP complaints in the first instance only.

A subsequent appeal to the court – commercial or administrative – is always provided for, unless the original complaint was heard by the court initially. This also applies to potential EU candidate countries, or countries in the region broadly following an EU model such as Albania, Croatia and Moldova.

An important issue in the context of appeals to the court is whether any standstill period lasts only until the decision of the remedies body, or until any appeal from the decision of such body has been heard by a court. Generally, the EU PP policy position is that the standstill period lasts only until the complaint is heard by the remedies body.

Thus, in most of the EU Member States in the EBRD region, when an appeal against a remedies body decision is heard by the court, the court is no longer able to decide on a remedial course of action, as the PP process has already been completed. The only option still available is to decide on suitable monetary compensation for the complainant tenderer, or – according to the new EU remedies directive – to cancel or terminate the PP contract. (In one sense, when a PP contract is cancelled, such action is a PP remedy – the error is rectified. However, the whole procurement process is effectively undone, rather than the error alone. For this reason, cancellation of a public contract is not generally classified as a remedial action.)

CIS countries

There are significant challenges with PP regulation in the CIS countries, and in general no dedicated remedies bodies have been established in these countries. The CIS countries enable PP dispute resolution through

an administrative or civil court. As noted above such systems are not strictly considered a remedies system. The general lack of a standstill period in the PP legislation and the absence of time limits for court proceedings mean that realistically no remedial action can be taken with respect to the PP process and that monetary compensation for the complaining tenderer is the only solution available.

Section 3: Efficiency of the national remedies systems

Having examined the PP remedies bodies' structures and procedures against the basic function indicators, the assessment then studied how efficiently the given structures performed in practice, by reference to the efficiency indicators (see Box 2 above). This was done primarily through the use of questionnaires and cases studies completed by local law firms experienced in providing legal advice to local tenderers.

Based on the opinions expressed by local legal advisers, it was observed that countries

in the EBRD region which scored "high" and "very high" on the quality of their PP remedies legislation do not achieve the same results on the implementation level.

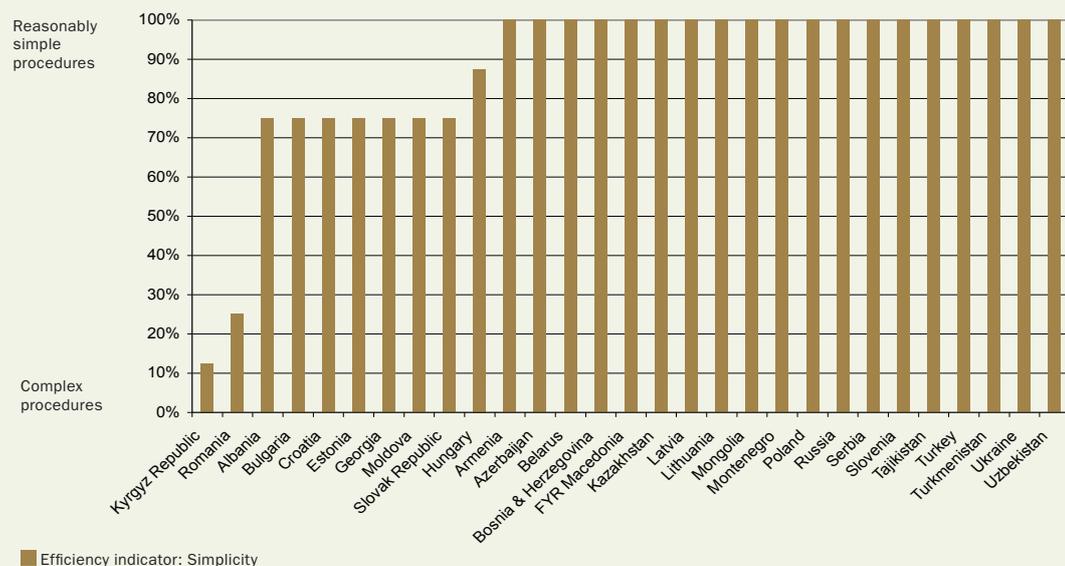
This study reveals that it is not easy to make assumptions about how efficient particular types of remedies systems will be. For example, while a judicial review process is considered to lead to higher quality decisions, courts are often thought of as more expensive and slower than administrative bodies. However, the review revealed that remedies systems based on judicial review could be as quick and inexpensive and achieve similar efficiency results to administrative review processes.

An important conclusion is that systems which are structurally deficient rarely exhibit any significant efficiency. Thus, systems which do not have a dedicated remedies body will be in general less accessible, more costly and time-consuming than others.

To learn how efficient the national remedies system is, it is necessary to look specifically at individual indicators of its performance.

Chart 2:

Simplicity of public procurement remedies procedures as observed by local lawyers in transition countries



Notes: The chart shows the score for simplicity of the PP remedies procedures practice for each country in the region. The score has been calculated on the basis of a checklist and a case study completed by local practitioners. Total scores are presented as a percentage, with 100 per cent representing the national PP remedies practice's optimal score for this efficiency indicator.

Source: EBRD Public Procurement Assessment 2010.

Simplicity

The assessment revealed that in most countries the remedies system is believed to be simple. However, in Albania, Bulgaria, Croatia, Estonia, Georgia, Kyrgyz Republic, Moldova, Romania and Slovak Republic the remedies system is considered more complex (see Chart 2).

In countries where the remedies procedures were found to be reasonably simple, this fact has not directly influenced the overall efficiency score of the remedies procedures. In 19 countries with the maximum score for simplicity of remedies procedures, the overall efficiency of the remedies system is only satisfactory.

On the other hand, in Romania procedures are believed to be more complex, but the efficiency of the remedies system is considered to be on the same satisfactory level as in most of the countries in southern Europe.

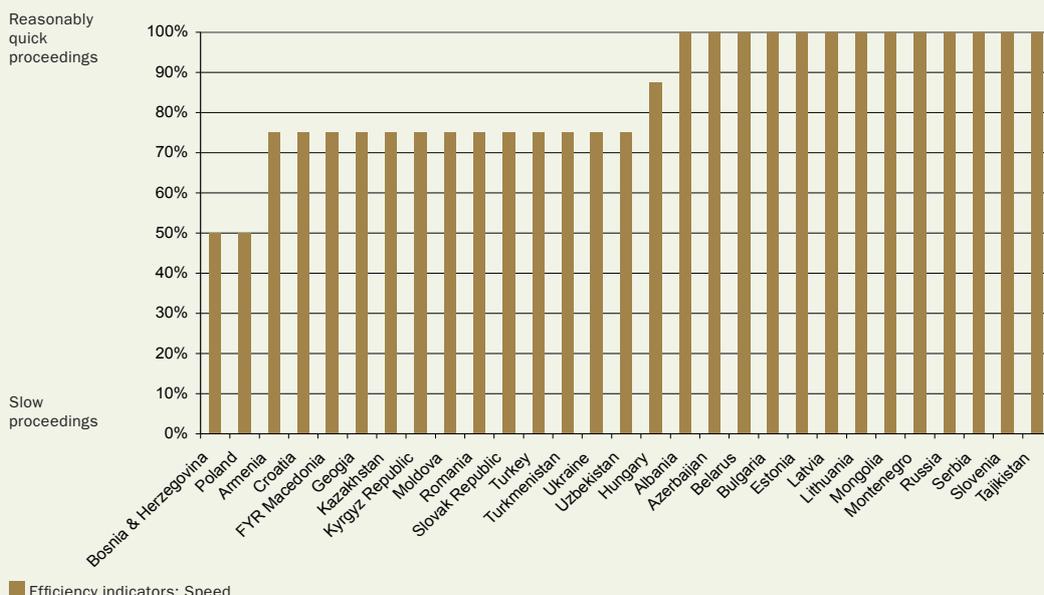
Speed

In Bosnia and Herzegovina and Poland it takes longer than in other countries to have the complaint heard by the PP remedies body. In contrast in Albania, Azerbaijan, Belarus, Bulgaria, Estonia, Latvia, Lithuania, Mongolia, Montenegro, Russia, Serbia, Slovenia and Tajikistan the speed of the remedies proceedings is perceived to be reasonable (see Chart 3).

The assessment also revealed that the speed of the remedies proceedings appears to come literally at a price, in the form of higher fees. This was the case for Albania, Belarus, Mongolia, Montenegro, Russia, Serbia and Slovenia.

Exceptions to the above general conclusion are found in Estonia, Latvia and Lithuania, where a minimal fixed fees system has been adopted, yet the remedies proceedings there are conducted as quickly as they are in the countries with high fees for remedies procedures.

Chart 3:
Speed of public procurement remedies proceedings as observed by local lawyers in transition countries



Notes: The chart shows the score for each country in the region for speed of their PP remedies proceedings. The score has been calculated on the basis of a checklist and a case study completed by local legal advisers. Total scores are presented as a percentage, with 100 per cent representing the national PP remedies practice' optimal score for this efficiency indicator.

Source: EBRD Public Procurement Assessment 2010.

Cost

In Albania, Bulgaria, Croatia, FYR Macedonia, Kyrgyz Republic, Poland, Romania, Serbia, Slovak Republic, Slovenia, Tajikistan and Ukraine the remedies system fees are relatively high and may be too expensive for small and medium-sized enterprises (SMEs) (see Chart 4).

Comparing the cost of remedies proceedings and how efficiently they are conducted reveals that higher fees imposed directly on the complainant for using the remedies procedure do not immediately translate into more efficient remedies practice. This is without considering the other function of high legal fees, namely restricting access to the PP remedies system and therefore the number of complaints.

Countries in the region with high fees (Albania, Bulgaria, Croatia, FYR Macedonia, Kyrgyz Republic, Romania, Serbia, Slovak Republic, Slovenia, Tajikistan, Ukraine and Poland) do not exhibit particularly good results with

respect to the general efficiency of their remedies systems. Only two countries with relatively higher fees scored high for remedies practice (Hungary and Slovenia). In all the remaining countries with relatively lower fees, the effectiveness of the remedies system is comparable to those where the standard fees of the remedies procedures are perceived as being high.

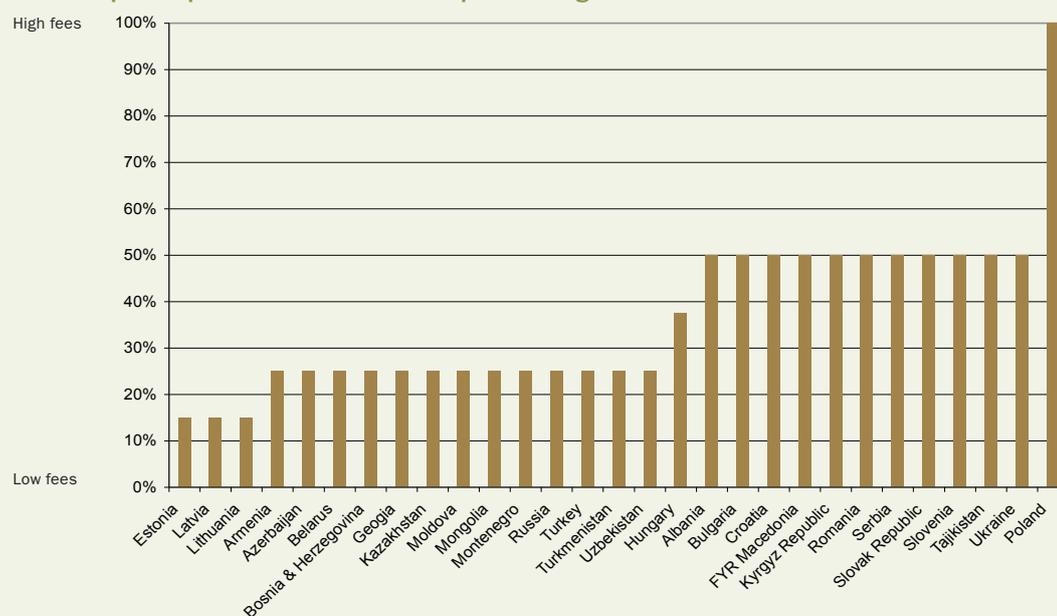
Thus, contrary to common belief, the results suggest that there is no direct correlation between the efficiency of a remedies practice and the fees of the remedies procedure imposed directly on the complainant for using the remedies procedure.

Certainty

The certainty indicator in this assessment refers to predictability as a critical element of any sound legal system. It has been assessed by local practitioners with respect to three individual sub-indicators: (a) consistency; (b) impartiality; and (c) resistance to corruption.

Chart 4:

Fees for public procurement remedies proceedings in transition countries



■ Efficiency indicator: Level of fees imposed directly on the complainant for using the remedies procedure

Notes: The chart shows the score for each country in the region for costs of their PP remedies proceedings for complaining tenderers. The score has been calculated on the basis of a checklist and a case study completed by local legal advisers. Total scores are presented as a percentage, from "low fees" to "high fees", with a low fixed fee system regarded as optimal for the efficiency of PP remedies practice.

Source: EBRD Public Procurement Assessment 2010.

(a) Consistency

It is critical for tenderers to have confidence in the regularity of public procurement proceedings, that is, that the PP process is stable and predictable. Charts 5-8 reflect the consistency of the remedies body decisions for each country in the EBRD region.

The study revealed that remedies bodies' decisions in Belarus, Bosnia and Herzegovina, Georgia, Kazakhstan, Mongolia, Montenegro, Poland, Romania and Serbia are not always predictable (see Chart 5). Decisions of the remedies body in Azerbaijan, Bulgaria, Croatia, Latvia, Lithuania and Slovenia are consistent. For the remaining countries predictability of the remedies bodies is reported as between 50 to 75 per cent.

It is important to mention that analyses of the correlation between predictability of the PP remedies body decision-making and overall efficiency of the national remedies system suggests that greater certainty contributes

to an increased efficiency of the remedies system, with some exceptions (Kazakhstan and Kyrgyz Republic).

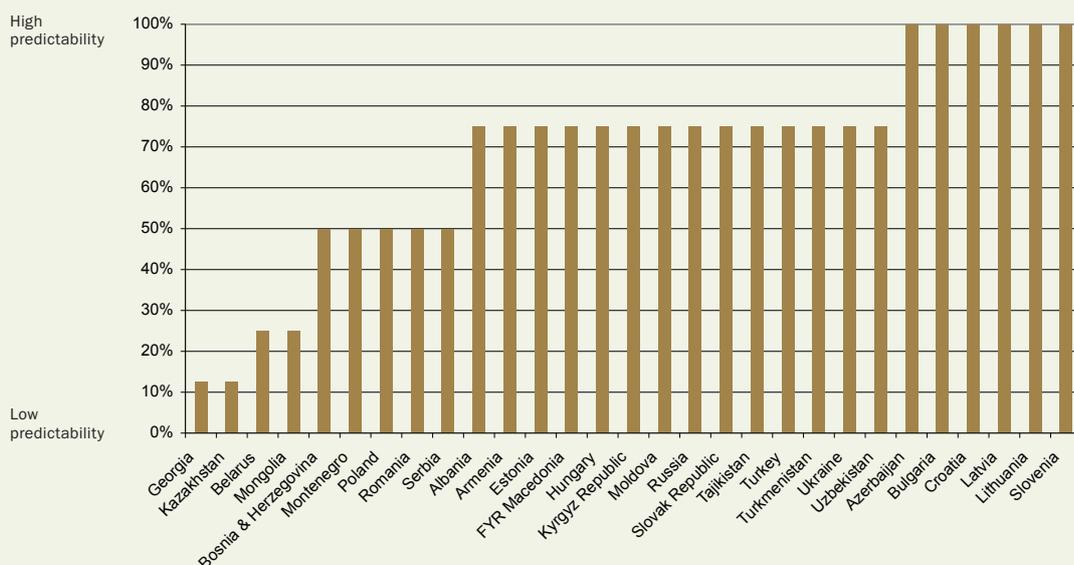
(b) Impartiality

The PP remedies system polices the impartiality of the contracting authorities; therefore it is essential for PP review bodies themselves to be, and to be seen to be, impartial.

For each country in the EBRD region, the diagram below indicates the impartiality of the remedies body, as observed by local practitioners.

Remedies bodies in Croatia, Estonia, Georgia, Latvia, Lithuania and Slovenia are believed to be impartial (see Chart 6), as are those in Belarus and Russia. The latter two instances are of interest, given their low score on efficiency indicators such as consistency, resistance to corruption and cost.

Chart 5:
Consistency of public procurement remedies body decision-making as observed by local lawyers in transition countries



■ Efficiency indicator: Consistency of PP remedies bodies decision-making

Notes: The chart shows the score for consistency of their PP remedies bodies' decision-making for each country in the region. The score has been calculated on the basis of a checklist and a case study completed by local legal advisers. Total scores are presented as a percentage, from "low predictability" to "high predictability", with 100 per cent representing the national PP remedies practice optimal score for this efficiency indicator.

Source: EBRD Public Procurement Assessment 2010.

In FYR Macedonia, Kazakhstan, Kyrgyz Republic, Montenegro, Serbia and Turkey, and also to a lesser extent, in Bosnia and Herzegovina, Moldova and Turkmenistan, remedies bodies appear not to be considered impartial.

(c) Resistance to corruption

To ensure integrity of PP processes the PP members should be of irreproachable integrity, and the PP remedies proceedings fully transparent. The assessment revealed that in most of the EU Member States in the EBRD region, there is a perception of low corruption within the PP remedies bodies. A perception of high corruption levels within the PP remedies bodies has been observed in Azerbaijan, FYR Macedonia, Kyrgyz Republic, Mongolia, Russia and Tajikistan (see Chart 7).

In addition, in some countries there is a worrying perception of significant corruption coupled with relatively high fees associated with the remedies procedures. This is the

case in FYR Macedonia, Kyrgyz Republic, Serbia, Tajikistan and Ukraine. Corruption and prohibitive remedies procedures fees are often mutually reinforcing, and represent substantial barriers to an efficient remedies system.

Fit-to-context

The efficiency of the remedies process depends on whether the remedies body is responsive to the economic, social and legal context within which it is designed to operate. A successful remedies body needs to: (a) achieve particular objectives of the PP law; (b) reach an appropriate balance between fulfilling the purchases' economic purpose and integrity requirements of the public client; (c) respond to the particular purchase characteristics; and (d) respond to the local market situation. Much here depends on the qualifications and experience of the members of remedies bodies.

To achieve the particular regulatory objectives of the PP policies and laws, members of

Chart 6:

Impartiality of public procurement remedies bodies in transition countries



Notes: The chart shows the score for impartiality of their PP remedies bodies for each country in the region, as observed by local practitioners. The score has been calculated on the basis of a checklist and a case study completed by local legal advisers. Total scores are presented as a percentage, from low to high level of compliance rate, with 100 per cent representing the national PP remedies practice optimal score for this efficiency indicator.

Source: EBRD Public Procurement Assessment 2010.

the remedies body need to possess a level of legal knowledge akin to that of qualified lawyers with significant practical experience.

In order to reach an appropriate balance between fulfilling the purchaser’s economic purpose and appropriate integrity requirements of the public client, members of the remedies body of course need to demonstrate high personal integrity, but also remain fully impartial and objective. This is hard to achieve if members remain professionally active outside of their duties in the remedies body; therefore the remedies body needs to be permanent, well paid and professional.

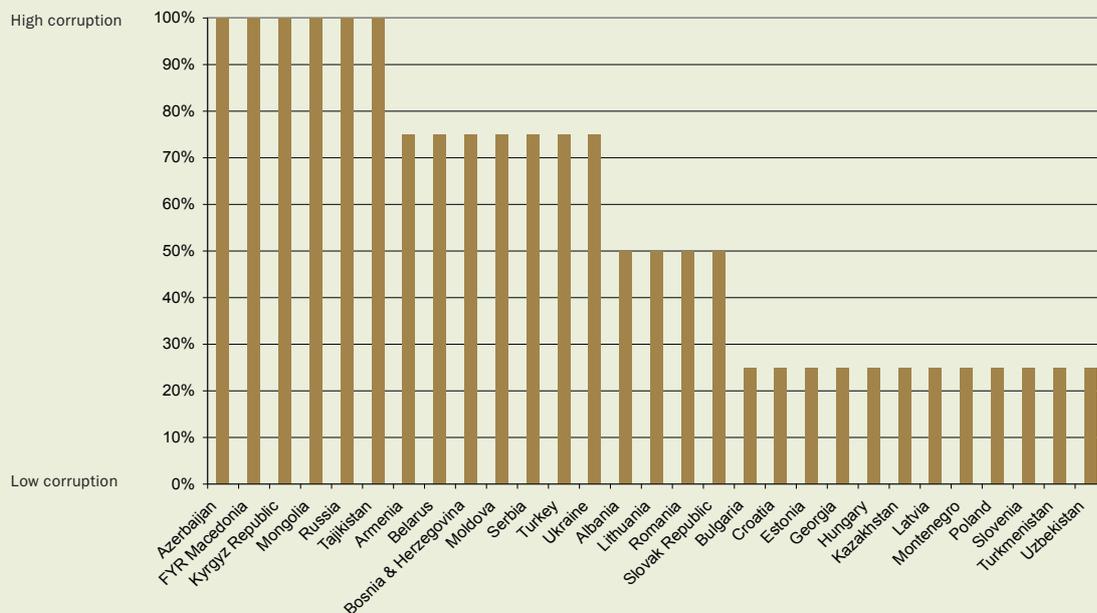
In addition, the remedies body should be able to respond to the relevant purchase characteristics; they need to be knowledgeable about the current situation in different product markets, which cannot be achieved without constant professional development, or providing the remedies body with external expertise when necessary.

Furthermore, the remedies body needs to respond to the local market situation. Therefore members of the remedies body should generally not be academics, but experienced practitioners, and should maintain their procurement specialist capacities and understanding of current procurement best practice. For this reason, members of the remedies body should serve for a single term and then return to professional practice.

For each country in the EBRD region, the diagram below reflects how a question about the professional adequacy of the remedies bodies has been answered by local legal advisers.

Chart 8 highlights the fact that remedies bodies in Albania, Bosnia and Herzegovina, FYR Macedonia, Mongolia, Montenegro, Poland, Turkmenistan and Uzbekistan are believed to lack sufficient skills to fulfil their responsibilities. In all remaining countries in the region the remedies bodies were reported

Chart 7:
Perceived corruption of public procurement remedies bodies in transition countries



■ Efficiency indicator: Corruption of PP remedies bodies as perceived by local practitioners

Notes: The chart shows the score for perceived corruption of their PP remedies bodies for each country in the region, as observed by local practitioners. The score has been calculated on the basis of a checklist and a case study completed by local legal advisers. Total scores are presented as a percentage, from low to high perception of corruption, with a low perception of corruption regarded as a standard for efficient PP remedies practice.

Source: EBRD Public Procurement Assessment 2010.

to be sufficiently professional to respond to the economic, social and legal context of their duties.

The review revealed that setting up a skilled and professional remedies body to rule on public procurement disputes can be achieved via different means, some of which are clearly linked to the standard fees imposed directly on the complainants using the remedies procedures.

In nine countries, a correlation can be observed between remedies bodies being context-specific and high standard fees. At the same time, a similar pattern can be observed between the level of the remedies body's professionalism and the perceived efficiency of the national remedies system.

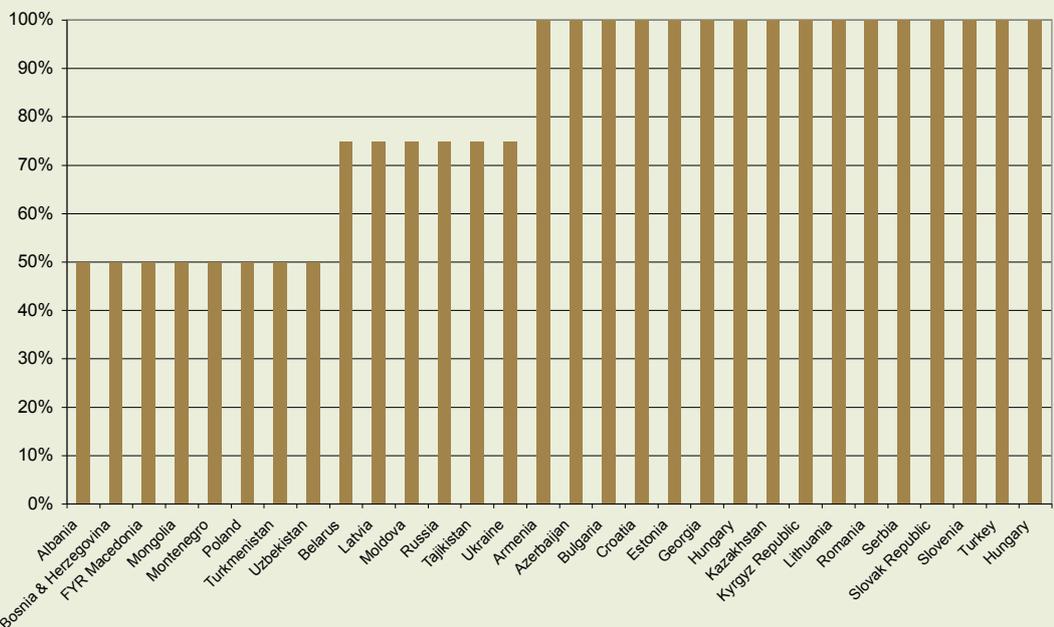
Conclusion

The assessment considered two elements of the PP remedies legislation both in theory and in practice: how satisfactory the PP remedies regulation is in terms of basic function, and how efficient the remedies procedures are in the event of a dispute.

The study revealed a disparity between the quality of PP legislation on remedies bodies and procedures, and its practical implementation. For example, as observed by local practitioners, high quality of PP remedies legislation does not immediately translate into more efficient remedies practice, if speed and market knowledge of remedies bodies is not ensured.

Chart 8:

Are remedies bodies responsive to the economic, social and legal context of public procurement disputes?



Notes: The chart shows the score for professional adequacy of their PP remedies bodies to PP legal and market context for each country in the region, as observed by local practitioners. The score has been calculated on the basis of a checklist and a case study completed by local legal advisers. Total scores are presented as a percentage, from a low to a high level of responsiveness, with 100 per cent representing the national PP remedies practice' optimal score for this efficiency indicator.

Source: EBRD Public Procurement Assessment 2010.

A truly efficient PP remedies regime balances the interests of public client and private contractor and provides appropriate remedial action, and does so in a manner which the local market can rely on. No perfect system has been identified, however some insight can be offered into the qualities commonly expected of an ideal remedies system.

The suggestion arising from the local legal advisers' opinions is that a national PP remedies body will be viewed as a success when it is professionally staffed, with members appointed for a single fixed term; specialised; objective; efficient; and thoroughly familiar with the commercial issues of procurement.

We argue that remedies procedures in PP legislation should firstly enable a correct assessment of the compliance of the contracting entity with binding PP standards in a local market context, and, secondly, impose corrective measures when necessary. A successful remedies body needs to: (a) achieve particular objectives of the PP law; (b) reach an appropriate balance between fulfilling the purchases' economic purpose and integrity requirements of the public client; (c) respond to the particular purchase characteristics; and (d) respond to the local market situation.

The assessment revealed that: (a) complexity of the remedies procedures may decrease the overall efficiency of the PP remedies system; (b) predictability of the remedies body decisions significantly increases efficiency of the whole system; (c) quality of remedies practices comes at a price; (d) responsiveness to the economic, social and legal context of public procurement is highly valued by practitioners, but may increase the total cost of the remedies system.

If a PP remedies body cannot be a specialised PP administrative tribunal, it is better to assign the PP remedies function to the civil or administrative court. This should be done so as to ensure full specialisation (one dedicated forum), as well as speedy decisions – time limits for hearing public procurement cases must be imposed. In addition, fixed fees for using the PP remedies procedures are desirable.

Otherwise, if legal and business culture allow, alternative dispute resolution procedures by public clients should be available. At present, in most of the countries in the EBRD region, the PP laws do not authorise either the use of arbitration or mediation for disputes relating to procurement contracts. However, in the countries where these mechanisms are available, arbitration rules are generally consistent with the UNCITRAL Model Law on Arbitration.

The success of a remedies system will inevitably depend on the contractual and judicial traditions, and individual legal culture of the country concerned. At the same time, public procurement remedies procedures need to comply with international standards to ensure that key recognised public governance values are respected. For PP remedies procedures, it is critical that key dimensions of the "rule of law" be safeguarded: a clear separation of powers, legal certainty and equality before the law. Therefore a solution based on "more court, less administration" is generally advocated. At the same time, speed and market awareness are essential. If these standards are not attained in the long term, competition in the public procurement market will be limited, with many contractors deterred from tendering for public clients. As a result, the cost of public purchases will be higher, and contracting entities will not fully enjoy the innovation and modern solutions which the private sector can bring to the public sector.

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Sound procurement – making it happen

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Public procurement is based on four fundamental principles: economy, efficiency, transparency and accountability. The art of procurement is to get and maintain the right balance between all four principles during the project cycle. In recent decades there were numerous attempts to develop the best set of procurement standards, including Procurement Policies and Rules adopted by the EBRD.

Despite well-established principles, flexible policies and a proactive approach as far as the implementation of projects is concerned, we still face a number of challenges within the Bank's countries of operations.

What is procurement?

At a public procurement course attended by professionals from various countries and professions, I once asked participants what their perception of procurement had been before working with the Bank. I was stunned by their answers, as many saw it as a set of bureaucratic procedures and arbitrarily set rules; an unfortunate necessity in the long wait for much-needed goods or essential works. It was widely believed among the audience that the process was superfluous and time-consuming, and better abandoned. Those views were in stark contrast to the position of many procurement specialists I have met, who believe that procurement is key to the success of any investment project.

So, what is procurement in its essence? A burden or a key to a project's success?

Fundamentals of procurement

In its early days, procurement ensured the survival of human beings through provision of food and meeting other basic needs. It developed over time as a trade, supporting the activities of organisations and countries. Public procurement, in the way we know it now, only began to take shape in the second half of the 20th century. With a strong focus on

the wise and accountable use of public funds, procurement's role and respective regulations began to gather force with the increase in public spending.

Later, procurement came to be viewed, among other things, as an important instrument to promote fair international trade.

Public procurement is based on four fundamental principles:

- ◆ economy
- ◆ efficiency
- ◆ transparency
- ◆ accountability.

These cornerstones are to be viewed and adhered to during the entire procurement cycle, not limited to the tendering process (as wrongly seen by some), but rather from project planning to project completion.

The art of procurement is to get the balance right between all four principles during the project cycle. When maintained, procurement should bring satisfaction to all parties concerned. Bankers, providing project financing, will be satisfied to see that cost and time overruns are under control. The clients are happy because they get the quality

goods, works or services they need at an economical price in due time. Contractors and suppliers are pleased to have the opportunity to deliver their best to their clients following a fair process. Governments get the economy running and expanding, while collecting more taxes.

Procurement standards

“What does it take to get the balance right?” you may ask. The answer is simple – there are two keys to success: good standards and the people involved.

In recent decades there were numerous attempts to develop the best set of procurement standards. Examples of these are the World Trade Organization (WTO) Government Procurement Agreement, the UNCITRAL Model Law on Procurement, the EU Procurement Directives, the World Bank Procurement Guidelines, the Asian Development Bank (ADB) Rules and Procedures for Procurement, the [EBRD Procurement Policies and Rules](#), national public procurement laws and so on.

All of the above sets of standards, having been created using the four fundamental principles, have a lot in common. At the same time they have been developed to serve distinct purposes and, therefore, they target different results and focus on various aspects of the processes.

Currently a large number of harmonisation initiatives are run by various stakeholders, which are aimed at standardisation of the approaches and synchronisation of the sets of rules and procedures. Substantial progress has been achieved. One might expect that in future all public procurement around the globe would be carried out according to one set of procedures, regardless of nationality or trade. However, this is unlikely to happen.

First, it seems that two main cultures exist in procurement practice. One is procurement as a compliance discipline, and the other, procurement as an art. These cultures do not necessarily contradict each other, but to a large extent they represent the polar reaches of the spectrum of available approaches. The first approach is based on strict adherence

to the letter of the law and documents, while the other provides for professional judgement and adheres to the spirit of the law and fundamental principles, based on the understanding that in procurement, as in real life, there are very few cases which can be described as black and white, with the majority of issues lying in the so-called grey area.

These cultures have been developed by people from various professional and cultural backgrounds, with different experience and visions of the aims of the procurement process. It is debatable as to which of the approaches is better.

Second, different countries, regulators and institutions pursue different goals and purposes, so it is impractical and pointless to try to establish a “one size fits all” set of rules. The fundamental principles of procurement can still be adhered to even if the specific rules and procedures may differ.

The Bank has always benefited from employing a crop of highly qualified and experienced procurement specialists. Hence, its procurement culture is built on the “art approach”, which provides for sensible flexibility in the decision-making process, while maintaining the highest level of integrity and professional discipline.

The Bank’s Procurement Policies and Rules, which are aligned with the WTO Government Procurement Agreement, are prescriptive and hence not restrictive, and provide for a wide framework based on sound implementation considerations and internationally recognised procurement and contracting practices.

One of the cornerstones of the Bank’s policies is that its clients are responsible for implementing Bank-financed projects, including all aspects of the procurement process.

The key points distinguishing the Bank’s Procurement Policies and Rules from many public procurement laws and directives are:

- ◆ a focus on project-specific qualifications of tenderers, while allowing all capable tenderers to bid
- ◆ the availability of multi-stage tendering procedures

- ◆ evaluation of tenders in monetary terms, taking into account multiple factors, hence identifying the most economically advantageous tenders
- ◆ strong anti-corruption measures
- ◆ use of a wide range of internationally recognised contract forms and conditions
- ◆ proactive monitoring of not only the tendering process, but contract implementation (until completion).

In addition to the general principles and specific rules, the Bank provides active support and extensive advice to its clients in the procurement process, preventing mistakes and facilitating implementation of the projects. We supply our clients with the standard tender and contract documents and guidance notes for the different types of projects and contracts involved, from the supply of simple water pumps for small towns in Central Asia, to the procurement of design and build or engineering, procurement and construction (EPC) contracts for state-of-the-art plants in eastern Europe.

Consistent implementation of procurement standards

A law or standard is only useful if it is consistently implemented as intended. Hence, the vital factor for efficiency of the procurement lies with the people involved in the process and quality assurance mechanisms established by an institution.

The Bank has the advantage of having sufficient, highly qualified professional resources to undertake a proactive engagement in the project implementation process, which has involved on average more than €1.2 billion capital investments a year and before the crisis, exceeded the €2.2 billion mark.

The Bank's procurement experts help clients with procurement planning, contract packaging and selection of the appropriate method of procurement and resulting contracts. They review the documents and reports prepared by clients and monitor the tendering process.

A special committee in the Bank reviews all complaints in respect of procurement. During implementation of the contracts, Bank staff monitor the progress of works and deliveries, assist with dispute resolution, where necessary and appropriate, and review all material modifications to contracts to ensure that the projects are implemented as planned and within the available funds. The Bank's involvement in the projects through their entire life cycle means that staff are in a position to undertake these activities efficiently.

Changing times

The Bank's countries of operations, many of which once belonged to the socialist camp, have done a lot to liberalise their economies, as well as to reform and modernise legal systems in their transition to a democratic and market-oriented economy.

The Bank too has changed. Having established its procurement policies in January 1992, these have been subject to alteration through the years. The most recent and substantial modification commenced in May 2009, when the Bank introduced significant changes to the thresholds for the application of the open tender, for goods, works and supply and installation contracts, as well as the application of consultant selection from both a shortlist and based on the evaluation of proposals.

Although the Bank's review process will be conducted on the basis of the English version of the documents, the revised Policies provide for a much wider use of local languages in tendering procedures. The evaluation of tenders on such operations may now take into account taxes and import duties. Clients are no longer bearing the foreign exchange risk and may determine the currency or currencies in which tender prices must be quoted. The revised Policies provide for a more straightforward and clear description of the Bank's review and monitoring process. A reference to the applicable Bank's Policy on the selection of private parties to concessions has also been incorporated in the revision.

The latest EBRD Procurement Policies and Rules therefore now reflect best practice in environmental and social matters as stipulated in the Bank's Environmental and Social Policy.

With the aim of assisting the fight against prohibited practices, such as fraud, corruption, coercion and collusion, the EBRD Procurement Policies and Rules incorporate a direct reference to the Bank's Enforcement Policy and Procedures, including the International Financial Institutions (IFI) harmonised definitions of prohibited practices.

In addition to that they provide much clearer wording and definitions of principles, considerations and guidance.

Challenges

Despite strong principles, flexible policies and a proactive approach as far as the implementation of projects is concerned, we still face a number of challenges.

People are the key to success

Over recent decades, many of the Bank's public clients for numerous reasons did not undertake complex and large investment projects. Very often the corporate structures and staff, albeit well-educated and trained, are not prepared to structure and even less prepared to implement projects in an effective manner. To help our clients with project implementation, the Bank provides

Good procurement benefits all

A transition economy is one which is changing from a centrally planned to a free market economy. One of the main components of the transition process is liberalisation – the process of allowing prices to be determined in free markets and lowering international trade barriers that limit contact with the price structure of the world's market economies. This is the main argument as to why competitive procurement procedures are essential for any investment project and remain a fundamental aspect in a civil society where the individual's rights are respected.

In the public sector, sound procurement regulation is important to complement public finance policies and management, to ensure the best value-for-money for public spending.

In respect of the above, public procurement regulation is dedicated to benefit the civil society, where the majority of people are hard-working law abiders and taxpayers, and therefore expect a high-quality public service.

Imposing fiscal restraints in the public sector without first reforming and upgrading the performance of public procurement regulation may bring no visible effect – as poorly managed and corrupt public procurement may defer expected results. To benefit from an effective public procurement process there must be sound legislation, efficient enforcement institutions, and professional procurement officers are essential.

The job of procurement officer is a highly responsible one, and requires skills and ethics that go well beyond just getting the job done. Therefore, procurement officers, business or legal, mark a significant cornerstone in the structure of a well-functioning public service, which in turn benefits all.

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its expert support, as previously mentioned, and arranges client training on project implementation with the support of other institutions or directly. Furthermore, the Bank through the complementary TurnAround Management and Business Advisory Service programme provides micro, small and medium-sized enterprises (MSMEs) with direct assistance from experienced business advisers and consultants, helping them adapt to the demands of a market economy.

Consultancy support

In addition, investment project implementation is extensively supported through technical assistance programmes funded by the Bank and grant agencies, or directly by the clients using their own or loan funds. At the same time, the quality of consulting support is very uneven and is often inadequate for the complexity of the projects and as such has large room for improvement. In order to enhance the clients' technical support the Bank has put a lot of emphasis on the quality of the consultancy services provided and worked extensively on monitoring consulting companies' performance.

Private versus public

There are perceptions that private sector procurement procedures are more economic and efficient than those in the public sector, and therefore they should be widely used on a utilities and natural monopolies level. However, the reality shows that this is not necessarily the case. Although there are some time-saving advantages, which are gained through fast-track decision-making, it is not proven that the overall efficiency and economy of the private sector procurement is higher than in well-structured procurement of the public sector. Among the Bank's funded projects there are numerous examples of complex and large projects successfully implemented by the public sector clients within budget during a relatively short period of time. Moreover, with natural monopolies and utilities passing their cost of investment on to the public through tariffs, the emphasis on economy and transparency of procurement becomes very important.

National procurement legislation reforms

Although there has been fast and progressive development of primary legislation in many of the Bank's countries of operations, secondary laws often have shortfalls inherited from the previous economic systems or accumulated due to hasty legal changes during the years of reforms. While the Bank's Procurement Policies and Rules provide for the use of local competitive tendering based on national procedures for procuring goods and works, when such are available locally at prices less than the international market, scattered geographically or spread over time, the local procedures must be acceptable to the Bank. In order to achieve the expected level of acceptability the Bank is engaged in a policy dialogue with the governments of the countries of operations and, through its Legal Transition Programme, contributes to international standard-setting initiatives in public procurement, develops and implements technical assistance projects in countries of operations, monitors and analyses the status of legal transition and advances legal reforms through outreach activities.

Fighting corruption

To rephrase a famous statement from Marx's communist manifesto: "A spectre is haunting the countries of operations – the spectre of corruption." In 2009, 12 countries of the Bank's operations scored as low as three points or less on the 10-point scale of Corruption Perceptions Index by Transparency International. A high level of corruption in these countries represents a strong challenge and tests the robustness and efficiency of the Bank's policies and their implementation daily. The Bank takes any allegations of misconduct during a tender process seriously and all complaints are reviewed thoroughly. To enhance the overall quality of the Bank's procurement work and ensure that decisions about procurement complaints comply with the EBRD Procurement Policies and Rules and are consistent and fair, the Bank has established the EBRD Procurement Complaints Committee. But corruption cannot be defeated by the efforts of one organisation alone. This battle requires the authorities, other institutions,

non-governmental organisations, clients as well as suppliers and contractors to merge their efforts in de-rooting this evil, which casts a very heavy shadow on the economies across the Bank's region.

Changing the business culture in the region

The Bank's Procurement Policies and Rules provide a solid framework for sustainable investments, based on development of the institutional capacity of the clients, applying the best procurement practices to acquire goods, works and services for the projects, involving economic cost, minimal time and high quality. Moreover, the Bank's policies broaden this framework to achieve sustainable procurement by taking into account subsequent development and utilisation of the investments, including environmental concerns, addressing social policies as well as the macro- and microeconomic aspects of development.

Procurement on the Bank's projects, wherever practical, addresses climate change and mitigates excessive exploitation of natural resources. It also focuses on issues of social policy, such as inclusiveness, equality and diversity targets. On a macroeconomic level, it can be seen that there are substantial economic benefits in the form of efficiency gained from incorporating life cycle cost into decision-making. In addition, the Bank's investments in countries of operations create sustainable markets for those works, goods and services essential for long-term growth and very often foster innovations and the use of new energy-efficient technologies. Investment provides for the creation of new jobs and wealth, and assists all sizes of businesses.

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The reform of public procurement practices in an era of fiscal restraint

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Optimisation of the performance of national procurement systems should be at a greater premium during an era of fiscal restraint. The degree to which budget cuts result in fewer public services and the like is mitigated by steps that enhance “value for money.” In this article I explore three principles to guide reform initiatives, which may be useful to policy-makers in the EBRD region.

Introduction

While the principle of obtaining the greatest value for money from state expenditures is long-standing, during booms and other eras of excess the pressure to squeeze the most out of state budgets is often relaxed. What is worse, sometimes when agency budgets are expanded quickly, the pressure to “get money out the door” can lead to inefficient public sourcing of goods and services. Eras of fiscal restraint, such as the one that descended over Europe in the first half of 2010, offer an opportunity to revisit public purchasing practices. The purpose of this article is to suggest three principles that might guide the reform of public procurement (PP) practices in an era of fiscal restraint.

Prior experience suggests that the pay-off from PP reform can be substantial. It is not difficult to see why. If a government spends only 5 per cent of national income on goods and services, then a 10 per cent increase in procurement efficiency releases the equivalent of 0.5 per cent of GDP. For developing countries, 0.5 per cent of GDP may well be multiples of the total aid received from abroad. For industrialised countries, 0.5 per cent of GDP would go a long way to meeting internationally agreed aid targets.

While some may be impressed by these potentially large gains (from a macroeconomic point of view), associated improvements can also translate into smaller reductions in the quantity/quality of public services offered should budget cuts follow fiscal austerity. Since both the quality and quantity of public services – such as education, health and transportation – have a direct bearing on the standard of living of poorer groups of society, then PP reform may have indirect consequences for inequality and income distribution. For this reason, the reform of PP policies should not just be a matter for finance officials; development officials, international organisations and non-government organisations ought to be concerned with the operational effectiveness of national procurement systems.

Of course, the aforementioned focus on government procurement systems is somewhat misplaced. In some jurisdictions many of the goods and services purchased by the state are bought by bodies other than the central government. The case for effective public purchasing practices carries over to other public sector agencies as well; likewise, the themes developed here for central government carry over to other levels of the public sector.

1. Comments on this article are welcome. Contact details can be found at the conclusion of this article.

The remainder of this article is organised as follows. Each of the following three sections is devoted to articulating a principle that should guide the reform of public purchasing during an era of fiscal restraint. While this article does not claim to be a comprehensive review of the state of procurement reform in transition countries, nevertheless, it is hoped that the focus on a small number of principles to guide reform initiatives might generate debate over the imperatives that ought to drive PP reform in developing and transition economies.

Principle one: do not overload public purchasing policies with too many objectives

Governments typically have many different objectives that they seek to accomplish with the plethora of policy instruments available to them. It is not the purpose here to question those objectives, which may well have been decided on via accepted, legitimate means. Instead, the goal here is to ask which objectives should PP practices target.

A review of national procurement legislation and implementing regulations in developing, transition and industrialised countries points to a wide range of objectives that procurement policies are meant to achieve. Attaining “value for money” is on almost every list of government objectives for procurement policy.

The promotion of previously disadvantaged or under-performing groups, firms, industries, and regions find their way onto the goals of most jurisdictions. Considerations of national security, security of supply, as well as public morals, frequently appear to affect the objectives and implementation of PP practices.

No doubt the attraction of using PP policies to advance these interests is that a certain minimum level of demand is guaranteed for producers – typically, but not necessarily, domestic producers – that seek to meet a stated objective. Expanded output and employment may appear to follow from this use of PP policies giving satisfaction to officials seeking “results.”² Desired results follow from state action, or so it seems.

SME sector

Of course, as far as the optimal design of public policy is concerned, the question arises as to which available policy tools can attain the stated objective at least cost.³ PP measures may not be the most direct, efficient tool. Frequently they are not. One example will suffice. Many governments seek to promote the commercial success of small and medium-sized enterprises (SMEs) and, as part of their procurement policies, favour tenders from such firms.⁴

The first question that should be asked is: what is the evidence that the SME sector is too small? Even if such evidence can be gathered, or a case for expanding the sector made on first (often ethical) principles, then the second question that arises is what available public policy or policies attains that goal at least cost? What public officials need to learn is what factors are holding the SME sector back and what policy tools are available that have the most effective leverage over the restraining factors. It may well be the case, for example, that the most important factor holding back SME growth is access to finance and working capital. In which case, governments should consider policies that encourage appropriate lending to SMEs by banks or others. Giving SMEs additional orders for goods and services is a very indirect, and therefore almost certainly inefficient, method for overcoming the obstacles in question.

A critical reader might well argue that banks are more willing to lend to SMEs if the latter’s order books are fuller and, therefore, public purchasing from SMEs has a positive knock-on effect. There is no denying the fact that, in principle, such a knock-on effect might exist (although the assumption should be checked that order book size is the key constraint on access to credit.) Even if order book size really is that important to securing credit, it does not follow that government purchasing policies should be implicated. After all, consideration should be given as to whether a state subsidy to private sector purchases might trigger more orders for the SMEs in question.

2. The phrase “may appear to follow” in the last sentence was deliberately used as the effectiveness of many public procurement measures that “set aside” or reserve certain state orders for favoured groups has been contested.

3. This takes into account other legitimate factors, such as quality and so on. The emphasis on cost in the text is not meant to imply that the budgetary cost is the only legitimate criterion determining sourcing decisions. More generally, economists refer typically to meeting an objective at least cost and to meeting a target using the most efficient method synonymously.

4. The favouritism can take many forms. What matters is that the government actively discriminates in favour of one group of bidders. Of course, reserving certain government contracts solely for one class of commercial bidder is tantamount to banning bids from non-favoured firms. Discrimination can involve inducements, penalties, and outright bans.

Hidden costs

Many of the considerations raised above – which are central to the optimal design of policies – tend to get quickly pushed under the carpet in the rush to design measures to “help” this or that constituency. The consequence of poor procurement policy design, including taking on objectives that can be better served elsewhere, is that the prices paid by state agencies for certain goods and services are higher than they need to be. Moreover, all too often the quality of service experienced by users of state-funded services is lower than it should be. It is important to appreciate that these costs are often “hidden” in the sense that rarely do governments report line items in budgets for the incremental costs associated with meeting objectives other than “value for money”.

While the costs of PP favouritism may be hidden, the corporate beneficiaries are well aware of their state-supported largesse. As is so often the case with resource-distorting public policies, typically there are a small number of beneficiaries of favouritism while the costs are spread across the nation’s taxpayers and users of public services. Each of the latter tends to lose little from each act of favouritism and so has few incentives to campaign for reform. This is why an external shock is often needed – such as acute budgetary pressures brought about (say) by a collapse in tax revenues following a severe economic downturn – to induce reform initiatives.

Cost of favouritism

An era of fiscal restraint provides an excellent opportunity for governments serious about improving the effectiveness of their procurement regimes to re-examine the rationale and effectiveness of existing practices. An independent audit could examine both the ends and means of existing procurement policies. The auditors should identify those public objectives that can best be served by government purchasing policies; other public goals should be taken care of more effectively with other state measures.

Defenders of the status quo would have to provide information publicly as to the costs of procurement favouritism and to demonstrate that no alternative policy better meets the state’s chosen goals. It would be important to stress that the purpose of the audit is not to argue that the government must abandon this or that objective; rather, the auditors would identify which government objectives can best be attained using PP policies and not some other form of state intervention.

Investigations such as these, therefore, would be evidence-led. Once established, governments should get into the habit of occasionally reviewing the costs and benefits of existing PP practices (not just the objectives pursued.) Potential innovations in procurement methods do arise over time and it makes sense also to compare various means for attaining a given government goal.

The government evidence-led assessments of PP policies therefore should be encouraged. If such a step is regarded as too costly, then the support of international development organisations and donors could be sought either to establish such a project or to fund the conduct of assessments of procurement policies.

Value-for-money

By and large, governments try to accomplish too much with PP policies. The implementation of such policies is often confused and made more complicated by the adoption of too many goals. Costs paid by state agencies are higher than they need to be and the quality of services supplied worse than the best tenderer could provide. The harsh reality is that the pursuit of many non-value-for-money objectives comes at the cost of attaining value-for-money.

An era of fiscal restraint allows for a cold, hard look at what governments can really accomplish with PP policies. Put bluntly, mindsets change when austerity beckons. Policy-makers must not fall into the trap – or be led to do so by interested parties – of assuming that reformulating procurement practices is the cheapest or most effective way to attain a specific government goal.

The information which makes the case about alternative ways to attain government goals should be collected, made public, and interested parties forced to defend the status quo. While it would be naïve to suppose that credible information alone will be enough to tip the balance in favour of reform (there will be more on reform in the section which details principle three), trying to make the case without such information and the associated change in policy-making mindset is much more difficult.

Principle two: promote competition and, whenever possible, treat tenderers equally

In effect there is more than one way to squeeze the most out of a limited agency's budget. On the one hand, procurement practices can be put in place so as to encourage – for a given quality level – tenderers to offer lower prices to supply the agency.

Alternatively, tenderers can be encouraged to offer more goods and services for a contract of a given monetary value. In either case, competition between independent tenderers has been shown to enhance value-for-money for state agencies. Competition, therefore, is not just over price; firms can compete on delivery times, reliability, and the introduction of new processes, goods and services and so on. Innovation can thus be spurred by competition between tenderers for public contracts.⁵

These are not just theoretical considerations. Over the past 20 years analysts have simulated the effect on procurement tendering systems of factors that enhance the competition between tenderers, such as increasing the number of potential tenderers.

Quite remarkably a number of these studies show the same qualitative finding: namely, that the cost to the state falls markedly as the number of (relatively equally matched) tenderers rises. It appears that costs tend to fall very quickly as the number of tenderers rises to five. From then on, costs per unit fall more slowly.⁶

As a general rule, however, encouraging as many appropriately qualified firms to tender is very much in the interests of government purchasers.⁷

While the principle may be easy to articulate, it is worth recalling that there are many features in the operation of government purchasing regimes that can stifle competition. First, tenderers must know about the procurement opportunity and have time to be able to respond. Second, tenderers must have confidence that the government evaluator is not biased against their tenders. Third, the cost of completing a tender and the information needed to put together an effective tender must be relatively inexpensive.

Transparency

These three factors refer to what is commonly known as the “transparency” of the PP regime. Improvements in transparency reduce the uncertainty associated with tendering, lower tender preparation costs, and provide assurance of equal treatment. Such improvements typically encourage the application of tenderers – both domestic and foreign – for public contracts. Evidence from southern Europe suggests that SMEs are particularly susceptible to improvements in transparency.⁸ Other evidence points to cost savings for state bodies that promoted transparency and, in so doing, elicited more tenderers or better-qualified tenderers for public contracts.⁹

Restrictions on tendering

Sometimes the restrictions on tendering for public contracts are explicit. For example, large firms may be banned from tendering for certain government contracts that are “reserved” for SMEs. Limiting the number of tenderers almost always raises the cost paid per unit by public agencies. In this model, the condition of competition between tenderers will always be distorted by explicit procurement rules. Adding a so-called price preference of (say) 20 per cent to foreign tenderers for government contracts alters the conditions of competition, typically making the foreign firms lower their tenders (by less than 20 per cent), domestic firms raise their tenders (by less than 20 per cent), and all too often the state ends up paying more per unit bought.

5. Note this is not the same as arguing that the public contracts should spur innovation and technological development.

6. For a review of the evidence see Evenett and Hoekman.

7. As suppliers located abroad are an important potential source of tenderers for government contracts, an implication of this finding is that protectionism against foreign tenderers is to be discouraged.

8. European Commission (2004).

9. OECD (2003) contains examples of the benefits of improving transparency. These economic benefits are in addition to any benefits that flow from improvements in the perceived legitimacy of the state contracting regime. Moreover, to the extent that improvements in transparency discourage corruption or other forms of self-dealing by state officials, then this is a desirable pay-off as well.

In other cases the impact on the conditions of competition is more subtle. For instance, the costs of certain tenderers can be raised more than others so as to meet certain requirements laid out in the tender documentation. Such cost-raising interventions typically raise tenders across the board, reducing the amount of goods and services a government can afford to buy from a fixed budget. The point here is two-fold. First, state buyers should not be too prescriptive in specifying how tenderers should meet certain requirements, such as health, safety and environmental standards. What matters is that the standards are met, not how they are met. Firms have strong incentives to meet those standards without waste and this helps keep costs down for governments.

The second point is to be wary of requirements that by design or effect are detrimental to any one class of tenderers. For instance, insisting that foreign tenderers meet certain domestic requirements when there is a perfectly acceptable foreign standard being met is often a means of affording domestic tenderers some protection from international competition.

Greater use of mutual recognition procedures, especially by countries in established trade blocs such as the European Union, should be encouraged. During an era of austerity, hard questions should be asked about the standards embedded in many procurement codes; again, the purpose is not to eliminate those standards but to ensure they are in line with best practice and do not impose unnecessary costs on classes of tenderers.

Value-for-money objective

Existing analysis provides some further information to guide reform initiatives. In contrast to measures that alter the conditions of competition between an existing set of tenderers (such as price preferences and regulation-induced asymmetric cost increases), by and large those measures that reduce the number of tenderers raise unit procurement costs the most. Unnecessary state-created cost increases raise unit costs as well, but by

less. The smallest increases in unit costs are engendered by price preferences that do not discourage disadvantaged firms from tendering in the first place (Evenett and Hoekman, 2007).

These findings would imply that the value-for-money objective is best served by a PP regime that:

- (i) places few restrictions on tendering in the first place
- (ii) imposes standards on outcomes (such as safety levels) and not on processes
- (iii) is open to the possibility that there are multiple ways to meet a given standard
- (iv) reserves any discrimination between tenderers to price preferences, which are transparent and the consequences of which can be taken on board by all tenderers. Such a regime would target the principle state-created constraints to competition in PP.¹⁰

While state restrictions on tendering for public contracts are a concern, so are private attempts to circumvent the competitive process. So-called “big rigging” can take many forms. Sophisticated procurement regimes and law enforcement officials have become well-versed in such techniques and guard against them.¹¹

Here procurement officials may need to cooperate with national competition authorities, as tender-rigging is often a violation of national competition statutes. Making public examples of firms that engage in tender-rigging is one option available to officials.

In summary, there are both private sector as well as (perhaps unintended) government threats to the competitive process in PP systems. Both need to be tackled. Improvements in the transparency of national procurement regimes ought to accompany a rethink as to the merits of discriminating in favour of or against any class of tenderer for public contracts. To the extent that discrimination must be used, then it should be the most transparent form of discrimination.

10. Those familiar with the public procurement chapters of many free trade agreements and with the World Trade Organization Agreement on Public Procurement will notice an irony. Much negotiating effort has gone into eliminating the most transparent form of discrimination against foreign bidders, namely, price preference policies, whereas the findings cited in the main text are that typically they have the least adverse effect on unit procurement costs (as compared with other forms of discrimination.) Perhaps over time the scope of binding disciplines will be expanded to include other forms of discrimination in public procurement.

11. For instance, the Antitrust Division of the United States Department of Justice has an extensive and very informative web page describing the different types of bid rigging and how public officials can try to detect such corporate malfeasance. This is not to imply that detection is straightforward, rather to suggest that the matter has been given substantial consideration by officials in certain jurisdictions.

Principle three: combine procurement reform initiatives with other governance reforms

Identifying the required reforms is one matter; getting them implemented is another.¹² There could well be many vested interests – not just firms and their employees but also public officials – that garner rents from the existing PP system and do not want to lose them. Opposition to reform, therefore, should be anticipated. Perhaps it can be countered with a multi-stranded approach.

Information on the inefficiency of current procurement practices can be a useful weapon. Horrendously high estimates of the cost per unit bought by a government have helped discredit existing practices in the past, putting the vested interests on the back foot. Evidence such as this creates the (possibly correct) impression that certain parties have benefited at the expense of the national interest. Indeed, relating additional procurement costs to “lost” or “foregone” hospital beds, nurses, doctors and teachers can provide powerful rhetorical tools.

Complementarities

Still, it may make sense to tie PP reform to other economic governance reforms, in so doing emphasising the connections between improving value for money in state purchasing and the capacity of the state to afford higher quality institutions and infrastructure. In so doing, the goal is to expand the set of interests that perceive benefits from PP reforms. Complementarities certainly exist between reforming PP measures and national competition policy, as alluded to above. Other complementarities exist between measures to fight corruption and related malfeasance and initiatives to improve government purchasing practices. These could be exploited in assembling a reform package.

Free trade agreements

One increasingly popular option is to use the occasion of negotiating a free trade agreement (FTA) to strengthen national PP regulatory institutions. Many such agreements now include chapters on PP matters. Although these chapters vary in content, and some appear to be solely motivated by the desire to gain access to foreign markets, nothing prevents signatories from making commitments concerning the transparency and other features of the PP process. Such chapters could also include provision to allow for periodic reviews, so ensuring that procurement matters retain a higher profile than in the past. There is clearly an element of opportunism here as reformers can structure procurement obligations in FTAs so as to garner support at home from export interests.

In essence the approach recommended here is to bundle PP reforms into or alongside other initiatives that expand the size of the constituency that favours reform. In this manner, appeals to political will (which all too often fall on deaf ears) are complemented – ideally replaced – by appeals to commercial interests. The latter provides a more enduring basis for PP reform.

12. Hunja (2003) provides a sobering account of the difficulties in reforming public procurement practices.

Conclusion

Many countries have a saying that amounts to the same thing: a crisis is too good an opportunity to miss. The silver lining in the cloud that is fiscal austerity is the opportunity to improve national PP regimes. In this article three principles to guide any reform efforts have been outlined for a situation where governments in Europe and elsewhere find themselves seeking better value for money from their state budgets. While national circumstances will undoubtedly influence potential reforms, there is enough common experience across countries to guide reformers in the months and years ahead.

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The WTO Agreement on Government Procurement: an emerging tool of global integration and good governance

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The World Trade Organization Agreement on Government Procurement (GPA) is working to expand its role as an instrument of global economic integration and good governance. This article reviews key developments in this area, including the main elements of the existing GPA, efforts to expand membership of the Agreement and its ongoing renegotiation. Lastly, it discusses three contextual factors that enhance the role of the Agreement as an instrument of global governance.

Introduction

The World Trade Organization (WTO) Agreement on Government Procurement (GPA) is on the cusp of a significant expansion of its role as an instrument of global economic integration and good governance. This reflects a confluence of factors, including: (i) the growing membership of the Agreement, and the prospect of accession to it by a broad range of developing, transition and other economies in the coming years; (ii) the updating of the Agreement itself to enhance its flexibility, user-friendliness and relevance to developing and transition economies, and to incorporate new provisions on governance; and (iii) the role that public infrastructure investment will undoubtedly continue to play as an underpinning of growth in the aftermath of the economic crisis, and the critical importance of such spending being undertaken on the basis of principles of fair and open competition to maximise value for taxpayers.

This article reviews key developments in this area. The remainder of the article is organised as follows: the second section summarises the main elements of the existing GPA, which will be improved upon but not radically altered in the revised text of the Agreement on which negotiations are nearing conclusion. The third section discusses the ongoing efforts to expand the membership of the Agreement, including through the pending accessions of China, Jordan and Armenia in addition to those of other developing and transition economies. The fourth provides information on the ongoing renegotiation of the Agreement, including with respect to its text and coverage.

The fifth section discusses three contextual factors that are further enhancing the role of the Agreement as an instrument of global governance. These are: (i) the importance of public infrastructure investment in the context of the recent economic crisis, and related surveillance activities that have taken place in the WTO Committee on

1. Parts of this article build on analysis and views expressed in various chapters contained in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, forthcoming). A version of the paper will be presented by the author at the Conference on Public Procurement – Global Revolution V, to be held in Copenhagen on 9-10 September 2010. The views expressed are the personal responsibility of the author and should not be attributed to the WTO or its Secretariat.

Government Procurement, which is responsible for administering the GPA; (ii) an ongoing proliferation of government procurement provisions modelled on the GPA in regional and bilateral trade agreements; and (iii) new thinking on the significance of good governance for development, which would appear to have implications for the GPA. The final section provides concluding remarks.

Main elements of the WTO Agreement on Government Procurement

The WTO Agreement on Government Procurement (GPA), signed by most of the world's industrialised countries at the conclusion of the Uruguay Round of multilateral trade negotiations in 1994, provides an international legal framework for the liberalisation and governance of PP markets. The Agreement consists of the following main elements:

- ◆ guarantees of national treatment and non-discrimination for the goods, services and suppliers of Parties to the Agreement with respect to procurement of covered goods, services and construction services as set out in each Party's schedules (Appendix I) and subject to various exceptions and exclusions that are noted therein
- ◆ minimum standards regarding national procurement processes, which are intended to ensure that the Parties' procurements are carried out in a transparent and competitive manner that does not discriminate against the suppliers of other Parties. Aspects of the procurement process that are addressed include: (i) the use of technical specifications; (ii) allowable tendering procedures; (iii) qualification of suppliers; (iv) invitations to participate in intended procurements; (v) selection procedures; (vi) time limits for tendering and delivery; (vii) tender documentation; (viii) submission, receipt and opening of tenders, and the awarding of contracts; (ix) negotiations by entities with suppliers; and (x) the use of limited tendering
- ◆ additional requirements regarding transparency of procurement-related information (for example, relevant statutes and regulations)

- ◆ procedures dealing with modifications and rectifications of Parties' coverage commitments
- ◆ requirements regarding the availability and nature of bid challenge (that is, domestic review) procedures which must be put in place by all Parties to the Agreement
- ◆ the application of the WTO Dispute Settlement Understanding in this area
- ◆ a "built-in agenda" for improvement of the Agreement, extension of coverage and elimination of remaining discriminatory measures applied by Parties.

As already noted, the text of the Agreement is the subject of ongoing negotiations. As will be explained in the renegotiation section, the revised text will improve upon the existing one in a number of ways. Nonetheless, the text will continue to be built around the main elements of the Agreement which are noted above.

Work under way to broaden the membership of the Agreement²

The GPA is a plurilateral agreement, meaning that not all Members of the WTO are bound by it. Currently, 41 WTO members are covered by the Agreement. These are: Canada; China; the European Union, including its 27 member States; Hong Kong, Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; Taipei China and the United States. The accession of Taipei China took effect only on 15 July 2009, bringing under the disciplines of the Agreement additional procurement opportunities that have been valued at in excess of US\$ 20 billion annually.³

Apart from the above, by the end of 2009, nine other WTO members (Albania, Armenia, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman and Panama) had applied for accession to the Agreement and submitted relevant documentation. In addition, a further five members (Croatia, the Former Yugoslav Republic of Macedonia [FYROM], Mongolia, Saudi Arabia and Ukraine) have provisions in their respective WTO Accession Protocols which call for them eventually to seek GPA

2. See, for a more extended analysis, Robert D. Anderson and Kodjo Osei-Lah, "Forging A More Global Procurement Market: Issues Concerning Accessions to the Agreement on Government Procurement," in Arrowsmith and Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, forthcoming).

3. See "Ambassador Ron Kirk Applauds Taiwan's Accession to the WTO Agreement on Government Procurement," USTR press release, available at www.ustr.gov/about-us/press-office/press-releases/2009/july/ambassador-ron-kirk-applauds-taiwans-accession-wto-ag.

accession. Overall, there is a clear trend for new countries that join the WTO to be asked to make, as one of their WTO accession commitments, a promise to also seek GPA accession.

The countries mentioned above are, in general, at different stages of the accession queue. Among those that are currently negotiating their accessions, four have been the subject of focused discussions and active negotiations in the Committee on Government Procurement during the past two years: Armenia, Moldova, China and Jordan.

Armenia

Work on the accession of Armenia is well advanced, and is expected to be completed in the second half of 2010. Armenia's application for accession and initial offer were formally circulated only on 4 September 2009. These documents were supplemented by an "Analysis of the Armenian Public Procurement Law and Implementing Decree vis-à-vis the EC Public Procurement Directives and the Agreement on Government Procurement (WTO)" and an overview of "Public Procurement in Armenia" that were prepared by SIGMA, a governance institute associated with the OECD and supported by the European Union.⁴ As was made clear by this documentation, Armenia's GPA accession is a natural and logical element of an overall effort to reform and modernise the country's procurement legislation and practices while fostering its integration with other jurisdictions in the region. Most recently, in April 2010, Armenia submitted a Draft Final Offer and its Replies to the Checklist of Issues to the Committee on Government Procurement. This additional documentation has given renewed impetus to Armenia's accession.

Moldova

Moldova's application for accession and its initial coverage offer were tabled for consideration by the Committee in December 2008. At the time, the high quality of Moldova's offer and documentation were noted by several Parties. Since then, substantive negotiations on the offer

have been deferred in light of an ongoing governmental reorganisation in Moldova. There are, nonetheless, hopes that discussions will resume in the coming months.

China

China's application for GPA accession, together with its initial coverage offer, was submitted to the WTO Secretariat at the end of 2007 and was circulated to GPA Parties early in 2008.⁵ Clearly, the accession of China raises complex issues for Parties' negotiators and involves significant stakes for the WTO system. Work on the accession of China is, nonetheless, proceeding actively, with China showing significant commitment and the existing Parties to the Agreement also being fully and actively engaged. China's offer has been discussed in several informal sessions of the Committee and many bilateral meetings. China has also submitted its replies to the "Checklist of Issues for Provision of Information Relating to Accession to the Agreement on Government Procurement" – an important step in the assessment of an accession candidate's procurement legislation and practices. Most recently, China submitted to the Committee on Government Procurement an "enriched" coverage offer incorporating a substantial reduction in its proposed thresholds under the Agreement, expanded coverage of central government entities and other improvements. Parties have expressed their strong appreciation for this development, while also continuing to make clear that further improvements are expected and that, in order for China's accession to be concluded, it will have to provide an eventual level of coverage that is comparable with that of other Parties to the Agreement.⁶

Other accessions

Work on the accessions of other GPA candidates and WTO members with accession commitments is at a less advanced stage. However, with the leadership of its Chairman (Mr Nicholas Niggli of Switzerland) the WTO Committee on Government Procurement has signalled a clear intention to keep all of the pending accessions and accession commitments under active review.

4. See, for background, Report (2009) of the WTO Committee on Government Procurement to the General Council (GPA/103, 12 November 2009), paragraph 14.

5. See GPA/95 of 9 December 2008, paragraph 13.

6. See Report (2009) of the WTO Agreement on Government Procurement, GPA/103 of 12 November 2009, paragraph 17.

A question that remains to be answered is whether, when the accessions of China and other current accession candidates are close to being concluded, other major developing/transition WTO Members might consider joining the Agreement.⁷ While this would clearly be contrary to currently held positions (at least in some cases), such Members might also see potential commercial opportunities in their participation in the Agreement and therefore might not want to be foreclosed from markets to which China has access (via the GPA).

In addition to its obvious significance in broadening the membership of the GPA over time, the accession of developing and transition economies such as China and (as called for in their WTO accession commitments) Saudi Arabia and Ukraine can be expected to involve important conceptual and practical challenges for the Parties. For example, a key issue in the accession negotiations of China and very likely also those of Saudi Arabia, Ukraine and others will concern the treatment of state-owned enterprises. These challenges are an important focus of the forthcoming volume edited by Arrowsmith and Anderson.

The ongoing renegotiation of the Agreement

Both the text and coverage of the GPA are the subject of ongoing negotiations in the WTO. The basis for these negotiations is provided in Article XXIV:7(b) and (c) of the Agreement. The purpose of these negotiations is threefold: (i) to improve and update the Agreement in the light, *inter alia*, of developments in information technology and procurement methods; (ii) to extend the coverage of the Agreement; and (iii) to eliminate remaining discriminatory measures.⁸

Further to the above, Article XXIV:7(c) of the GPA directs Parties to avoid introducing or prolonging discriminatory measures and practices which distort open procurement and further stipulates that the negotiations under subparagraph (b) shall seek to eliminate remaining discriminatory measures and

practices. The negotiations are also intended to facilitate accession to the Agreement by additional Parties, notably developing countries. The negotiations under the GPA are not part of the Doha Round of negotiations in the WTO which are multilateral rather than plurilateral in nature and relate to a range of other topics including agriculture, non-agricultural market access (NAMA), services trade and intellectual property issues.⁹

The negotiations called for in Article XXIV:7 have been under way for several years. They have been conducted in a series of informal plurilateral meetings of the Parties' negotiators in Geneva, supplemented by bilateral meetings between Parties. An important milestone was reached in December 2006, when agreement was reached by the negotiators in Geneva on the text of a revised Agreement on Government Procurement (the revised draft text is available here: www.wto.org/english/tratop_e/gproc_e/gproc_e.htm). At the time that the agreement on the text was reached, it was made provisional in the following two senses: first, it was subject to a final legal check (rectification process) which has now been completed; and second, the agreement on the text was made subject to a mutually satisfactory outcome to the parallel negotiations to extend the coverage of the Agreement.¹⁰

In general, the revised GPA text is based on the same principles and contains the same main elements as the existing Agreement. Nonetheless, it improves on the existing text of the Agreement in various significant ways.¹¹

- ◆ It incorporates a complete revision of the wording of the provisions of the Agreement with a view to making them more streamlined, easier to understand and user-friendly.
- ◆ The text has been updated to take into account developments in current government procurement practice, notably the use of electronic tools. The revised text also sets out related requirements regarding the general availability and interoperability of the information technology systems and software used; the availability of mechanisms to ensure the

7. In an important development, India became an observer to the Committee on Government Procurement in February 2010. Press reports have indicated that India is looking seriously at the pros and cons of GPA accession. See "Foreign firms could get access to govt contracts," *Financial Express (India)*, 3 November 2009.

8. See, in particular, the chapters in the book authored by Ping Wang.

9. See, for background, "The Doha Agenda", www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm.

10. See Report (2006) of the Committee on Government Procurement, paragraph 20, available here: www.wto.org/english/tratop_e/gproc_e/documents_e.htm.

integrity of requests for participation and tenders; and maintenance of data to ensure the traceability of the conduct of covered procurement by electronic means.

- ◆ Additional flexibility for Parties' procurement authorities has been included, for example in the form of shorter notice periods when electronic tools are used. Shorter time-periods have also been allowed for procuring goods and services of types that are available on the commercial marketplace.
- ◆ There is more explicit recognition of the GPA's significance for governance and development, and of its shared purpose with other international instruments and initiatives in this regard.

In a key additional change, the transitional measures ("special and differential treatment") that are available to developing countries that accede to the Agreement have been more clearly spelled out. The transitional measures that will potentially be available, subject to negotiations, include: (i) price preferences; (ii) offsets; (iii) phased-in addition of specific entities and sectors; and (iv) thresholds that are initially set higher than their permanent level (see the provisionally agreed revised GPA, Article IV). Provision has also been made for delaying the application of any specific obligation contained in the Agreement, other than the requirement to provide equivalent treatment to the goods, services and suppliers of all other Parties to the Agreement, for a period of five years following accession to the Agreement for Least Developed Countries (LDCs) or up to three years for other developing countries. These periods can be extended by decision of the Committee on Government Procurement, on request by the country concerned.¹² There is a clear hope, on the part of the Parties, that the availability of these measures and possibilities will both encourage developing countries to consider joining the Agreement and facilitate their respective accession processes.

Coverage

As indicated, work is also under way on renegotiation of the coverage of the Agreement on Government Procurement.¹³ The concept of coverage refers to the sets of entities that are bound by the Agreement, the thresholds that will apply, relevant exception and exclusions, and other elements that define whether particular procurements will be subject to the disciplines of the Agreement. Under the agreement reached by the negotiators in 2006, the revised GPA text cannot come into force until a conclusion has been reached in the coverage negotiations.

Until recently there were few signs of significant movement towards an overall conclusion of the coverage negotiations. Indeed, public reports indicated that there was a gap in aspirations between major parties in the negotiations and little progress toward overall convergence through mid-2009.¹⁴ However, beginning in late 2009 and coming through more forcefully in the first half of 2010, there have been signs of renewed energy and possibilities for a successful conclusion of the negotiations. The Chairman of the Committee on Government Procurement, Mr Niggli, has put forward a "roadmap" for conclusion of the negotiations by the end of the year, encompassing not only the coverage negotiations themselves but also the finalisation of the revised GPA text; the process for bringing it into effect; and the future work programme of the Committee.¹⁵

GPA Parties have expressed strong support for the Chairman's roadmap. In addition, hope has been expressed that revised offers in the negotiations from Canada and the United States that have been circulated under a bilateral agreement between the two countries could provide a springboard for broader forward movement.¹⁶ Hence, as this article is finalised (August 2010), there are renewed prospects for a successful conclusion to the negotiations. This would, in turn, permit the coming into force of the revised GPA text. It could also facilitate future accessions to the

11. For a more extended analysis see Robert D. Anderson, "Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations," *Public Procurement Law Review*, Issue 4, 2007.

12. For an insightful analysis, see Anna Caroline Müller, "Transitional Measures for Developing Countries Accessing to the GPA under the Existing and Revised Texts of the GPA," in Arrowsmith and Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform*, above note 1.

13. See, for additional details, Robert D. Anderson and Kodjo Osei-Lah, "The GPA Coverage Negotiations: Context, Mandate and Process," in Arrowsmith and Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform*, above note 1.

14. See, for example, "U.S., EU Spar Over WTO Government Procurement Pact, Miss Deadline," *Inside US Trade*, 21 December 21 2007.

15. See, for related details, Anderson and Osei-Lah, "The GPA Coverage Negotiations: Context, Mandate, Process and Prospects," in Arrowsmith and Anderson (eds), above note 1.

16. See "GPA Signatories Hope U.S.-Canada Deal Triggers Stalled Market Access Talks," *Inside U.S. Trade*, 19 February 2010.

extent that these are made easier by the additional flexibilities and more specific and concrete provisions on special and differential treatment that the new text embodies.¹⁷

Recent contextual developments that have enhanced the role and significance of the GPA

(a) The recent economic crisis and trends in world infrastructure spending

The economic downturn of 2008-09 triggered increased emphasis on public infrastructure spending as an element of economic stimulus packages around the globe.¹⁸ The size of fiscal stimulus packages in OECD countries to date has been estimated at around 3.5 per cent of collective GDP in these countries. Of course, only a portion of this is accounted for by infrastructure spending. Regarding the latter, it has been estimated that, in 2009, governments around the world have spent around 2.9 per cent of world GDP on infrastructure, up from 2.2 per cent in 2008.¹⁹ A related point worth noting is that, over the next two decades, US infrastructure spending is expected by some observers to decline to less than 10 per cent of the world market, while China's share may grow to exceed 28 per cent and that of the European Union may account for more than 20 per cent.²⁰ These trends would appear to highlight both the increased emphasis on infrastructure spending in the context of the economic crisis and the growing importance for the world economy of such spending in emerging markets, notably China but also India and others.

Together with the current emphasis on infrastructure spending as an element of economic stimulus, there has been something of a worldwide trend towards the introduction of "buy-national" policies and requirements relating to PP. The web site of the Global Trade Alert (GTA), an independent organisation that monitors trade policy developments internationally, refers to more than 30 actual or proposed measures, in countries including Australia, Botswana, Brazil, Canada, China, France, India, Kazakhstan, Korea, Spain, Ukraine and the United States.²¹

The potential adverse effects of buy national measures in relation to PP policies for the international trading system were profiled in the December 2009 report by the WTO's Director-General to the Trade Policy Review Body (the WTO body that monitors general developments in trade policy at the multilateral level). As the report pointed out, such measures raise concerns for trade and the international trading system in three main ways. First, they can exclude foreign suppliers from markets in which they might otherwise hope to compete, either by reserving the market completely for domestic suppliers or by introducing administrative complexities that make procurement procedures less easily accessible to foreign suppliers. Second, paradoxically, in some cases buy national requirements may also raise the costs or impede the operations of domestic companies in the countries implementing the relevant measures, if such companies experience difficulties in sourcing domestically and cannot easily obtain waivers for purchases abroad. Third, as in other economic sectors, the implementation of discriminatory government procurement measures in one country may engender pressures for the adoption of similar measures by other countries.²²

In this context, in 2009 increased attention was given in the WTO Committee on Government Procurement, which administers the GPA, to the monitoring of PP policy developments related to the economic crisis and related stimulus measures.²³ A key focus was on the US stimulus legislation, the American Recovery and Reinvestment Act of 2009 (Pub. Law 111-5). This legislation introduced two new "Buy American" requirements, one relating to the procurement of iron, steel and manufactured goods for construction and related projects concerning public buildings and works (section 1605 of the legislation) and the other involving the procurement of specified items of clothing or equipment for the Department of Homeland Security (section 604). In both cases, the stimulus legislation addressed the potential for conflict with US international trade commitments by including a further provision stipulating that "This section shall be applied

17. See Anderson and Osei-Lah, "Forging a More Global Procurement Market: Issues Concerning Accessions to the Agreement on Government Procurement," above note 1.

18. World Trade Organization, Overview of Developments in the International Trading Environment, 18 November 2009, p. 39.

19. A.E. Feldman, "Infrastructure Spending to Surge in 2009", <http://blog.aefeldman.com/2009/01/13/infrastructure-spending-to-surge-in-2009-opening-doors-in-infrastructure-finance/>.

20. "U.S. Infrastructure Will Fall to 10 Per Cent Of World Market by 2030, Report Says", http://cg-la.com/images/articles/bna_article.pdf.

21. See www.globaltradealert.org/measure?tid=All&tid_1=All&tid_3=2205. To be sure, it is important not to draw strong conclusions without more detailed study of these measures given the inclusion of proposed, in addition to actual, measures in the GTA data set.

22. World Trade Organization, Overview of Developments in the International Trading Environment, 18 November 2009, p. 42.

23. Report (2009) of the WTO Committee on Government Procurement to the General Council (GPA/103, 12 November 2009), paragraph 7.

24. See GPA/98 of 24 April 2009.

25. Report (2009) of the WTO Committee on Government Procurement to the General Council (GPA/103, 12 November 2009), paragraph 7.

in a manner consistent with United States obligations under international agreements” (see section 604(k) and section 1605(d) of the legislation, respectively).

Subsequently, related interim implementing measures were issued. A timely notification on this topic was provided by the United States to the WTO Committee on Government Procurement,²⁴ and was the subject of significant discussion in the Committee during the year.²⁵

Overall, the framing of these measures and the discussions that took place in the WTO Committee would seem to have illustrated both the value of international instruments and bodies such as the WTO Agreement on Government Procurement and the Committee and the important efforts that have been made by Parties to the Agreement to ensure that the rules are honoured.²⁶

Of course, governments that are not Parties to the WTO Agreement on Government Procurement, including many of those mentioned above that appear to be implementing or at least considering protectionist measures in this area, are not constrained by it. This highlights the importance of the efforts that are currently under way to expand the membership of the Agreement.

Another point to note concerning infrastructure spending in a time of crisis relates to the stress that can be placed on national procurement systems when such spending is quickly ramped up. Indeed, various reports have cited an increased risk of corruption or other abuses in procurement systems around the globe.²⁷ The risks for good procurement practices may be even greater where the responsible authorities are required to implement buy national requirements. In this context, Schooner and Yukins have argued that, particularly in times of crisis, countries are wise to focus their procurement systems on human capital upgrading, value for money and the integrity of purchasing mechanisms, and not on trade protectionism.²⁸ This consideration further highlights the usefulness of an agreed body of rules reflecting

best practices and binding commitments to non-discrimination in PP in a time of economic crisis.

(b) The proliferation of regional trade agreements embodying government procurement provisions

The majority of regional trade agreements (RTAs) that have been notified to the WTO in recent years contain provisions on government procurement, whether of a detailed or a limited nature. These include arrangements involving one or more Parties to the GPA and a number of non-Parties. Moreover, in a growing number of cases, these agreements contain detailed provisions on government procurement that are modelled closely on the GPA. This shows clearly that the acceptability in principle of such disciplines extends beyond the current membership of the GPA, and implies that, in some cases, parties to these arrangements that are currently outside the GPA are in a position to join the Agreement with relative ease.²⁹

(c) New thinking on good governance as a tool of economic development: another factor enhancing the role of the GPA

Still another consideration that may increase the importance of the GPA over time is the heightened appreciation, particularly in current thinking and research on economic development, of the need for adequate governance mechanisms (that is, appropriate laws and institutions) as a counterpart to market opening and liberalisation. In the words of Pascal Lamy, Director-General of the WTO:

“the mere removal of obstacles to trade may not, by itself, ensure optimal performance if rules are not in place to ensure fair procedures, appropriate transparency of markets, and responsible competitive behaviour that is environmentally sustainable. It is time to recognise that such rules are an essential counterpart to market opening.”³⁰

To be sure, there is no universal recipe for economic growth.³¹ It would be misleading to portray any single policy instrument or tool

26. See also World Trade Organization, Overview of Developments in the International Trading Environment, 18 November 2009, p. 42.

27. See, for example, “Cost of fraud in global stimulus spending estimated at \$500 billion”, www.assetrecovery.org/kc/node/b8f7d4b1-647e-11de-bacd-a7d8a60b2a36.0.jsessionid=3B734478F2F1A77EFEB3543FB67739D4.

28. Steven L. Schooner and Christopher R. Yukins, “Public Procurement: Focus on People, Value for Money and Systemic Integrity, Not Protectionism,” George Washington University Law School Legal Studies Research Paper No. 460, 2009. See also the useful contribution of Simon Evenett to this issue of *Law in transition*.

29. See, for detailed discussion and evidence, Robert D. Anderson, Anna Caroline Müller, Kodjo Osei-Lah, Josefita Pardo De Leon and Philippe Pelletier, “Government procurement provisions in regional trade agreements: a stepping stone to GPA accession?”, in Arrowsmith and Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform*, above note 1.

in this way. Cutting-edge thinking on growth does, however, highlight the importance of robust governance systems to ensure the stable and effective functioning of markets, and thereby to promote sustainable growth over the long-term.³² The implementation of citizen-oriented governance mechanisms is also a central aspect of the broader concept of “development” (encompassing life-enhancing social and institutional change) as distinct from growth per se.³³

Arguably, the GPA is a good example of an international framework to enhance governance of the type that can help countries to implement and lock-in citizen-empowering institutional reforms. Rather than simply seeking to open markets, it recognises explicitly the need for rules, procedures and institutions to ensure that markets perform well in this sector. These rules and institutions are intended to ensure transparency, fairness and non-discrimination in procurement processes, and can thereby help to ensure maximum value for money for taxpayers in addition to freer trade.

In the foregoing context, Mr Lamy comments further as follows:

“The GPA is a paradigm example of a trade opening instrument that also recognises the need for governance mechanisms – in this case, the procedural rules that Parties to the Agreement must follow to ensure fair and transparent contracting practices and the domestic review or bid challenge mechanisms that the Agreement requires all Parties to put in place.”³⁴

Further, the revised GPA text contains a new and explicit requirement that procurement be carried out in a manner that avoids conflicts of interest and prevents corrupt practices.³⁵ This is a significant innovation in WTO rules. The treatment of this issue in the revised GPA text may well inform broader debates on the role and future of the multilateral trading system.

Conclusion

This article has summarised the current state of work in the WTO regarding the plurilateral GPA. Reference has been made, in this regard, to: (i) the prospects for a significant broadening of the membership of the Agreement over time, through the accession to it by a range of developing, transition and other economies; (ii) the development of the provisionally agreed revised GPA text, to enhance the flexibility, user-friendliness and relevance of the Agreement to developing and transition economies; and (iii) related efforts to broaden the extent of existing Parties’ commitments that are subject to the disciplines of the Agreement.

Reference has also been made to various contextual factors that are further enhancing the role of the Agreement as an instrument of global governance. The article has argued, in this regard, that the recent economic crisis – and particularly the emphasis that many governments have placed on public infrastructure spending as an aspect of their strategies for recovery from the crisis – have increased the importance and profile of the GPA as an instrument of international economic policy. Another factor that is likely to enhance the importance of the agreement over time is the heightened appreciation of the need for adequate governance mechanisms in relation to development and the management of globalisation that is increasingly evident in related thinking and research. These and other trends discussed in this article will further extend the reach of the Agreement on Government Procurement and enhance its significance as an instrument of global governance over time.

30. Pascal Lamy, “Remarks to a Symposium on ‘The WTO Agreement on Government Procurement: Developmental and Trade Significance, Changing Context and Future Prospects,’” Centre William Rappard, Geneva, 11 February 2010, available here: http://www.wto.org/english/news_e/sppl_e/sppl147_e.htm.

31. Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions and Economic Growth* (Princeton University Press, 2007); William Easterly, *The Elusive Quest for Growth: Economists’ Adventures and Misadventures in the Tropics* (MIT Press, 2001).

32. “... the key to longer-term prosperity, once growth is launched, is to develop institutions that maintain productive dynamism and generate resilience to external shocks.” Rodrick, id. p. 43.

33. “Good governance, by which I mean transparency, accountability, rule of law, and bureaucratic competence and effectiveness, is clearly desirable as an objective in itself. We might even say that good governance is what development is all about.” Dani Rodrick, “Thinking about governance and getting a headache,” 26 March 2008, http://rodrik.typepad.com/dani_rodriks_weblog/2008/03/thinking-about.html. Rodrick goes on to state that “Where economists have a comparative advantage is in designing institutional arrangements for specific policy reforms targeted at binding growth constraints – whether in trade, monetary policy, or education. This agenda differs quite a bit from the broad-brush governance agenda on which discussion tends to focus.”

34. Pascal Lamy, above note 29.

35. See provisionally agreed revised GPA text (GPA/W/297), Article V:4(b) and (c).

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Reform of the UNCITRAL Model Law on Procurement

1. The opinions expressed in this article are personal and are not to be viewed as representing official views of the United Nations.

2. UNCITRAL is the legal body of the United Nations system in the field of international trade law, with a general mandate to further the progressive harmonisation and unification of the law of international trade, through the issue of conventions and model laws, cooperation with other international organisations, and technical assistance.

3. Observers are permitted to participate in discussions at sessions of the Commission and its working groups to the same extent as members.

4. See Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I. The full text is available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html.

5. See the Guide to Enactment, History and purpose of UNCITRAL Model Law on Procurement of Goods, Construction and Services, Introduction, paragraph 3.

6. See the Guide to Enactment, History and purpose of UNCITRAL Model Law on Procurement of Goods, Construction and Services, Introduction, paragraph 3: "In those countries, a substantial portion of all procurement is engaged in by the public sector. Much of such procurement is in connection with projects that are part of the essential process of economic and social development. Those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible. The utility of the Model Law is enhanced in States whose economic systems are in transition, since reform of the public procurement system is a cornerstone of the law reforms being undertaken to increase the market orientation of the economy."

7. Afghanistan, Albania, Azerbaijan, Bangladesh, Croatia, Estonia, Gambia, Ghana, Guyana, Kazakhstan, Kenya, Kyrgyz Republic, Madagascar, Malawi, Mauritius, Moldova, Mongolia, Nepal, Nigeria, Poland, Romania, Rwanda, Slovak Republic, Tanzania, Uganda, Uzbekistan and Zambia. See www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html.

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In 1994 UNCITRAL issued its Model Law on Procurement of Goods, Construction and Services (the PP Model Law). The PP Model Law is a template available to national governments seeking to introduce or reform public procurement legislation for their internal market. In 2004 UNCITRAL's Working Group on procurement was charged with updating the PP Model Law to reflect new procurement practices, in particular regarding electronic procurement (e-procurement) and related aspects of electronic commerce, and the experience gained in the use of the PP Model Law as a basis for legal reform.

The UNCITRAL PP Model Law

The United Nations Commission on International Trade Law (UNCITRAL)² has the mandate to further the progressive harmonisation and unification of the law of international trade. UNCITRAL comprises 60 UN Member States elected by the General Assembly, and those members, together with observers (all UN Member States that are not members of UNCITRAL, as well as interested international organisations), are invited to attend sessions of the UNCITRAL and the Working Groups.³

The combination of broad representation and the fact that decision-making is consensual enables UNCITRAL's texts to be widely acceptable and widely used among States with different legal systems and levels of economic and social development. The texts also seek to reflect best practice from around the world.

Purpose and use of the PP Model Law

UNCITRAL issued its PP Model Law on Procurement of Goods, Construction, and Services in 1994 (the PP Model Law).⁴ The PP Model Law is a template available to national governments seeking to introduce or reform procurement legislation for their

domestic economies. It is intended to provide all the essential procedures and principles for conducting various types of procurement proceedings in a national system, and can be flexibly implemented to accord with local circumstances, while preserving the desired outcomes (in this regard it seeks to harmonise procurement law, rather than imposing a mandatory text as a convention or treaty would).

UNCITRAL's work on the PP Model Law was undertaken in response to the fact that in a number of countries the existing legislation governing procurement was perceived to be inadequate or outdated, resulting in inefficiency and ineffectiveness in the procurement process, abuse, and the failure of the public purchaser to obtain adequate value in return for public funds expenditure.⁵ The need for the PP Model Law was considered to be most acute in developing countries and transition countries,⁶ and, indeed, it is those countries that have been the main users of the text. The UNCITRAL web site records that approaching 30 States have enacted legislation based on the PP Model Law.⁷ Its influence has probably been broader and deeper than this list might suggest: both because there is no obligation to notify the

United Nations when the text is used (unlike in the case of treaties or conventions), and because procurement reform has in many cases been based on the principles and procedures of the PP Model Law, as explained in an accompanying Guide to Enactment. This latter text discusses the aims and objectives of the provisions in the PP Model Law itself, and how the provisions themselves implement them.

Scope of the PP Model Law

Article 1 of the 1994 PP Model Law provides that the law applies to “all procurement by procuring entities”, subject to a limited set of exemptions, the most significant of which is defence procurement. There are various options provided in the text to define the concept of the “procuring entity”, reflecting different notions of the extent of the public sector that may be found among States, making it clear that the law is intended to address public and not private sector procurement.⁸ By contrast with other international procurement texts (including the EU procurement Directives and the Agreement on Government Procurement of the World Trade Organization, the GPA),⁹ there is no general threshold below which the PP Model Law’s provisions do not apply (although there is a limited number of thresholds below which certain exemptions, such as those from advertising requirements, do apply).¹⁰

As part of the current programme to reform the PP Model Law (discussed in Section 5) it is proposed to remove the blanket exemption for defence procurement.¹¹ The reason for removing this exemption is that not all procurement in these sectors is so sensitive as to justify it being procured differently from other government purchases. The aim of bringing national defence and national security sectors within the general ambit of the PP Model Law is to promote a harmonised procurement legal regime across various sectors in each enacting State, but special provisions will allow for the protection of classified information.

The PP Model Law, in common with many procurement regimes, notes that its provisions address the “procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract”. Its Guide to Enactment states that the PP Model Law does not address the terms of contract for a procurement, the contract performance or implementation phase,¹² including resolution of contract disputes, and by implication, much of the procurement planning phase.

The objectives of the PP Model Law

The PP Model Law has six main objectives, set out in its Preamble, as follows:

- ◆ maximising economy and efficiency in procurement
- ◆ fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, thereby promoting international trade
- ◆ promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured
- ◆ providing for the fair and equitable treatment of all suppliers and contractors
- ◆ promoting the integrity of, and fairness and public confidence in, the procurement process
- ◆ achieving transparency in the procedures relating to procurement.

These objectives are largely self-explanatory, although it is worth noting that “economy and efficiency” involve both achieving value for money in what is purchased, and administrative efficiency in the process, and the notion of “integrity” encompasses not only the prevention of corruption and abuse but also the notion of personnel involved in procurement acting ethically and fairly. The objectives are placed on an equal footing in the Preamble, although the Guide

8. Alternatives to assist enacting States in defining the scope include references to all “governmental departments, agencies, organs and other units within the enacting State”, explained in the Guide to Enactment as referring to provincial, local or other governmental sub-divisions of the enacting State, as well as to the central government; and to entities or enterprises that are not considered part of the government, if the government has an interest in requiring those entities to conduct procurement in accordance with the Model Law. See the Guide to Enactment, Section II, Article-by-Article remarks, Article 2. Definitions, paragraph 2.

9. Annex 4(b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations, available at www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf. The provisionally agreed revised version of the text, document GPA/W/297, of December 2006, is available as of the date of writing at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

10. See, for example, Article 8 on domestic procurement, and Article 21 on request for quotations procurement.

11. For details of the reform programme, and the documents supporting it, see www.uncitral.org/uncitral/en/commission/working_groups/1/Procurement.html. As regards the question of defence procurement, see documents A/64/17, paras. 40, 48 and 100-103, and A/CN.9/668, paragraphs 17 and 59, drawing on A/CN.9/WG.I/WP.66 (paras. 54-55), available on this web page.

12. See Guide to Enactment, Introduction, paragraph 12.

to Enactment comments that they “are considered essential for fostering economy and efficiency in procurement and for curbing abuses,”¹³ indicating that these latter are the ultimate goals of the PP Model Law.

Other commonly cited procurement objectives include accountability (meaning that compliance with the rules and regulations of the system are seen to be achieved), uniformity (meaning the standardisation of procedures and processes, and ultimately, of outcomes), and non-discrimination (meaning fair and equal treatment of suppliers and also, in the international context, permitting overseas competition).¹⁴

Reform of the PP Model Law

In 2004 UNCITRAL’s Working Group on procurement was charged with updating the PP Model Law to reflect new practices, in particular regarding electronic procurement (e-procurement) and related aspects of electronic commerce, and the experience gained in the use of the PP Model Law as a basis for law reform. The aim was to ensure that the text continues to meet its objectives.

Although the Working Group was given a flexible mandate to identify the issues to be addressed in its review, it was instructed not to depart from the basic principles of the PP Model Law, nor from the flexible, non-prescriptive approach in the 1994 text.

The main topics for review in the reform process were:

- (a) e-procurement
- (b) abnormally low tenders
- (c) framework and similar agreements and the use of suppliers’ lists
- (d) evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies
- (e) services and alternative methods of procurement
- (f) simplification and standardisation of the PP Model Law

(g) remedies and enforcement

(h) management of conflicts of interest.

E-procurement

There are two main aspects of e-procurement: the use of electronic communications (e-communications) in procurement, and the use of information technology to conduct a procurement procedure (such as electronic reverse auctions, electronic catalogues, and electronic framework agreements, which we will discuss shortly).

Benefits

The benefits of introducing e-procurement are now widely recognised.

Procurement of goods, works and services through internet-based information technologies (e-procurement) is emerging worldwide with the potential to reform processes, improve market access, and promote integrity in public procurement.

E-procurement, when properly designed, can drastically reduce the cost of information while at the same time facilitate information accessibility. The strength of e-procurement in the anti-corruption agenda arises from this capacity to greatly reduce the cost and increase the accessibility of information, as well as automate practices prone to corruption.¹⁵

Commentators have noted additional gains in terms of introducing uniformity into the procurement system through e-procurement. Automated systems yield even greater benefits where repeated purchases of commodity-type items are concerned, and integrating the systems of e-procurement and oversight, documentary record-keeping, information and knowledge-sharing can maximise the benefits of e-procurement.¹⁶

As those benefits would enhance achievement of the PP Model Law’s objectives, and given the increasing use of e-commerce in procurement and generally, the Working Group decided that the PP Model Law should allow for, and encourage where appropriate, e-procurement in the text.

13. See the Guide to Enactment, Section I, Main features of the Model Law, Objectives, paragraph 8.

14. For a more detailed discussion of procurement objectives, see “Desiderata: Objectives for a System of Government Contract Law”, Schooner, Public Procurement Law Review, Vol. 11, Pp. 103, 2002, also available at www.papers.ssrn.com/sol3/papers.cfm?abstract_id=304620.

15. “Corruption and Technology in Public Procurement”, January 2007, Schapper/World Bank. Quotation reproduced by kind permission of the World Bank.

16. For further detail, see Working Group papers on electronic communications and e-procurement, available at www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html.

The UNCITRAL approach to the introduction of e-procurement focuses on allowing maximum advantage to be taken of its benefits, while providing for an appropriate level of safeguards. These are intended to place e-procurement in terms of safety and security on a par with traditional paper-based procurement, rather than trying to ensure it is foolproof. The main reason for this is that excessively stringent safeguards would make the introduction of e-procurement onerous and present an obstacle to its use (a significant concern given its potential benefits).

Communications

As regards e-communications in procurement, the revised Article 7 of the PP Model Law will address the form and means of communications together. It will not distinguish between paper-based or electronic means of communication – and will not refer to any particular medium, but will provide that information in a form that provides a record of the content and is accessible so as to be usable at a later date. This approach applies the “functional equivalent” approach of the UNCITRAL PP Model Law on Electronic Commerce (1996)¹⁷ (as followed in the PP Model Law on Electronic Signatures (2001)¹⁸ and the United Nations Convention on Electronic Contracting (2005).¹⁹ For example, the provisions may require communications to be recorded in writing, but whether the writing is on paper or on screen is not prescribed. The provisions also allow for electronic publication of procurement-related information (an important element in enhancing market access), virtual meetings, electronic submission, and opening of tenders, and the storing and exchange of information electronically. The formulation means that there will be no discrimination against traditional, paper-based communications and face-to-face meetings, which continue to be used to a great extent, particularly in tendering proceedings in some developing countries.

The provisions will also ensure transparency and predictability by requiring the form and means of communications used to be specified by the procuring entity at the beginning of the proceedings. The procuring entity does not need to justify its selection

of means of communication, subject to the caveat that any selection of electronic means (or, indeed, paper-based means) may not operate to restrict access to the procurement market.

Electronic submission of tenders

As regards the submission of tenders, a procuring entity will be able to require the electronic submission of tenders (altering the 1994 option for suppliers to submit tenders in writing and in a sealed envelope). The Guide will discuss how to undertake the virtual equivalent of a public opening of tenders (that is, taking the tenders from a secure electronic tender box at the opening time, opening them, and uploading them onto a designated web site for public viewing immediately thereafter), and issues such as establishing the time of receipt, encryption, security, potential threats from viruses, and so on.

Safeguards addressing security, authenticity, confidentiality and integrity will be included. These issues are particularly important where the submission of tenders and other offers are concerned. However, under the principles of technological neutrality and functional equivalence, and because of the pace of technological development and risk of obsolescence, the text itself will not describe the technology that needs to be used. The Guide to Enactment will provide further detail of the functional aspects of systems (discussing the costs and benefits, for example, of public key encryption systems and password-based systems).

Thus the aim of these measures is to offer comparable levels of security to those that exist in the paper environment, so as to maximise the take-up of e-procurement.

Electronic reverse auction

Another aspect of electronic procurement is the electronic reverse auction, an online, real-time dynamic auction between the procuring entity as buyer and a number of suppliers competing against each other to win the contract by submitting successively lower-priced or better-ranked bids during a scheduled time period. The Working Group has recognised the potential to enhance value

17. For the text of the Model Law on Electronic Commerce, see Official Records of the General Assembly, Fifty-first session, Supplement No. 17 (A/51/17), annex I (also published in the UNCITRAL Yearbook, vol. XXVII:1996) (United Nations publication, Sales No. E.98.V.7), part three, annex I, and available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html

18. Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17), annex II (also published in the UNCITRAL Yearbook, vol. XXXII:2001) (United Nations publication, Sales No. E.04.V.4). The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication (Sales No. E.02.V.8), and available at www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf.

19. United Nations General Assembly resolution 60/21 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/488/80/PDF/N0548880.pdf?OpenElement>

for money through a focus on price, and that an online operation can give wide market accessibility. However, there is concern that the price focus may compromise quality and that in the longer term auctions may be anti-competitive and encourage collusion. Indeed, it is the risks of collusion should the participants become aware of their identities that has led to the inclusion of electronic auctions in the revised PP Model Law.

Abnormally low tenders

In the context of its review of auctions, the Working Group considered studies highlighting a risk that the auction procedure might entice suppliers to submit bids at prices that are unsustainably low, with a risk of non- or substandard performance. The Working Group decided that the PP Model Law should address abnormally low prices as a general matter, because the performance risk was one that could arise in any procurement procedure.

The Guide will note that the procuring entity should examine the risk of an abnormally low tender as part of its evaluation of every tender or other offer (and when examining the qualifications of suppliers). A provision in the 1994 text permitting a procuring entity to ask for clarifications of tenders will be amended to give an express authority to permit a procuring entity to investigate a suspected abnormally low tender. Only if there has been such an investigation, and the procuring entity concludes that the price is abnormally low, can the procuring entity reject the submission for that reason under revised Article 18.

Framework agreements and the use of suppliers' lists

Framework agreements are two-stage procurements in which one or more suppliers conclude a framework agreement with the procuring entity at the first stage, and the procuring entity issues procurement contracts to suppliers, often in the form of purchase orders, at the second stage. The Working Group has recognised that these tools are now widely used in practice, and that they allow for an envisaged series of procurements where the procuring entity might not know the quantities to be purchased and the times of each purchase at the outset. Framework

agreements were not addressed in the 1994 PP Model Law, partly because their use was infrequent at that time. They will be included in the PP Model Law to take advantage of benefits such as reductions in administrative and transaction costs and times, and assuring the security of supply (important in, for example, medical procurement for future emergencies). Transparency and competition in smaller procurements can also be enhanced because aggregating them may subject them to more rigorous procedures and avoid the risk of abuse or failure to achieve value for money that may accompany the relatively unstructured procurement methods normally used for such purchases. Further, the grouping of a series of smaller procurements can facilitate oversight.

The PP Model Law will provide for three types of framework agreement:

- (i) a "closed" framework agreement, in which the specification and all terms and conditions of the procurement are set out in the framework, and there is no further opening of competition between the suppliers at the second stage. It may be concluded with one or more suppliers
- (ii) a "closed" framework agreement, which sets out the specification and the main terms and conditions of the procurement, but involves a further competition among the supplier-parties to the framework agreement before the procuring entity awards contracts. It is always concluded with more than one supplier
- (iii) an "open" framework agreement, involving a framework agreement concluded with more than one supplier and involving a second-stage competition between all the supplier-parties to the framework. Open framework agreements will operate electronically (involving unrestricted public access to their terms), and the provisions include many of the features of dynamic purchasing systems under EU Directive 2004/18/EC.²⁰ This type of framework agreement is intended to provide rapid purchases of commonly used, off-the-shelf goods or of straightforward, recurring services that are normally purchased on the basis of the lowest price.²¹

20. Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the "Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts", published in Chapter V, 2004 O.J. (L134) 114 (2004) (the EU Directive), available at www.ec.europa.eu/internal_market/publicprocurement/legislation_en.htm. It is the main text of international character addressing framework agreements in detail. Under Article 15 of the Directive, "A 'dynamic purchasing system' is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specifications."

21. The intention is not to exclude construction procurement per se, though it is considered that little construction procurement would be appropriate for framework agreement procurement. The reference to "lowest price" here is to the definition of "lowest price" tender under the Model Law, to be contrasted with "lowest evaluated tender". The concept is that under this type of framework agreement, there is no competitive evaluation at the first stage of the procurement and, at the second stage, the procurement is awarded to the lowest responsive tender, and quality criteria are pass or fail. Under some systems, the framework agreement operates to provide a dynamic electronic catalogue.

Risks

The provisions will include controls to prevent and limit certain risks that frameworks present in practice, including risks to effective competition in the longer term, risks of collusion between suppliers, and difficulties in ensuring adequate competition in and monitoring the operation of framework agreements (particularly where a monopolistic or oligopolistic market may exist).²² In addition, the use of framework agreements simply to achieve administrative efficiencies can compromise value for money if they are not in fact the appropriate tool for the procurement concerned.²³ Framework agreements are also considered to involve a higher risk of procurement based on relationships between suppliers and procuring entities, rather than on competition among suppliers. All of these concerns and risks can be elevated where the framework agreements are of longer duration. Therefore States will be required to include in their laws a maximum duration for closed frameworks (to avoid them being used to shut out suppliers from competition for long periods). The Guide will discuss the benefits and risks in some detail.

The procuring entity that wishes to use a framework agreement procedure will be required to justify both the use of the framework agreement procedure and the type of agreement to be used (since the tool will be administratively inefficient if under-used or may compromise competition if inappropriately used). For example, the procedures can be appropriate for commodity-type purchases, such as stationery, spare parts, information technology supplies and maintenance, which are normally regular purchases for which quantities may vary, and for the purchase of items from more than one source, such as electricity, and items for which the need can sometimes arise on an emergency basis, such as medicines, and to ensure security of supply in procurement. On the other hand, complex procurement for which the terms and conditions (including specifications) vary for each purchase would not be suitable for this technique, such as large investment or capital contracts, highly technical or specialised items, and more complex services procurement.

As regards procedures, the procuring entity must follow one of the procurement methods of the PP Model Law to select the suppliers to be parties to the framework agreement (the first stage). In addition to transparency provisions, no material changes during the currency of the framework agreement will be permitted. In order to ensure sufficient competition at the second stage of the procedure, all suppliers capable of fulfilling the requirement concerned must be invited to compete. However, the Working Group has sought to avoid limiting the usefulness of framework agreements and their administrative efficiency by formulating too many conditions for their use or too many inflexible procedures.

Evaluation and comparison of tenders and the use of procurement to promote industrial, social and environmental policies

The revised PP Model Law will include a single set of requirements as regards evaluation criteria which build on the provisions of the 1994 text, and were contained in several provisions in the PP Model Law. The extent of the obligations on the procuring entity to disclose the manner in which the criteria, margins, relative weights and thresholds would be applied differed among procurement methods in the 1994 text. The essence of the new evaluation criteria provision (revised Article 11) is that such criteria must be relevant to the subject matter of the procurement and, to the extent practicable, be objective and quantifiable, and that they have to be disclosed at the outset of the procurement together with any margins of preference, relative weights, thresholds and the manner in which these will be applied. The requirement for the criteria to be relevant is a new provision, and the Working Group decided that there need no longer be an exhaustive list of permissible criteria as a result, but the other changes are essentially presentational and not substantive – bringing previous requirements together. The aim is to enable tenders or other offers to be evaluated objectively and compared on a common basis.

22. See Section 2.1 of European Commission, Directorate General Internal Market and Services, Explanatory Note – Framework Agreements – Classic Directive (2005), available at www.ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-framework_en.pdf.

23. For example, procuring entities may procure through an existing framework agreement that does not quite meet its needs; to avoid having to draft their own specifications and terms and conditions; to issue a procurement notice, to examine the qualifications of suppliers, to evaluate full tenders and so on. The end result may be a cheaper procurement in terms of administrative costs, but the purchase may not offer optimal value for money.

The Working Group noted studies discussing the use of procurement to promote industrial, social and environmental policies of States (other socio-economic policies), in particular whether the PP Model Law should allow procurement law to do so, and whether the intended results were achieved. Some studies highlighted the possible costs of such measures in terms of reduced value for money and quality, the economic costs of sub-optimal allocation of resources, and the administrative burden of ensuring compliance with the measures implementing those policies. Others addressed the potential benefits of such policies for development within States. The 1994 PP Model Law permitted advantages to domestic suppliers to be conferred when evaluating tenders or other offers through the use of a margin of preference and through permitting the procuring entity to take account of balance-of-payments positions and other economic criteria, and it was noted that States had indeed used these tools. Procuring entities could also apply socio-economic policies at the qualification stage.

However, it was also noted that the use of the tools was not always carried out in a transparent manner and that the PP Model Law was insufficiently rigorous in this regard. The Working Group therefore decided that the revised PP Model Law should continue to permit enacting States to use procurement to achieve socio-economic policy goals (subject to any constraints on such use that might be applied where the State concerned was a member of the World Trade Organization or a regional trade organisation).

Services and alternative methods of procurement

As part of the reform programme, the conditions for use of services procurement methods and alternative procurement methods have been re-considered. Under the 1994 text, there was a principal method of procurement for services, with three selection procedures similar to the methods for goods and construction (other than consecutive negotiations, available only for services). However, studies showed that procurement decisions were increasingly reflecting broader circumstances surrounding each procurement

procedure; that whether the procurement was of goods, construction or services (such as its degree of complexity, whether specifications could be drafted by the procuring entity, whether negotiations were needed, the extent to which the ultimate selection would be objective or would involve elements of subjectivity, and the degree of urgency). Accordingly, the Working Group decided that this change in procurement practice would be reflected in the text, which would no longer focus on whether the procurement was of goods, construction or services. Although some studies also noted a move away from (open) tendering as the primary procurement method in a limited number of systems, the Working Group reaffirmed that it would remain the procurement method of choice under the PP Model Law (also to ensure that there was no departure from the basic principles of the 1994 text).

Overlap

The Working Group also noted a certain element of overlap in the use of procurement methods other than tendering under the 1994 text. For example, two-stage tendering, request for proposals and competitive negotiation could be used under the same conditions. Some of the conditions for the use of two-stage tendering, request for proposals and competitive negotiation could also justify the use of single-source procurement. The Guide noted these overlaps but did not set out a hierarchy of procurement methods.

The Working Group noted that conditions for use would not lead to a “right answer” as to the most appropriate procurement method, and that some degree of overlap would always be present. Consequently, and in order to ensure that procuring entities exercise discretion appropriately, it decided that the choice of procurement method should be undertaken using a toolbox approach, and the procuring entity should be given guidance in addition to conditions for use to assist in arriving at the most appropriate (that is, the procurement method to be used). In this regard, the procuring entity must exercise its choice with a view to maximising competition (and implementing the objectives set out in the preamble). Procurement methods will

be grouped to reflect standard, relatively simple and complex procurement in individual chapters of the revised PP Model Law, the conditions of use for all methods and the selection of open or direct solicitation,²⁴ and the use of tools such as auctions and framework agreements will be located together, in chapter II of the revised text.

A new procurement method, “Request for proposals with dialogue” will also be introduced in the revised PP Model Law, for very complex procurement. Procedurally, it operates like two-stage tendering, but it has greater supplier input in defining the terms of the procurement. The essential difference between two-stage tendering and this new method is that the procedure is based on crafting a range of technical solutions to the procuring entity’s needs during the dialogue. Those needs will not be based on technical specifications, but on broader terms of reference, and the dialogue procedure is not intended to refine the initial description to a single technical solution against which all participating suppliers bid. Rather, the suppliers improve their own proposals during the procedure, and it is generally not permitted to disclose elements of one proposal to other suppliers. The Guide to Enactment will address the benefits and concerns of this method, and also indicate which other methods under the PP Model Law can provide an alternative for complex procurement if there is insufficient capacity to operate this method.

Simplification and standardisation of the PP Model Law

The revised text has been drafted to enhance user-friendliness and promote best practice, but the extent of the work to simplify and standardise it will not go beyond what is necessary, because of the possible negative impact that so doing might have on current users of the 1994 text. For example, chapter I has been expanded to address all principles that are of a general nature, but principles that apply to one method only or need to be adapted for each method are set out. As noted above, chapter II guides the procuring entity in the selection of the procurement method, and the manner of solicitation, and is

predicated on the notion of ensuring effective competition. The subsequent chapters set out the procedures for the method selected, and the final chapter addresses remedies, and is discussed below.

Remedies

The United Nations Convention against Corruption (“UNCAC”)²⁵ entered into force in 2005, after the Working Group had commenced its review of the PP Model Law. The Working Group took note of article 9 of UNCAC, which requires (among other things) procurement systems to address: “[a]n effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established ... are not followed.”

Bearing in mind that the 1994 PP Model Law’s provisions regarding review were optional,²⁶ administrative and limited, and did not require an independent review, and that supporting guidance gives considerable discretion to the enacting State in implementing review provisions of the PP Model Law, the Working Group considered that the 1994 PP Model Law was insufficiently robust to comply with UNCAC, and with best practice. Accordingly, it has recommended revisions to strengthen the provisions, among other things by removing their voluntary nature, and by deleting a lengthy list of decisions that were exempted from any review process (contained in article 52 (2) of the 1994 PP Model Law). The most notable of the exceptions, and one which had received considerable criticism, was the decision as to the procurement method to be applied. This decision will therefore be subject to challenge, a matter that the Working Group considered important as a corollary to the toolbox approach to the selection of the appropriate method.

Managing conflicts of interest

UNCAC requires enacting States to provide “[w]here appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements”.

24. Open (international) solicitation must take place by default unless restricted or domestic tendering is justified.

25. The text of UNCAC is available at www.unodc.org/unodc/en/treaties/CAC/index.html. UNCAC entered into force on 14 December 2005, following the ratification of its text by 30 signatories. The objectives of UNCAC are to promote, facilitate and support: (i) measures to prevent and combat corruption more efficiently and effectively; (ii) international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and (iii) integrity, accountability, and proper management of public affairs and property.

26. A note to the 1994 text suggested that enacting States might not incorporate all or some of the articles.

There are no equivalent provisions in the 1994 PP Model Law. The Working Group accordingly decided to include provisions to address such matters in chapter I of the revised text and, because those provisions go considerably beyond the administrative issues that are normally found in a procurement law, it will be recommended that they be fleshed out in regulations or other branches of law.

Conclusion

The draft revised text of the PP Model Law is expected to be available during the course of 2010, and its final version will be formally published in 2011, along with a considerably expanded Guide to Enactment. Both texts are designed to reflect the best of modern procurement practice, retaining the principles of the 1994 text that have stood the test of time, and to enable procuring entities, in these times of increasing complexity in procurement, to maximise value for money and avoid abuse by applying clear principles and following streamlined procedures.

Further information

As is standard practice when UNCITRAL's Working Group drafts provisions, all the draft provisions that the Working Group formulates will be presented to the Commission for consideration in due course. Full details of the Working Group's deliberations, the studies on which they are based, and the results of the sessions in the project held to date are found at: www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html

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Procurement in the utilities sector

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The utilities sector consists of the water, energy, transport and postal sectors. Under the EU Utilities Directive, state-owned and commercial entities are obliged to apply the EU procurement policy when they purchase goods, services and works to pursue an activity in one of these sectors.

Introduction

The first EU Directive for state/government procurement (a Classical Directive) was adopted in 1971 and regulated public procurement (PP) of works. This was followed by a Directive regulating the procurement of goods in 1976 and a Directive regulating the procurement of public services in 1992. All the earlier Directives were replaced by a new EU Directive in 2004, which is still in force.¹

The utilities sector was, however, excluded from these provisions, and remained unregulated for many years. Using as a basis the first legal provisions for the utilities sectors on the articles in the Treaty regarding free movement of goods, persons, services and capital, the EU Member States finally adopted a Directive to regulate procurements in these sectors in 1990.

The reason given for adopting a Utilities Directive was to fully establish the Internal Market, an area without internal barriers in which free movement of goods, persons, services and capital was to be guaranteed. Three years later, in 1993, a new Directive for the utilities sectors came into force.² These earlier Utilities Directives were replaced by a new Directive in 2004, at the same time as the Classical Directive, and both are still in force.³

One of the reasons why the utilities sectors were, and still are, excluded from the state/government procurement directives was

that the entities providing utilities services in some countries were governed by public law, in others by private law. This made it difficult to adopt common rules for all entities.

Another reason as to why these entities did not purchase on the basis of Community-wide competition was the closed nature of the markets in which they operated. The EU Member States themselves gave special or exclusive rights granted by and through their national authorities to their own companies or to private companies for the supply to, provision or operation of different kinds of national networks. It was also the EU Member States themselves that gave special or exclusive rights for the exploitation of given geographical areas and for the provision or operation of public telecommunications networks and services.

A third reason given was that national authorities could influence the behaviour of the entities to which they gave special or exclusive rights, including participation in their capital and representation in their administrative, managerial or supervisory bodies. The reasons stated in the directives also hint as to why it took such a long time to adopt common provisions for utilities; the EU Member States were reluctant to give up the power of controlling and regulating these areas themselves.

There are generally major differences between the organisations involved in and the operations carried out in the classical sector

1. Directive 2004/18/EC.

2. Directive 90/531/EEC and Directive 93/38/EC.

3. Directive 2004/17/EC.

(state/government procurement) and in the utilities sectors. Because of these differences, the utilities sectors have been given major exceptions from the standard EU policies on procurement, such as twice-as-high thresholds for goods and services and the option of buying directly without competition from an affiliated undertaking or a joint venture. The reasons for these exceptions are that entities in the utilities sectors are often organised in a different way to those of authorities; the public entities more often resemble how private companies are organised, with subsidiaries and so on in company groups. An example of different application of the utilities PP policy in two markets is discussed in the boxes below.

Due to the differences between the sectors, in the EU Member States in the EBRD region it is necessary that any organisation carefully examine if it is encompassed by the classical sector or the utilities sector. There is a major risk that contracting authorities in the classical sector will try to take advantage of the more liberal exemptions in the Utilities Directive. Such mistakes can mean that the whole procurement process must start over, or worse, that a delivered contract is revoked in court and the goods have to be returned and remuneration repaid.

Practice in the UK – utilities in a privatised environment

Has your country adopted a new separate law to implement the 17/2004/EC directive?

The UK has implemented the Utilities Directive (2004/17/EC) through the Utilities Contracts Regulations 2006 (Statutory Instrument (S.I.) 2006 No. 6). These Regulations also provide for the enforcement provisions of the Utilities Remedies Directive (92/13/EC).

Has your country fully implemented the 17/2004/EC directive or its mandatory instruments only?

The UK Regulations (S.I. 2006 No. 6) fully implement 2004/17/EC.

What are the main differences between state and utilities public procurement in your country?

First, the public procurement rules are different and for the utilities sectors more flexible. As stated above, the Utilities Regulations implement the Utilities Directive but there are separate regulations which implement 2004/18/EC for public sector bodies. The Utilities Regulations implement the more flexible regime of the Utilities Directive in its entirety, including the higher thresholds.

Second, most UK utilities are private sector companies and operate in a fully commercial environment. It is not surprising, therefore, that there have been three successful applications to remove utilities from the scope of the rules under the exemption mechanism of Article 30 of the 2004/17/EC. Article 30 allows for exemption, where market access is free and competitive conditions apply. The exemptions cover oil and gas exploration, power generation and energy supply.

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Practice in Poland – utilities largely owned by the public

Has your country adopted a new separate law to implement the 17/2004/EC directive?

Polish Public Procurement Law (PPL) of 29 January 2004 (Journal of Laws of 2010 No 113, item 759 with amendments) regulates all aspects of PP procedure, from the commencement of the process until the conclusion of the contract. It refers both to the so-called “classical” sector (2004/18/EC Directive) as well as to utilities (2004/17/EC). It also provides for detailed rules concerning legal protection measures in that respect. PPL comprises 203 articles divided into several titles and chapters devoted to different instruments and aspects of the PP process. Specific rules concerning utilities are contained in Title III (“Specific Provisions”) and Chapter 5 (“Utilities”); however it is important to note that there are a lot of references to the provisions contained in other parts of the PPL, notably to Title I (“General Provisions”) and Title II (“Award Procedures”).

There are several acts of secondary legislation issued in order to implement and make more precise provisions of the PPL. Due to the fact that utilities are comprised in the PPL, most of the implementing regulations are to be followed also in this regard.

Has your country fully implemented the 17/2004/EC directive or its mandatory instruments only?

Polish legislators decided to implement all the instruments provided for in 2004/17/EC Directive, apart from one. PPL does not contain direct provisions regarding the qualification system (art. 53 of 2004/17/EC); however the establishment of such systems is possible.

It is worth mentioning that some of the mechanisms, in spite of being implemented, have not been commonly used in practice. This is the case for dynamic purchasing systems (art. 15 of 2004/17/EC) and central purchasing bodies (art. 29 of 2004/17/EC) and is due to the fact that both instruments are relatively new in Poland, so for the time being there is a lack of guidelines or best practice in this regard.

On the other hand, recently there has been a growth in the use of electronic means, including electronic auctions, in the PP procedures that may contribute to the development of the above mentioned mechanisms in the near future.

Regarding the procedure for establishing whether a given utility activity is subject to 2004/17/EC Directive (art. 30 of 2004/17/EC), PPL does not allow the contracting entity to submit a request directly to the European Commission. According to PPL, only the authority competent for that activity – indicated in the Council of Ministers implementing regulation – acting either on its own initiative or at the request of the contracting entity, is entitled to lodge such an application. Since the implementation of 2004/17/EC Directive there has been only one request submitted up until August 2010, concerning the production and wholesale of electricity. However, according to Decision 2008/741/EC the production and sale of electricity in Poland is not directly exposed to competition and is still considered to be one of the utilities activities subject to 2004/17/EC Directive.

What are the main differences between state and utilities public procurement in your country?

Apart from the fact that provisions concerning utilities under PPL are more flexible – which is a direct consequence of 2004/17/EC Directive – there are two particularities of the Polish PP system in respect of utilities procurement.

First of all, provisions of the PPL concerning utilities are applicable if the contract value exceeds the relevant thresholds in accordance with 2004/17/EC, whereas for classical procurement this threshold is set at €14,000.

Additionally, neither state and regional or local contracting authorities are covered by utilities provisions contained in the PPL. As a consequence, only bodies governed by public law, public undertakings as well as private entities operating on the basis of special or exclusive rights, may be considered as utilities entities under the PPL.

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Contracts covered

The Utilities Directive covers procurements made in order to pursue an activity in the utilities sectors. The EU Member States in the text of the Directive have clearly stated what sectors are covered. These sectors are defined as the water, energy, transport and postal sectors. The reason these sectors are called “utilities”, that is, referred to in the plural, is that several sectors are covered, unlike the classical sector which is generally regarded as a single sector. The utilities sectors are related to the national infrastructure and various types of visible and invisible networks. For example, for the rail infrastructure, the network is clearly visible on the surface, compared with bus transportation, where the network is only to be found in the bus schedules.

The EU Court has pointed out that all contracts that contracting entities award in order to pursue an activity in the utilities sectors should follow the provisions in the Utilities Directive.⁴ A common misconception has previously been that only goods and services that are directly tied to the supply of the specific service, such as trains or pilotage services, were covered by the Utilities Directive. Other goods and services would be procured under the provisions of the Classical Directive, such as office supplies and cell phones. The EU Court, however, clarified that contracting entities in the utilities sectors are to apply the provisions of the Utilities Directive for all their contracts. Thus even coffee machines, cleaning services and office supplies should be awarded in accordance with the provisions of the Utilities Directive, if they are to be used for a utilities activity.

Water

Water utilities are entities working with networks for the production and supply of drinking water. The disposal or treatment of sewage also falls within the water sector, if it is carried out by a contracting entity which also operates in the drinking water sector. Private organisations producing drinking water as a side component of their principal activity need not apply the provisions in the Utilities

Directive. There is a special exclusion for the water sector, in that the companies operating in this sector do not have to put the purchase of water out to tender, but can instead buy water from the nearest water source.

Energy

Energy utilities are entities running networks for producing and supplying gas, heat and/or electricity. In this sector, private organisations are also excluded if the production is an unavoidable consequence of carrying out another activity. If a private company does not need a special or exclusive right granted by an EU Member State to produce electricity, as in Sweden, these private companies do not have to follow the provisions of the Utilities Directive.

Organisations that pursue activities involving the use of land for the purpose of exploring for or extracting oil, gas, coal or other solid fuels are subject to the Utilities Directive. If an applicant does not need to get a special licence to conduct such activities, then the EU Member States may apply to the Commission for an exemption. Such exemptions, for instance, have been granted to Germany, the Netherlands and Great Britain.

Contracts relating to the purchase of energy or fuel for the production of gas or heat or for the exploration or extraction of gas, oil, coal or other solid fuels are exempt from the provisions of the Utilities Directive.

Transport

Transport utilities provide or operate networks for transport by railway, automated systems, tramway, trolley bus, bus or cable. For a transport service to be covered, it must operate under conditions set by a competent authority, such as the routes to be served, the capacity to be made available or the frequency of the service. This means that only passenger transport is covered, not transport of goods, since there are normally no networks for the transport of goods set by a competent authority. On the other hand, bus transport of passengers between different parts of an EU Member State which a bus company organises on its own, is not covered.

4. See joined cases C-462/03 and C-463/03, *Strabag and Kostmann* [2005] ECR I-5397 and case C-393/06, *Ing. Aigner* [2008] I-2339.

If an organisation provides airports, ports or other terminal facilities to carriers by air, sea or inland waterways, its activities are covered by the Utilities Directive. In Sweden, there are only two commercial privately owned airports, Linköping and Skavsta, and they both use the utilities provisions. There are also a number of commercial ports that are privately owned. They, like the privately owned airports, shall apply the provisions of the Utilities Directives when they buy goods, services or works to pursue their activities.

Postal

The postal utilities collect, sort, transport and deliver postal items and related services. A postal item includes correspondence, books, catalogues, magazines, periodicals and parcel post. The postal sector previously belonged to the classical sector, but was transferred to the utilities sectors under the new directives of 2004. The reason for this move was that it became increasingly competitive, and there were no possible exemptions on the grounds of competition in the Classical Directive.

Purchases for other activities, unrelated to utilities sector business

Purchases made in order to pursue activities that are not covered by the Utilities Directives could either be covered by the Classical Directive, or may even fall outside the EU procurement provisions altogether. It is therefore necessary to examine for what purpose a procurement is conducted, in order to establish what provisions are applicable. It is also necessary, in order for it to be covered by the Utilities Directive, that a pursued activity actually involves offering goods and services to the public.

For example, the Port of Stockholm offers services to all cargo ships to download and unload their cargo at the port and is therefore a contracting entity within the utilities sectors. The local boat club next to it, however, only offers services to its members' boats; thus its activities fall outside the utilities provisions.

State-owned contracting entities

The organisations covered by the provisions of the Utilities Directive are called contracting entities, compared with contracting authorities in the classical sector. The Utilities Directive states that there is a need to ensure a real opening-up of the market and a fair balance in the application of procurement rules in the utilities sectors. It is therefore required that contracting entities must be identified on an alternative basis rather than by reference to their legal status, as is done in the classical sector. An organisation operating in the utilities sectors usually has some kind of monopoly or oligopoly situation. This means in turn that such an organisation does not have to bother with making good and economical purchases, since it can easily transfer the costs onto the public, who has no alternative sources of supply available. "The public" in these cases includes both private persons and organisations.

For the contracts of an entity to be covered by the Utilities Directive, it is of no importance as to who owns the entity, who supplied its capital or who has the right to appoint members of its board. It is not important whether an entity has an industrial or commercial character. The only issue to be regarded is if the entity pursues an activity covered by the Utilities Directive.

If we first look at the organisations that are contracting authorities in the classical sector, these organisations can become contracting entities if they pursue any of the activities covered by the Utilities Directive. For example, a state-owned company that operates railways will become a contracting entity, the same way as a company owned by a municipality that operates the city's water supply will be covered by the Utilities Directive. In addition, the Utilities Directive also mentions so-called "public undertakings", which are companies that in some way are controlled by the EU Member States.

An organisation can become both a contracting authority and a contracting entity. If for example a municipality has a separate division that operates the public bus service, the part of the municipality running the bus service will be covered by the utilities sector, while the rest of the municipality will be covered by the classical sector.

Private contracting entities in the utilities sector

If we then go on to examine private organisations, contrary to the classical sector, these organisations can also be covered by the provisions of the Utilities Directive. The condition is that they pursue an activity covered by the utilities sectors under a special or exclusive right granted by a competent authority in the EU Member State. The special or exclusive right must restrict the right to pursue the activity to one or more organisations and place the private companies in a monopoly or oligopoly situation. The special or exclusive rights must also substantially affect the ability of other undertakings to carry out such activity.

It will therefore be difficult for other companies to establish themselves in the same industry in the same field, both *de jure* (legally) and *de facto* (actual exclusivity, that is, practically difficult for competitors to pursue similar activities). Only one company can, for example, get permission to build and operate an electricity network in a given geographical area, therefore that company receives special status.

Other examples of private organisations that may become contracting entities are oil exploration companies and companies owning commercial airports and ports, since they have usually found themselves in a monopoly situation. However, if a specific right can be obtained by all or nearly all applicants, companies will not be subject to the provisions of the Utilities Directive. Companies which operate in a competitive market must

minimise their costs, at the risk of otherwise being eliminated from the market and going bankrupt. They are therefore not considered to be in need of further pressure to keep their costs low.

Private companies operating in the utilities sectors, having won a contract in a PP process, are not subject to the provisions of the Utilities Directive, even if they end up in a monopolistic or oligopolistic position. Such companies are considered to already have had to streamline their procurement in order to submit a competitive offer. They therefore do not need to comply with the utilities provisions when they buy goods and services to fulfil these contracts.⁵

Because of the possibility of private organisations being covered by the provisions of the Utilities Directive, procurements and contracts in the utilities sectors are not deemed “public”.

Special exceptions for utilities

There are some special exemptions from the EU rules on procurement in the utilities sectors that are not applicable in the classical sector. We describe the most important ones here.

Competitive activities

It is possible for an EU Member State to apply to the Commission for an exemption from the Utilities Directive for an activity that is directly competitive in a market with free access. The condition for exemption is that the activity is fully competitive, both *de jure* (the EU Member State has implemented all EU deregulation provisions in the area) and *de facto* (that even in practice it is possible for competitors to pursue similar activities). The Commission examines if the conditions for an exemption are met. If it finds that a sector is fully competitive, it will declare that the specific activity in the specific geographic area (usually an EU Member State) is exempt from the application of procurement rules.

5. See the Commissions' explanatory note on the Utilities Directive – definition of exclusive or special rights, page 6, which can be found at www.ec.europa.eu/internal_market/publicprocurement/explan-notes_en.htm

The 80/20 rule for affiliated companies

The 80/20 rule means that purchases of goods, services or works from so-called “affiliated companies” in a corporate group need not comply with the competition requirements of the Utilities Directive. The exemption also covers the situation where companies that are part of a joint venture formed by contracting entities to pursue an activity in the utilities sectors, purchase from each other. The provisions of the 80/20 rule are that not more than 20 per cent of the goods, services or works have been sold on the free market, calculated over an average of the previous three years. Eighty per cent of the products must have been sold within the corporate group or the joint venture. The idea is that goods, services or works produced solely or mainly for the benefit of the group, should not have to be put out to tender.

New companies lacking turnover figures from over three years may instead, by means of business projections and so on, show how they meet the requirements.

Reselling or leasing of goods to third parties

In the utilities sectors, it happens that entities purchase goods to resell them or rent them out, without further processing the goods. If the contracting entity enjoys no special or exclusive right to sell or lease the same kind of goods, that is, other companies have the right to sell or lease the goods under the same conditions, such contracts are exempt from the provisions of the Utilities Directive. Two examples are the purchase of computers for staff leasing or the purchase of containers for leasing to shipping companies at airports and ports.

Non-EU/EEA geographical areas

Contracting entities engaged in activities covered by the utilities, but which are geographically situated outside the European Economic Area (EEA), or without using any physical network or geographical area of any EU/EEA country, are also exempt from the coverage of the Utilities Directive. An example would be if a public power company were to build or operate an electricity network in the Middle East or in India. Contracts for these activities are exempt from the Utilities Directive, since because of cost reasons it is deemed necessary that procurement and advertising must be done in the geographical area where the activity is conducted.

Remedies

The remedies for the utilities sectors are regulated in a special Directive, which in 2007 was amended by a supplementary Directive.⁶ These amendments for the utilities sectors are more or less the same as those for the classical sector.

6. Directive 92/13/EEC and the supplementary Directive 2007/66/EC.

Conclusion

The provisions of the Utilities Directives differ in many ways from the Classical Directive, especially regarding which organisations are covered and the possibility of exclusion.

As mentioned, organisations operating in the utilities sectors usually have some kind of monopoly or oligopoly situation. This means in turn that these organisations do not have to bother with making good and economical purchases, they can simply transfer their extra costs onto the public, who normally has no alternative source of supply available. This is the main reason why it is of great importance to regulate procurement in these areas. If there is no incentive for the utilities to keep their costs down, it could severely affect the competitiveness of other industries which in turn have to raise their prices. The purchasing power of the population would then be affected, to the detriment of a nation's whole economy.

The fact that the Utilities Directive also covers private organisations is a major difference which still causes some problems in Sweden. Many private organisations have a hard time understanding why they have to follow public rules when they are private, commercial companies. The reason is the same as for regulating the public utilities – they are usually in a monopoly or oligopoly situation, which allows them to ignore their cost levels. It is therefore of major importance to also put extra pressure on these organisations to ensure they do not ignore their costs at the expense of other industries, the consumers and, by extension, the national economy.

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Modernising public procurement and creating an independent public procurement regulatory authority

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In the last decade Turkey has dramatically changed its public procurement system. Contemporary public procurement regulation has been introduced, a reformist approach and modern procurement techniques have been adopted, and an independent public procurement regulatory body has been established to raise the profile of procurement and drive up national public procurement sector capability.

Introduction

Public procurement (PP) plays a significant role in a country's economy and is an effective tool for the government and local authorities to encourage economic development. It is estimated that in the EU Member States, PP constitutes 16 per cent of GNP, while this value is about 10 per cent in Turkey.

Those considerable figures have forced many countries to reform their PP regime in various ways. International and regional economic organisations such as the World Trade Organization (WTO), the World Bank and the European Union have each laid down standards in this field.

It is a well-established fact that an efficient PP policy means that public institutions have the opportunity to purchase higher quality goods and services at lower prices. European Union experience proves that up to 10 per cent of public expenditure can be saved by using open and transparent PP procedures.

The regulation of PP is a traditional function of Turkish public administration, and plays an important role as an economic and social policy tool to enhance the country's sustainable development.

Evolution of the Turkish PP system

Legislative reform

The first law governing PP in Turkey was the Law on the Acquisitions Made on Behalf of the Government (Law no: 661), which was enacted in 1925 and in force until 1934. In that same year another law, namely the Law of Auctions, Reverse Auctions and Tendering (Law no: 2940), was adopted which was the longest implemented law in Turkey, staying in force for nearly 50 years, with several amendments during this time.

Subsequently, State Bidding Law no: 2886 was introduced in 1983, with the aim of reducing the bottlenecks in the system and implementing PP in the subsequent two decades. However, that law was designed to mainly focus on works contracts and regulating the construction projects of public entities. Although it also covered purchases of goods, it barely included articles on procurement of services by public entities and this deficiency became a serious issue at the beginning of the 2000s in the context of contemporary PP regulations and good practice.

In addition, this law has not fully covered the public sector in Turkey. As the law itself allowed the public agencies not covered by law to issue their own purchasing regulations with the approval of the Parliament, it brought about dozens of regulations from several public entities.

Furthermore, uncertainties in determining the “estimated cost” (or “appropriate value”), practice of the carnet system and short tender deadlines were also considered to be the other shortcomings of this law. Those aspects left too much discretion to the procurement officers involved in the procurement process, caused a lack of transparency and fair competition, and thus gave way to favouritism and eventually corruption.

Each of the three laws no: 661, no: 2940 and no: 2886 had one important point in common; they regulated not only the purchases made by public entities but also selling, buying, leasing and swapping by all of the government agencies.

Another key element of this period is that the Ministry of Finance and the Ministry of Public Works and Settlements were the two main actors in regulating the sector. The latter two, along with the Court of Accounts and Administrative Courts, also monitored and audited the implementation of the PP legislation.

All the above disadvantages and their incompatibility with modern international PP good practice motivated Turkey to amend the ongoing system. At the beginning of the 21st century, apart from the technical difficulties and above listed problems there were some other national and international developments requiring reform in the PP system.

First, in the framework of Turkey’s candidacy for EU membership, alignment of Turkish PP legislation with the EU *acquis communautaire* was announced as a medium-term priority.¹

Second, following the economic crisis which occurred at the beginning of 2001, Turkey concluded some agreements with the World Bank and the International Monetary Fund (IMF) in which the reform of the PP sector

was also stated as a precondition. Legislative changes alone were not considered sufficient and establishment of an independent regulatory body to oversee the Turkish PP system was also required by the international financial organisations.

Each of these developments added speed to the reform efforts initiated at the beginning of 2000. An inter-ministerial committee with the support and assistance of the European Union and the World Bank prepared a draft PP law based on the UNCITRAL Model Law and EU Directives on PP.

Lastly, Turkey carried out a significant reform in 2002 by adopting two new laws called the Public Procurement Law (PPL) and Public Procurement Contracts Law (PPCL), numbered 4734 and 4735, respectively. The PPL governs the rules and principles of the new PP system, while PPCL establishes the principles and procedures related to creating and implementing public contracts.

Both laws entered into force on 1 January 2003 and since then, they have been amended to take into account the experience from national stakeholders, the progress in PP methods and also the legislative changes in the European Union. Related secondary legislation was also prepared with a reformist approach in mind.

The current version of the PPL aims to cover as many public entities that are spending public money as possible and to govern the PP sector by administering the principles of transparency, competition, equal treatment, accountability and efficiency. With the recent amendments, further alignment with the principles of the EU Directives (Directives 2004/17/EC, 2004/18/EC and 2007/66/EC) has been achieved.

Initiatives such as advance contract notice, standstill period, framework agreements, dynamic purchasing system, electronic auction and eProcurement platform have been introduced. The complaint review system, contract award announcement procedures and tender evaluation criteria have been revised. Time limits for the review of complaints by the Public Procurement Authority (PPA)

1. National Programme for the Adoption of Acquis, NPAA of Turkey, April 2001.

have been shortened as well. Therefore a more transparent, effective and less time-consuming PP regulation that is compatible with modern communication technology and international good practice has been achieved.

Institutional structure

Along with this reform in the legal framework, the regulatory structure of the PP sector has been significantly changed. Before the reform, there was no central public agency responsible for PP regulation. Kamu Ihale Kurumu, the PPA, a financially and administratively autonomous regulatory body, was established by that law to regulate and monitor the national PP sector.

The PPA is assigned and authorised to accurately implement the principles, procedures and proceedings specified in the Law. It is independent in the fulfilment of its duties. No organisation, office, entity, or person can issue orders or instructions for the purpose of influencing the decisions of the PPA.

The Authority is related to the Ministry of Finance and is based in Ankara.

The PPA consists of a 10-member Public Procurement Board, chairmanship, and the service units. At present, the staff numbers almost 250. The chairman of the PPA is also the chairman of the Board. The Board members are nominated by different ministries, high courts and private sector unions, and appointed by a Council of Ministers. The duty period of the Board members is five years. A member may not be elected more than once.

The duties and powers of the PPA are to:

- ◆ prepare, develop and guide implementation
- ◆ review the complaints about the tender process and proceedings conducted by the contracting entities
- ◆ prepare secondary legislation in relation to the implementation of the PPL and PPCL
- ◆ provide training on procurement legislation both in the public and private sector
- ◆ collect, analyse and publish the data concerning the procurement carried out in the framework of this law

- ◆ keep the records of tenderers prohibited from participation
- ◆ regulate the principles and procedures with regard to the tender notices and to publish *The Public Procurement Bulletin* in an electronic environment
- ◆ establish and operate the Electronic Public Procurement Platform.

The duties and powers of the PPA

Among its permanent activities, the PPA regularly publishes *The Public Procurement Bulletin*, an electronic journal which covers all contract notices in a single source nationwide. Access to this bulletin is free of charge and open to the public. As the eProcurement project is a priority for the Turkish government, the PPA has actively carried out the necessary studies and established a web site to inform all stakeholders of the developments and activities in the PP field. This web site is also used as an electronic platform to transmit data and documents (see www.kik.gov.tr).

The notices are transmitted through the Public Procurement Platform, and published following an examination by the PPA staff. Thus, it is aimed at minimising the errors in contract notices, preventing interruptions of and helping the contracting entities to complete their work on time.

The PPA also publishes annual reports relating to the PP sector and PP policy developments in Turkey.

In order to give a general idea about the current scale of the PP sector in Turkey, Table 1 summarises the PP in the last four years according to the information obtained from the contract award data.

The PPA is also responsible for developing procurement capacity in the sector. The PPA provides training both in the public and private sector on PP legislation and implementation. The training activities are carried out by PPA personnel. When expressed in figures, a total of 15,483 participants from 468 public institutions have participated in training organised by the PPA between 2002 and 2009.

Remedies in the new PP regulation

An important novelty of PPL is the introduction of a complaint review mechanism for disappointed economic operators. Disputes which may arise in the course of the procurement process can be settled in successive steps:

- ◆ complaint application to the related contracting entity
- ◆ appeal application to the PPA
- ◆ the administrative court as the last resort.

The complaint and appeal applications are the mandatory administrative steps which must be exhausted successively before filing a lawsuit.

A complaint application to the contracting entity should be made to the latter within 10 days in general and five days in urgent cases, from the date which the proceeding or action that is the subject matter of the complaint has been realised or should be realised, and before the contract is signed.

An appeal application to the PPA should be made within 10 days following the expiration of the decision period if no decision is taken by the contracting entity, or following the decision by the contracting entity if the concerned decision is not deemed appropriate. The PPA will take the final decision within 20 days in general, and 10 working days in urgent cases.

In the applications, reasoned decisions to be made by the contracting entity or by the PPA are as follows:

- ◆ ordering the termination of the procurement proceedings in case of violation of law
- ◆ determining the corrective action in cases where the problem may be remedied through correction
- ◆ rejecting the application in cases where the application does not comply with related rules.

Table 1:
Public procurement in Turkey 2006-09

Year	2006		2007		2008		2009	
	Number of contracts	Value (in US\$ 1,000s) ***	Number of contracts	Value (in US\$ 1,000s) ***	Number of contracts	Value (in US\$ 1,000s) ***	Number of contracts	Value (in US\$ 1,000s) ***
Procurement in total (*)	166,025	27,637,011	179,828	56,633,727	188,704	54,882,470	173,922	44,297,549
Procurement covered by PPL (**)	137,857	24,138,889	148,969	49,635,215	158,727	47,854,178	137,374	38,975,827
Share in total (%)	83	87	83	88	84	87	79	88

(*) number of contracts concluded by entities covered by PPL

(**) procurement realised under exceptional provisions of the PPL is not included

(***) based on the foreign exchange rate at the end of the related year.

The PPA has also introduced a standstill period, which is a significant element of recently amended EU Directives on remedies. This new provision provides that a contract may not be signed unless 10 days have passed in general, and five days in urgent cases, following the notification of all the tenderers of the tender result.

The Public Procurement Board is empowered to hear the parties and the relevant persons, if deemed necessary in the course of review.

With regard to the effectiveness of the Board's decisions, contracting entities are obliged to immediately execute the necessary transactions resulting from them. Board decisions are exempted from appropriateness supervision. However, it does not pose an obstacle to the judicial supervision, because final decisions made by the PPA with regard to the appeal applications will be under the jurisdiction of the Turkish courts, and such cases will have priority. On the other hand, signing the contract or withdrawal of the appeal application will not constitute an obstacle for reviewing the PP procedure in question.

Table 2 gives annual figures of appeal applications during the last four years.

Revenues of PPA

The PPA derives revenue from several sources such as:

- ◆ 0.05 per cent of the contract value is to be collected from the contractor within the scope of PPL, among those above a certain level
- ◆ application fees from the tenderers filing a complaint
- ◆ income from any kind of printed documents, forms, notices and publications

Revenue and expenses of the PPA are subject to audit by the Court of Accounts, which is *ex post* external audit. Table 3 presents the income-expenditure ratio of the PPA.

PPA's contacts at an international level

As PP is high on the agenda of both international and regional institutions and organisations, the PPA pays special attention to the international dimension of PP. Thus, it participates in working groups established under the United Nations or WTO and, more importantly, several activities on PP conducted under the auspices of the European Union. Further, the OECD's studies on the fight against corruption are also regularly followed as this subject is closely interconnected with PP. The PPA has also established bilateral cooperation with several countries to exchange experiences in PP.

Table 2:
Number of contracts and appeal applications 2006-09

Year	Number of contracts*	Number of appeal applications	Ratio of complaints to total (in %)
2006	140,445	3,830	2.73
2007	148,016	4,769	3.22
2008	150,594	5,592	3.71
2009	127,505	2,954	2.32

*(Exceptions from the scope of Law are not included.)

Future prospects of PP policy in Turkey

Objectives of the PPA in the near future include full alignment with the European Union PP policy, full implementation of e-procurement-based procurements, and establishment of a qualification system for tenderers.

The related policies which Turkey is going to follow within this framework should also be determined and implemented as soon as possible. As an example, although the expression of “green public procurement” is a new concept to our country, we should constitute and carry out necessary PP policies that are compatible with environmental protection policies.

The institutional structure constituted by reform should be strengthened and protected. The existence of an independent and objective body in its usual activities and internal functions is important as regards the controversy, with deviations and corruptions which might be faced in this area. A complaint review system is an important instrument which needs continuous improvement to protect the rights and interests of tenderers.

As is the case in any subject, reform is an endless process. Our current PP policy enables us to catch and consider the changes and progress, and this should be sustained. For this reason, we expect that reform in the social, environmental and economic areas will continue in the country alongside global changes.

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Table 3:

Income and expenditure of the PPA

Year	Income (in US \$)*	Expenditure (in US \$)*	Amount transferred to Treasury (in US \$)*
2003	7,875,766.17	6,619,911.58	0
2004	38,641,561.98	14,239,263.22	11,764,705.88
2005	47,555,011.46	14,108,352.37	19,952,304.15
2006	46,224,706.63	15,648,658.77	30,508,379.82
2007	59,070,413.18	24,373,367.46	18,667,611.30
2008	46,658,434.94	20,254,073.99	21,064,156.03
2009	46,463,398.07	34,431,572.19	22,475,937.69

(*) Based on the foreign exchange rate at the end of the related year.

eProcurement in a transition country: a big step towards transparency in Albania

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The government of Albania has worked hard to establish modern public procurement regulation and introduce procurement. This article describes how from 2007 the Public Procurement Agency (PPA) has designed and implemented an eProcurement platform for conducting public procurement. It is remarkable that in Albania, a country struggling to transform its economy and lacking a developed telecommunications infrastructure, all public procurement has been conducted via an eProcurement platform since the beginning of 2009.

Background

To understand how the Albanian e-platform was designed and implemented it is necessary to mention how public procurement (PP) has changed in Albania since 2005.

Before Law No. 9643 on Public Procurement (20 November 2006) was approved and new practices introduced, transparency in PP in Albania was non-existent.

Contracting authorities frequently did not provide tender documents to companies wishing to compete for a contract in order to prohibit them from participating in tender procedures. Whenever the interested companies managed to contact the contracting authority, they would have to pass through a difficult process to obtain tender documents, going through different contracting authority offices to make it possible.

In cases where the interested companies managed to obtain tender documents and produce a proposal, if the contracting

authority did not want them to participate, the companies would find that they were unable to access the contracting authority at the tender deadline and submit the offer. If the interested companies still managed to present the offer on time, members of the evaluation commission would sometimes illegally modify the original tender documents, and then dismiss the offer as non-compliant with the requirements stated in the tender documents.

It was therefore very hard for companies to participate in any tender without “an understanding” with the contracting authority. Even in cases where a complaint procedure was in place, it was difficult, or even impossible, for the companies participating in the tender to prove misconduct by the contracting authority.

In such conditions it was very difficult to consider a regulation system providing for transparency, equality or other fundamental principles of the PP regime.

A transparent system

The Government and the Public Procurement Agency (PPA) were well aware of the problems with transparency and focused on solving the major problems in the PP system and improving PP regulation.

The first step in increasing transparency and moving towards electronic procurement was to make amendments to PP secondary legislation, obligating all contracting authorities to publish every tender document on the PPA web page. This occurred in July 2006.

This move had a very direct impact on the PP system, for the number of complaints was reduced by 50 per cent. Economic operators could download tender documents from the PPA web page for free.

The lesson learned was that using online facilities can increase transparency and improve the whole system. The government of Albania and the PPA therefore decided to pursue the idea.

Electronic procurement

Law No. 9643 on Public Procurement (2006), as amended, anticipated electronic procurement for the first time. During 2007 the PPA was then faced with the challenge of establishing and implementing an eProcurement system. This was challenging because the PPA had no previous experience, but we were all convinced it was the best solution.

The system was set up with the assistance of the Millennium Challenge Threshold Agreement Program for Albania, managed by the United States Agency for International Development (USAID). It was piloted at the end of 2007 by the Line Ministries and General Directory of Roads and applied during 2008. The pilot contracting authorities were those of high volume and high value tenders, so we could see the effects of utilising the eProcurement platform almost immediately.

At the same time, during 2008 the PPA assessed all contracting authorities on their capacity to conduct PP procedures via an eProcurement platform.

By the end of 2008, 2.1 per cent of the PP procedures carried out were conducted electronically. As mentioned in the final report of the Millennium Challenge Threshold Agreement Program, during 2008 the costs of the public contracts signed with suppliers and contractors in the electronically conducted PP procedures were reduced by 15 per cent.

The benefits of going online

The piloted eProcurement platform in 2008 was successful and as there was a strong will to combat corruption and increase transparency, by January 2009 the system was adopted by the Decision of the Council of Ministers No. 45, on the Performance of Public Procurement Procedures with Electronic Means.

Since then all contracting authorities have had to carry out their PP procedures via the eProcurement platform, except for small value contracts and those PP procedures which require no prior publication of their contract notice.

This means that all proposals, offers and requests for participation are sent and received electronically and also that the evaluation process is now performed online following every activity of the contracting authority. This electronic procedure not only shortens the time necessary to sign a contract, but also reduces the internal and external costs of conducting PPs, compared with the paper-based format.

A strong political push

A strong political will to make the eProcurement platform an obligatory solution for all contracting authorities made this possible.

The PPA, in collaboration with the other responsible public authorities, delivered training to all contracting authorities in Albania from November to December 2008 to prepare them for using the eProcurement platform for all of their public contracts.

The new system was not accepted easily by contracting authorities or suppliers and contractors in the market: it was a completely new tool that they were unfamiliar with. If the decision had been left to the stakeholders, it would have been impossible to achieve the objective of 100 per cent PP conducted via the eProcurement platform.

In addition, other measures were taken to facilitate the use of the eProcurement platform for contracting authorities without the internal means to do so. For example, for contracting authorities whose access to the internet was limited, dedicated PC work stations with internet access in the regional authorities' offices were prepared.

The lesson was learned that having to utilise an eProcurement platform encouraged contracting authorities to increase their overall electronic communication capacities.

How the new system works

Central and local government institutions are now using electronically conducted PP procedures for all their transactions.

Electronic procurement is used for every tender above the threshold of €3,500 (except negotiated procedures without prior publication of the contract notice).

Here is a short description of how the procedure is run electronically.

- ◆ The contracting authorities prepare the tender documents (dossier) electronically, following a dossier template on the eProcurement platform. When they finish preparing the whole dossier, they send it electronically to the account of the PPA officer for publishing on the platform: www.app.gov.al/ep/default.aspx.
- ◆ After a general check, the tender dossier is published on the eProcurement platform and is available to all interested parties on the platform's web site.
- ◆ If interested companies have any questions, they can send them electronically, using a special form on the web site and will receive the response electronically to their email address, without being identified by the contracting authority or other participants.
- ◆ Bids are submitted by the companies wishing to compete for a public contract in electronic form by downloading the file consisting of the proposal, offer and request to participate on the platform web site.
- ◆ Nobody can see who is actually offering and for how much before the deadline for opening the bids. This avoids collusions between interested companies and any understanding between contracting authorities and tenderers.
- ◆ No-one can see offers before the deadline for opening the bids. The members of the evaluation commission have to open all tenders received at the same time. It is unnecessary for them to be present at the same place because access to the offers is online, but each member has to access the eProcurement platform using a password and username at the same time. Offers can only be opened through this collective procedure and the commission can continue the evaluation.

Table 1:
Public procurement procedures announced during 2009

	Total	Conducted via eProcurement platform
Number of announced PP procedures	8,459	7,277
Budget of announced PP procedures	110,722,796,084	106,967,873,867
Number of consultancy services	216	216
Consultancy service in value	2,185,956,022	2,185,956,022
Number of negotiated PP procedures with contract notice	9	9
Value of negotiated PP procedures with contract notice	17,357,490	17,357,490
Number of international open tenders	11	11
Value of international open tenders	12,904,892,615	12,904,892,615
Number of local open tenders	3,200	3,200
Value of local open tenders	80,276,016,724	80,276,016,724
Number of call for proposal PP procedures	3,830	3,830
Value of call for proposal PP procedures	9,125,111,004	9,125,111,004
Number of international restricted tenders	2	2
Value of international restricted tenders	1,960,868,000	1,960,868,000
Number of locally restricted tenders	9	9
Value of locally restricted tenders	497,672,013	497,672,013
Number of negotiated PP procedures without contract notice	1,182	-
Value of negotiated PP procedures without contract notice	3,754,922,217	-
Total number of successful PP procedures	4,816	3,634
Total budget	63,807,627,376	60,052,705,159
Total expenditure	54,880,046,198	51,358,000,549
Total savings	8,927,581,178	8,694,704,610
% taken up by the offered prices against the procurement budget	14%	15%

- ◆ After the evaluation, the eProcurement platform messaging system announces to all participants whether they are qualified or not. If necessary, they can then go through the complaint procedure, which is so far outside of the eProcurement platform.
- ◆ Lastly, the contracting authority announces the tender's winner and his/her name is published on the platform's web site. Once the contract itself is signed the contract is also published on the platform.
- ◆ All decisions of the contracting authority are processed via the eProcurement platform, thus they are recorded in real time and provide easy access to PP records.

eProcurement is therefore an effective means against corruption, since it increases the transparency of PP procedures and avoids the threat of interested companies contacting each other and agreeing on offered prices or the misconduct of procurement officials of the contracting authorities dealing with the procurement procedures.

Achievements

The achieved indicators during 2009 are as follows. Values are given in Albanian lek (Lk).

Clear advantages

The indicators above reflect how the transparency of the PP processes has increased and how fighting corruption has been effective. Another important indicator of the latter is the increase in the number of companies competing for public contracts conducted via the eProcurement platform, from an average of two companies to seven. Thus, competition is greater, and there is a significant improvement towards increasing the number of companies in the market convinced that the PP system is incorrupt and can be trusted. All this has increased participation in tenders and lowered average prices.

Our experiences with modernising the Albanian PP system confirm the theoretical advantages of conducting PP electronically. The effectiveness of implementing a complete, electronic workflow-based online PP system

has been clearly demonstrated. This cannot be achieved by providing for electronic publication of contract notices or occasional electronic auctions only.

Contracting authorities can easily archive and search information on e-tenders organised by other institutions, avoiding a lot of paperwork. The eProcurement platform ensures that more companies in the market are getting interested in and participating in public tenders, because they can submit their bids from the relative comfort of their own office. This ensures more competition and, potentially, better services and goods, for a lower price. Anonymous enquiries, submitting bids entirely online and mandatory cooperation of the evaluation commission members, who can also stay in their offices, has significantly simplified the PP process and reduced the perceived corruption of the PP system.

Security

The eProcurement platform provides confidentiality for offers and requests for participation. Furthermore, it guarantees that the transmitted data will remain intact and incorrupt, as the detection of non-authorized interventions is provided for. Only authorised procurement officers are allowed to set or change the deadlines for the opening of bids, proposals or requests for participation.

Contracting authorities can only see into the content of the bids and requests for participation after the deadline for their submission is over. All roles in the procurement process are well defined and allocated to the authorised procurement officers; all their activities are recorded and can be easily tracked in the system.

Likewise, the eProcurement platform enables full control at any time. There is a black-box to ensure the security of the system, situated away from the PPA, where the hardware of the system is hosted. This external server registers all data in the system and any action of the users. It is administered by the Prime Minister's office and any suspicion of misconduct or illegal intervention in the system can easily be verified.

Back-up plan

In order to guarantee business continuity, as well as the security of the eProcurement platform, there is a back-up of the existing system at the offices of the National Agency of Information Society (NAIS). An agreement has been signed between the PPA and NAIS on managing the back-up system. And if anything happens to the basic system, the back-up system immediately begins to run, in order to provide a smooth service for contracting authorities that are running tenders and companies participating in PP procedures.

This business continuity plan guarantees the following:

- ◆ data kept in the eProcurement platform are secure
- ◆ emergency situations can be easily managed at all times
- ◆ lost data may be retrieved at all times
- ◆ all services are returned to the same state that they were in prior to the system crashing
- ◆ data security and integrity is maintained.

Challenges and training

The performance of PP procedures electronically can only be realised through the active contribution of both the contracting authorities and economic operators interested in participating. As a result, acknowledgement of the system by both parties is a necessary requirement in order to carry out procedures.

This has been another challenge for the PPA, which has carried out ongoing training and provided assistance to the procurement officers working for contracting authorities throughout the entire country, as well as to the companies in the market participating in PP procedures. This training and assistance has been carried out in collaboration with the Millennium Challenge Threshold Agreement Program for Albania and the Public Administration Trainings Institute.

Conclusion

It has been a very long and demanding project, but the results achieved justify all efforts.

The PPA was awarded second place in the 2010 United Nations Public Service Award in the category of “Improving Transparency, Accountability, and Responsiveness in the Public Service.”

Further information

On the home page, www.app.gov.al/ep/default.aspx, you will find details of all contract notices, winner notices, and contract award notices published on the Albanian eProcurement platform. Furthermore, you can obtain updated information on PP law and rules, guidelines and user manuals for the contracting authorities and economic operators, as well as the standard tender documents for various procedures.

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Information about the EBRD's Legal Transition Programme can be found at www.ebrd.com/law
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