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ISSUES PAPER 1: PUBLIC PROCUREMENT



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The findings and opinions expressed in this report remain those of the authors and do not necessarily reflect those of the Government of Ukraine, Ministry of Economy or British Government

Executive Summary

The Ukraine EU FTA is likely to involve progressive approximation of Ukraine's legislation with the EC acquis and the introduction of mutual access to their respective markets at all levels on the basis of national treatment.

The main benefits of this to Ukraine will be to increase efficiency of public investment in Ukraine (lower, more competitive bids) leading to increased government investment (from procurement savings) and increased trade in goods and services from Ukrainian business as they win EU public procurement contracts.

The key issues, which stakeholders and negotiators need to address are:

How much and how quickly to adopt EU public procurement laws, practises and mutual access

Stakeholders in Ukraine should adopt a position on these key issues based on analysis of a number of factors which will determine how these potential changes will affect them.

Opportunities: The level of integration will depend on the benefits to Ukraine (perceived and actual).

Assess what supplies, services and works Ukrainian business could realistically provide to public authorities in the EU and estimate their value.

Evaluate the efficiency gains in public spending

Laws: The legislative changes needed will depend on the difference between the current legislative framework and that of the EU.

Assess the changes in Ukrainian legislation required to comply with EU legislation on public procurement

Based on the analysis of steps to be taken and level of compliance, evaluate the ease of achieving each step in terms of political realities

Institutions: Compliance with public procurement legislation requires an effective institutional framework.

Assess the differences between the existing institutional framework in Ukraine and that required by the EU Directives

Based on the above analysis, list the changes required to the existing institutional framework, including creation of any new bodies

Assessment of the institutional legislation required to ensure effective implementation

Capacity: Implementation will require capacity of government and politicians to effect the changes required and implement the rules effectively.

Assess the pool of technical experts able to develop and implement EU style rules

Training needs assessment across all government and state owned enterprises

The level of political commitment and understanding

Context

Government procurement negotiations involve access of each party to government contracts and can include central government, regional government and state owned enterprises. However, the coverage of procurement on a sector-by-sector basis can be negotiated, as can the thresholds where national treatment is applied and type of contract (works, supply and services).

Scope of negotiations

The FTA is likely to involve progressive approximation of Ukraine's legislation with the EC acquis and the introduction of mutual access to their respective markets at all levels on the basis of national treatment. This could apply to public contracts, concessions and supply, service and works contracts awarded by utilities, state-owned enterprises and private undertakings over which the state retains effective control or utilities that operate with exclusive rights. Furthermore, it is likely that the EC would require independent and effective domestic review mechanisms and reform of the institutions involved in procurement.

Economic benefit

The economic impact of approximation of procurement laws and practices to those of the EU will be:

- to increase efficiency of public investment in Ukraine (lower, more competitive bids) leading to increased government investment (from procurement savings);
- reallocation of resources from public tendering to more efficient companies, particularly SMEs, which would grow and reinvest in the economy;
- lower costs from cheaper EU companies and potentially increased quality of public works, supplies and services;
- increased trade in goods and services from Ukrainian business as they win EU public procurement contracts.

The potential benefits of increased efficiency (through greater transparency) in Ukraine of adopting the acquis have been estimated as follows:

- Public procurement is estimated to be between 5 and 20 per cent¹ of GDP;
- The existing level of participation in open tenders is relatively low, on average², only 2.6 firms per bid (2005). The number of single participant bids represented 15.3 per cent³ of total value of procurement;
- 11.4 per cent⁴ of bids by value are requests for price proposals;
- 99.8 per cent⁵ of all contracts by value are awarded to domestic firms;
- Over US\$ 14 million⁶ of budgetary funds are still spent without any procurement procedures, despite the law.

Key Issues

In light of the scope and implications of these negotiations, the key issues, which stakeholders and negotiators need to address, are:

How quickly can or should Ukraine adopt the EU public procurement laws and practices?

How much of the EU legislation/practices should Ukraine adopt (all or part)?

What timeframe should be allowed for Ukraine to open up its procurement market to full EU participation with national treatment?

Are any sectors to be excluded? On what basis?

¹ Studies by the ECORYS (2008) Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement ; Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations; CEPS, IFW & ICPS (2006) The Prospects of deep free trade between the European Union and Ukraine.

² Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations

³ ECORYS (2008) Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement

⁴ Ibid.

⁵ Ibid.

⁶ Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations

Existing Regime in the EU

The EU public procurement regime is based on core principals of transparency, equal treatment, free competition and non-discrimination. This ensures that government resources in the EU are allocated more effectively and promotes trade and growth.

Legislative Framework

The award of public contracts in the EU (public works, public supply and public service contracts) is governed by two specific directives regarding the classical sector (traditional contracting authorities) and utilities sector (covering the authorities and entities operating in the fields of water, energy, transport and postal services).

The scope of application of these directives depends on the type of contracting authorities/entities, contracts covered, thresholds and exclusions. To ensure the procurement process follows the general principles these directives dictate specifications for contract documents, different types of procurement procedures, advertising and transparency, selection criteria and rules on contract award.

The directives also provide for electronic procurement including electronic communication, dynamic purchasing systems and electronic auctions. The rules on the contracts covered and on advertising are detailed by separate regulations on the Common Procurement Vocabulary (CPV) and standard forms for publication.

Compliance with the procurement directives requires adequate implementation capacity including the appropriate administrative structures at a central level to ensure the key functions of policy-making, drafting of primary and secondary legislation, provision of operational tools, help-desk, monitoring and statistics and controls for all aspects of public procurement. Moreover, purchasers at all levels have to possess the necessary administrative capacities to allow for effective implementation of these rules.

There are three further directives addressing remedies for both sectors, which contain requirements for the establishment of effective review procedures against any action or inaction of contracting authorities/entities liable to produce legal effects. The procedures need to guarantee access to independent review, including the powers to adopt interim measures and award damages. These review bodies require adequate capacity to guarantee the effectiveness of the system as a whole.

EU Public Procurement Legislation

Directive 2004/17/EC [Utilities Directive] of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (30.04.2004).

Directive 2004/18/EC [Traditional Sector Directive] 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 (30.04.2004).

Commission Regulation (EC) No 2151/2003 of 16 December 2003 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV)

Commission Regulation (EC) No 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (to be implemented by Member States into national law before 20 December 2009)

Overview of the Public Procurement Regime in the EU

Scope of Application

The public procurement rules apply when three main pre-conditions are met:

1. The procuring body is a "contracting authority" as defined in the rules:

| | Contracting authority |
|------------------|---|
| Classic Sector | 'Contracting authorities' are the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law. |
| Utilities Sector | 'Contracting entities' are contracting authorities, public undertakings, or any other body (including private organisations) granted special or exclusive rights, that undertake any of the following activities: <ul style="list-style-type: none">- <u>Gas, heat and electricity</u>: the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat; or the supply of gas or heat to such networks.- <u>Water</u>: the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; or the supply of drinking water to such networks.- <u>Transport services</u>: provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.- <u>Postal services</u>: services consisting of the clearance, sorting, routing and delivery of postal items. |

- **Solid Fuels:** Exploration for, or extraction of, oil, gas, coal or other solid fuels.
- **Ports and airports:** the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

Note: public undertakings are defined as any undertaking over which a contracting authority exercises a dominant influence by ownership, financial participation or through the rules which govern it.

2. The contract is a public works, services or supplies contract. In the case of mixed contracts (e.g. for supply and maintenance), the rules applicable will relate to the predominant element of the contract, as set out by the directive;
3. The estimated value of the contract (net of VAT) equals or exceeds the relevant financial threshold (Euro).

| | Supplies | Services | Works |
|------------------|----------|----------|-----------|
| Classic Sector | 133,000 | 133,000 | 5,150,000 |
| Utilities Sector | 412,000 | 412,000 | 5,150,000 |

The rules expressly prohibit deliberately splitting contracts to bring them below the thresholds.

There are a number of specific exclusions to the application of the public procurement directives:

| Specific exclusions for contracts: | |
|------------------------------------|---|
| Classic Sector | <ul style="list-style-type: none"> • for the purpose of permitting the contracting authorities to provide or exploit public telecommunications networks or to provide to the public one or more telecommunications services; • contracts when they are declared to be secret, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of that Member State so requires; • the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; • the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time; • arbitration and conciliation services; • financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital, and central bank services; • employment contracts; • research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority. |
| Utilities Sector | <p>Works and services contracts:</p> <ul style="list-style-type: none"> • awarded for purposes of resale or lease to third parties; • awarded for purposes other than the pursuit of an activity |

- covered or for the pursuit of such an activity in a third country;
- which are secret or require special security measures;
- awarded pursuant to international rules;
- awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture.

Services contracts:

- the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon;
- arbitration and conciliation services;
- financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting entities to raise money or capital;
- employment contracts;
- research and development services other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting entity.

Procurement Procedures

In tendering, the contracting authority or entity must use one of the proscribed procedures:

Open - There are no restrictions as to when this procedure can be used. All interested parties can submit a tender in response to a notice, subject to meeting the contracting authority's selection criteria, if any. No negotiation with the bidders is permitted.

Restricted - There are no restrictions as to when this procedure can be used. All interested parties may express interest but only those meeting the contracting authority's selection criteria will be invited to tender. No negotiation with the bidders is permitted.

Competitive Dialogue - This procedure can only be used in limited circumstances, principally for complex contracts where:

- an open or restricted procedures will not allow the award of the contract;
- an Authority is not objectively able to define the technical means of satisfying its needs and/or it is not objectively able to specify the legal/financial structure of a project;
- an Authority is concentrating on the outputs of the contract and allows innovation from the market as to the methods of delivery through a dialogue process.

All interested parties may express an interest but only those meeting the contracting authority's selection criteria will be invited to tender. During the "dialogue" phase, tenderers are able to discuss all aspects of the contract individually with the contracting authority. Once the dialogue has generated

solutions to the agreed requirements, final tenders are invited based on each tenderer's individual solution. The best tender can then be selected, but there is very limited room for any further changes to be made once submitted.

Negotiated - There are two types of negotiated procedure:

- without prior advert, the contracting authority is not required to issue a notice and may negotiate directly with the supplier of its choice;
- with prior advert, the contracting authority must publish a notice. All interested parties may express an interest but only those meeting the selection criteria will be invited to negotiate the terms of the contract.

The Regulations do not set out any rules to govern the conduct of negotiations, which means that the contracting authority can, within certain parameters, establish its own procedures for the negotiation and tender stage.

Advertising and Transparency

Contracts covered by these Regulations must be published in a contract notice in the Official Journal of the EU (OJEU) using the EU standard forms and with minimum lead time periods (52 days for open procedures, 37 days for Expressions of Interest, 40 days for tender submission for restricted procedures and 37 days for both competitive dialogue and negotiated procedures).

If a candidate is excluded or its bid unsuccessful at any stage of the tender process it is entitled to receive an explanation within 15 days of a written request, providing reasons why the candidate was unsuccessful and, if it submitted a compliant tender, also the characteristics and relative advantages of the successful tenderer and the name of the successful tenderer.

Award Criteria

Contracting authorities/entities must award a contract on the basis of either:

1. Lowest price: The lowest priced tender wins. No other element of the tender may be taken into account; or
2. The most economically advantageous tender (MEAT): Factors other than or in addition to price, like quality, technical merit and running costs can be taken into account. If MEAT is being used:

- the headline contract award criteria (e.g. "price, quality of services, risk to contracting authority etc.") must be set out either in the notice or the tender documents; and
- the weighting of each criterion must also normally be given, either as an exact number or as a meaningful range (e.g. 'price: 30%-40%').

Institutional Framework

To implement the Public Procurement directives, a range of procurement tasks and functions are required to be implemented by governments, including:

1. Primary policy and legislative functions
2. Secondary policy and regulatory functions
3. International co-ordination functions
4. Monitoring and control functions
5. Advisory and operations' support functions
6. Publication and information functions
7. Professionalisation and capacity-strengthening functions
8. Development and procurement co-ordination functions
9. Enforcement and remedies
10. Central purchasing functions (not a necessity or requirement)

The organisational structures of the EU Member States to undertake these tasks are not proscribed by the Directives (except to some extent, Remedies) but most Member States have central public procurement bodies, although their respective responsibilities, functions and tasks differ. For the new Member States, central public procurement bodies have been shown⁷ to have been highly successful in developing procurement systems and this has become the preferred model for implementation.

The remedies directive requires that in each Member State, aggrieved bidders should have access to rapid, effective, transparent, and non-discriminatory review and remedies.

⁷ Central Public Procurement Structures and Capacity in Member States of the European Union, SIGMA PAPER No. 40 (2007)

There is substantial common ground amongst Member States but also considerable differences between the public procurement review and remedies systems:⁸

“most Member States provide for direct complaints to the contracting entity that committed the alleged breach of public procurement law as a direct or indirect first stage of review. However, this possibility is not regarded as a first stage of the review process required by the relevant EC Directives. Therefore differences can be found in terms of whether such a complaint is set as a compulsory first stage of review and whether tenderers actually use this possibility in practice, and with regard to procedural details, such as time limits. All Member States operate a first-instance judicial or quasi-judicial review of procurement decisions.”

⁸ Public Procurement Review and Remedies Systems in The European Union SIGMA PAPER NO. 41 (2007)

Existing Regime in Ukraine

Public procurement in Ukraine amounts to US\$ 3-5 billion or 5-7 per cent of GDP. However, studies have shown that much of the procurement lacks effective competition and therefore, is likely to be allocated inefficiently.

Legislative Framework

The framework law 'On Public Procurement of Goods, Services and Works' was adopted in February 2000 and subsequently amended many times. However, it was eventually cancelled by a Law adopted by the Verkhovna Rada of Ukraine in March 2008.

It has been replaced by the Cabinet of Ministers Regulation N921 dated 7.10.2008 "On Approval of Rules of Procurement of Goods, Works and Services from State Funds" (PPR).

Unlike the EU, Ukraine has no special rules for utilities, therefore the utilities sector must apply and be governed by the PPR.

Overview of the Public Procurement Regime in Ukraine

Scope of Application

The PPR applies to supplies and services contracts of a minimum of UAH 100,000 and works contracts of a minimum of UAH 300,000 by all state and local governments, public enterprises, and private enterprises in which the public share is more than 50%.

There are a number of exclusions concerning secret contracts and defense procurement. In addition, there is also a clause which designates that special goods, works and services are not covered by the PPR and that the Cabinet of Ministers will define, on a case by case basis, those which are "special".

The Regulation does not apply to a range of specific supplies, works and services:

Exempt supplies, works and services:

- blank sheets for valuable papers and forgery – proof documents;
- Ukrainian government awards;
- government standard education certificates;
- bank services relating to processing of housing and utility payments, servicing current accounts and payment processing
- services relating to transportation by air, automobile transportation, food, housing, use of sports facilities and special – purpose equipment designated for sports training sessions, sports competitions and events of national and international levels, purchases of fuel, lubricants and pharmaceutical goods for Ukraine's national teams;
- services relating to ensuring the fire safety of facilities by units of the state fire-fighting service;
- supplies, works and services provided by Ukraine as humanitarian aid to other states;
- supplies, works and services related to the elimination of emergency situations under specific decisions of the Cabinet of ministers of Ukraine;
- electrical energy, its transportation and distribution;
- supplies, works and services procured by enterprises for emergency repair of equipment directly used for production of thermo-energy;
- nuclear fuel and fuel elements for nuclear reactors;
- supplies, works and services relating to the organization and performance of official state and international events under specific decisions of the Government;

- supplies, works and services for carrying out events and official receptions involving the President of Ukraine, Speaker of the Parliament of Ukraine and management of the Cabinet of Ministers of Ukraine
- supplies, works and services relating to supporting activities of individuals protected by the state and operation of special regime facilities;
- air transportation services for official delegations of members of the State, parliamentary, government, diplomatic delegations;
- services relating to servicing the official delegations of members of the state, parliamentary, government, diplomatic delegations and officials of the government authorities;
- administrative services provided exclusively by the executive government authorities in accordance with legislation;
- services and goods prices (tariffs) which are set by the executive government agencies, by the Council of ministers of the Autonomous Republic of Crimea, executive agencies of village, town and city councils as required by law;
- leasing of immovable property;
- purchase of immovable property;
- railroad transportation services;
- services relating to the training of specialists, science and instruction workers, qualification improvement, re-training (post-diploma education) and training of workers under government order;
- postal services, postage stamps and stamped envelopes;
- natural gas transportation, distribution and delivery services;
- natural gas;
- prosthetic and orthopedic goods;
- orthopedic footwear;
- technical appliances for rehabilitation of invalids, maintenance services and parts thereof;
- prosthetic and orthopedic services and services relating to rehabilitation and treatment of invalids (including those with spinal problems);
- visual art creations: paintings, graphics, sculpture, as well as decorative - applied and folk art objects, for purposes of replenishment of the State museum fund;
- books, periodicals and other documents fixed on paper, magnetic, cinema and photo film, optical disks or other media for purposes of replenishment of library funds;
- supplies and services for creation of new shows (concerts), production of movies and audio-visual works;
- telecommunication services, including radio and television broadcasting (excluding mobile communication and Internet providers' services);
- supplies and services relating to designing and producing forgery-proof paper, bank notes and coins;
- services procured to ensure implementation of the state budget involving government borrowing and government debt servicing and redemption;
- supplies, works and services procured by customers located outside Ukraine;
- supplies and services procured directly for purposes of carrying out tour events by artistic collectives and performers;
- supplies, works and services procured by the bodies, agencies, educational establishments and enterprises of the criminal-executive system and from the enterprises of the criminal-executive system;
- centralized supply of water, water drainage and maintenance of sewage systems;
- centralized supply of thermo-energy;
- legal services relating to protection of the rights and interests of Ukraine in the course of case trials in agencies of foreign jurisdictions;
- procurement of scientific and technical, research and design and development services that have passed the competitive procedure for selection of scientific projects.

Procurement Procedures

In tendering, the contracting authority must use one of the following procedures:

Open - The open procedure is the main procedure to be used unless specific circumstances justify other procedures;

Restricted - This procedure may only be used where, due to the complex or specialised nature of the contract, there are a limited number of potential tenderers. If this procedure is to be used for contracts above UAH 500,000 (EUR 100,000) prior approval from the authorised agency is required. Only the invited tenderers – at least two – are entitled to submit tenders;

Two-stage tender – This procedure may only be used in cases where:

- the goods, services and works cannot be sufficiently specified in advance;
- all tender proposals delivered by the tenderers in an open tender were declined by the client due to either price or the bids did not meet the tenders documentary qualifications;

- for the execution of construction works, which are the repetition of previous work which was conducted under restricted tender;
- scientific research, experiments or development work, the provision of consultancy and other special services.

The first step consists of the submission of preliminary offers without any price indication. Negotiations are then conducted with the tenderers, and technical specifications and award criteria are developed. The tenderers whose preliminary proposals were not rejected are then invited to submit a final tender, with an indication of price.

Open tender with price reduction – This procedure may only be used for standard goods and services when the contract is above UAH 200,000. The tender proceeds as an open tender, with the difference being that the submission of proposals takes place in two stages. In the first stage, preliminary tenders are submitted without any indication of price. In the second stage, the preliminary tenders selected in the first stage are invited to submit a final tender, with an indication of price. This is followed by a reverse auction, where tenderers are invited to adjust their prices downwards.

Request for quotations - This procedure may only be used for standard goods and services when the contract does not exceed UAH 200,000. At least three tenderers must be invited to bid, and the lowest price is the only award criteria.

Single-source procurement - There are no funding limits specified for this procedure but it may only be used in following situations:

- procurement of arts and procurements related to Intellectual Property;
- absence of competition;
- need for additional procurement of goods or services when changing the supplier would lead to a change of specification of the goods or services;
- construction works where some of the works were not originally envisaged. The additional contract should not be more than 50% of the initial contract;
- procurement contract with the winner of an architects competition;

- immediate needs procurements in relation to special economic or social circumstances, including emergency situations.

Advertising and Transparency

The PPR requires authorities to publish annual notices of planned procurement procedures and to publish individual tenders based on a set outline and with minimum lead time periods (45 days for open, 30 days for restricted, 30 days for 2 stage, 15 days for open with price reduction and 5 days for request for quotations).

These notices must be published in the official Public Procurement Bulletin (“Visnyk Derzhavnyh Zakupivel”) produced by the Ministry of Economy and be placed on the web-portal for public procurement – www.tender.me.gov.ua

The tender procedure is not to be started until the announcement is published in the Public Procurement Bulletin and placed on the public procurement web-portal, except in the case of restricted tenders, requests for quotations and single-source procurement award procedures.

For larger contracts (Supplies – above Euro 200,000, Services – above Euro 300,000 and Works – above euro 500,000) that are presumed to be of international interest, the notices must also be published in relevant international bulletins and websites.

Award Criteria

The award criteria for all contracts must be based on:

- price;
- time of delivery of goods, work and services;
- quality and functional characteristics, ecological purity;
- after-sales services;
- payments modalities;
- operational costs;
- transfer of technologies and training of managerial, scientific and manufacturing personnel with the use of local resources, including means of production, labour and materials for the output of goods, performance of works and provision of services proposed by the bidder.

When criteria other than price are used, for the purpose of the evaluation process they must be either priced or otherwise weighted to indicate their relative importance. The price factor may not be weighted at less than 70% of the evaluation.

Evaluation of tenders and decision making must be undertaken within 30 days of the official opening of tender documents.

Review Procedures

Both the choice of procedure and decision not to accept any tender proposal are not eligible for review of complaint. All other complaints have to be brought within 15 days of the date on which the grounds for bringing the proceedings were established. Receipt of the complaint will result in a suspension of the procurement procedure for a period up to 15 working days. All tenderers must be notified within three days.

Where the alleged breaches are found after tender process, the Ministry of Economy can take a decision to cancel the results of the tender and restart the tender process.

Institutional Framework

The Public Procurement Department (PPD)

The functions of a public procurement office are carried out by the Public Procurement Department (PPD) in the Ministry of Economy. This department was designated as the authorised central agency for co-ordination of the procurement of goods, works and services. It is not an independent authority.

The functions of the PPD include the development of public procurement:

- Reporting - preparation and submission of various reports to the Cabinet of Ministers, Parliament and the Accounting Chamber; provision of explanations of the PPR procedures; organisation of training in the area of procurement; international co-operation and; support to the participation of domestic manufacturers in procurement tenders outside Ukraine;
- Control - responsible for collecting information on planned procurement procedures and tenders, is actively involved in the approval of procurement procedures other than the open

tenders, and reviews complaints submitted by participants prior to the conclusion of a procurement process;

- Compliance with procurement legislation - inspections of the spending units and in the event of the discovery of actionable breaches of the PPR has the power to work with law enforcement agencies. It also co-operates closely with the Antimonopoly Committee in the detection of violations of the legislation to protect economic competition in the area of procurement. It also co-operates with state authorities involved in the prevention of corruption in state procurement.

The Procurement Bulletin

The Procurement Bulletin Enterprise (PBE) is a self-financing enterprise owned by the Ministry of Economy. Its main activities are the publication of the Public Procurement Bulletin and of methodological guidelines. The Bulletin is a weekly publication containing procurement notices, which number approximately 1,000 per week. The PBE also operates a web-based advertising vehicle, which reproduces the paper notices. There are in approximately 10,000 combined subscribers to the paper (also available in public libraries) and web-based versions.

Consultative and Methodological Council on Public Procurement

The Consultative and Methodological Council on Public Procurement (MC) was created by the PPD and is mainly a consultative and methodological body. MC is staffed with the Deputy Ministers of Economy, Finance, Justice, Head of State Control and Audit Service, State Treasury, Antimonopoly Committee, State Price Inspection, and if agreed, Deputies of the Accounting Chamber, Members of the Verkhovna Rada Committee on Economic Issues and Committee on Corruption. Its main responsibilities are to review documents related to any disputes that occur before contract signature, as well as agree on procedures relating to the use of single source procurement or restricted tenders.

Bodies responsible in the case of infringement of PPR

1. State Control and Audit Service: Control of the implementation of the PPR by contracting entities. Additionally they conduct execution of the protocols regarding administrative breaches that are presented to law enforcement agencies as well as other functions designated by the Legislation of Ukraine.

2. State Treasury: Control of procurement contract eligibility and ensuring that this corresponds to the protocol of the Tender. It also has the right to present corresponding materials to law enforcement agencies as well as other functions designated by the Legislation of Ukraine.
3. State Committee for Statistics: Collects information regarding the results of public procurement and approves the forms that are needed to fulfill this task, as well as other functions designated by the Legislation of Ukraine.
4. Antimonopoly Committee: Creation and organization of activities to develop a competitive public procurement environment. It is also responsible for enforcing legislation related to fair economic competition in PP area.
5. Law enforcement agencies: Enforce the PPR within the framework of their competence.

Discussion Points

In order to address the key issues, stakeholders and negotiators need to analyse the current differences between the regime in Ukraine and that of the EU. Only when they have analysed this, will they be able to form an individual position for national debate on:

- *How quickly can or should Ukraine adopt the EU public procurement laws and practices?*
- *How much of the EU legislation/practices should it adopt (all or part)?*
- *What timeframe should be allowed for Ukraine to open up its procurement market to full EU participation with national treatment?*
- *Are any sectors to be excluded? On what basis?*

Opportunities

One of the major considerations in addressing the key issues of how much and how quickly to adopt EU public procurement laws, practises and mutual access will be the benefits that will be derived. Stakeholders may support deeper integration if the benefits to them are significant. To assess the benefits, each stakeholder group should consider a range of benefits and costs:

Assess what supplies, services and works Ukrainian business could realistically provide to public authorities in the EU and estimate their value.

EU public procurement is valued at Euro 382 billion (2006)⁹ and could provide a new avenue for Ukrainian trade. Stakeholders need to assess precisely which sectors in Ukraine would be able to take advantage of procurement opportunities in which countries, if national treatment was accorded. Combined with this, the impact of mutual access would also affect Ukrainian business that currently win national contracts and would face new competitors from the EU. An assessment of where EU firms are likely to be able to compete and the impact on Ukraine is also needed.

Evaluate the efficiency gains in public spending

Given that only an average of 2.6 firms submit proposals for each open contract in Ukraine, 26 per cent of all bids are single participant or request for proposals and that more than US\$ 14 million are contracted without any procurement procedure, the level of competition in Ukrainian public procurement is limited. Stakeholders need to assess the impact of adopting EU laws and practises on efficiency (both price and quality) in public spending.

Laws

Another factor in determining how much and how quickly to adopt EU public procurement laws will be the difference between the current legislative framework

⁹ Eurostat Database 2008

in Ukraine and that of the EU, as well as likely ease of developing and adopting the necessary legislation:

Assess the changes in Ukrainian legislation required to comply with EU legislation on public procurement

Whilst it would appear from the overview of the EU legislation and the current Ukrainian legislation that the structure and content of Regulation N921 and EU Directives 2004/17/EC and 2004/18/EC are similar, a more detailed assessment of the precise changes needed should be made. Also, an assessment of the actions needed to ensure Ukrainian legislation complied with the other EU directives is needed to provide a list of clear steps which could be taken and the level of compliance that would be achieved with each step.

Based on the analysis of steps to be taken and level of compliance, evaluate the ease of achieving each step in terms of political realities

Given that the last law on Public Procurement (February 2000) in Ukraine was amended nine times by the Verkhovna Rada until it became unworkable and was cancelled in 2008, the ease to which the range of legislation needed would be passed by the Rada needs to be evaluated. In addition, the political commitment by various Ministries and government agencies also needs to be assessed as their willingness to present and defend legislation will also affect the legislative process.

Institutions

Compliance with public procurement legislation requires an effective institutional framework. How much and how quickly Ukraine can adopt EU public procurement laws will depend on the institutional development required to establish effective institutions. This in turn depends on the existing institutional framework and the further development of it that may be required by EU legislation:

Assess the differences between the existing institutional framework in Ukraine and that required by the EU Directives

Although EU legislation does not proscribe precisely the institutional framework for public procurement (in fact the framework differs amongst some EU member States), studies have shown that “best practise” approach by newly acceded members have not only guaranteed the requirements of the directives, but also provided the greatest gains in efficiency in public procurement. Moreover, there is a need to study the relationship between current institutions to ensure requirements of the Directives regarding independence, ensuring no conflict of interest and ensuring sufficient review and recourse in the case of complaints.

Based on the above analysis, list the changes required to the existing institutional framework, including creation of any new bodies

The speed and depth of adoption of EU public procurement legislation will also depend on the institutional development required to comply and fulfil all obligations, especially if new institutions are required to be created.

Assessment of the institutional legislation required to ensure effective implementation

Once the institutions are in place, they must have the powers and structures which enable them to undertake their tasks effectively. This requires that each of the institutions and bodies involved in the process have the legal backing to undertake their tasks. Therefore, an assessment of the legal mandate and powers of these institutions is required. The political will to adopt these powers and mandates will also need to be assessed to determine how realistic these objectives are.

Capacity

The final consideration in addressing the key issues of how much and how quickly to adopt EU public procurement laws, practises and mutual access will be the capacity of government and politicians to not only effect the changes required, but to also implement the rules and take advantage of the benefits derived. To assess the capacity requirements, each stakeholder group should consider:

Assess the pool of technical experts able to develop and implement EU style rules

The ability and understanding of both government and non-government stakeholders in developing the legislation, implementing the rules and monitoring compliance will affect the scope and speed of adoption of EU rules. This can only be assessed in light of the legislative and institutional requirements detailed above.

Training needs assessment across all government and state owned enterprises

The rules for public procurement have to be applied across a wide range of central, regional and local governments, as well as state owned enterprises. All of these authorities will require in depth training on how to apply these new rules. The size of this task will depend on current practises and understanding of the core principles of open procurement.

The level of political commitment and understanding

Adoption of EU legislation will require funding to improve both the capacity and to establish an effective administrative and institutional structure. The costs of this can be estimated but the realistic depth and speed of adoption will depend on the money available from government and the political commitment to allocate funds to this task. Much of this is based on both political will and the understanding of the politicians as to the benefits of adopting the new approach.