

Assessing Public Procurement Practice in Ukraine - 2017

General Description of the Public Procurement System

X. Management of the Public Procurement System

Please provide a brief description of how the public procurement system is managed in your country by answering the following questions:

Is there a single state body responsible for managing the public procurement system, or is this function distributed among more than one state body? What is its/their authority and responsibilities and are legal requirements met in practice in this regard? What is the level of independence of this body/ies and are legal requirements met in practice? Is there duplication of authority?

Please provide the answer in a maximum of 5-10 sentences.

The state bodies having roles in PP system of Ukraine are following:

- The Ministry of Economic Development and Trade (MEDT, www.me.gov.ua) is state regulator and policy maker in the public procurement sphere being responsible for legislation framework, performing also analytical monitoring function and supervising and owning of PROZORRO e-procurement system. MEDT is central executive body, Minister is member of Cabinet of Ministers (Government) appointed by the Parliament (as other ministers) as proposed by Prime-Minister.
- The Anti-Monopoly Committee of Ukraine (www.amc.gov.ua) is the Complaints Review Body in the context of on-going public procurement procedures and also the enforcement agency in regard to bid-rigging. It is quite independent body having special Constitution status and specific dedicated law, 8 State commissioners of AMCU are appointed by the President (under proposals of Prime-Minister) for fixed term of 7 years and Head of AMCU is appointed by the President for 7 years after approval of the Parliament.
- The State Audit Service (www.dkrs.gov.ua) as a key governmental control body carrying out planned and ad-hoc audits of compliance by contracting authorities with the rules for the disbursement of budgetary funds and the regulations for the use of state-owned and municipal assets including control/oversight over public procurement operations conducted through PROZORRO by public sector contracting authorities.
- The Accounting Chamber (www.ac-rada.gov.ua), exercising parliamentary control over the execution of the state budget, the efficiency of public institutions in the implementation of budgetary programs and the effectiveness of public procurement as a component of public finance management;
- The State Treasury Service (www.treasury.gov.ua) carrying out operational control

over payments to be made under public contracts resulting from public procurement procedures.

- State enterprise PROZORRO (www.prozorro.gov.ua) is the operator and administrator of the e-procurement system subordinated to MEDT.
- Civil Society Organizations, exercising an increasing and important oversight role by monitoring public procurement and anti-corruption activities. In Ukraine, civil society organizations and their associations are entitled to free and full access to information about public procurement and can monitor these activities. Specific important role is played by NGO Transparency International Ukraine that was first initial formal owner of PROZORRO IT-system (further transferred to MEDT on free-of-charge basis) and now is owner of analytical tool BI.PROZORRO (www.bi.prozorro.org) and NGOs monitoring online forum Dozorro (www.dozorro.org).

Roles and of MEDT and AMCU as complaints review body are well described in Public Procurement Law¹ (PPL) while discovering bid collusions role of AMCU as well as roles and competences of State Audit Service and Accounting Chamber set by respective dedicated laws on their activities. Some duplication limited to state budget expenditures/procurements may be pointed out in regard of State Audit Service (that also controls local budgets and state enterprises) and Accounting Chamber (focused only on state budget).

X. Are tenders electronic or paper based? In cases when tenders are solely electronic, are there cases of paper-based tendering? Is there insufficient enforcement of PPL?

Please provide the answer in a maximum of 3-4 sentences.

Comment: Art. 14.1 of PPL is quite clear highlighting that all information in the course of procurement procedures must be submitted electronically via the e-procurement system, incl. tenders. But in Ukraine there is strong illegal inertia among procuring entities to include in tender documentation the requirement for winner to submit relevant qualification and eligibility documents not only in electronic form but in addition simultaneously in paper (scans or originals). Such requirement contradicts to PPL that was also confirmed by AMCU case law as review body.

X. Is public procurement conducted through a centralized, single website or are there multiple websites for conducting public procurement? Is its/their use mandatory or voluntary?

Please provide the answer in a maximum of 3-4 sentences.

Comment: According to art.10 of PPL all tender opportunities of public sector of Ukraine are mandatory published at official portal www.prozorro.gov.ua where these opportunities (as well as all other procurement information incl. tender documentation, submitted bids (BUT only after

¹ <http://eupublicprocurement.org.ua/wp-content/uploads/2016/03/PPL-No.-922-of-25-December-2015-ENG.pdf>

completion of mandatory e-auction), award information, contracts etc) are freely accessible to anyone visiting the portal even without registration. All these publications are also duplicated at 22 accredited (by MEDT) e-platforms that are front offices for procuring entities to publish relevant information and for bidders to submit their bids. Ukrainian e-procurement system PROZORRO is hybrid model involves a central database for procurement transactions (e-auction module and data storage under administration of SE PROZORRO subordinated to MEDT) and 22 (as for 1st May 2018) authorized commercial e-platforms which manage the communications between both bidders and procuring entities.

X. If there is a register of suppliers, what is the number of registered suppliers in it?

If possible, please provide a comparison with several (at least 5) previous years?

Comment:

There is no official special register on suppliers but e-procurement system itself automatically plays role of such register fixing and counting any newly registered economic operator. So as for end of 2017 there was 35 283 unique economic operators participated (submitted a bid at least once) in public tenders in PROZORRO.

X. What is the total number of competitive procedures?

If possible, please provide a comparison with several (at least 5) previous years.

Comment:

2017: 84 898 tenders (open tender and competitive dialogue procedures) as completed and 127 319 as announced,

2016: 63 124 tenders (open tender, competitive dialogue, pre-qualification with restricted tender and price quotation),

2015: 52 188 tenders (open tender, 2-stage tender, pre-qualification with restricted tender and price quotation),

2014: 40 523 tenders (open tender, 2-stage tender, pre-qualification with restricted tender and price quotation),

2013: 41 244 tenders (open tender, 2-stage tender, pre-qualification with restricted tender and price quotation),

X. What is share of public procurement in the country's GDP?

Comment:

The total value of public procurement in Ukraine represented approximately:

32% of GDP in 2012,

21% of GDP in 2013,

15% of GDP in 2014,

12.6 % of GDP in 2015,

12,1 % of GDP in 2016.

21 % of GDP in 2017

The declining trend 2014-2016 reflects the recent economic downturn and a more recent curtailment in public expenditure while 2017 reflects stabilisation and economic growth as well as coming President and Parliamentary elections in 2019 (usually ruling power politicians try to raise public expenditures incl. procurements for infrastructure and social projects to impress voters).

X. What are the monetary thresholds for single source procurement (works, goods, services)? _____

Is the monetary threshold acceptable? Why or why not?

Comment:

For the Law “On Public Procurement” to apply, the minimum value threshold for goods/services is 200,000 UAH (eqv. USD 8000) and for works it is 1.5 million UAH (eqv. USD 60000).

For contracting authorities in the utilities sectors (e.g. energy production and supply, water, transport, postal services and telecommunications), the relevant value thresholds are:

For goods/services - 1 million UAH (eqv. USD 40000),

For works - 5 million UAH (eqv. USD 200000).

Finally, if the value of the procurement item equals or exceeds 50,000 UAH (eqv. USD 2000) but is lower than the thresholds indicated above, relevant contracting authority MAY (on fully own discretion) :

- OR conduct a simplified e-auction through Prozorro
- OR conclude a direct contract with a supplier selected at its fully own discretion without any formal procedures and e-auction. In these latter cases, it is only mandatory for the contracting authority to publish a report about the contract concluded (volume, name and address of contractor) at the Prozorro website for sake of transparency.
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Moreover, though PPL is completely silent about contracts below 50000 UAH thresholds, in fact PROZORRO allows to be used for such smaller contracts where technically (but not legally) minimum value threshold is set in the system on default as 3000 UAH. Many procuring entities following high-level political recommendations (by the President, Government, ministers) try to use PROZORRO e-auction even for such small contracts but it is definitely not regulated by the PPL.

X. What share (% in terms of procurement value) of government spending is conducted through competitive public procurement procedures? ____

Please provide a brief analysis of this data point. If possible, provide a comparison with several (at least 5) previous years and possible explanations for the resulting trend.

Comment:

Shares (in terms of value) of competitive procurement procedures:

70,1 % in 2011,

50% in 2012,

59,2% in 2013,

70,1% in 2014,

56 % in 2015,

67,75 % in 2016,

80,5 % in 2017.

Except for 2012-2013 and 2015 it can be said that growth of competitive procedures is main trend accelerating in 2016-2017 when new PPL and comprehensive e-procurement system entered into force. 2012-2013 low level is explained by EURO 2012 European Football Championship with numerous high-value infrastructure contracts conducted through direct single source procurement. Low level of competitive procedures in 2015 is reasoned by high-value defence and security procurements through single source as needed for military actions at East of Ukraine to stop Russian invasion.

In period 2011-2016 there were 4 competitive procedures including open tender, 2-stage tender, tender with pre-qualification and price quotation.

From August 2016 till now there are only 2 competitive procedure (of 3 total) – open tender and competitive dialogue.

X. What share (% in terms of procurement value) of total public procurement spending is conducted through single source procurement? ____

Please provide a brief analysis of this data point. If possible, provide a comparison with several (at least 5) previous years and possible explanations for the resulting trend. If possible, provide a breakdown of this data point by the list of legal exemptions considered acceptable or unnecessary by the TPPR Methodology (Pre-tendering phase, Indicator 9).

Comment:

Shares (in terms of value) of single source procurement :

29,9 % in 2011,

50% in 2012,

40,8% in 2013,

29,9% in 2014,

44 % in 2015,

22,25 % in 2016,

19,5 % in 2017.

The reasons of peaks in 2012-2013 and 2015 are explained in previous block. Anyway reduction of value of non-competitive procedures in 2015-2017 reflects very positive dynamic . **It should be also**

emphasized that significant part of non-competitive procedures is related to the procurement of municipal utility services and postal services which are de facto and sometimes even de jure naturally monopolized.

Notable part of non-competitive tendering procedures during last 3 years was conducted for the purposes of the defence. It is obviously caused by the on-going war in Eastern Ukraine.

In period 2011-2016 single source was called so having 9 grounds for allowed use while from August 2016 till now it is called as negotiated procedure with 7 grounds for allowed use.

Most popular (statistically) cases to be used for justifying of single-source (negotiated procedure) are -- absence of competition on technical or other reasons (around 23-25 % of all cases), urgent necessity (21-22 % of all cases) and additional procurement for goods/services/works from same contractor (9-10 % of all cases).

X. What is the share (% in terms of procurement value) of below threshold single source procurement in total public procurement spending? _____

Please provide an analysis of this data point in 2-3 sentences (if possible, provide data from previous 5 years).

Comment:

Shares (in terms of value) of procurements out of Public procurement law procedures (below threshold direct procurement and exemptions):

21,24% in 2012,

33,9% in 2013,

53,98% in 2014,

42,26 % in 2015,

31,74% in 2016,

19,3 % in 2017 (only below threshold direct procurement without exemptions).

The figures above for 2012-2016 cover not only small value below thresholds contracts but also direct exemptions from Public Procurement law (listed in it). Figure for 2017 is only small value below thresholds contracts not counting exemptions.

The reasons of peaks are following:

in 2013 – there were 41 legal exemptions from Public procurement law while in 2012 there were only 24 such exemptions ;

in 2014 – during 4 months of 2014 previous 2013 version of Public Procurement Law was in force allowing 41 legal exemptions. In addition some urgent procurements for military actions and security needs were done as secret and urgent under special law.

in 2015-2016 – main reason is secret procurements for military actions and security needs.

From August 2016 if the value of the procurement item equals or exceeds 50,000 UAH (USD 2000) but is lower than national thresholds (8000 USD for goods/services and 60000 USD) indicated above, the contracting authority MAY (on fully own discretion) :

- OR conduct a simplified e-auction through Prozorro,
- OR conclude a direct contract with a supplier selected at its fully own discretion without any formal procedures and e-auction. In these latter cases, it is only mandatory for the contracting authority to publish a report about the contract concluded (volume, name and address of contractor) at the Prozorro website for sake of transparency.

Moreover, though PPL is completely silent about contracts below 50000 UAH thresholds, in fact PROZORRO allows to be used for such smaller contracts where technically (but not legally) minimum value threshold is set in the system on default as 3000 UAH (150 USD). Many procuring entities following high-level political recommendations (by the President, Government, ministers) try to use PROZORRO e-auction even for such small contracts but it is not regulated by the PPL.

X. If your country has any unreasonable exemptions to the Public Procurement Legislation (e.g. contingency funds, utilities, certain procuring entities or sectors of the economy), provide your estimate of the volume spent in this way and the share (% in terms of value) these exemptions would constitute in total procurement spending? Volume : ____ share: ____

Please provide a brief analysis of this data point. If possible, provide a comparison with several (at least 5) previous years and possible explanations for the resulting trend.

Comment: In addition to comments above it might be said that there are NO un-reasonable exemptions as for now, all existing 14 exemptions of PPL are recognised compliant to EU legislation and Government Procurement Agreement of World Trade Organisation (Ukraine is GPA member from 2016).

X. What is the volume of secret government procurement? What is the share (value in %) of secret government procurement in total public procurement expenditures? Volume: ____ share: ____

Please provide a brief analysis of this data point. If possible, provide a comparison with several (at least 5) previous years and possible explanations for the resulting trend.

Comment:
Information is not available taking into account military situation at East of Ukraine.

Competitiveness

X. What is the average number of bidders?

If possible, provide a comparison with several (at least 5) previous years and possible explanations for the resulting trend. If possible, provide a breakdown of this data point by goods, works and services.

Comment: Average number of bidders for competitive tenders has been as following:

2,8 in 2012,

2,85 in 2013,

2,9 in 2015,

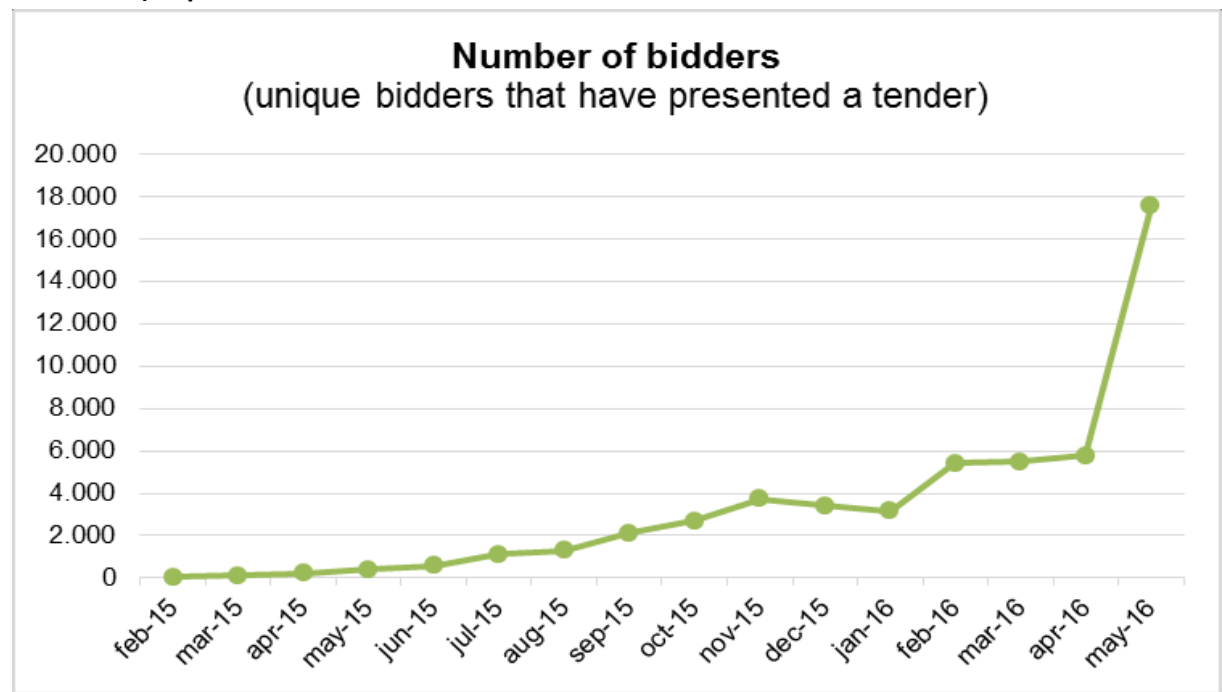
2,9 in 2015,

2,45 in 2016,

2.7 in 2017.

Notable sharp reduction of average number in 2016 is explained by different scope of calculation in 2015 and 2016 due to different versions of PPL, but in effect it also is compensated by notable raise in share of competitive procedures compared to non-competitive, as well as by growth of the indicator in 2017 that jointly promotes more contract opportunities for business and respectively general higher competition in public procurement system.

It is also interesting to witness growth of figures regarding participation of economic operators in PROZORRO public tenders in very beginning (2015-first half of 2016) as shown below and now (end of 2017) taking into account that 35 283 unique economic operators participated (submitted a bid at least once) in public tenders in 2017.



X. What is the share (% in terms of procurement value) of competitive procedures with single bidders in total competitive spending? ____

If possible, please provide information on the share (number) of competitive contracts won by single bidders in the total number of competitive procedures.

Comment: Ukrainian PPL does not recognise procedure as competitive if it happens with single bidder – any tender with 1 or 0 bidders must be cancelled. So relevant data is not possible.

X. What is the share (% in terms of procurement value) of competitive procedures with five or more bidders in total competitive spending? 22,3 % -- for 2016-first half of 2018.

If possible, please provide information on the share (number) of competitive contracts with three or more bidders in the total number of competitive procedures.

Such indicator for period 2016-first half of 2018 is

- 33,5 % including cancelled tenders (where only 1 bid was submitted) and**
- 50,1 % for successfully finished tenders with concluded contracts.**

X. What share (% in terms of procurement value) of public procurement contracts is won by commercial state-owned enterprises (above 50% ownership)? __N/A__

Provide an analysis of this data point. If applicable, provide a comparison with several previous years. If possible, provide a breakdown of this data point by type of procedure, i.e. competitive procedures vs. direct procurement. Is there any reason to believe that state owned companies are getting preferential treatment?

Comment: Calculation of the given indicator does not have representing analytical sense in Ukraine – it is roughly but definitely less than 40-50 % thus more interesting is data on sectors where state/municipal companies have obviously dominative share of awarded public contracts. For better description such case shall be divided into competitive and non-competitive procedures.

In case of non-competitive negotiated procedure the significant part of it is related to the procurement of so called municipal utility services (i.e. water supply, sewing, centralised heating), gas supply (state company NaftoGaz) and postal services (state company UkrPoshta) which are de facto (due to technical and historical reasons) and sometimes even de jure (like NaftoGaz and UkrPoshta)naturally monopolized by municipal or state-owned companies namely (in terms of value):

- 14,5 % of all procurement contracts or 74 % of non-competitive procedure in 2017,**
- 22,05 % of all procurement contracts or 67,3 % of non-competitive procedure in 2016,**
- 28 % of all procurement contracts or 63,6 % of non-competitive procedure in 2016).**

Similar to general positive trend for reduction of negotiated procedure (commented above) we can see positive reduction of share of such “monopoly utilities” contracts in regard to all procurement contracts and simultaneous increase of share of such contracts in regard to non-competitive procedure contracts. Latter figure also reflects reduction and thus more careful application of negotiated procedure for other than “monopoly utilities” contracts.

In case of competitive procedures there are 2 obvious sectors where state-owned

companies/organisations have dominative share of awarded contracts – maintenance and repair of roads and some R&D (those that are covered by PPL). If case of roads tenders are usually played among regional state-owned companies subordinated to State Road Service or State-owned SC “Roads of Ukraine”. In case of R&D they are mostly related to economical, sociological and similar character so such tenders are usually organised by state bodies with dominative participation of scientific & research institutions of National Academy of Science (they are not purely state-owned having autonomous status but partially directly financed from state budget) and state universities(also partially directly financed from state budget).

X. What share (% in terms of procurement volume) of public procurement contracts is won by foreign enterprises? ____

2012 – 0,31 %

2013 – 0,18 %

2014 – 0,15 %

2015 – 0, 4 %

2016 – 0, 5 %

2017 – 0,16 %

If possible, provide a comparison with several (at least 5) previous years and possible explanations for the resulting trend.

Comment: Comparatively high level in 2012 is explained by procurements for EURO 2012 football championship where some large infrastructure contracts were awarded to foreign companies (i.e. HYUNDAI trains for fast Intercity connection, or reconstruction of airports with Turkish contractors etc). Another high levels in 2014 and 2015 are explained by notable raise of defence and security related contracts awarded to foreign companies in times of hot military actions at East of Ukraine. In 2017 this indicator is coming back to usual normal level (around 0,2 %).

Anyway most important thing here is that in fact foreign business is very well present in Ukrainian public procurement market not directly but through official dealers and local offices that are registered as Ukrainian legal entities counted in procurement statistics as Ukrainian companies. Such practical situation is very natural even between EU members with single market (i.e. in Poland only around 40-50 contracts per year are awarded to nominally foreign (mostly German) bidders while other foreign business work through local companies-agents.

So comparatively low level of foreign awards must not be accepted as final figure.

X. What is the share (%) of procuring entities which only used single source procurement in the total number of procuring entities? _0%_

If possible, provide a comparison with several (at least 5) previous years and possible explanations for the resulting trend.

Comment: During last 4 years no any procuring entity was so brave to use only single source procurement. Reason for that is powerful influence and extensive monitoring of all procurements at all levels by civil society activists and media as well as activity of new police and anti-corruption bodies. Even in case of military procurements only state secret contracts are out of PPL and e-procurement system, all other are notable and single source (negotiated procedure in Ukrainian

PPL) is always target #1. So last well-known case of completely single-source for all contracts took place in 2011-2013 by National Agency for organising of EURO 2012 football championship under special separate temporary law prescribing to do all EURO 2012 related contracts by this agency through single source.

Efficiency

X. What is the share (%) of failed tenders in the total number of tenders? _____

If possible, provide a comparison with several (at least 5) previous years and possible explanations for the resulting trend. If possible, provide a breakdown of this data point by tenders with no bidders, cancelled tenders or unsuccessful tenders where no relevant competitor was found.

Comment: Ukrainian PPL has 2 kinds of unsuccessful tender – when it is cancelled or when it recognised as void. Difference lays in reasons and force of obstacles:

- 1) in case of cancellation procuring entity MUST cancel procedure due to a) absence of bids; b) if only 1 bid was submitted; c) all bids or all except 1 bid were rejected before evaluation;**
- 2) in case of void tender procuring entity MAY recognise a procedure void if a) best offer exceeds estimated procurement value, b) force-majeure; c) cutting off of procurement budget.**

So statistics for last 5 years is following:

In 2017: 6,8% tenders were cancelled and 30,3% of tenders were recognized as void (37,1 % as a whole),

In 2016: 19 % tenders were cancelled and 6% were recognized as void (25% as a whole),

In 2015: 29 % tenders were cancelled and 6,6% were recognized as void (26,6% as a whole),

In 2014 – 22,2% tenders were cancelled and recognized as void as a whole (concrete points distribution is not available);

In 2013 -- 20,2% tenders were cancelled and recognized as void as a whole (concrete points distribution is not available).

First notable feature to be commented is stable trend for growth of unsuccessful tenders that is explained by few reasons. Main reason is essential growth of number of procurement procedures and number of procuring entities based on serious enlargement of scope of PPL during last 3 years (for example in current PPL 2016 there are only 14 exclusions while in PPL 2013 there were 41 exclusions incl. state enterprises that are now covered by PPL 2016). Same reason is also supplemented by decrease of procurement procedure duration from 3 months (old fashioned paper tenders) to 1,5 months in average (new e-procurement procedures) that makes possibility to repeat failed procurement procedure more comfortable. So this quite high 37,1 % index in 2017 is not final figure because large part of such tenders were repeated as successful ones.

Another interesting aspect in change of proportion between tenders cancelled (lower part) and those recognized void (larger part) in 2017 while in 2013-2016 there were more notable more cancelled tenders than recognized void. Faster procurement process based on e-procurement operations has also significant role here making procuring entities less scared to re-open tenders. But main reason for recognizing tenders as void is poor budget planning and market analysis among procuring entities that often face best bids higher than their estimated procurement values. Respectively it concerns low level of procurement professionalism in public sector that is quite

seriously caused by permanent staff changes.

X. What share (%) of planned public procurement expenditure was saved as a result of competitive procedures? ____

If possible, provide a comparison with several (at least 5) previous years and possible explanations for the resulting trend.

Comment: Savings (as difference between planned and contracted values) in case of competitive procedures are following:

In 2017 – 7,45% of planned expenditures,

In 2016 – 8,6 % of planned expenditures,

In 2015 – 14 % of planned expenditures,

In 2014 – 29 % of planned expenditures,

In 2013 – 32 % of planned expenditures.

The decreasing trend of savings during 2013-2017 is quite notable that might be explained by few factors: 1) data accuracy in e-procurement system (2016-2017) is definitely better than in paper data collection (2013-2015); 2) 2013-2015 results counting include all tenders both successful and cancelled while 2016-2017 counts only successful tenders with awarded contracts. So data for 2016-2017 shows quite realistic savings while 2013-2015 data are more indicative and less explicit. Anyway continuation of decrease in 2016-2017 is also grounded on more realistic procurement planning from one hand and more balanced and market oriented price policy among bidders.

Finally, Indication of savings (or economy) is often quite debatable and even controversial because calculation of savings as efficiency indicator may be done in quite different ways with different deepness of data analysis. Thus, on opinion of author of this report, for many procurements savings hardly can be considered as main proof of efficiency but real implementation of the projects within legally correct competitive award and assigned finance seems more realistic approach to efficiency assessment.

X. What is the share (% in terms of procurement value) of tenders where price is the only criterion compared to competitive procedures where other criteria are also used? ____

If possible, provide a comparison with several (at least 5) previous years, as well as a brief analysis of this data point.

The asked data is not available (its calculation is hypothetically possible but taking into account near 130 000 announced tenders only in 2017, the relevant efforts are not proportional) but Ukrainian PPL is very clear in promoting lowest price as sole criteria for most contracts allowing use of other criteria only for complex and specific cases (and even so lowest price still can not be lower than 70 % of weight). So rough index for price as only criterion is 80-90% of all tenders for last 5 years. And according to surveys in Ukraine and expert assessments of foreign experts it is one of

the largest problems. For example, the latest survey on PROZORRO conducted in 1st quarter of 2018 by International Marketing Group (as financed by USAID²) has demonstrated that main shortcoming of PROZORRO as for opinion of business and state authorities is lowest price domination as award criteria. This opinion is well shared by EU experts (as not well complaint with EU Directives) and WB experts.

X. What is the share (%) of non-executed contracts in the total number of contracts? ____

If relevant, provide a comparison with several (at least 5) previous years. If possible, provide a breakdown of this data point by type of procedure, i.e. competitive procedures vs. direct procurement. If possible, indicate the share (%) of non-executed contracts awarded through competitive procedures, as well as single source procurement.

Comment: The asked data is not available or not reliable. The requirement to publish report on contracts performance arrived in PPL in late 2015 but procuring entities still have quite bad discipline to publish this report.

Accountability

X. Describe the dispute settlement mechanism in public procurement, its composition, authority, level of independence, and decision-making procedures. What are the major strengths and problems in law and practice:

Comment:

General

The Complaints Review Board consisting of 3 State AMCU Commissioners within the Anti-Monopoly Committee of Ukraine, is responsible for handling public procurement complaints, which must be submitted electronically. Complaints are submitted via the e-platform where the complainant is registered and a fee is payable (complainant must pay fixed fee -- eqv. 200 USD for supply/service contracts and eqv. 600 USD for construction contracts). The effect of a complaint being submitted is to suspend the procurement procedure, meaning that the contract cannot be awarded until the Complaints Review Board has made a decision. Decisions of the Complaints Review Board can be appealed via the court system (judicial review)

Subjects of Complaints

It is possible to complain about any decision, action or omission of public entities in connection with their procurements. Practice shows that typical themes for complaints are the following:

- qualification requirements that go beyond what the specific contract reasonably requires;

² All generalized results are available only in Ukrainian -- <http://www.prozorro.gov.ua/news/rezultati-opituvannya-miskogo-naseleння-ukrayini-biznesu-ta-organiv-derzhavnoyi-vladi-shodo-ocinki-sprijnyattya-ta-rivnya-pidtrimki-sistemi-elektronnih-publichnih-zakupivel-prozorro>

- award criteria that are unnecessarily complex or given excessive weight, for example in the case of standard deliveries;
- unreasonably sophisticated and exaggerated technical specifications;
- requirements to use a particular trade mark;
- unjustified rejection of bids;
- award of a contract to a non-compliant bidder.

Who can complain?

In principle, the right to complain is open to anyone who can demonstrate an infringement of their rights or legitimate interests. This includes typically:

- Persons that considered submitting a bid, but did not do so, due to the content of the tender material.
- Bidders that were rejected as unqualified or who had their bids rejected as non-compliant.
- Bidders who were not awarded the contract.

Time limits for complaints

Complaints must be submitted electronically and within certain time limits, depending on the subject of the complaint. To enable the complainant to prove the time of submission of the complaint, the electronic system automatically issues a registration card with an indication of the time and date of submission which is published on the Prozorro web-portal.

It is important to be aware of and act within the correct deadline for the subject of the complaint. Essentially, there are three situations and three points in time of relevance:

- before the deadline for tender submission -- complaints concerning tender documents and any decision or action before the expiry of the deadline for bid submission must be submitted *at least four days before this deadline expires*,
- after the assessment of the compliance of bids -- complaints concerning decisions or actions following the evaluation of the compliance of bids and the qualifications of bidders must be submitted *five days after the publication of the notice concerning this evaluation*;
- after the final evaluation of the bids -- complaints concerning decisions or actions following the final evaluation of the bids must be submitted *within ten days after the publication of the contract award*.

Content of the complaint

The complaint must, in addition to the name and address of the contracting authority and the complainant, include the following elements:

- A description of the facts that the complaint concerns. This should be a description of the relevant conditions in the tender material or the decisions, actions or omissions of the contracting authority. Any documentation available, including copies of the relevant part of the tender material, notices from the official web-site, must be added in electronic form.
- An explanation of why the complainant thinks that the tender conditions, decisions etc. are unlawful according to the Law "On Public Procurement", and in what way his rights and legitimate interests have been affected. References should be made to specific articles of the

Law “On Public Procurement”, that the complainant considers relevant.

- A description of what the complainant wants the Complaints Review Board to decide and why.
- Documentation confirming payment of the filing fee to the State Budget of Ukraine.

Upon receipt, and in addition to the registration card, the electronic system automatically assigns to the complaint various references to identify the complaint and the relevant procurement procedure as well as the date and time of receipt. This enables the complainant to ensure that the complaint has been duly received.

The Complaints Review Board must, within three days of the receipt of a complaint, decide whether to admit or reject the complaint. Only complaints fulfilling the requirements as regards content and which have been submitted on time and with the filing fee paid are admitted as legally filed. A notice concerning the admission of a complaint and its substance in summary is then published on the Prozorro web-portal: www.prozorro.gov.ua. In this way, the complainant can also easily verify that his complaint has been accepted.

Procedural rights

The Law “On Public Procurement” specifically requires that the complainant has the same right as others to attend the complaints review proceedings and to make video/audiotape recordings of those proceedings.

Effects of the automatic suspension

The admission of the complaint has the effect of automatically suspending the relevant procurement procedure. This means that the contracting authority cannot continue the procedure. This is effectively ensured by the blocking in the electronic system of any notices on procedure, results or the conclusion of the procurement contract. The contracting authority will only be able to take action as regards remedying of what was found to be unlawful by Complaints Review Board in the complaints procedure. The suspension will end when the Complaints Review Board takes a decision concerning the complaint.

Possibility for judicial review of the decision of the Complaints Review Board

Unlike other decisions of the Anti-Monopoly Committee of Ukraine, the decisions of the Complaints Review Board cannot be appealed within Anti-Monopoly Committee (for example, submitted to head of AMCU or to the full board of 9 AMCU State Commissioners) but may only be appealed before the Kyiv District Administrative Court. *For this purpose*, the decision of the Complaints Review Board includes a summary of the complaint, the findings of the Complaints Review Board and its decision and the deadline for appealing against the decision to the Court. Such an appeal will need to fulfil the requirements according to normal court procedures.

Review vs contract

According to art.18.2 of PPL complaints submitted after signing of procurement contracts shall be considered only in courts (it has practical sense only in case of serious violations) and not by AMCU

within PPL review process. If it is clear that contract was signed during mandatory standstill period (that is clearly prohibited by art.32.2 of PPL) such contract is automatically (by law. art.37.1 of PPL) null and void thus AMCU in such case reviews complaint.

Main problems related to review process:

- 1) "Misuse of the right of the complainant" - a significant number of "technical" complaints and complainants complaining "to delay or block" procurement procedures (by the results of 2016 - 29% of all complaints).
- 2) An huge increase in the number of complaints, a reduction in the period of review (twice as compared with the previous law), the low cost of payment for filing a complaint (did not change since 2010, with the appreciation of the dollar three times).
- 3) The imperfection of the electronic system for accepting complaints (in the absence of payment, the time-barring system should automatically leave the complaint without consideration).

Procurement process problems according to AMCU review practice based on most popular mistakes/infringement:

- *On bidders side (all mistakes below are fatal resulting in bids rejection):*
 - Incorrect bank guaranties as bid security (size of guarantee is not equal to sum required by tender documentation as well as conditions to realize guarantee in certain cases);
 - Absence of all required documents.
 - *On contracting entities side:*
 - Discriminatory bids rejection and/or award to incompliant (in regard to tender) as well as discriminatory technical or qualification requirements limiting competition.
- NB! It is worth underlining that the Law "On Public Procurement" does not specify in detail what may constitute a discriminatory action. This depends strongly on the procurement item and the specific market. Accordingly, a contracting authority must pay additional attention in setting requirements and take into account the market situation and legal regulation associated with certain procurements (for example, licensing or technical regulation). Sometimes it is real challenge for contracting authorities to formulate requirements without signs of discrimination. While the existence of discrimination depends on the specific case, there are general situations where discrimination is obvious. These include:*
- ❖ *Discriminatory qualification criteria – e.g. requirements to have own (in property) equipment, unjustified quantity and volume of similar contracts as proof of previous experience;*
 - ❖ *Setting unjustified requirements to submit unnecessary additional documents – e.g. confirmation of the status of the tenderer as a manufacturer, submission of copies of previous contracts only with State authorities;*
 - ❖ *Discriminatory conditions on the technical specification of the procurement item - technical parameters related to concrete manufacturer/brand, references to technical standards not legally recognised in Ukraine or not directly related to the procurement item.*
 - Unjustified cancellation of tenders when contracting entity had subjective personal negativism in relation to potential winner.

Strengths

Huge increase of complaint for last few years is obvious **strength and positive aspect** of the system

confirming increase of competition, improvement of legal background and procurement knowledge of business, effective law provisions on review process (article 18 of PPL), convenient e-complaining service in PROZORRO system and good trust in impartiality, professionalism and fair review of AMCU as complaints review body.

X. What is the number of complaints submitted to the dispute resolution board (or equivalent body)? __

If possible, provide a comparison with several (at least 5) previous years and possible explanations for the resulting trend.

Comment:

Number of submitted complaints:

In 2017: 5706

In 2016: 1846

In 2015: 1342

In 2014: 930

In 2013: 1182

The figures show obvious increasing trend with sharp increase in 2017 comparing to 2016 (309% of growth). Acceleration of growth during last 3 years is reasoned by following:

- increase of competition among bidders,
- convenient e-complaining service in PROZORRO system,
- improvement of legal background and procurement knowledge of business,
- effective law provisions on review process (article 18 of PPL),
- trust in impartiality, professionalism and fair review of AMCU as complaints review body.

X. What is the share (%) of disputed tenders in the total number of tenders? 4.5 % in 2017 and 3.2 % in 2016

If possible, please provide an analysis of this data point in 2-3 sentences.

Comment: This index confirms number of cases when tender was challenged through review mechanism and reasons are described above. From other hand notable majority of tenders are not complained that can be interpreted in a way that Ukrainian e-procurement system with incredible level of transparency reduces risks of obvious violations to be reviewed via complaints.

X. What share (%) of disputes was won by the initiator in the Dispute Resolution Board (or equivalent body)? 36 % in 2017 and 19% in 2016.

If possible, please provide an analysis of this data point in 2-3 sentences.

Comment: Almost 2 times of growth in complaining success might be explained by more careful, professional and knowledgeable efforts of complainants in review process that brought good results for them.

X. What share of decisions of the Dispute Resolution Board have been taken to courts? **Near 5 % per year in average during last 3 years.**

If possible, provide a comparison with several (at least 5) previous years and possible explanations for the resulting trend.

Comment: This index is quite stable that can be explained by few reasons namely:

- 1) time length of juridical process in courts with hardly forecasted results;**
- 2) additional expenditures of claimer;**
- 3) very high results of wins of AMCU (Dispute Resolution Board) in courts.**

X. What share (%) of the total competitive procurement spending was received by companies that have donated (including private donations by their owners) to the current government? ____

If possible, please provide an analysis of this data point in 2-3 sentences.

Comment: Such kind of donations is prohibited by Ukrainian legislation. Specific law sets rules that state power authorities can be financed only from the state budget.

X. What share (%) of the total single source procurement spending was received by companies that have donated (including private donations by their owners) to the current government? ____

If possible, please provide an analysis of this data point in 2-3 sentences. Have there been any high profile cases of politically affiliated companies receiving single source contracts?

Comment: Same as above

Transparency

X. Can public procurement related data be downloaded in bulk? If yes, can data be downloaded in any of the following formats - CSV, JSON, or XML?

Yes, it can.

The data can be downloaded in CSV format.

X. Are there any significant data quality issues? (Are any control mechanisms in place to ensure data quality is maintained?)

The State Treasury Service (www.treasury.gov.ua) carrying out operational control over payments to be made under public contracts resulting from public procurement procedures. Such control is based on data published by procuring entities at Prozorro e-procurement system so if there is

something wrong with data State Treasury will not pay contracts.

Next stage of control is made by the State Audit Service (www.dkrs.gov.ua) as a key governmental control body carrying out planned and ad-hoc audits of compliance by contracting authorities with the rules for the disbursement of budgetary funds and the regulations for the use of state-owned and municipal assets including control/oversight over public procurement operations conducted through PROZORRO by public sector contracting authorities.

In terms of data storage and security it is liability of State Enterprise PROZORRO as the official administrator of the system. As an e-procurement system, PROZORRO is based on open source software thus it provides that all data is structured in line with the Open Contracting Data Standard, making cross-country data comparison and analysis possible. The PROZORRO system consists of two main components: the front-end platforms (aka eMalls), and the Central Unit, which includes a central database (CDB), an API and several front-end servers to provide or exchange information with a range of stakeholders. The core approach realized in the system is interoperability that provides real-time online publication of relevant procurement information in all components of the system whenever it comes from (what platform).

The front-end platforms are web platforms that implement e-Procurement system features and provide access for CAs and EOs. The front-end platforms interact with the CDB via the OpenProcurement API over a secure VPN connection, and provide suppliers with temporary credentials to access the electronic auction module hosted on the Central Unit for participation in the auction. The toolkit implementing the OpenProcurement API has been developed using powerful open source web technologies such as Python, Pyramid, AngularJS, Bootstrap, Flask, CouchDB, and PouchDB to ensure reliable functionality and secure workflow. Interactions between the front-end platforms and CDB are performed through the API, a web interface based on JSON notation. Business logic is implemented in Python. A non-relational database, CouchDB, is used to store data about the auctions and the bids. Additional information, such as tender specifications and details of the offers from the bidders that are provided in binary files (PDF, Word, Excel, etc.) are stored on the file server.

X. Please fill the Data Transparency Table below by indicating either “Yes”, “No” or “N/A” in each empty slot:

Data Transparency Table - Access to Public Procurement Related Documents

Type of document	Is this information required to be public by law?	Is this information publicly available?	Is the database complete?	Electronic	Machine-readable *	Free of charge	Exact format
PPL documents	Yes	Yes	Yes	Yes	Yes	Yes	N/A
Annual public procurement plans	Yes	Yes	Yes	Yes	Yes	Yes	N/A
Notices of intended procurement	Yes	Yes	Yes	Yes	Yes	Yes	N/A
Amendments to tender documentation	Yes	Yes	Yes	Yes	Yes	Yes	N/A
Tender candidate applications	Yes	Yes	Yes	Yes	No	Yes	N/A
Bids	Yes	Yes	Yes	Yes	Yes	Yes	N/A
Tender commission decisions	Yes	Yes	Yes	Yes	No	Yes	N/A
Information on subcontractors	Yes	Yes	No	Yes	No	Yes	N/A
Procurement contracts	Yes	Yes	No	Yes	No	Yes	N/A
Contract amendments	Yes	Yes	No	Yes	No	Yes	N/A
Contract performance information	Yes	Yes	No	Yes	Yes	Yes	N/A
Payment receipts	Yes	Yes	No	Yes	Yes	Yes	N/A
Inspection and	No	No	No	No	No	No	N/A

quality control reports							
Complaints	Yes	Yes	Yes	Yes	Yes	Yes	N/A
Dispute resolutions	Yes	Yes	Yes	Yes	Yes	Yes	N/A
Internal and external audit reports	Yes	Yes	No	No	No	No	N/A

* For the purposes of this questionnaire, machine-readable means: for quantitative data formats, such as: JSON, CSV, XML, and for text documents - document that are NOT uploaded in the form of a scanned photo or PDF file.

In the comment box below, please elaborate on any irregularities or important details related to the above table.

Comment: None

X. In addition to what is listed in the Data Transparency Table above, are there any gaps in the public procurement database/s? (e.g. gaps in the completeness of data from specific procurers or specific time periods?)

It is already commented above on data quality point.

Major Strengths and Weaknesses

X. What are the 3 major gaps between the country's public procurement legislation requirements and their implementation in practice? (e.g. ignored provisions, legal loophole, etc.) What are your recommendations for how to align the practice with the legislation? Please provide a brief description of each in a maximum of 4-5 sentences.

1. Gap: PP legislation provisions introducing framework agreements (art.13 of PPL and respective sub-law Government (Ministerial) Order dated from September 2017) are not still implemented in e-procurement system making this very perspective tool (framework agreements) not available for applying.

Recommendation: To speed up relevant IT development to introduce practical possibility to use framework agreements by end of 2018.

2. Gap: PPL provision introducing centralised procurement bodies (CPBs) still is not fully implemented due to absence of relevant sub-law Government Decree on peculiarities of establishment and functionality of CPBs.

Recommendation: The relevant draft Decree is prepared so it is recommended to finalise its adoption by end of 2018 with parallel improvements in IT functionality of Prozorro intended for launching of CPBs e-cabinet and e-catalogues in future as well as continuation of current piloting of experimental CPB (experiment has been commencing in 2017).

3. Gap: Majority of procuring entities vainly avoid use of competitive dialogue procedure (this procedure allows to skip lowest price as dominative criterion) or use of multi-criteria evaluation (even though lowest price must be not less 70 % of total weight) in open tenders in cases of complex and complicated projects (construction, services etc) where quality plays very important role.

Recommendation: Issuing of guidelines on how best to conduct tenders for complex and complicated projects as well as inclusion of this topic in existing training activities/programs.

X. What are the 3 major weaknesses / challenges of the country's public procurement system as a whole? And what are your recommendations for overcoming them? Please provide a brief description of each in a maximum of 4-5 sentences.

1. Challenge: Despite all recent positive developments, the 2016 public procurement law of Ukraine (with respect to necessity to implement EU-Ukraine Association Agreement) still requires further improvement and compliance with the EU Directives,

Recommendation: According to PP Strategy 2016-2022 Ukraine in 2018/2019 is supposed to adopt PP legislation with very high compliance to EU law, in particular in terms of types of procurement procedures (3 in Ukraine versus 5 in EU), role and way of e-auction, additional flexibilities for utilities, introduction of variants and abnormally low prices. In principle volume of novelties and amendments deserves for new edition of PPL hopefully to be adopted in first half of 2019, meantime relevant drafting work is in process.

2. Challenge: Technical reliability and functionality of the IT system as well as some (non-critical) deviations between technical solution of e-procurement system and provisions of the PPL.

Recommendation: First of all it is a permanent challenge related to any ICT system or IT solution in any country of the world (that sometimes becomes quite threat in times of global cyber-attacks). Secondly, SE PROZORRO (system administrator) is one of the leading IT team in the sector putting a

lot of efforts to improve functionality and security of the system. As latest proof of this in 2017 PROZORRO was integrated with some official e-registers -- Unified State Register of legal entities (May 2017), Tax Register (June 2017), State Treasury Register (for budget funds – September 2017) and partially with Criminal Record Register (September 2017) that allows economic operators to not spend time for obtaining of relevant business data now available for procuring entity or that easily can be received from the e-registers.

So recommendation is to consolidate efforts of SE PROZORRO, Ministry of Economic Development and Trade as well as e-platforms in order to implement planned measures in this direction incl. collaboration with EU TED and piloting international WTO GPA e-portal.

3. Challenge: One of the main negative practice-based challenge is bad practice of too often and doubtfully justified contract amendments (first of all contract price) undermining awarded price conditions.

Recommendation: To envisage in nearest PPL amendments the provision limiting scope and grounds of possible contract amendments.

X. What are the 3 major strengths / successes of the country's public procurement system as a whole? Please provide a brief description of each in a maximum of 4-5 sentences.

1. Mighty increase of civil society monitoring over public expenditures and transparency of public procurement operations as secured by the PPL and e-procurement system functionalities incl. traceability and recording of data.

2. More simple and efficient procurement process as result of completely electronic way of doing – convenience for both main parties (buyers and sellers) regarding online participation in tender process and simplification in related documentary formalities

3. Recognition of latest reforms in public procurement system as success case both by citizens and international partners (EBRD³, WB⁴, EU⁵, OECD⁶, International Monetary Fund IMF⁷, United Nations Development Programme UNDP⁸ as well as 4 international awards received during 2016-2017).

³ <http://www.ebrd.com/news/2017/ebd-strengthens-public-procurement-in-ukraine.html>

⁴ <http://www.worldbank.org/en/news/press-release/2017/05/22/international-experts-discuss-efforts-to-reduce-fraud-and-corruption-in-public-procurement>

⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1520603877743&uri=SWD:2018:66:FIN>

⁶ In the 2017 monitoring report OECD summarizes that "... situation concerning public procurement has significantly improved after these reforms" (<https://www.oecd.org/corruption/acn/ACN-Ukraine-Round-4-Monitoring-Report-ENG.pdf>).

⁷ <https://www.imf.org/external/pubs/ft/fandd/2018/03/pdf/wellis.pdf>

⁸ <http://www.ua.undp.org/content/ukraine/en/home/ourperspective/ourperspectivearticles/2016/12/27/fighting-corruption-in-ukraine-how-can-we-make-it-happen.html>