

# Transparent Public Procurement Rating



## Implementation Assessment of the Moldovan Public Procurement Legislation

The Implementation Assessment of the Public Procurement Legislation of Moldova was prepared by Expert-Grup (Moldova).

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## Introduction

Since its independence, the Republic of Moldova has developed a rather sophisticated public procurement system. It has gone through several major stages of transformations, and with each new one it being more closely adjusted to European standards. The last wave began just recently and coincided with the signature of Association Agreement (AA) between the European Union (EU) and the Republic of Moldova in 2014, which imposed gradual alignment of national legal framework to EU Acquis on public procurement and implementation of institutional reforms. In the immediate aftermath of this event, in July 2015, a new Public Procurement Law (PPL) was adopted, which transposed the clauses of 2004 EU Directive in the field of procurement into the national legislation. Also, according to the engagements of the AA there will be the gradual implementation of new 2014 EU Directive, which repealed the 2004 one. Concurrently, in 2015 the Republic of Moldova adhered to World Trade Organization (WTO) Agreement on Government Procurement (GPA) that envisaged a list of engagements related to public procurement.

Recent efforts to adjust national legislative framework to European standards in public procurement and WTO GPA gave rise to a sounder public procurement system. There were introduced a set of critical changes to the PPL such as increase in the procurement thresholds, extension of minimum deadlines for bid submission, introduction of standstill period, etc. One of the advantages of the changes is that PPL covers the procurement of goods, works and services by all public entities or entities governed by public law. Also, the Law stipulates a rather clear and reasonable list of exceptions, as well as an exhaustive enumeration of procurement procedures. Overall, there are seven general procurement procedures like open or closed tenders, and three special procurement procedures like framework-agreements. Finally, the new PPL as the previous one stipulates the possibility for economic agents to submit the offers either in paper or in electronic forms, if this is mentioned in the procurement notice.

Still, there are some shortcomings in recent modifications of PPL. Among the main failings can be mentioned such issues as the transparency, corruption and sectoral coverage of the Law. The transparency requirements were not improved essentially in comparison with the older versions, since the procuring entities still are not required to publish or give full access to all procurement documents. Also, the issue with explicit incorporation of provisions concerning the conflict of interest, corruption and fraud into the tender documentation was not resolved in the PPL. Finally, one of the most important drawbacks is the lack of any kind of provisions to include the state-owned and private enterprises operating on the basis of special rights in the field of utilities in the sphere of the PPL. Currently, the procurements of these enterprises are not governed not only by the PPL, but also by any regulatory act relevant to procurements.

The newly adopted PPL also introduced some changes into the institutional framework of the public procurements, which has a decentralized institutional architecture. The sector is governed by the Ministry of Finance responsible for development of public procurement policies and Public Procurement Agency (PPA), which is under authority of the Ministry of Finance. The PPA mostly performs monitoring, instructive and public procurement policy implementation functions at the moment. Also, at central level was approved the establishment of an independent National Dispute Settlement Agency (NDSA), subordinated directly to the Parliament.

Nationwide, all contracting entities have full responsibility for conducting public procurements and send only reports to PPA on conducted procedures. However, the existing decentralized institutional architecture has an essential drawback. Namely, there are too many contracting entities – over four thousands nationwide. Such kind of fragmentation gives rise to lack of qualified personnel, small tender lots and entrenched local interests of public officials, as well as results in impossibility to ensure adequate supervision of procurements done by each contracting authority. According to newly adopted Public Procurement Strategy in order to increase the efficiency of the system it was planned to diminish the number of entities by 75 % until 2020. This institutional transformation will be boosted by concurrent reformation of existing electronic procurement system.

*Box 1*

**Key Public Procurement Indicators for the Republic of Moldova in 2016**

1. Total number of contracts was 22 202, of which for goods (73.8 %), works (13.3%), and services (12.9%). These contracts were concluded through following procedures – tenders (42.9%), request for quotation (43.4%), request for quotation without publication (9.0%), framework-agreements (0.3%), and direct procurement (4.4%);
2. Total value of contracts was 7.5 billion Lei, which constituted circa 5.6% of GDP, and with following shares for goods (43.1%), works (40.8%) and services (16.1%). This contractual value was contracted through following procedures tenders (78.7%), request for quotation (11.9%), request for quotation without publication (3.5%), framework-agreements (0.01%), and direct procurement (5.8%);
3. It was annulled 1286 contracts (procedures), which constitutes circa 15.2% of total registered procedures. From these annulled procedures 796 were requests for quotation (62.0%), 31 requests for quotations without publication (2.4%), 7 framework-agreements (0.5%), and 452 tenders (35.1%);
4. Data for complaints filed to PPA are not available for the entire year, since the PPA was stripped of its review functions in the spring 2016, and another independent body was not instituted till the end of the year. Actually, the review process was halted and was possible only through courts.

*Source: Annual Report of PPA for 2016*

The ongoing reform of current electronic system is essential both from quantitative and qualitative point of view. In the former case, it is critical to modernize the existing electronic system, since until now there were only 311 procuring entities out of more than four thousand connected to it. From the qualitative point of view, the mentioned system is grossly outdated and does not correspond to the best efficiency and transparency requirements for an e-procurement system. Namely, it is used by PPA and the contracting authorities mainly as a register of tenders than a fully-fledged electronic procurement system, since it is impossible for applicants to submit complete electronic offers, and not all tender documents are available online after the finalization of the procedure.

The recent efforts to modernize the electronic procurement system seriously modified the schedule of legislative adjustments stipulated in the AA. The new e-system will impose high transparency and procedural requirements on all procuring entities, since the tender offers will be submitted only in electronic forms and all the procurement documentation will be available online for anyone interested in these procedures. Since, such radical requirements do not correspond to stipulations of existing PPL, Ministry of Finance intends to amend or write a new PPL in foreseeable future, also including the latest provisions of 2014 EU Directive.

## Problems in Practice

As set forth in the TPR Methodology, the assessment of public procurement system in the Republic of Moldova was done in accordance with six benchmark indicators. The gravity of the problems and deviations depicted in the assessment process vary from one indicator to another. In some areas such as transparency the situations is rather dramatic, while in the other domains such as transparency environment the state of play is better (Table 1).

**Table 1. Scoring of PPL in the Republic of Moldova in accordance to benchmark indicators**

| Name of benchmark indicator             | Maximum number of points in each indicator | Number of points in each indicator after assessment | Total scoring for each indicator (%) |
|-----------------------------------------|--------------------------------------------|-----------------------------------------------------|--------------------------------------|
| Transparency environment                | 5                                          | 5                                                   | 100                                  |
| Uniformity of the Legislative Framework | 14                                         | 12.25                                               | 87.5                                 |
| Efficiency                              | 10                                         | 7.75                                                | 77.5                                 |
| Transparency                            | 18                                         | 6.65                                                | 36.9                                 |
| Accountability and Integrity            | 7                                          | 7                                                   | 100                                  |
| Competitiveness and Impartiality        | 10                                         | 8.67                                                | 86.75                                |
| <b>Total</b>                            | <b>64</b>                                  | <b>47.32</b>                                        | <b>73.94</b>                         |

*Source: TPR for the Republic of Moldova*

Below, a detailed description of main problems uncovered per each benchmark indicator is offered. Since, the state of affairs differs significantly between indicators, in the analysis which follows they are arranged in an order from the worst situation to the best one. The arrangement was done in accordance to the scores mentioned in Table 1.

## Transparency

National PPL is rather weak in imposing transparency standards for all procuring entities. Out of twelve main types of documents to be found in a typical procuring process only four of them are required to be

published in electronic format (Table 2). And more strikingly, the technical stipulations for published documents to be a machine-readable or not, are to be found nowhere in the legislation.

**Table 2. Key transparency requirements in PPL for main type of procurement documents**

| <b>Type of document</b>                | <b>Electronic format</b> | <b>Machine-readable</b> | <b>Free-of-charge</b> |
|----------------------------------------|--------------------------|-------------------------|-----------------------|
| Annual public procurement plans        | Yes                      | No                      | Yes                   |
| Notices of intended procurement        | Yes                      | Yes                     | No                    |
| Tender documentation amendments        | No                       | No                      | Yes                   |
| Tender candidate applications          | No                       | No                      | No                    |
| Bids                                   | No                       | No                      | No                    |
| Decision of tender commission          | No                       | No                      | Yes                   |
| Information on subcontractors          | No                       | No                      | No                    |
| Procurement contracts                  | No                       | No                      | No                    |
| Contract amendments                    | No                       | No                      | No                    |
| Contract performance information       | Yes                      | No                      | Yes                   |
| Payment receipts                       | No                       | No                      | No                    |
| Inspection and quality control reports | Yes                      | No                      | Yes                   |

*Source: TPPR for the Republic of Moldova*

Also, there are significant gaps between the legal stipulations and their practical implementations by the contracting authorities. Many monitoring reports of public procurements published by different local NGOs identified the facts that many authorities do not have or do not publish their procurement plans, notices of intended procurement or contract implementation information. In most cases, if these documents are published, they are in a scanned format of poor quality or it is difficult to identify those documents on webpages of contracting authorities (lack of uniformity in placement of procurement information).

There are deficiencies in access to key complaint documents. These deficiencies cover both access to the submitted materials by the tender participants and the dispute resolutions of the review body. The current PPL does not stipulate the obligation of review body to publish the submitted complaints in any form. There are requirements to publish the motivated decisions by the review body on its website, but also without any details in the PPL or any sub-legal acts about the formats of documents to be published.

The problem with access to complaint materials is important since the share of contested procedures is rather high. In period of 2014 – 2016 the share of contested procedures remained stable at about 7.7 –

8.5% of total public procurement procedures.<sup>1</sup> This relative number remained stable despite large variances in absolute number of procedures due to such factors as budget austerity. From May 2016, following the provisions of the new PPL, the dispute settling function was transferred from PPA to NDSA, that should have been established by September 2016. Unfortunately, after one year of implementation of the new PPL, the complaint system is still not functional. Also, NDSA should ensure high level of transparency and independence, or else the worthiness of this institution will be low.

Concerning the access to important documents such as contracts or bids, here also, there are some legal hurdles. In current version of PPL, access to such information is given only at the request of the court. Only recently, a legal amendment that makes the decision of the tender commission publically available was adopted, but again without specifying the technical specifications for these documents. Still, there are limitations in the decision of tender commission related to information that represents state and/or commercial secret. These provisions leave some room for interpretation and create artificial barriers to access the very decision or some relevant data.

## Efficiency

The public procurement system in the Republic of Moldova is a mixed one. There are procurement procedures both in electronic form and on paperback support. In 2016, circa 35% of all contracts were concluded through the electronic system, but constituting 63.7% of total value of contracts attributed nationwide. So, by electronic means mainly large tenders (in terms of value) were conducted, while the smaller ones on paperback formats. Also, a positive dynamics here was observed, since in 2016 the share of such contracts increased by 14.2 p.p. and the value by 12.2 p.p. in comparison to the year 2015.<sup>2</sup>

Despite the gradual increase in number of contracts attributed by electronic means, still there are a lot of them done on paperback support. One of significant impediments, mainly as a legal one, is the lack of any provisions in the PPL that would state the primacy of electronic means of conducting the public procurement over those in paperback form. The PPL only stipulates the right of the procuring entity to resort to electronic forms of procurement, but not the obligation. This legal aspect combined with the obsolescence of electronic procurement system and weak institutional capacities of procuring entities hinders the process of procurement migration to more transparent and efficient electronic means of procurements.

Another important issue is the splitting of the planned procurements below the existing minimum monetary thresholds. This is done in order to apply less transparent procurement procedures (due to intentional reduction of cost estimate slightly below the threshold) with further increase of quantity of deliverables and contract value above the thresholds.

Also, involvement of independent experts in drafting of tender documentation would be very helpful for contracting authorities, taking into account their weak capacity in procurement, especially in relation to complex procurement. According to PPL, individual or legal entity that participated in the preparation of

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<sup>1</sup> Annual reports of the Public Procurement Agency

<sup>2</sup> Ibid

the tender documentation has the right, as an economic operator, to be a bidder, associate or subcontractor, but only if his involvement in the preparation of the tender documentation is not such as to distort competition. Unfortunately, there are cases of formal or informal involvement of experts, representing private companies in drafting technical specifications, as well as cases of arranged technical specification for specific companies. In some case external experts are not included in the tender commission and are not supposed to declare lack of conflict of interest. According to the latest Court of Accounts audit report on public procurement, in more than 14% of cases members of tender committee do not sign declaration on own responsibility, confidentiality and impartiality. The above mentioned demonstrates high risk of conflict of interest on involvement of experts in procurement planning and drafting tender documentation.

One of the constraints of current PPL concerns the evaluation criteria, which the contracting authorities can use in evaluating the competing offers. In last version of the Law, besides the classical attribution criterion of least price, a new concept of – the most advantageous offer from perspective of technical-economic parameters was introduced. These parameters are calculated as weighted average of such variables as prices, terms of delivery, quality, etc. Still, there are established minimum thresholds for the weight of prices, depending of the type of procurement. One key issue to be addressed in later legal amendments is the inclusion of more flexible evaluation methods like life-cycle costs, best price-quality ratios, and environmental and/or social costs.

## **Competitiveness and Impartiality**

Two types of deficiencies were identified for this benchmark indicator. The first drawback concerns such aspect as more restrictive timeframes for submission of tender applications in comparison with international best practices. Namely, for submission of tender application national PPL stipulated more restrictive terms than those stipulated in GPA standards (Article XI). This discrepancy still is in force despite the fact that the Republic of Moldova adhered recently to WTO GPA.

Second type of deficiencies identified regards some lapses in technical specifications to be included in tender documents. So, the template of the notice of intended procurement (invitation to tender) does not include such important information as the value of the goods or services to be procured and payment information for multi-year contracts.

There are case of including ambiguous and unclear description of good/works/services in a notice of the intended procurement, or the time-frame of the contract is extremely short and is not enough to complete the delivery (in most cases is changed on contract signing or during the contract implementation). All these result in a lower number of bids submitted.

In spite of the restriction (in PPL) to make reference to specific products or particular economic operator in the tender documentation, there is still high level of risk of arranged requirements, by using technical description of the specific product with precise figures with restriction for any deviations from the requirement.



## Accountability and Integrity

Recently the Government approved a Regulation concerning the planning of public procurement contracts in which was stipulated that these procurements can be planned when there are financial resources or evidence of their allocation.<sup>3</sup> So, henceforth all procuring entities are obliged to identify financial resources before launching a public procurement or face a risk of annulment for these procedures. From statistical point of view this problem can be viewed as insignificant at first glance, since in 2016 only 79 out of total of 1286 cancelled procurement procedure were annulled by this reason, or mere 0.93%.<sup>4</sup> And all these cancelations were done by procuring entities.

Despite the mentioned data, several NGOs conducting the monitoring activities of procurement identified the contrary facts, i.e. that many procuring entities began the procurement process without having enough financial resources.

## Uniformity of the Legislative Framework

One of the major drawbacks of existing legal framework in public procurements is the list of exemptions. The main one is the fact that existing PPL does not cover state-owned enterprises According to the data of State Registry Office there are more than 1500 state and municipal enterprises, and sheer size of the sector speaks about the importance to somehow make the procurement process more transparent and efficient.

As mentioned above, recently the institutional framework of public procurements was modified by introduction of an independent NDSA. Still, the legal provisions for this institution contain several deviations from best international practices in this realm. First of all, the adopted status of DSA does not presume a participation of civil society members in activity of review body with equal rights and obligations as employees of this Agency. Secondly, there are some constraints for complaint submission. Namely, complaints can be submitted only by the tender participants and not by the third party to the process such as civil society.

The gravest situation with the review process at this moment is the lack of any functional authority. In the process of institutional reform the PPA was stripped of its review functions since May 2016, but with plans to institute until the second half of that year a fully functional NDSA. The process of NDSA formation lingers for more than one year. The Regulation on organization and functioning of NDSA was approved in December 2016, after the amendment of the PPL, but the NDSA is still not being active in the second quarter of 2017. That is why, the review process practically stopped and companies can only resort to courts to solve their complaints. Such institutional lapses hinder the process of public procurement and undermine the trust of private sector in the willingness of public authorities to build a transparent and efficient procurement system.

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<sup>3</sup> Government decision nr. 1419 from 28.12.2016

<sup>4</sup> Ibid

## Conclusion and Recommendations

The PPL assessment uncovered a rather satisfactory situation in the Republic of Moldova with general legal and institutional framework in this realm. Still, there are some areas in which the country lags behind the best international standards. Most of the deficiencies identified that drags overall country's rating are in sphere of transparency. A wide range of critical documents such as procurement plans, notices of intended procurements, decisions of tender commissions, contracts, amendments, etc. are not required to be published, or if they should be published it is not specified in which format. Also, the current PPL hinders the access to procurement dossiers to third parties. And even the current stipulations are not fulfilled by all authorities and such state of affairs gives rise to opaqueness in public procurement system.

Besides the transparency issue, the recent adoption of new PPL did not solve some critical problems that persisted in time. One of these problems is the list of exemptions. Despite the fact that PPL establishes a reasonable list of exemptions, there are problems with universality application of the Law, and the most egregious one is the exclusion of state-owned enterprises from coverage of the PPL. Since the sheer number of such enterprises is rather large, the risks of corruption and fraud in procurement process is significant due to the fact, that information on procurements are not publically available and not strictly regulated. Still, the inclusion of this domain into PPL remains a daunting task to be accomplished in the next steps of the system's reform.

Some deviations from best practices were depicted in the review and complaint solving framework. Among the main ones can be indicated the fact that civil society has no permission to be officially involved in review process, and to file complaints. Also, the review body is not obliged to publish the complaints, and the requirements to disclose the final resolution does not stipulate the format of the document. Even the launch of newly created DSA turned out to be an extremely difficult one, not entering into force a year after the PPA was stripped of its functions to review the complaints. The mere existence of such deviations in recently reformed framework indicates on the difficulties encountered by reformist agents in public administration to adjust the public procurement system to the best sectoral standards.

One of the major causes of the sector's problems, especially for transparency and efficiency issues, is the existence of an outdated electronic procurement system. The limited functionalities of existing electronic system hindered the process of information disclosure and migration from paperback procedures to electronic ones. Recently, the Ministry of Finance launched an overarching reform of this system. So, deficiency identified in this document can be used as indicators to be taken into account and embedded into the modernized architecture of the e-system.

In order to move to a more transparent, efficient and fair public procurement system the relevant authorities should align this system to international best practices, i.e. to eliminate the identified deficiencies. In light of the assessment's findings it is recommend operating following adjustment to national legal and institutional framework:

- To stipulate in the PPL and corresponding sub-legal acts the technical detail of documents to be published (to be machine-readable). Also, to ensure that in new e-system will be published all

procurement documents beginning with planning and ending with post-tendering stage of procurement. The access to all documents should be free-of-charge and in a user friendly format

- To embed the electronic system of the NDSA into general electronic procurement system. This should be done in such mode, that users of general system will have direct access to submitted complaints and dispute resolution of the NDSA. In turn, the register of complaints developed by the NDSA should be detailed as much as possible, containing such fields as reference to procedure, short description of the procurement, contracting authority, etc.;
- In the PPL should be stipulated the obligation to publish full versions of complaints and of the dispute resolutions. These documents should be accessible free-of-charge and be in machine-readable format;
- Permit the members of the civil society to take part in the review process of NDSA, and to file complaints to this body;
- Include the state-owned enterprises and private companies in the field of utilities into the remit of the PPL;
- Extend the number of evaluation criteria of tenders by introducing into the PPL such options as life-cycle costs, best price-quality ratios, and environmental and/or social costs;
- Adjust national timeframes for submission of tender applications to those stipulated in GPA standards (Article XI);
- Develop handbooks and methodologies, as well as e-learning module for contracting authorities and business sector for continuous capacity building in public procurement field;
- Strengthen ex-ante and ex-post control mechanisms of public procurement, which will enable relevant institutions with applicable instruments of monitoring. Ensure high level of transparency of control activities;
- Perform a functional review of public procurement system, in order to assess the options and costs of optimization;
- Implement awareness activities promoting e-procurement, and information to all stakeholders and society about this system.