



# ASSESSMENT OF STATE PROCUREMENT SYSTEM OF GEORGIA

FINAL

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# **ASSESSMENT OF STATE PROCUREMENT SYSTEM OF GEORGIA**

FINAL

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# DATA

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# ABSTRACT

Within the past year, the state procurement system of Georgia has undergone significant changes in terms of the legal framework for state procurement, the procedures and practices applied in the course of conduct procurement, and some of the institutional and organizational arrangements for the system. Foremost among those changes has been the introduction of the Electronic Procurement System (EPS), through which most procurement is now being conducted. That move, which is aimed at boosting efficiency and transparency in state procurement, as well as promoting competition and integrity, is widely acknowledged as being a very significant and bold forward step. While the introduction of the EPS and the other new aspects of the state procurement system are still quite recent, and attempting to make comprehensive and definitive assessment would be premature, it is nevertheless already possible to identify areas in which some midcourse adjustments and corrections and adjustments would be merited, as well as to identify strategic ways in which to solidify and build on the progress achieved, so that further strengthening and evolution of the system could be achieved. The report makes findings and recommendations in particular as to ways in which the legal framework can be further developed and improved, prioritize ways in which procurement procedures and practices can be further improved to maximize quality and value for money outcomes, steps to ameliorate low rates of supplier participation, and measures to increase the capacity of the procurement workforce.

# ABBREVIATIONS

EBRD	European Bank for Reconstruction and Development
GIZ	Information and Communication Technologies for Development
GSMEA	Georgia Small and Medium Enterprises Association
OECD	Organization for Cooperation and Development
SOCAR	State Oil Company of Azerbaijan
SPA	State Procurement Agency
UNCITRAL	United Nations Commission on International Trade Law

# CONTENTS

<b>I.</b>	<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
<b>II.</b>	<b>APPENDICES .....</b>	<b>4</b>
	A. BACKGROUND .....	5
	B. METHODOLOGY .....	6
	C. FINDINGS.....	7
	D. RECOMMENDATIONS .....	36
	E. ADDITIONAL INFORMATION.....	39

# I. EXECUTIVE SUMMARY

1. The Georgia state procurement system has undergone numerous reforms over the last decade as a means of attaining the following stated government objectives:

- a. -Ensure rational expenditure of funds designated for state procurement;
- b. Promotion of healthy competition in the area of the production of goods, provision of services and the performance of construction works necessary for the state;
- c. Ensure fair and nondiscriminatory approach towards the participants of procurements during the performance of public procurement;
- d. Ensure publicity of state procurement;
- e. Formation of an integrated electronic system of public procurement and building public confidence thereof.” (Revised Public Procurement Law, 28.06.2010. N3163 from August 1, 2010)

2. Among the recent changes, the most important is the introduction of a custom-designed EPS by the SPA in December 2010. The cornerstone of this e-procurement system lies in electronic tendering during which bidders remain anonymous, detailed information about bid activity is freely accessible to the public in real time via the Internet, and the lowest total price is determined impartially and objectively. The SPA has standardized its tendering and procurement commodity classifications based upon the European Union’s Common Procurement Vocabulary (CPV) schema.

3. The SPA manages approximately \$1.8 billion in spend and employs 35 staff members. In the first six months of 2011, the agency has overseen 14,400 tenders with estimated total value of GEL 640.5 million, as compared with only 2,300 tenders through all of 2010 and 1950 in 2009. As of this report date, the e-procurement system has 7,718 registered users, of which 5,243 are suppliers and 2475 are state procuring entities.

4. The key objective of this assessment is a review of the state procurement system and underlying legal, institutional, and procedural framework to identify gaps that threaten transparency, fairness, and nondiscrimination in procurement according to internationally recognized public procurement principles and benchmarks, and to identify possible next steps in the further development of the system. As importantly, this assessment seeks to identify opportunities for harnessing the cross-cutting effects of public procurement expenditures within various value chains to more effectively drive economic prosperity, including actively engaging regional and small and medium-sized business enterprises (SMEs) into the government procurement market.

5. While the assessors’ initial impressions of the e-procurement system and supporting framework are positive overall, the development of this system is still in its infancy and the system cannot be fully measured for effectiveness at this stage in its life cycle. Nevertheless, early indications are positive and we are confident that the SPA can continue its focus on transparency and visibility of information while enhancing the overall effectiveness of the system, including by implementing the steps listed below.

## RECOMMENDED NEXT STEPS FOR EPI BENEFICIARIES (PRIMARILY SPA):

### 1. Recommendations for Legal, Institutional, and Capacity Aspects:

Preliminary findings indicate widely uneven distribution of skill sets and capacity of state procurement officers throughout the 2,400+ state procuring entities. Additionally, the lack of qualified suppliers participating in the tender process is constraining free competition despite the SPA e-tendering system's capabilities. The legal framework, is overall quite a positive collection of provisions, and has been rated in a recent EBRD assessment as a leading example of progressive procurement legal development in the region. Nevertheless, it still displays a number of gaps and weaknesses, and structural characteristics that can be addressed through further elaboration and refinement. Recommendations:

- (a) Develop a practical hands-on procurement manual to be distributed with proper supporting orientation training to procurement officers throughout Georgia, in keeping with international standards
- (b) Develop a supplier guide: "Doing Business with the Georgian Government" that offers potential suppliers a simple and practical insight into the SPA's supplier qualification criteria, guidelines for identifying government procurement needs and opportunities, accessing and using the SPA's online procurement system, and other relevant information in accordance with Procurement Law and policies
- (c) Further elaborate, refine, and consolidate the main instruments in the legal framework for state procurement, including for the purposes of further development of procedures and practices (e.g., framework agreements) and introduction of sustainable procurement policies, and develop essential additional instruments (standard bidding documents and general conditions of contract)
- (d) Establish an ongoing SPA awareness campaign for supplier involvement in state procurement; actively recruit suppliers in the regions to increase participation and competition in the tendering process
- (e) Conduct feasibility study to establish regional governmental shared-service hubs to support training and recruiting activities, and to facilitate SME access to the procurement system, in the regions
- (f) Develop and implement SPA human institutional capacity development (HICD) plan – a) map and streamline departmental processes, b) develop accurate job descriptions or terms of reference (TORs) for procurement staff, c) develop ongoing communications plan
- (g) Define key performance attributes and establish corresponding capacity-development plan for procurement officers within state procuring entities with goal of establishing certification program in 2012/13
- (h) Assist SPA in developing bid evaluation criteria and review/scoring process for critical nonprice factors affecting total life cycle costs within select procurement classifications

- (i) Establish the framework and guidelines for risk-based monitoring and evaluation of the public tendering process
  - (j) Develop process for aggregating and disaggregating items according to the CPV classifications, as a means of simplifying and streamlining the State procurement process
2. Recommendations for continued e-procurement system development and implementation
- (k) Prioritize and implement data capture/business intelligence tool(s) to overlay onto e-procurement system to report and manage key competitive data, such as: number of CPV codes in active use; spend by category; spend by region; spend with SMEs (related proposal in process via another donor but no action started to date)
  - (l) Establish system lockout of debarred (black-listed) suppliers to prevent their participation in e-tenders
  - (m) As dispute board findings are filed electronically, enable indexing by subject and/or date rather than just by filer's name
  - (n) Enable e-catalog functionality

## **II. APPENDICES**

- A. BACKGROUND**
- B. METHODOLOGY**
- C. FINDINGS**
- D. RECOMMENDATIONS**
- E. ADDITIONAL INFORMATION**

# A. BACKGROUND

## STATE PROCUREMENT SYSTEM REFORMS

The state procurement system has undergone continuous reforms over the last decade. The latest and most substantial amendments that took place in 2009-2010 affected the system in many positive ways. The procurement procedures have become more transparent and nondiscriminatory, helping ensure robust competition and minimizing the risk of corruption.

Among recent changes, the most important is the introduction of an electronic procurement system. From December 2010, e-procurement has become the single means of state procurement. The cornerstone of e-procurement lies in electronic tendering through which the lowest price is determined. Supplier qualification criteria (quality, supply timelines, experience, etc.) are set by procuring entity and verified offline.

This fundamental change in procurement structure and process poses some new challenges to the SPA and procuring organizations, as well as potential suppliers. The agency has to cope with new responsibilities and functions; the shift to an electronic system has completely changed its operational mode, which was paper-based before. At the same time, new e-tendering system puts excessive responsibility on procuring organizations. Drawing up the proper tender documentation and recruitment and qualification of potential suppliers requires specific knowledge and skills that are still lacking in a number of state procurement organizations.

## OBJECTIVE

The objective of this consultancy was to thoroughly assess the state procurement system, and identify its gaps and shortcomings for further improvement of the system.

The specific charter for this initiative included a review of the state procurement system to identify gaps that threaten transparency, fairness, and nondiscrimination in procurement and develop feasible action plan to improve it according to leading practices and provide greater access to procurement to small and medium-sized enterprises.

## B. METHODOLOGY

The methodology applied in the preparation of this assessment included interviews conducted by the team with a range of stakeholders in the state procurement system of Georgia, including officials from the SPA, from a number of procuring entities (including state administrative bodies, and state-owned enterprises), suppliers, and contractors, and umbrella business organizations representing large and smaller companies. A listing of the persons interviewed, and the organizations with which they are affiliated, is provided in Appendix E.

The team reviewed the main instruments in the legal framework for state procurement and a detailed assessment is presented in Appendix C. Following the assessment of the legal framework, Appendix C presents an assessment of the state procurement institutional framework and capacity development. The framework for that assessment are the *OECD Principles for Enhancing Integrity in Public Procurement*.

In addition to the above, the team compiled and analyzed available empirical data on a randomly selected sample of 100 procurement proceedings.

# C. FINDINGS

## EXAMINATION OF THE LEGAL FRAMEWORK SUPPORTING THE GEORGIA STATE PROCUREMENT SYSTEM

### A. Main component instruments of legal framework

1. The legal framework for public procurement is anchored by The Law of Georgia on State Procurement, which entered into force on January 1, 2006 (hereinafter, ~~the~~ Procurement Law<sup>1</sup>). The Procurement Law has been subjected to a series of amendments since its enactment<sup>1</sup>. Most recently, some additional amendments to the Procurement Law were enacted on by Parliament (No. 4632-I, May 5, 2011) [and published on May 25, 2011].

2. The Procurement Law represents a significant step forward in the development of the legal framework for public procurement in Georgia, and for the procurement system that is defined and regulated by the law. In conducting an assessment of the public procurement sector in its 29 countries of operations, the EBRD found that the new legislation had introduced dramatic improvements to the system.<sup>2</sup> The EBRD ranked the legislation number 4 out of the 29 countries assessed.

3. The normative (sublegislative) texts supporting the implementation of the Procurement Law include:

(a) *Rules for Conducting Simplified Procurement, Simplified Electronic Tender and Electronic Tender, issued Order No. 9 of the Chairman of the SPA* (dated April 7, 2011) (hereinafter, ~~the~~ Rules<sup>3</sup>) — devoted in particular to defining and setting the procedural steps and phases in the implementation of the integrated EPS, and its accessibility through the SPA Web site ([www.procurement.gov.ge](http://www.procurement.gov.ge)).

(b) *Rules for the Determination of Homogeneity of Procurement Objects, and the Rules for the Identification of Procurement Objects and Determination of Homogeneity Thereof* (8.04.2011 N 10), issued by Order No. 7 of the Chairman of the SPA (hereinafter ~~Order~~ No. 7<sup>3</sup>) – affirms the classification coding system to be applied CPV of the EU).

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<sup>1</sup> Prior to the most recent amendments (May 25, 2011), amendments to the Procurement Law were enacted in the following enactments: N627 December 5, 2008, N1336 June 19, 2009, N1690 September 24, 2009, N2107 November 20, 2009, N2760 March 12, 2010, N3162 June 28, 2010, N3163 June 28, 2010, N3164 June 28, 2010, N3352 July 28, 2007, N3767 October 28, 2010, N4068 December 15, 2010, N4272 February 25, 2011, N4273 February 25, 2011.

<sup>2</sup> *A model for improving public procurement regulation – the case of Georgia,* a summary of EBRD's findings in 2010 regarding the developments in the procurement system of Georgia; provided by EBRD Secretariat on May 24, 2011. The assessment applied the *EBRD Core Principle on an Efficient Public Procurement Framework*.

- (c) *Rules of reporting of Procuring Organizations* issued by Order No. 2 of the Chairman of the SPA (February 10, 2011) – specifies the coordination and oversight role of the SPA, and details obligations of procuring entities as regards the state procurement quarterly report, the annual report on state procurement, preparation, and modification of the annual procurement plan of procuring entities, planning steps for individual procurement proceedings, retention of documentation; templates are provided for the Annual Plan, the Quarterly Report, and the Annual Report, as well as instructions for using the various the templates.
- (d) *Conditions and Rules for State Procurement of Design (Project) Services through a Design Contest* issued by the Order No. 3 of the Chairman of the SPA – outlines some basic procedural aspects for conducting the contest.
- (e) *Rules of Activity of the Procurement-Related Disputes Resolution Board under the SPA*, issued by Order of the Chairman of the SPA No. 11 (November 30, 2010) – affirms and elaborates the essential principles and procedures of the complaint review process, and the composition, structure role of the Dispute Resolution Board, the role of the Office of the Board, the procedural rule applicable to the meetings and decision making of the Board.

4. There is no doubt that the changes introduced into the procurement system, in particular by the introduction of the integrated EPS, have been bold and have added substantially to transparency, economy and efficiency and are a promising basis for further development of the procurement system.

5. At the same time, as a result of the successive amendments that have been made to the Procurement Law over the years and up to the present, the Procurement Law has been transformed considerably, displaying numerous deletions and additions, while still having various gaps. This has left the Procurement Law appearing somewhat fragmentary, with so many basic aspects left to be defined in sublegislative instruments, including some aspects that typically are dealt with in the Procurement Law rather than being left to supporting sublegislative texts.

6. The most recent amendment to the Procurement Law have added to that condition in which it appears that some fundamental aspects that should be defined in the Procurement Law are left to be defined in a sublegislative text (e.g., the new art. 20<sup>3</sup>, in introducing the two-phase variant of electronic tendering). Furthermore, the number of sublegislative texts contributes to the legal framework as a whole becoming fragmentary and unwieldy.

7. That may create a sense of uncertainty as to the hierarchy between the Procurement Law and the sublegislative texts. Also unusual from the viewpoint of hierarchy of instruments in the legal framework, is the provision in the Rules (art. 1(5)) that calls for deferring to conflicting provisions in the –procedures in the Integrated Electronic System of State Procurement,” by way of modifying the Rules any time a conflict is detected between the procedures and the Rule. In other words, it seems to be saying that whatever the procedures that are in EPS, they take precedence over the Procurement Law/Rules and the

Procurement Law should be modified right away accordingly, which somehow seems to establish an upside down hierarchy.

8. A notable gap in the legal framework is the lack of standard bidding documents and general conditions of contract.

## **B. Scope of application**

### Types of procurement

9. The Procurement Law applies to all types of state procurement (art. 1.2) with the major exception being procurement related to state secrets as defined in the Procurement Law on states secrets. In addition, a number of specific types of procurement are excluded from the coverage of the Procurement Law (art. 1.3<sup>1</sup>) (e.g., procurement of immovable property, procurement of electricity, strategic reserve capacity, natural gas, and water supply).

10. The Procurement Law (art. 1.4) refers to the possibility deferring to the procurement rules of the World Bank, European Bank for Reconstruction and Development, Asian Development Bank, German Reconstruction Credit Bank, and the European Investment Bank, –provided these organizations are involved in legal relations related to the effecting of procurement.”

11. As compared with provisions of this type seen in some other systems, this provision in the Procurement Law is not particularly complete in that it merely permits such deference (when in fact the donor procurement rules are likely to be mandatory pursuant to a treaty obligation of the state).

12. Also, the provision does not contain the proviso that the donor rules apply to the extent of any conflict with applicable Georgian rules, but that otherwise the Georgian Procurement Law (and its supporting instruments) continue to apply. Furthermore, by specifically listing the donors, there is a risk of legal uncertainty when a situation like this arises in the context of a procurement financed by an international donor not listed in art. 1.4 of the Procurement Law, thus requiring a special government decree. The need for such a special decree could be avoided by drafting the provision in a more general manner in line with the corresponding provision in the UNCITRAL Model Law on Procurement.

### Covered entities

13. The Procurement Law identifies the entities whose procurement is subject to the Procurement Law by reference to the use of funds of the state budget, and other referenced funds, as defined in the Procurement Law (art. 3.1(a); see in particular the definitions of the term –state procurement,” which lists the types of funds whose use in procurement triggers the application of the Procurement Law (art. 3.1(a)).

14. Thus, the Procurement Law applies to procurement financed by state budget funds, by budgets of the Autonomous Republics of Abkhazia and Adjara, budget funds of local self-government units, credit and investment funds received under state guarantee, funds of

a legal entity of public law, and funds of an enterprise in which the state has a greater than 50 percent ownership interest -- though the Procurement Law refers to the issuance of special rules for procurement by such enterprises involving goods or services "related to the specificity" of their operations (in the absence of which the Procurement Law applies).

15. In order to conduct procurement proceedings through the EPS, procuring entities must register themselves in the system (registration procedures are outlined in the Rules, art. 5).

#### Main types of issues addressed in legal framework

16. Apart from being defined by the types of procurement funding and types of entities covered by the Procurement Law, the scope of the Procurement Law and the legal framework as a whole is also measurable by the types of issues dealt with in the Procurement Law, which include:

- (a) Objectives -- includes the standard ones, to which was added the formation of an integrated EPS (art. 1)
- (b) Institutional and organizational arrangements -- roles and responsibilities involved in the implementation and oversight of the procurement process (including procuring entities, Authorized Agency)
- (c) Procedures and practices -- to be applied in implementing the procurement process (planning, procurement methods and procedures, contract implementation, and administration)
- (d) Transparency-related provisions -- those include in particular the provisions requiring the uploading of various types of documents generated in the course of conducting procurement proceedings
- (e) Ethics and conduct rules -- provisions on conduct and conflict of interest rules applicable to participants in the procurement process

#### **C. Institutional and organizational arrangements**

17. The Procurement Law and its supporting sublegislative texts contain provisions of the type outlined below concerning the institutional and organizational arrangement for operating and overseeing the state procurement system of Georgia.

- (a) Authorized body -- The Procurement Law (art. 4) calls for the designation by the President of an authorized body (referred to as the "Agency") for the purposes of conducting a variety of functions related to the oversight of the procurement system. The functions (art. 4(6)) of what became the SPA include the classical functions assigned to such policy and oversight bodies.

The potential for a positive and creative role of the SPA is accentuated in practice by a joint working setup by the SPA and the Business Association of Georgia (BAG), which helps to provide SPA with business feedback aimed in particular at identifying and solving problems that may arise in the implementation of the EPS. In the further evolution of the SPA, it may be useful to consider adding to the functions of the SPA in developing sustainable procurement policies (e.g., development of SMEs, green procurement). For example, it is reported that foreign companies have had difficulties in identifying local business partners, which may affect the efficiency of the procurement system, as well as diminishing the extent to which state procurement expenditures can be harnessed to promote development of the Georgian economy, including SMEs.

Other provisions concern the rights and obligations of the SPA Chairman (art. 5), and the role of the SPA in the complaint review process (art. 23, as specified in Order No. 11). As noted in this report, the SPA, apart from its regulatory functions, also performs some operational functions (e.g., operation of the EPS (art. 4(7)), a combination with may be reviewed in terms of the possible future evolution of the SPA into a policy and oversight body.

The Procurement Law (art. 6) also defines the composition and functions of the Supervisory Board of the SPA. To the extent that the reference to the participation of “controlling bodies” in the Board means the inclusion of a designee of the Chamber of Control, that may be reviewed in the further evolution of the SPA, since that would not be optimal from the standpoint of preserving the autonomous role of the Chamber of Control and the separation of the functions of the SPA from the those of the Chamber of Control. The Chamber of Control serves as the supreme audit body of the country and should not be drawn into operational involvements of the entities subject to its auditing.

- (b) Procurement-Related Dispute Resolution Board – The Board is established in accordance with the Procurement Law (art. 23), as specified in Order No. 11 (art. 3). The Board is composed of three SPA employees designated by the SPA Chairman (who serves as Chairman of the Board) and three representatives of the nongovernmental organization (NGO) (civil society) sector, who serve one-year terms. Secretariat services for the Board are performed by SPA staff (referred to as the “Office of the Board” (Order No. 11, art. 4)).
- (c) Procuring entities – The Procurement Law (art. 7) lists the tasks and obligations of the procuring entities in the implementation of the procurement process. The establishment of a tender committee in the procuring entity for the purposes of conducting procurement is called for by the Procurement Law (art. 11) and the Rules (art. 14). While those provisions refer to the provision of secretariat services for the tender committee, and the possibility of accessing experts and consultants relevant to the subject matter being dealt with by the committee, those provisions seem to fall

short of calling for the establishment of permanent procurement units in procuring entities of the type that characterize professionalized procurement systems.

18. The Procurement Law establishes a decentralized procurement system, though there is the possibility that some common use items would, pursuant to a government decision, be procured using the consolidated tender procedure (see para. 31, 32, below).

19. It is noted that, apart from the institutional and organizational arrangements that may be defined in the Procurement Law and its sublegislative texts, other ancillary though very important aspects are also involved the wider architecture of a modern procurement system, even though they are not established or defined in the core legal instruments governing the procurement system. Those include in particular the internal *ex ante* financial control and internal *ex post* audit mechanisms within procuring entities. Those need to be substantially developed and are indispensable for the proper development of expenditure management and control, and audit, in the context of procurement expenditures<sup>3</sup>. In March 2010, new legislation was enacted on public internal financial control within entities, and on internal audit within entities, along with some secondary texts. The challenges to be met in implementation include that those are new notions, and capacity, awareness, and understanding of the new control and audit system on the part of officials are still limited.

#### **D. Procedures and practices**

20. Outlined below are the key features of the provisions in the legal framework defining the procedures and practices to be implemented in carrying out the procurement process. To the extent gaps and weaknesses are identified, it is for the purposes of charting the way forward and building on the progress in the legal framework that has been achieved thus far so as to bring it to its next stage of development.

##### *Procurement methods*

21. The Procurement Law has introduced a substantial procedural transformation into the procurement system, by transferring the bulk of public procurement to be processed electronically. The new e-procurement system, which implements the electronic tender and simplified electronic tender methods referred to above, is referred as the “integrated EPS”, and is mandatory for the performance of state procurement through electronic means (Rules, art. 1(6)).

22. Accordingly, the Procurement Law identifies the following methods of procurement:

- (a) Electronic tender – the method to be used for procurement with a value of GEL 200,000 and over (Procurement Law, art. 3.1(p)).

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<sup>3</sup> See *Georgia Public Expenditure and Financial Accountability (PEFA) – Joint World Bank-European Commission Public Financial Management Assessment* (Report No. 42886-GE, November 2008), which found that substantial development of internal financial control and internal audit remained to be done (see discussion and rating of indicators 20 and 21, pp. 28 – 31. [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/01/29/000333038\\_20090129230214/Rendered/PDF/428860ESW0GE0P1010disclosed0Jan0281.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/01/29/000333038_20090129230214/Rendered/PDF/428860ESW0GE0P1010disclosed0Jan0281.pdf)

- (b) Simplified electronic tender – a simplified, quicker method to be used for procurement with a value up to GEL 200,000 (Procurement Law, art. 3.1(q); though the Rules (art. 25) authorize the President or the government to issue an exception to that limitation in connection with conducting an event of state and public importance).
- (c) Simplified procurement – a direct (single-source) type of procurement method available for use in very small transactions (value up to GEL 5,000), or in the special cases identified in the Procurement Law (art. 10<sup>1</sup>(3)), as well as procurement (up to GEL 20,000) by diplomatic posts abroad and procurement by security forces up to a specified ceiling amount (art. 3(1)r<sup>1</sup>); this method may be paper-based or could also be electronically implemented (e.g., ordering over the internet (Procurement Law, art. 21(1<sup>1</sup>)(b)). Some clarification of the application of the monetary ceiling is provided in the Rules, art. 3(2)a.a and a.b, including the case in which the procuring entity may need to look to possible bidders across the border that are nearby, though that clarification is itself not entirely clear.
- (d) Two-phase versions of electronic tender and electronic simplified tender -- these variants have been added pursuant to the latest amendments to the Procurement Law (art. 20<sup>3</sup>), so as to enable evaluation criteria other than price that are disclosed in the bidding documents (e.g., quality of technical performance) to be factored into the evaluation, comparison, and ranking of bids with the procedures to be specified in a sublegislative text.

23. While not listed as a distinct method, both the electronic tender and the simplified electronic tender methods feature, as a final stage in the proceeding, an “electronic bargaining” procedure. That is, in effect, an electronic reverse auction, giving participating bidders three rounds in which to lodge a successively improved bid (with respect to price or other quantifiable criteria). Each bidder is permitted only one price reduction in each round in accordance with the minimum price reduction increment applicable to each such reduction (Rules, art. 2(y)).

24. Practitioners and regulatory authorities have acknowledged that it is expected that there is some risk of savvy bidders gaming the electronic bargaining (reverse auction) with its fixed three rounds of price submissions and rules as to the order of those submissions. Perhaps a part of the solution to mitigate that risk might involve removing the limitations of the three-round structure of the reverse auction, with one price reduction per bidder per round, and replace it with a continuous reverse auction period without such limitations. That would allow the participating bidders to submit an unlimited number of price quotations during the reverse auction period, thus making the system more difficult to manipulate.

25. Regarding the use of the simplified procurement method, the case of urgency (Procurement Law, art. 10<sup>1</sup>(3)(b)) does not limit the resort on grounds of urgency based on whether the procuring entity might have foreseen the circumstances and been negligent in not planning properly for them (see the rule in the corresponding provision in the UNCITRAL Model Law, art. 22(1)(a)).

26. Given the rapidity with which procurement proceedings now seem to be able to be processed in the EPS, it is not clear why the exception to competitive proceedings contemplated in art. 10<sup>1</sup>(3)(d) is needed, as well as in the light of the exception in art. 10<sup>1</sup>(3)(b).

27. Another case for the use of the simplified procurement method that might warrant some tightening (if not elimination altogether) is the situation in which existing goods are traded in for new replacements (Procurement Law, art. 10(3)(e)). This is not a ground for single-source (direct) procurement typically found in other systems and, on its face, does not seem to present circumstances in which competition provided by other procurement methods could not usefully be injected in order to identify the best possible deal for the procuring entity.

28. The inclusion of the case of maintenance and spare parts as one of the grounds for single-source procurement (Procurement Law, art. 10(3)(h)) may obscure the fact that there may be better ways to deal with such needs rather than viewing them through the optic of single-source procurement. Those other ways, which are based more on competition and more likely to deliver value for money, include competing maintenance and spare parts aspects as part of the procurement package put to competition, obtaining maintenance and spare parts services as part of the procurement contract, and engaging in framework agreements for maintenance and repair services (framework agreements that would be established on the basis of a competitive process). In fact, the provisions in the Rules (art. 26) on procurement of services on the basis of a price list appear to be a step in the direction of using framework agreements. Overall, the legal framework should elaborate provisions on the use of the framework agreement.

29. For the purposes of selecting the appropriate method of procurement to be used, and determining the packaging and bundling of procurement, and suppressing the artificial splitting of procurement in order to avoid more time-consuming procedures, a pivotal concept is homogeneity of procurement (see definition of this notion in the Procurement Law, art. 3(1)(d<sup>1</sup>)). The application of the notion of homogeneity of procurement seems to have raised some challenges in practical application, including in the context of the application of the CPV, and is the subject of a sublegislative text (Order No. 7; furthermore, the Rules (art. 23) call for the development of methodology for the identification of artificial splitting of procurement, which the SPA is planning to do).

30. Additional methods provided in the Procurement Law include:

- (a) Consolidated tender – this method involves the consolidation of the procurement of common use items in a proceeding conducted by the SPA (art. 3(1)(u)); the Procurement Law calls for the issuance of a sublegislative text to define the details of this procedures, which is being awaited.
- (b) Alternative procurement – a procedure, which allows a procuring entity that has engaged a service provider for the purposes of communications to engage an alternative provider as a backup for cases in which the communication services from the contracted supplier are down (art. 3(1)(w)).

(c) Competition/contest – an alternative method for the procurement of design services and demolition (art. 3(1)(x)).

31. As in the case with various other aspects of the procurement process, the Procurement Law (see art. 20<sup>2</sup>), apart from locking a procuring entity that has announced a consolidated tender in its annual procurement into using the arrangement, provides a limited indication of the essential principles and procedures applicable to the holding of consolidated tender proceedings. The consolidated tender proceeding is apparently akin to the framework agreement type of procedure available to procuring entities functioning under the EU Directives. The Procurement Law does make reference to rules and conditions being set forth by way of a sublegislative text some essential principles and procedural aspects, but the role of the Procurement Law, as the anchor of the legal framework, would properly entail more than referring to so many issues to be defined by way of a sublegislative instruments.

32. The Procurement Law (art. 20<sup>2</sup>) also seems to preclude the possibility that consolidated (framework) arrangements would be established and made mandatory in some cases for all entities in the system. Perhaps that might be a matter left to be handled in a sublegislative text rather than in the more rigid form of a law.

33. The Procurement Law does not define the procedures to be applied in the competition/contest method and merely defines it as a method that is “different from simplified procurement, simplified e-tender and electronic tender,” and leaves the details to sublegislative regulation (art. 10<sup>2</sup>). The provisions on the contest method are elaborated, though only in a rather limited, skeletal fashion in the rules under Order No. 3.

#### *Procurement planning*

34. The Procurement Law (art. 9(1)) requires that procurement be conducted in accordance with a pre-established annual procurement plan. Rules are established as to the timing of the preparation of the plan and its submission to the SPA, and the factors to be taken into account in the preparation of the annual plan (art. 9(4) to (6)). Various details on the preparation of the annual plan, a template for the annual plan (which it is planned to make Web-based), rules on estimation of contract value, and the identification of steps in planning individual procurement proceedings are addressed in Order No. 2 (art. 4). The annual procurement plan of each procuring entity is published on the SPA Web site. Every registered user can view the annual plans. Only guests cannot view the plans.

35. The possibility of multiyear procurement planning (referred to as “long-term procurement”) is envisaged in the Procurement Law (art. 9(1)), and requires the approval of the relevant finance authorities and notification of the SPA.

36. Emphasis is placed on the avoidance of artificial splitting of procurement (art. 8(3<sup>1</sup>) and 10(4)). As mentioned above, the operative concept for identifying potential cases of artificial splitting is homogeneity of procurement objects, which is coupled with the foreseeability of a procurement requirement and the inclusion of a budget for the procurement in the annual budget (see also Order No. 7 (art. 5) concerning the application of

the homogeneity principles). The rule against artificial splitting is subject to exceptions that may be justified on geographical grounds or rationality in expenditure of funds, or due to unforeseeability. There has been a pattern of difficulties encountered by procuring entities in defining the concept of homogeneity and interpreting and applying it in practical cases. At the same time, the legal framework prohibits bundling of items from more than one CPV category, which may complicate efficient planning of procurement in some cases.

37. Provision is made in the legal framework for the possibility of procuring entities jointly conducting a procurement (Rules, art. 4).

#### *Solicitation of bids*

38. The Procurement Law (art. 12<sup>1</sup>(1)) requires publication, in the Georgian language, of the invitation to bid (e-tender announcement) and the bidding documents in the EPS (subject to payment of a fee pursuant to a recent amendment to the Procurement Law (art. 3(1)(n<sup>1</sup>

39. The Procurement Law (art 12<sup>1</sup>(5)) lists the required contents of the bidding documents. The list reveals some room for improvement. Para. (5)(e) requires the bidding documents to contain a “complete description of technical and qualitative features of an object of procurement, including relevant technical specifications, designs, drawings, and sketches”. That formulation seems not to take into account the possibility of formulating the technical description of the procurement object in terms of required performance or outputs, rather than a “complete description,” “design,” etc. Perhaps the formulation of para. (5)(e) reflects the lowest price bid evaluation approach reflected in the e-tendering methodology currently being applied, which is not geared to evaluating and comparing qualitative differences among bids in arriving at a ranking and determining the winner (e.g., life cycle cost evaluation).

40. That, combined with the lack of procedures to deal with abnormally low-priced bids accentuates the pressure on procuring entities to formulate technical specifications precisely, to ensure that the required quality is obtained. However, a side effect of that combination of approaches to technical specifications and bid evaluation criteria may be factors that inadvertently contribute to depressed rates of participation in procurement proceedings.

41. Moreover, there is a concern that additional factors on top of the lack of procedures on abnormally low-priced bids and narrowly drawn technical specifications (exclusive use of lowest bid price criterion for evaluation of bids, the pressure to lower prices in the price reduction, and reverse auction rounds) contribute to the risk that bidders will cut corners when it comes to quality.

42. Pursuant to Order No. 7 (September 20, 2010), the CPV (issued under EU Directive EC N213/2008) is required to be used for the classification and coding of objects of procurement, and is incorporated into the EPS. The CPV classification, which is accessible through the SPA Web site ([www.procurement.gov.ge](http://www.procurement.gov.ge)), is applicable in the determination of homogeneity of objects of procurement. Practitioners have reported some difficulties in the application of the CPV in that regard, in particular when apparently diverse items fall under classes and categories of the same CPV group, an area where lack of clarity may affect the packaging of procurement and the choice of the procurement method.

43. A procedure is available for appeal to the SPA for a declaration that objects are nonhomogeneous despite falling under the same classes and categories of the same group (Order No 7, art. 5(2)). However, that may sometimes result in low-value tenders, in which there may be limited supplier interest. Thus, use of the CPV may be the subject of needed guidance material and instruction. Possible translation issues have also been reported as complicating use of the CPV.

44. No mention is made of any requirement to disclose in the bidding documents the bid evaluation criteria to be applied in evaluating, comparing, and ranking the bids.

45. No mention is made of pre bid conference possibility, or of site visits.

46. Para. (5)(f) refers to the inclusion in the bidding documents of “those mandatory provisions of the contract which the procuring organization is aware of in advance.” Such a lax formulation is a departure from the good practice standard to include the contract in the bidding documents, with a view to ensure that bidders are able to prepare responsive bids and offer their best possible prices, and to maximize transparency in the process.

47. The above-mentioned weaknesses in the Procurement Law provisions on the bidding documents are compounded by the lack of standard bidding documents, and lack of general conditions of contract, which would facilitate inclusion of the contract terms in the bidding documents. The lack of inclusion of the procurement contract terms in the bidding documents may also be a factor behind the provision later in the Procurement Law (art. 16<sup>1</sup>(5)) suggesting that there is a contract negotiation process at the award stage (see para. 92, below).

48. The Procurement Law (art. 19<sup>1</sup>(1); see also Rules, art. 16(3)) requires bidders to pay a fee of GEL 50 to participate in the procurement proceeding. However, a fee of GEL 5,000 is imposed in the case a consolidated tender procedure. While the rationale for such a higher fee may be that a consolidated procurement proceeding offers greater potential for business opportunity and more serious participants, such a fee seems not to conform to the principle that participation fees should be modest (reflecting only the cost of reproducing and distributing copies of bidding documents) so as to facilitate greater rates of participation rather than deterring potential participants. That sort of concern would be accentuated given the risk of aggravating the low rates of participation in procurement proceedings. Meanwhile, in practice, charging a fee for the bidding documents has been eliminated in the context of such documents being made available via download.

49. However, there remains a concern that, even when the low participation fee applies, the fees charged for other administrative documents that a bidder may be required to provide dissuade participation in small, low-value procurement transactions.

50. Provision is made for clarification of the bidding documents (Rules, art. 6). There seems to be some misalignment, however, in that the Rules permit requesting clarifications not only in the period of preparation of bids but also all the way up to the deadline for submission of bids, while the right of the procuring entity to modify the bidding documents is cut off once the period for submission of bids commences. That may be problematic to the extent that some needed modifications of bidding documents may be brought to the attention of the procuring entity by way of requests for clarification of bidding documents. The legal framework should also make it clear that, when circulating a clarification of the bidding documents, the identity of the bidder who requested the clarification should not be disclosed (that rule is not mentioned in the pertinent provision in the Rules (art. 6)).

51. In a departure from conventionally applied procurement rules, in the EPS process, the right of the procuring entity to modify the bidding documents is curtailed, being limited to the period of time following the announcement of the tender until the point at which the period for submission of bids commences (Rules, art. 2(j)). At that point, the only avenue for a procuring entity that needed to alter the bidding documents would be to cancel the procurement proceedings and start all over again. The lack of standard bidding documents may compound the risk of such a scenario taking place.

#### *Qualifications of bidders*

52. Access to the EPS is on an open-system basis. Information posted in the system is widely accessible, including to guests (i.e., users that have not registered), though for some purposes (downloading of reports on procurement proceedings) registration is required. In order to participate as bidders, suppliers must register themselves in the system. However, registration is a simple, straightforward step not requiring any fee or complex application or prequalification process, and results in the obtaining of a username and a password (Rules, art. 2(c), 5) (this is done online and backed up by a mailed letter).

53. The Procurement Law (art. 13) establishes the principle that requirements for qualification data must be fair and nondiscriminatory and promote competition. It leaves defining qualification requirements and other related issues to be dealt with by a sublegislative text. Furthermore, the Rules (art. 11(2)) provide that “technical specifications can be established in relation to professional skills, financial resources, experience and reputation, technical facilities, and other aspects of bidder.” At the same time, the Rules (art. 11(4)) expressly authorize procuring entities not to require submission of administrative eligibility type of data (e.g., regarding payment of tax obligations (Rules, art. 11(4)) and to some extent even encourage any such requirements to be minimized when the simplified e-tender method is being used.

54. In the EPS, a post qualification procedure is applied, in which only the qualification data of the first-ranked bidder are actually evaluated (the first-ranked bidder is requested to submit its qualification data) (Rules, art. 2(z<sup>6</sup>), and should be given a reasonable time to do

so, but not more than five days (Rules, art. 12(7)). On its face, that seems like a rather potentially short period of time if this involves obtaining administrative documents from the bureaucracy. Perhaps a better solution would be to require the bidder to submit such documentation with their bids. At any rate, the limitation of submission of qualification information to only the winning bidder, and the electronic uploading of qualification documentation, are perceived by observers as steps that have eased the possibility of participation, including by foreign companies and SMEs (though rates of participation so far remain relatively low).

55. It appears that the legal framework does not provide a prequalification procedure. That may leave the system less than optimally equipped to deal with procurement transactions in which the use of prequalification has a useful role to play (e.g., procurement of large civil works, or of complex, high-value systems). To the extent that some serious potential bidders would shy away from participating in such procurement proceedings if they are not preceded by prequalification, this may contribute in some cases to depressed levels of participation.

56. All in all, the above-mentioned provisions on qualifications and eligibility merit further consideration and refinement to minimize the risk of the system to exposure to unqualified bidders, since the core principles and procedures related to qualifications of bidders are among the most critical and basic provisions in a legal framework for public procurement and therefore merit greater, more definitive attention in the Procurement Law.

57. Furthermore, consideration may be given to adding provisions on the assessment of qualifications of bidders in the form of a joint venture. Without such provisions, procuring entities do not have guidance on important aspects of such a scenario, including the extent to which the qualification requirements must be applied to each individual member of the joint venture or may be cumulated.

#### *Submission of bids*

58. In the case of e-tendering, the Procurement Law (art. 15<sup>1</sup>(3); Rules, art. 8(2) and (3)) establishes a minimum 20-day period for preparation and submission of bids, though that period of time is broken up into a minimum 15-day period during which bidders may study the bidding documents and prepare their bids (but not submit them). Following that 15-day period, there is a five-day period during which bids may be submitted.

59. A much shorter timeframe applies in the case of the simplified e-tender method (at least one day for familiarization with the bidding documents, and a two-day time period following thereafter for the submission of bids). Since such a high percentage of procurement proceedings are in the simplified e-tender method, and given the pattern of low participation in procurement proceedings, consideration might be given to lengthening somewhat the time periods involved in the implementation of this method.

60. Technical documentation accompanying bids, as well as qualification data are uploaded in EPS, though qualification data is only submitted by the first-ranked bidder at the request of the procuring entity following the evaluation of bids. Furthermore, the successful

bidder will be obliged to submit the original versions of the qualification data proof documents when signing the agreement (procurement contract), not beforehand.

61. The EPS includes a procedure for the electronic submission of bid securities (Rules, art. 16). Exceptions to electronic submission of bid securities may be authorized by way of prior agreement with the SPA in the event of failure of the system for e-submission of the securities. The required amount of the bid security (one percent of the estimated procurement value) is within the range of widely recognized good practice. However, some aspects of the requirements concerning bid security requirements are outside of the typical pattern of such provisions and might be examined as a deterrent to participation by some potential bidders, by possibly overreaching in some of the grounds for forfeiture of the bid security (e.g., submission of nonconforming qualification documents, or nonsubmission of qualification data, for the issuance of both of which the bidder may be dependent upon governmental agencies).

62. Furthermore, with a view to overcoming low rates of participation in procurement proceeding, it may be worthwhile to consider authorizing procuring entities, in appropriate cases, to replace the bid security requirement with a requirement that bidders merely sign a bid securing declaration (according to which a bidder agrees that, in the event of a contingency of the type normally secured by a bid security, the bidder would be automatically debarred for a specified period of time).

63. In the “basic time” (i.e., the bid submission period that precedes the additional e-reverse auction rounds that follow), the system ensures the anonymity of bidders and keeps hidden technical proposal and bid price uploaded. The bid price is available after starting additional rounds (Rules, art. 10(8)) (though the identity of bidders does become visible at the bid evaluation stage (Rules, art. 10(9)). Samples, if the bidding documents indicate that possibility, are requested by the procuring entity and submitted only as part of the post qualification exercise (Rules, art. 11(3)).

64. The Rules (art. 10(3)) mandate a specific order of submission of the component parts of the bid, noncollusion affidavit, e-guarantee and fee payment, technical documents describing the procurement object being offered, and the bid price. No modification of a technical proposal is allowed, but the bid price can be modified during the “basic time” stage (Rules, art. 10(4) (Rules, art. 10(6)).

65. In specifying bid prices, bidders are constrained by the requirement in the Rules (art. 10(4)) that a bid price must not exceed the procuring entity’s estimated price, which is disclosed to bidders. That may be something to look at in the search for causes of the low rate of participation in procurement proceedings. Moreover, the risks of such an approach are exacerbated by the lack of a provision for dealing with abnormally bid prices. As a result, procuring entities may not reject a bid on the grounds of an abnormally low bid price.

66. It is being reported by participants from the procuring entity, as well as the bidder sides, that inadequate server capacity of the EPS is hampering the ability to upload information into the system. The Rules contain some safety valve provision designed to enable bidders to bypass system failures that may hamper online submissions. For

example, submission of the bid guarantee and payment of the fee is possible without using EPS when the system is down, with the prior agreement of the SPA (Rules, art. 16(5)). There is also the provision that allows a bidder to submit qualification data proof documents to a procuring entity without using the system, in accordance with the Georgian legislation (Rules, art. 12(8)).

67. However, it is reported that a new rule added in April 2011 by way of Order No. 9 (art. 12(6)) has apparently led to the disqualification of some bidders who are forced to split up submissions of technical documentation related to a bid (on the grounds of the rule in that provision that procuring entities are not permitted to seek clarification of technical documentation that has a ~~technical fault~~”).

68. Technical capacity limitations in EPS also appear to be hindering in some instances the submission of last minute price quotations, which risks compromising the effectiveness and openness of the electronic bargaining phase (electronic reverse auction). It is understood that testing is being conducted of a procedure for electronic sealing of bids to deal with the risk of last minute positioning by bidders under the existing system.

#### *Opening and evaluation of bids*

69. Some provisions related to the ~~opening~~” of bids are found to the extent that the legal framework defines what types of information become accessible at various stages of the submission and evaluation of bids (see Rules, art. 10(8) and (9)).

70. The Procurement Law (art. 15<sup>1</sup>(10)) does not contain provisions on the procedure for evaluation of bids, but rather leaves that entirely up to the sublegislative text. While it is not necessary for the detailed aspects of the bid evaluation process to be defined in the core statutory instrument in the legal framework for public procurement, one would expect to find there at least the affirmation of the fundamental principles and procedural essentials of the bid evaluation process.

71. That gap in the Procurement Law is exacerbated by the lack, as noted above, of a requirement stated in the Procurement Law that the bid evaluation criteria and methodology should be disclosed in the bidding documents. Such fundamental features of the Procurement Law should not disappear simply because of the adoption of electronic means in carrying out the procurement process. The approach to disclosure of evaluation criteria will also have to be modified to the extent that the EPS is elaborated to allow quality aspects to be factored into the bid evaluation process in a comparative manner.

72. The steps in the bid evaluation process are specified in the Rules. As provided in the Rules (art. 12(3)), evaluation, comparison, and automatic ranking of bids is on the basis of lowest bid price. The lowest-priced bid is selected for award, provided that the technical documentation submitted with that bid price conforms (on a pass/fail basis) to the requirements in the bidding documents (Rules, art. 12(4)), even if there are some minor deviations in the technical documentation (Rules, art. 12(5); the words ~~price of a proposal~~” at the end should probably be replaced by the words ~~actual cost of a proposal to the procuring entity.~~”

73. The procuring entity is empowered, at the stage of examining the technical data submitted by the lowest-priced bidder, to seek clarification of a bid (Rules, art. 12(6)); though two safeguards that should apply are not mentioned: that any such request for clarification and response thereto should be in writing and that no negotiation of the bid should take place. (See, however, the reference above to the cases that have come up in the context of a submission having to be split up to overcome insufficient capacity in the EPS server, and that have resulted in disqualification based on the new rule, introduced by Order No. 9 (art. 12(6)) and itself perhaps not drafted with sufficient clarity, that a procuring entity may not seek clarification of technical documentation that has a “technical fault (that is not legible),” i.e., lack of clarity as to whether that rule refers to the inability to read the text or to ambiguity in its formulation.)

74. Perhaps it is not surprising in that light that there is reported to be a high incidence of disputes concerning whether a bidder has been given a sufficient opportunity to clarify the bid, as sometimes a strict approach and sometimes a loose approach is applied as to what constitutes a clarification as opposed to a modification of a bid.

#### *Cancellation of procurement proceeding*

75. The Rules (art. 18) contains provisions on suspension and termination of procurement proceedings. While those include provision on the procedures to be followed in such cases, there is no guidance in particular as to the types of circumstances in which cancellation of a procurement proceeding may be appropriate.

#### *Review of complaints*

76. The Procurement Law (art. 23(1)) affirms the right of an aggrieved bidder (or potential bidder) to submit and obtain review of a complaint (referred to as an “appeal”) concerning an alleged violation of the rules applicable to the procurement process. Two possible tracks of submitting a complaint are provided, one being the submission of the complaint to the concerned procuring entity or tender committee, and the other submission of a complaint to the SPA.

77. Pursuant to the Procurement Law (art. 23(4<sup>1</sup>)), complaints submitted to the SPA are considered by a Board composed of representative of the SPA and NGOs on a parity basis. This is another instance where at some point consideration may be given to strengthening the principle of separation of functions in regards to the current mixing of operational and complaint review roles of the SPA.

78. The number of complaints has been rising, which may reflect factors, including the increasing number of procurement proceedings, as well as increased confidence in the complaint review process.

79. Complaints to the concerned procuring entity (or tender committee) or to the SPA are receivable prior to the conclusion of the procurement contract. By contrast, as affirmed by the Procurement Law (art. 23(2)), a complaint may be filed in court at any stage.

80. Apart from the rule that complaints submitted to the concerned procuring entity (or tender committee) or to the SPA are receivable only prior to the conclusion of the contract, the Procurement Law does not establish any deadlines or time periods for filing a complaint. There is no standstill period following the announcement of the winner, during which the conclusion of the contract must await the expiry of the standstill period.

81. In many systems inspired by the approach in the UNCITRAL Model Law, a bidder has a window to initiate a complaint following the point of time at which the bidder knew (or should have known with proper diligence) of the complained of decision, action, inaction, or omission of the procuring entity. The purpose of such a rule is to ensure that bidders with grievances do not sit on those grievances and expose the system to stale complaints and undue disruption. That approach is in line with the principle that it is better to try to resolve any problems with the manner in which a procurement proceeding is being conducted earlier rather than later.

82. Complaints to the SPA are to be submitted using the format appended to Order No. 11. A complaint may be submitted to the SPA electronically, through the SPA official Web site (Order No. 11, art. 2(4)). The functions of Office of the Board include determining whether a complaint is formally admissible and, if not, indicating to the complainant what needs to be done to make it admissible (Order No. 11, art. 4(2)(a) and (b)).

83. The right to obtain review of a complaint is subject to a couple of exceptions (the procuring entity's decision as to the choice of the procurement method to be used, and a decision of a procuring entity on "the suspension or termination of procurement statutory acts" (Procurement Law, art. 23(9), which is a reference to the suspension and termination of a procurement proceeding (Rules, art. 18)). Presumably, however, the procedure followed by the procuring entity in resuming a suspended or terminated proceeding would be subject to the complaint process if it did not comply with the requirements set forth in the Rules (art. 18(2) and (3)).

84. In a further development of the legal framework, consideration may be given to removing the exclusion of the decision as to choice of procurement method from the complaint process, which is inspired by the UNCITRAL Model Law, but which UNCITRAL will no longer retain in the revised version of the UNCITRAL Model Law currently being prepared.

85. The Procurement Law (art. 23(2<sup>2</sup>)) provides for suspension of the procurement proceeding due to a complaint, which is available in a targeted manner (during the period following completion of the electronic bargaining (reverse auction) procedure, and in the case of procurement through a consolidated tender or competition, as specified in Order No. 11 (art. 2(2)). The interplay between that provision (which limits and targets the timing of the suspended effect of a complaint) and art. 23(11) which states what appears to be a general, immediate suspended effect of a complaint lodged with the procuring entity could usefully be clarified.

86. That uncertainty is compounded to the extent that not all the sublegislative texts referred to in art. 23(2<sup>2</sup>) concerning suspended effects of complaints in the context of

contests and consolidate procurement have been issued, and the one that has been issued (Order No. 3, on contests) refers to the right of a participant to complain but does not have any provision on suspended effect of a complaint and refers to the Order No. 11 (on the complaint review board). Order No. 11 provides that a suspension is only available after e-bargaining has taken place (but there is no e-bargaining in the contest method). So the situation regarding suspension is not quite clearly presented and perhaps not sufficiently elaborated.

87. Provisions on the meetings of the Board at which complaints are considered, which are generally open to the public (Order No. 11, art. 4), include affirmation of the procedures to allow the parties to present their positions and pose questions to each other, as well as to employ electronic means to facilitate participation by participants and Board members (Order No. 11, art. 5 and 6).

88. The decision of the Board includes a statement of the circumstances or evidence on which it is based (Order No. 11, the rationale on if it sustains a complaint the Board is empowered to issue remedies binding on the concerned procuring entity (Procurement Law, art. 23(7); Order No. 11, art. 7(2)) (but any monetary damages that may be awarded would be limited to reimbursement of the complainant's cost of participating in the procurement proceeding and do not include lost profits (art. 23(13), and Order No. 11, art. 2(5), and rescission of a concluded contract is available only from a court).

89. The decisions of the Board are published on the SPA Web site. Decisions are searchable by the names of the parties; it is planned to create an index of decisions searchable by issues addressed in Board decisions.

90. The decision of the Board, and that of the procuring entity, regarding a complaint are appealable to the court (art. 23(12)). The Procurement Law (art. 23(14)) further provides that appealing an administrative-legal act of an authorized body does not result in a suspension of the act, which means (though it is not clear on the face of the text) that the appealing to the court of an administrative-legal act of an authorized body does not automatically suspend the act, though the court may issue an order suspending the act.

#### *Contract award and implementation*

91. The award decision is made by a majority vote of the Tender Committee (established pursuant to art. 11(1<sup>1</sup>) to (3) of the Procurement Law. In accordance with the Rules (art. 15(1)), the procurement contract must be signed within five days of the submission of qualification data (with the possibility of a one-time five-day extension of that period on the basis of a justified decision of the Tender Committee).

92. The Procurement Law appears to send contradictory messages as to whether there is a possibility of negotiating contract terms. On the one hand, art. 16<sup>1</sup>(5) refers to negotiation of a contract with the second-ranked bidder when the first-ranked bidder fails to sign a procurement contract; by seeming contrast, art. 18<sup>1</sup> states in its first paragraph the "inadmissibility to hold negotiations during the e-tender process"; then, states in the second paragraph, that apparently general prohibition is diluted by the statement that negotiation are

not permitted ~~except~~ as stipulated under sublegislative statutory act.” (Until its removal in the most recent amendment to the Procurement Law, there had been a reference to ~~verbal bargaining~~” in the provision on procurement of oil products (art. 21(2<sup>1</sup>)).

93. The Procurement Law (art. 15<sup>1</sup>(14)) and the Rules (art. 15(2)) require the procurement contract to be published in the e-procurement system.

94. While the Procurement Law (art. 21(1<sup>1</sup>)) affirms the basic requirement that procurement contracts must be concluded in writing, the Procurement Law identifies several cases in which a contract may be concluded without the actual signature of a discreet procurement contract instrument, and indicates possible ways in which the contractual relationship is documented in such cases (Procurement Law, art. 21(5<sup>3</sup>); Rules, art. 19(9) to (11)).

95. The Procurement Law (art. 21(3<sup>1</sup>); see also Rules, art. 21) requires the imposition of a performance security requirement when the value of the procurement contract is or exceeds GEL 200,000. However, the Procurement Law (art. 21(3<sup>1</sup>)) allows that requirement to be waived by the procuring entity for an individual contractor based on reputation. That runs fundamentally afoul of the essential procurement principle of equal treatment of bidders. Furthermore, some provisions in the Rules (specifically, art. 21(3) and (5)) notably do not mention that any requirement for a performance security must be disclosed in the bidding documents, while emphasizing some flexibility in the imposition of such a requirement.

96. The Procurement Law (art. 7(1)(d)) assigns to the procuring entity the task of exercising control and oversight over the fulfillment by the supplier of the procurement contracts terms and conditions. However, contract implementation and administration are reported to be areas of considerable challenge in the system, in particular as regards control of the quality of contract performance. That concern compounds the quality-related concerns at earlier stages of the procurement process. It has been suggested that a comprehensive manual covering contract administration would be helpful, including issues such as feedback/reporting mechanisms concerning quality of contract performance.

97. The Rules (art. 19(6)) contain a provision listing the essential contents of a procurement contract. However, that list does not include a number of key provisions typically found in contracts (e.g., delay penalties, warranty). While the motive behind a truncated list of contract terms may be to take into account some degree of unfamiliarity with and apprehension about detailed contracts, and the Rules (art. 19(8)) do mention the possibility for a procuring entity to add additional clauses to the contract, there is a lack of general conditions of contract in the procurement system. That leaves practitioners with incomplete guidance and tools for the formulation of contracts, and hinders the degree of harmonization and predictability in contractual practice.

98. A restrictive approach to contract modification is established in the Procurement Law (art. 21(5)), permitting such modification (which results in a higher contract price or renders the contract condition ~~less favorable~~”) only in the cases provided in art. 398 of the Civil Code (which deals with contract adaptation in cases of changed circumstances).

99. Such a broad prohibition of contract modification may not necessarily be the optimal way to deal with risks associated with contract modification as it may tie the hands of the parties in dealing most effectively with situations that arise in contract implementation and that genuinely require modification of the contract.

100. While art. 398 of the Civil Code may provide some respite in cases of changed circumstances, there is a 10 percent overall cap on the permissible modification on Civil Code art. 398 grounds (Rules, art. 20(3), except in petroleum contracts, and unless otherwise decided by the Government of Georgia under broad powers given to it in regards to the contents of contracts (see Rules, art. 20(12)). Furthermore, according to art. 398 of the Civil Code, if the parties cannot agree on a contract adaptation to deal with the changed circumstances, a party may be entitled unilaterally to repudiate the contract. That leaves it uncertain at best whether a typical contract remedy, such as a unilateral variation order issued by the procuring entity or its representative (e.g., a consulting engineer supervising implementation of a construction contract), would be permissible.

*Provisions on transparency, monitoring, and control*

101. From an overall perspective, the introduction of the EPS has opened the door to a more transparent procurement system. Advertisement of procurement proceedings on the EPS Web site is a key transparency step. Various types of information are to be uploaded onto the EPS Web site as the implementation of procurement proceedings progresses (e.g., immediate uploading of minutes of Tender Committee meetings related to the evaluation of bids (Rules, art. 2(m)); uploading of documents proving qualification data of winning bidder (Rules, art. 2(o)); uploading of signed procurement contract and information on the winning bidder (Rules, art. 2(p)) and contract awards; uploading of contract modifications (Rules, art. 20(1)). Most uploaded information is accessible even to unregistered guests (Rules, art. 2(d)). The uploading of contracts, and contract modifications, is also dealt with Order No. 2 (and contract modifications are also now uploaded in the system).

102. The Procurement Law (art. 22(4)) requires the procurement report and various related documents (minutes of tender committee meetings and other documents referred to in the sublegislative text) to be made available to interested parties upon request (in practice the reports are downloadable by registered users of the e-procurement system). At any rate, as noted above, registration is a simple procedure, which allows access to additional information uploaded on EPS.

103. However, in the wake of various modifications of the Procurement Law, it is not clear how much of a requirement, if any, that a procuring entity prepare a report on an individual procurement proceeding has survived (with the exception of the provision in the Procurement Law (art. 22(5), which refers to the filing of a report in the case of procurement with a value over GEL 2,000,000, but without specifying what the contents of such a report should include).

104. From a transparency standpoint, it is promising that the SPA plans to develop an EPS capability of producing both standardized and customized reports related to procurement activities.

105. Reporting requirements are established by the Procurement Law with respect to procurement with a value over GEL 2,000,000 (transmission of procurement report by the head of the procuring entity to the government; art. 22(5)), and annual reports on progress of contract implementation in accordance with simplified procedures set forth in a sublegislative text by entities with a very low cumulative annual level of procurement (GEL 50,000) (art. 22(3)<sup>1</sup>). Pursuant to the Procurement law (art. 22(10)), the Rules detail various aspects of the reporting procedures. Further details of reporting obligations are specified in Order No. 2.

106. The Procurement Law (art. 22(7) and (8)) also affirms the right of the SPA to obtain, from procuring entities and participants, information and documentation related to procurement, and the obligation of the SPA to conduct monitoring of compliance by procuring entities. It may be noted that the role of monitoring and verifying compliance is carried out by the SPA in parallel with its operational role in the implementation of the integrated e-procurement system, which might raise a concern of mixing of operational and regulatory functions.

107. The Procurement Law (art. 22<sup>1</sup>) also affirms the control function of the Chamber of Control of Georgia, and the obligation of procuring entities and participants to provide information requested by the Chamber of Control of Georgia.

#### *Ethics and conduct rules*

108. In accordance with a 2010 amendment, the Procurement Law (art. 8) contains provisions on avoidance of conflicts of interest, including a listing of key activities particularly sensitive to risk of conflicts of interest (art. 8(1)). That list could be broadened to include the planning and preparatory stage of the procurement process, which can also lead to distortion of the procurement process if there is a conflict of interest on the part of officials involved in those activities (e.g., preparation of technical specifications). The provisions on avoidance of conflict of interest are supplemented by the requirement of disclosure and recusal in cases of conflict of interest (art. 8(5)). In regard to defining conflict of interest situations, the Procurement Law refers to the definitions in art. 19 of the Tax Code.

109. At the completion of the e-bargaining, the Tender Committee members and its secretariat must confirm in writing the absence of conflict of interest with the bidders and upload the document into the EPS (Rules, art. 17(1)). Bidders are required to submit an affidavit to the effect that they are not participating in collusion with respect to the submission of bids (Rules, 9. Art. 10(3)).

110. The Procurement Law (art. 8(3)) prohibits bidders and suppliers from seeking to exert influence over a person performing the key activities referred to above (in art. 8(1)). However, there are no provisions concerning the classical conflict of interest situations of award of a contract to a company (or its affiliate) that was involved in the preparation of the procurement.

111. The Procurement Law (art. 3.1(l)) calls for the establishment of a registry of blacklisted participants in the procurement process. The blacklisting sanction is applied for a period of one year, and the registry of blacklisted bidders is posted on the SPA Web site and accessible to the general public. Some details of the blacklisting procedure are specified in the Rules (art. 24). Blacklisting is initiated by an application from a procuring entity (Procurement law, art. 7(1)(b)).

112. According to the Rules (art. 24(1)), the grounds for blacklisting include the failure by a bidder to conclude a contract after having been selected or to provide a required performance security for the contract, in the obtaining of a contract, or failure to discharge obligations under a contract. The Rules make it obligatory for the concerned procuring entity to report any such occurrences to the SPA, which then triggers a blacklisting for a period of one year. No mention is made in the Rules concerning any procedural safeguards, including any procedure for the accused to challenge the allegations before the imposition of the blacklisting sanction. This may be another area to examine in the search for ways to address low rates of participation in procurement.

#### **E. Summary of findings on legal framework**

113. The review of the legal framework for the state procurement system presents a mixed picture overall. There are certainly many positive aspects of the legal framework, and those are acknowledged as a promising basis on which the further evolution of the legal framework can take place. For the purposes of facilitating that further evolution, the report identified various gaps and weaknesses in the form and content of the legal framework, which are summarized as follows:

- (a) Gaps in content – some basic elements typically considered to be core elements of a statute on state procurement are not addressed in the Procurement Law (e.g., no provisions on prequalification or on bid evaluation criteria, including no provisions on life cycle costing analysis), and in respect of some core issues there may be an over reliance of lower level, sublegislative texts to establish basic principles and procedures that should firstly be affirmed in the Procurement Law; furthermore, in some respects the provisions in the sublegislative texts needed to provide sufficient detailed guidance for implementation of the Procurement Law are not fully developed or have not yet been developed at all (e.g., required contents of bidding documents, guidance on the application of the consolidated tender and the contest methods).
- (b) Fragmentation of legal framework -- due to the above-mentioned gaps in the legal framework, the frequency of amendments of the Procurement Law, and the number of sublegislative issuances, the legal framework has developed a somewhat fragmentary and spotty character, which also creates some uncertainty as to the hierarchy among the instruments that make up the legal framework, which risks diminishing transparency of the legal framework.
- (c) Unclear drafting of some provisions – with respect to certain procedures and requirements, the formulations in the legal framework are not sufficiently clear (e.g., mixed signals in the drafting on the possibility of negotiations in the contract

award process, whether a suspension is triggered by the filing of a complaint by a bidder).

- (d) Lack of standard bidding documents and general conditions of contract – the development of such tools would help to create greater procedural clarity and legal certainty in the implementation of the procurement process.
- (e) Provisions that may deter participation – the report identifies a number of instances in which procedures and requirements imposed by the legal framework may contribute to the depressed rate of participation by bidders in procurement proceedings (e.g., the short period for preparation and submission of bids in the simplified e-tender method, the rule that bid prices must not exceed the procuring entity's stated estimated price, the high participation fee in the case of the consolidated tender method, the range of situations in which the bid security is subject to forfeiture, and the extent of situations that may lead to blacklisting).
- (f) Further development of provisions on institutional and organizational arrangements – aspects of the provisions in this respect that were noted in the report include the duality inherent in the operational and nonoperational roles of the SPA. A legislative mandate could usefully be given for the implantation and development of procurement units within procuring entities, and the development of a professionalized procurement workforce.

## STATE PROCUREMENT INSTITUTIONAL FRAMEWORK AND CAPACITY DEVELOPMENT

114. The OECD is a global governance and market development organization comprised of 30 member states. The internationally recognized 10 *OECD Principles for Enhancing Integrity in Public Procurement* provide the institutional framework against which the SPA's procurement system is assessed from a functional perspective. Note that some recommendations have been repeated within the following text as a means of reinforcing specific underlying principles.

***Principle 1. Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.***

### OBSERVATIONS

115. The state e-Procurement System as it is designed enables a high degree of transparency through the public procurement process from initiation and planning to the point of award:

1. *Initiation and Planning:* Procuring entities are required to submit an approved procurement plan, tied to their respective budget allocation, at the start of the fiscal year. Annual budgets are visible in the system to SPA and other government officials, and procurement plans are published on the Web site and available to registered users.
2. *Solicitation Announcement:* Solicitations are announced online, as identified and standardized via a CPV code. The CPV is a commodity classification

system in force in the EU as amended under Commission Regulation (EC) No. 213/2008 in November 2007. All registered users and Web site guests have access to solicitations via the SPA Web site.

3. *Standard Tender Documents:* Tender documents are submitted directly online by prospective suppliers. Price bids are also submitted electronically in a reverse-auction format, with supporting documentation attached. Recently amended rules and system functionality require that bid prices are hidden in the “basic time” until additional rounds are initiated. As additional rounds of bidding commence the bid prices are available automatically. Supplier identification and the content of technical proposals submitted via the system are kept anonymous through the process to the point of award. Given that the bid process is blind, there is less chance of favoritism or collusion among buyers and suppliers than within traditional paper-based systems. However, as of yet, no standard tender documents have been developed and distributed to state procuring entities.
4. *Bid Evaluation:* As electronic bids are received, they are evaluated by no less than a three-person bid committee. The winning bids are accessible to the public, and suppliers remain anonymous until the point of award. Note that a common perception among stakeholders interviewed is that the price-based bid evaluation applied in the e-procurement system does not allow for evaluation of nonprice factors (e.g., total life cycle cost). Put another way, quality differences among offerings are not perceived as being given weight in the state’s online bid evaluation process. The existing system depends on the procuring entity to set proper specifications and supplier qualification criteria, against which the winning bidder (i.e., the bidder submitting the lowest-priced bid) will be judged to pass or fail. In response to those observations, a modification of the Procurement Law has just been enacted calling on the e-procurement system to be modified (by Regulations, to be effective January 2012) to allow nonprice evaluation criteria to be factored into the comparative evaluation of bids.
5. *Award:* The announcement of award is publicly available online.

116. State procuring entities do not often have in-house expertise to draft proper specifications and estimated costs on all procurement classifications. Additionally, the evaluation of nonprice factors within some procurement classifications (such as professional services) is constrained by the system and by procuring entity skill sets. Thus, while transparency and visibility exist within the procurement cycle, challenges of competitiveness still exist as procuring entities and the SPA strive to overcome system limitations and challenges in these areas.

117. The use of the EU’s CPV classification system has been beneficial to standardize procurement categories, but presents challenges around specific rules of aggregation and disaggregation designed to help prevent splitting of tenders and contracts to avoid approval thresholds. Procurement law mandates homogeneity of individual procurement tenders via the first three digits of the CPV classification code to help eliminate the splitting of awards to avoid approval thresholds. This EU classification system, while well-developed overall, may lead to the suboptimization of state procurement in some instances. In practice, certain CPV codes offer challenges to homogeneity principles: For example, CPV code 482 includes administration software but does not include word processing software (code 483) or word processing software development services (code 722) – these three codes would require

separate solicitations. On the other hand, code 301 encompasses both clipboards and automatic cash dispensers (ATMs) among other general office equipment and supplies and might be viewed as too broad a category.

## FUTURE CONSIDERATIONS

118. While procuring entities submit a procurement plan prior to each fiscal year, the process of changing the composition of procurements, within the overall limits of the original budget, is a relatively simple process of obtaining the procuring entity director's approval and submitting to the SPA for recording. Consider developing a needs assessment process to help verify and document validity of procuring entity needs based on budgetary considerations.

***Principle 2. Maximize transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.***

## OBSERVATIONS

119. While the state's e-Procurement system enables transparency in competitive tendering, significant limitations still exist in practice to ensure adequate supplier participation and fair and open competition. According to data from the e-Procurement system from January 1, 2011, through the end of May, almost half of all closed state tenders were unable to be concluded successfully with a supplier agreement:

- While 6743 e-procurement events and agreements were successfully concluded.
- 6216 e-procurement events concluded with no supplier participation; and
- 859 e-procurement events concluded with negative results or were cancelled.
- Separately, 1537 e-procurement events were in process as of the end of May 2011.

120. A random sample of 100 successfully concluded tenders totaling over 27 million GEL in estimated value were extracted from the SPA e-Procurement system and analyzed with the following observations:

- 55% of sample tender events resulted in only one bidder participating, for a total cost reduction of 41,000 GEL or 0.4% as compared with estimated values.
- 44% of sample tender events included at least two suppliers competing for a total cost reduction of almost 3.5 million GEL, or more than 21% as compared with estimated values.
- The introduction of competition clearly results in significant cost reductions, but many e-tender events (both simplified and full tender) simply do not have adequate participation by suppliers to ensure fair competition.

121. Stakeholder interviews indicate that small- and medium-sized enterprises (SMEs) in the regions have difficulty participating successfully in government tenders. It should be highlighted that virtually all interviewees agreed that the e-Procurement system is not a contributing factor per se, but rather a larger concern exists over the capacity of regional suppliers to understand and respond successfully to government tenders.

## FUTURE CONSIDERATIONS

122. Donor efforts aimed at competitiveness and supplier development should focus on specific CPV categories with demonstrated lack of participation, in order to maximize effectiveness in supplier recruiting efforts. In addition, future research should focus on the process of developing tender descriptions and specifications, and calculation of estimated costs, by state procuring entities.

***Principle 3. Ensure that public funds are used in public procurement according to the purposes intended.***

#### OBSERVATIONS

123. The open accessibility of the e-Procurement system to the public helps to ensure that monitoring of the process is not limited to government officials, but all who wish to log into the system.

124. The effectiveness of budgeting and use of public funds is open to debate as in any nation. The budget execution process in Georgia starts with an approved budget against which the procuring entity submits an annual procurement plan to the SPA. Solicitations and subsequent tenders are executed against this plan.

#### FUTURE CONSIDERATIONS

125. The ability to extract business intelligence (BI) from the system is key to any analysis of budget utilization and effective use of resources.

***Principle 4. Ensure that procurement officials meet high professional standards of knowledge, skills, and integrity.***

#### OBSERVATIONS

126. Approximately 2,475 state procuring entities, from small libraries to state governmental ministries, are chartered with establishing budgets and procurement plans and executing tenders within the e-Procurement system. Procurement entities must be capable of leveraging technical expertise within a wide range of procurement classifications (or CPV codes).

127. Stakeholder interviews indicate a general concern at the uneven distribution of skill sets within governmental procurement staff. While some procuring entities perform effectively and efficiently, others have little background or knowledge to control procurements to the standards stated above. No written guidelines or desktop procedures' manual exists to facilitate training or staff development.

128. The SPA is lacking formal job descriptions and capacity development plans for procurement staff.

#### FUTURE CONSIDERATIONS

129. SPA is investigating the implementation of a skills certification process for procurement officers in 2012/13.

***Principle 5. Put mechanisms in place to prevent risks to integrity in public procurement.***

## OBSERVATIONS

130. Systemically, the SPA e-Procurement platform incorporates some anti-corruption measures in the blind, or anonymous, nature of bid submissions and the transparency of the end-to-end procurement process, including the publishing of estimated costs by procuring entities. Additionally, the SPA has further embraced anti-corruption principles in the establishment of a dispute resolution board (see Principle 9 below) to hear and resolve complaints relative to state tendering and procurement.

131. Separate from but related to state e-Procurement, Government of Georgia has created a national anti-corruption strategy that includes as one of its core tenets; the establishment of and continued support for an Anti-Corruption Interagency Coordination Council chaired by the Minister of Justice, responsible for creation and monitoring of anti-corruption strategy and action plans. The national strategy incorporates monitoring and involvement by NGOs and the public, much as the state procurement system encourages.

## FUTURE CONSIDERATIONS

132. Consider establishment of an anti-corruption hotline to accept anonymous calls for follow up.

133. Consider process for rotating senior procurement officers within procuring entities so as to encourage and coach leading practices and reduce the likelihood of collusion.

***Principle 6. Encourage close cooperation between government and the private sector to maintain high standards of integrity, particularly in contract management.***

## OBSERVATIONS

134. The e-Procurement system allows open access to potential suppliers who register on the site. In practice, however, not enough suppliers are participating in the state e-tendering process. This is evidenced in the fact that in 2011 to date, almost half of all e-Procurement events failed to result in contract execution due to lack of bid participation. Sample data indicate that of the remaining balance of state e-Procurement activities, a number of bid events were only represented by a single supplier, thus effectively eliminating competitive influences in the process.

135. Currently no standard tender document or contract templates exist on the system. The inclusion of such model documents would help build consistency in the process among procuring entities and build supplier confidence in the process.

## FUTURE CONSIDERATIONS

136. Create and make available standard tender and contract document templates on the Web site (under consideration by SPA for 2012).

137. Consider active partnership with business advocacy groups such as BAG and the Georgian Small and Medium Enterprises Association (GSMEA).

***Principle 7. Provide specific mechanisms to monitor public procurement, as well as to detect misconduct and apply sanctions accordingly.***

## OBSERVATIONS

138. The SPA has expressed its interest in establishing a risk-based monitoring process in line with leading practices worldwide. Beyond the openness of the system and its underlying transparency of information, no such formal monitoring exists to date.

139. The SPA has established a debarred suppliers registry (the “Black List”) as a means of sanctioning and tracking suppliers who exhibit unethical or inappropriate behavior during e-tendering. The sanctions last for one year. The e-tendering system does not automatically block participation of so-called ‘Black-Listed’ suppliers, however, but rather depends upon diligence by procuring agencies to identify such unqualified suppliers.

## FUTURE CONSIDERATIONS

140. Consider design enhancements to the current system to enable more robust reporting of supplier participation and enhance monitoring and risk mitigation within the system.

***Principle 8. Establish a clear chain of responsibility together with effective control mechanisms.***

## OBSERVATIONS

141. No formal job descriptions or organization charts exist for the SPA or its staff.

142. While accountability of various aspects of the procurement process are defined in Georgia law, no procurement manual exists to assist in day-to-day decision making within SPA and its affiliated procuring entities.

## FUTURE CONSIDERATIONS

143. Enable e-catalog functionality as a means of establishing central controls within categories of consumable spend (under consideration by SPA in 2012).

***Principle 9. Handle complaints from potential suppliers in a fair and timely manner.***

## OBSERVATIONS

144. The SPA has established a Dispute Resolution Board that meets regularly to resolve supplier complaints. This board is comprised of six members, including three SPA officials and three NGO representatives.

145. Board decisions are not indexed by issue but by supplier name. Thus, it can be difficult to determine existing precedent on matters involving similar issues.

## FUTURE CONSIDERATIONS

146. Consider engaging in a benchmarking study against other public procurement organizations in the region to verify leading practices for such a dispute resolution board.

***Principle 10. Empower civil society organizations, media, and the wider public to scrutinize public procurement.***

## OBSERVATIONS

147. As discussed above, the state system enables visibility and transparency but could benefit from enhanced reporting and monitoring functionality.

## FUTURE CONSIDERATIONS

148. Refer to Principle 7 future considerations above.

## D. RECOMMENDATIONS

### PROCUREMENT LEGAL FRAMEWORK

- (a) Consolidate legal framework with a view to remedying fragmentation that has developed over time, including filling gaps in the Procurement Law as to essential principles and procedures, and preparing a consolidated sublegislative text (regulations).
- (b) Clarify the drafting of those aspects and issues in the legal framework that may be unclear.
- (c) Elaborate further the provisions on procedures and practices to be applied in the procurement process in line with the findings of this report (e.g., rules on the application of nonprice bid evaluation criteria, including life cycle costing, and other quality and performance-related criteria, use of framework agreements, and introduction of sustainable procurement policies and practices).
- (d) Address provisions in the legal framework that may contribute, without adding commensurate value, to low rates of participation in procurement proceedings.
- (e) Develop standard bidding documents, and general conditions of contract, for the main types of procurement.
- (f) Further develop provisions on institutional and organizational arrangements for the state procurement system that provide for the further evolution of the oversight, policy development, and implementation structures of the system, in line with basic principles such as separation of functions.

### INSTITUTIONAL FRAMEWORK AND CAPACITY DEVELOPMENT

#### Principle 1

- (g) Assist SPA in developing bid evaluation criteria and review/scoring process for critical nonprice factors affecting total life cycle costs within select procurement classifications;
- (h) Develop process for aggregating and disaggregating items according to the common procurement vocabulary classifications, as a means of simplifying and streamlining the state procurement process.

#### Principle 2

- (i) Develop a practical hands-on procurement manual to be distributed with proper supporting orientation training to procurement officers throughout Georgia, in keeping with international standards;
- (j) Develop a supplier guide: Doing Business with the Georgian Government that offers potential suppliers a simple and practical insight into the SPA's supplier

qualification criteria, guidelines for identifying government procurement needs and opportunities, accessing and using the SPA's online procurement system, and other relevant information in accordance with Procurement Law and policies;

- (k) Establish ongoing SPA awareness campaign for supplier involvement in state procurements; actively recruit suppliers in the regions to increase participation and competition in the tendering process;
- (l) Conduct feasibility study to establish regional governmental shared-service hubs to support training and recruiting activities, and to facilitate SME access to the procurement system, in the regions.

### Principle 3

- (m) Continue current practice of allowing guest access and open monitoring of system.

### Principle 4

- (n) Develop a practical hands-on procurement manual to be distributed with proper supporting orientation training to procurement officers throughout Georgia, in keeping with international standards;
- (o) Implement SPA HICD plan – a) map and streamline departmental processes; b) develop accurate job descriptions or TORs for procurement staff; c) develop ongoing communications plan;
- (p) Define key performance attributes and establish a corresponding capacity development plan for procurement officers within state procuring entities with goal of establishing certification program in 2012/13;

### Principle 5

- (q) Establish the framework and guidelines for risk-based monitoring and evaluation of the public tendering process;
- (r) Continue alignment of and support for the national anti-corruption strategy within the e-Procurement system and supporting processes.

### Principle 6

- (s) Develop a supplier guide: “Doing Business with the Georgian Government” that offers potential suppliers a simple and practical insight into the SPA's supplier qualification criteria, guidelines for identifying government procurement needs and opportunities, accessing and using the SPA's online procurement system and other relevant information in accordance with Procurement Law and policies;
- (t) Establish ongoing SPA awareness campaign for supplier involvement in state procurements; actively recruit suppliers in the regions to increase participation and competition in the tendering process;

- (u) Conduct feasibility study to establish regional governmental shared-service hubs to support training and recruiting activities and to facilitate SME access to the procurement system, in the regions.

#### Principle 7

- (v) Work with the SPA to design and complete a risk assessment for the e-Procurement system and develop corresponding risk-based monitoring approach.
- (w) Establish system lockout of debarred (black-listed) suppliers to prevent their participation in e-tenders.

#### Principle 8

- (x) Implement SPA HICD plan – a) map and streamline departmental processes; b) develop accurate job descriptions or TORs for procurement staff; c) develop ongoing communications plan;
- (y) Define key performance attributes and establish corresponding capacity development plan for procurement officers within state procuring entities with goal of establishing certification program in 2012/13;
- (z) Develop a practical hands-on procurement manual to be distributed with proper supporting orientation training to procurement officers throughout Georgia, in keeping with international standards.

#### Principle 9

- (aa) As dispute board findings are filed electronically, enable indexing by subject and/or date rather than just the filer's name.

#### Principle 10

- (bb) Refer to Principle 7 recommendations above.

# E. ADDITIONAL INFORMATION

## SAMPLE E-PROCUREMENT SYSTEM DATA

CPV Code	Type	# Bidders	Opening			
			Estimate	Bid Close	# Days	Difference
798	s	1	340	340	3	0
425	s	1	1900	1900	4	0
150	s	1	67200	67200	3	0
798	s	1	1125	1026	4	99
90	s	1	4480	4400	5	80
90	s	1	6450	6450	7	0
501	s	1	17627	17627	5	0
91	s	1	100800	97143	3	3657
031, 032	s	1	21430	21230	4	200
221	s	1	4800	4800	5	0
798	s	1	4950	4950	3	0
91	s	1	148750	148750	8	0
151, 153, 154,						
155, 156	s	1	54711	54711	4	0
336	x	1	3650000	3650000	23	0
32	s	1	3940	3940	4	0
720	s	1	3500	3420	4	80
450, 454	s	1	7765	7765	5	0
336	x	1	120000	120000	23	0
336	x	1	892500	892500	23	0
336	x	1	598422	593422	23	5000
336	x	1	59290	59290	23	0
398	s	1	2525	2525	4	0
336	x	1	11000	10925	23	75
91	s	1	10,000	10,000	7	0
426	x	1	105000	105000	21	0
91	s	1	29900	29900	3	0
337	s	1	1340	1340	3	0
505	s	1	15000	14542	3	458
792	x	1	225450	215000	25	10450
91	s	1	13000	11650	3	1350
91	x	1	446500	446500	22	0
91	x	1	276000	276000	22	0
91	x	1	58750	58750	22	0
452	x	1	72700	71500	21	1200
341	x	1	2252250	2252250	23	0
454	x	1	18000	17700	23	300
424	x	1	190000	182800	21	7200
302	s	1	15000	15000	3	0
228	x	1	2725	2725	21	0
452	x	1	14300	14300	22	0
452	x	1	617	617	21	0
341	x	1	110000	110000	21	0
343	s	1	39500	39500	13	0
452	x	1	790026	779833	22	10193
798	x	1	29130	29130	22	0
91	x	1	28980	28980	22	0
452	x	1	97440	96943	21	497
91	x	1	14490	14490	23	0
331	s	1	16155	16155	11	0
373	s	1	9010	9010	3	0
188	s	1	12100	12100	6	0
301	s	1	1500	1500	4	0
442	s	1	113750	113750	7	0
501	s	1	26000	26000	9	99
713	s	1	4000	4000	4	80
441	s	2	36706	34249	3	0
792	s	2	15000	10900	6	0
384	s	2	12000	10900	6	3657
336	x	2	4200	2000	21	200
336	x	2	2720000	1955000	21	0
851	s	2	20000	18500	14	0
444	s	2	20000	17777	3	0
302	s	2	17000	14777	3	0
311	x	2	54000	40000	21	0
453	x	2	299100	200049	22	0
452	x	2	696220	522000	22	80
301	x	2	7200	5840	21	0
452	x	2	2011200	1990200	21	0
302	s	2	25000	22990	3	0
302	s	2	42000	36000	3	5000
343	s	2	9533	7800	10	0
452	x	2	20000	15100	21	0
792	s	3	2500	998	3	75
301, 302	s	3	13690	9400	6	0
720	s	3	5500	1999	6	0
452	x	3	77388	57149	21	0
453	s	3	27850	23490	10	0
391	s	3	6656	3995	7	458
452	x	3	52800	44890	22	10450
909	s	3	9000	2799	7	1350
302	x	3	7400	5898	22	0
323	s	3	29300	16695	5	0
453	x	3	45850	37899	24	0
452	x	3	492000	419985	21	1200
180	x	4	420500	281999	21	0
180	x	4	1645000	1596500	21	300
452	x	4	98900	57700	21	7200
798	x	4	18200	12640	21	0
302	s	4	21000	18179	3	0
665	x	4	14500	8750	21	0
384	s	4	8700	4797	4	0
452	x	5	59000	40450	21	0
452	x	5	391106	284900	22	0
454	x	5	58643	39998	21	10193
454	x	5	28464	18799	21	0
452	x	6	443000	384400	21	0
182	x	7	744850	444275	21	497
452	x	8	5257647	3920000	21	0
452	x	9	247196	139999	21	0
453	s	10	20000	9999	7	0

## DOCUMENTS REVIEWED

- (a) Law of Georgia on State Procurement (January 1, 2006, as amended variously)
- (b) Rules for Conducting Simplified Procurement, Simplified Electronic Tender and Electronic Tender, issued Order No. 9 of Chairman of the SPA (dated April 7, 2011)
- (c) Rules for the Determination of Homogeneity of Procurement Objects, and the Rules for the Identification of Procurement Objects and Determination of Homogeneity Thereof (8.04.2011 N 10), issued by Order No. 7 of Chairman of the SPA.
- (d) Rules of reporting of Procuring Organizations issued by Order No. 2 of Chairman of SPA (February 10, 2011)
- (e) Conditions and Rules for State Procurement of Design (Project) Services through a Design Contest issued by the Order No. 3 of Chairman of the SPA
- (f) Rules of Activity of the Procurement Related Disputes Resolution Board under the SPA, issued by Order No. 11 of Chairman of the SPA (November 30, 2010)
- (g) –A model for improving public procurement regulation – the case of Georgia,” a summary of EBRD’s findings in 2010 regarding the developments in the procurement system of Georgia; provided by EBRD Secretariat on May 24, 2011
- (h) *Georgia Public Expenditure and Financial Accountability (PEFA) – Joint World Bank-European Commission Public Financial Management Assessment* (Report No. 42886-GE, November 2008 [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/01/29/000333038\\_20090129230214/Rendered/PDF/428860ESW0GE0P1010disclosed0Jan0281.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/01/29/000333038_20090129230214/Rendered/PDF/428860ESW0GE0P1010disclosed0Jan0281.pdf))
- (i) UNCITRAL Model Law on Procurement of Goods, Works, and Services

## LIST OF INTERVIEWS

<b>Person</b>	<b>Title</b>	<b>Organization</b>
Tato Ujumelahvili	Chairman	SPA
David Marghania	Head, IT Department	SPA
Thorsten Scherf	Economic Development and Employment Advisor	GIZ
Nick Nanuashvili	Lawyer	Business Association of Georgia
Temur Kurashvili	Head, Procurement, revenue and Expenditure Control Department	Electricity System Commercial Operator Ltd.
David Namchevadze	Head, Legal Department	Electricity System Commercial Operator Ltd.
Irakli Purtseladze	General Director	AVERSI
Irakli Khmaladze	Project manager Economics and Public Finance	EU
Gia Tarieladze	Head, Division for Legal Affairs	National Center for Education Quality Enhancement (under Ministry of Education)
Iakob Ghlonti	Head, Legal Service	Education and Scientific Infrastructure Development Agency (under Ministry of Education)
Archil Pirtskhalavaa	Head, Legal Department	State Oil Company of Azerbaijan (SOCAR)
Kakha Kokhraidze	Vice President	GSMEA

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