



MONITORING REPORT ON PUBLIC PROCUREMENT: WEAKNESSES IDENTIFIED AND POLICY RECOMMENDATIONS

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ABBREVIATIONS AND ACRONYMS

PPA - Public Procurement Agency

CA –contracting authority

PP –public procurement.

ANSC - National Agency for Solving Complaints

BAP - Public Procurement Bulletin

BERD - European Bank for Reconstruction and Development

CR –District Council

COPF - call for tenders without publication

DCFTA - Deep and Comprehensive Free Trade Agreement.

LP – public bidding.

MF –Ministry of Finance

OECD – Organization for Economic Cooperation and Development

WTO - World Trade Organization

UNDP - United Nations Development Programme

EPPS - Electronic Public Procurement System

INTRODUCTION

Public procurement in the Republic of Moldova plays an increasingly important role in economy. The **value of public procurement contracts** registered by PPA in 2014 amounted to 11538.4 million lei, which accounts for about 10.3% of **Gross Domestic Product** (111 757 million lei)¹. Conducting transparent, non-discriminatory, open and competitive procurement procedures is a prerequisite for high quality public services and investment, sound and competitive business environment and sustainable economic development. In addition to providing public entities with goods, services and works, public procurement should be regarded as an important barometer in assessing the quality of a country's governance.

By signing in 2014 the Association Agreement with the European Union and establishing EU-Republic of Moldova Deep and Comprehensive Free Trade Area, the Republic of Moldova has undertaken several commitments concerning **national public procurement system reform** as well. The Republic of Moldova has to make strenuous efforts in three directions: gradual approximation of legislation on public procurement with the Union acquis; institutional reform in public procurement and establishment of an effective system of appeals concerning the award of public procurement contracts.

Since 2015 has started a process of review and adjustment of primary law and secondary law to European standards, principles and practices. In 2016, the Ministry of Finance together with the

PPA launched a comprehensive reform of the public procurement system, setting very ambitious objectives: transparent procurement processes, public procurement without corruption, best use of budget in the public interest, implementation of “economies of scale” and assessment of “lifetime cost”, promotion of institutional accountability and personal responsibility, fostering a sound and competitive business environment.

The national public procurement system in the Republic of Moldova is facing a range of problems in terms of both low degree of transparency and competitiveness on procurement market and a low level of compliance of legal and institutional framework. According to a recent report by World Justice “Open Government Index 2015”, the Republic of Moldova had a score of 0.55 (*on a scale from 0 to 1, where 1 = greatest openness*) in terms of **government openness, ranking the 46th among 102 countries included in the rankings** and 6 out of 25 in the lower middle income group of countries. In terms of right to information, the same report states that **only 44% of citizens are aware of their right to access public records** held by public authorities (central and local) and legislation that guarantees the right to access public information. That is why **only 7% of citizens have requested information from public institutions** and **only 81% of them received the public information requested**. Furthermore, 50% of people who requested public information claim that the information they received was rather incomplete, vague, unclear or evasive.

¹ Judgment of the Court of Accounts no. 37 of 01.10.2015 on audit report on public procurement system performance. Monitorul Oficial no. 306-310/34 of 13.11.2015

METHODOLOGY OF DATA COLLECTION AND MONITORING PROCUREMENT

In January - June 2016, IDIS “Viitorul” held several activities aiming to strengthen the national public procurement system. The beneficiaries were PP specialists from CAs, economic operators and civil society. The activities include: promotion of good governance in public procurement (lawfulness, transparency, integrity, efficiency, accountability), a study visit to a number of institutions and organizations in Romania (European Institute of Romania (IER), Ministry for consultation and social dialogue, National Agency for Public Procurement, National Council for Solving Complaints, Institute for Public Policy, Competition Council, Romanian Centre for European Policies, Freedom House Romania, Bucharest Ilfov Regional Development Agency for a group of representatives of project beneficiaries, informing and training members of the working group on public procurement within CAs of 9 districts (Anenii-Noi, Criuleni, Hîncești, Soroca, Sîngerei, Drochia, Căușeni, Ștefan-Vodă și Cahul). The issues debated in the framework of conducted activities referred to legislative changes in the area, Public Procurement dispute resolution, and best international practices relating to transparency, fair competition and efficiency in using public money and methodologies applied to monitor PP.

During the 11 activities that were conducted, over 400 participants assessed various aspects relating to public procurement quality and efficient use of public resources, including compliance of primary and secondary legislation, transparency at each stage of public procurement process, competition and access of economic operators to public procurement procedures, compliance and regularity of public procurement planning, skills and knowledge of specialists within CAs, cases of anticompetitive practices and conflicts of interest.

Participants pointed out the problems they face and came up with suggestions and recommendations on improving PP system, particularly relating to boosting transparency, reducing administrative burden, enhancing CAs capacities, preventing frauds, irregularities and anticompetitive practices and streamlining the entire process.

Within the same activities, 9 CAs (previously selected based upon several criteria: volume of public procurement over the last 2 years, number of complaints filed against them and value of additional agreements increasing the initial value of contracts) were monitored in terms of compliance of public procurement procedures and aspects mentioned above.

The sources of information were as follows:

- Questionnaires filled in by participants in the activities (representatives of local public authorities, business community and civil society, overall 436 persons);
- Information provided by the 8 CAs, which replied to our requests;
- Data and information published on the website of PPA and Electronic Registry for PP;
- Websites of CAs monitored;
- Other sources of information (civil society monitoring reports).

Out of those 9 CAs monitored from which information was requested, 8 CAs replied to the request made by IDIS “Viitorul” - DC Anenii-Noi, DC Hîncești, DC Soroca, DC Sîngerei, DC Drochia, DC Căușeni, DC Ștefan-Vodă and DC Cahul. Some of them provided us with incomplete/selective information. One CA has not responded to the request - DC Criuleni.

MAIN LEGISLATIVE AMENDMENTS IN THE AREA OF PROCUREMENT

Harmonization of national legislation on public procurement started in 2014 by developing a project to amend the legislation on public procurement, in order to transpose European directives on public procurement, namely:

- *Directive 2004/18 / EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.*
- *Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.*

We should mention that both European directives were repealed in 2014. The new legislative package seeking to modernize the European public procurement provisions was published in the EU Official Journal L94 of 28 March 2014. The package consists of 3 directives, approved by the European Parliament and Council on 26 February 2014:

- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.
- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

In the Republic of Moldova, the new law on public procurement was approved on 3 July 2015

and entered into force on 1 May this year². Some provisions such as publication of the notice of intent, contract notice, and contract award notice in the Official Journal of the European Union are to enter into force on 31 December 2020.

Main legislative and institutional changes refer to:

- ❖ **Increasing thresholds and extending time limits for submitting and reviewing documentation and contracts.** This shall lead to more efficient CA activity, on the one hand, and tenderers' activity, on the other hand. CAs will be able to focus on efficient use of public money and meeting genuine needs than on red tape and paper work even for a small procurement. Longer terms for submitting tenders allow economic operators to conduct a meaningful assessment of technical specifications and better prepare the tender.
- ❖ **Establishment of a specialized governmental body** - National Agency for Solving Complaints – an impartial and independent structure that is responsible for reviewing decisions taken by contracting authorities or entities while awarding contracts. It is supposed to make decisions by this body subject to judicial review.
- ❖ **Extending the tasks and responsibilities of the working group on procurement.** Thus, the working group will ensure execution of public procurement contracts, drawing up quarterly / half-yearly and annual reports. These reports are to include information on fulfilment of contractual obligations, reasons for failure to comply with them, complaints lodged and sanctions applied, remarks on the

² Law no. 131 of 03.07.2015 on public procurement. Monitorul Oficial nr. 197-205/402 dated 31.07.2015.

quality of contract execution etc. They will be placed on the website of CAs, and in case there is no website, on the official website of the central authority to which the CA is subordinated or on the website of the local authorities of the second level.

- ❖ **A more active role of civil society**, whose representatives will be members of the working group on public procurement within CAs. Contracting authorities, on their turn, are obliged to include into the working group civil society representatives, if the latter submit a written request to that effect two days before the deadline for submission of tenders. Although they are supposed to have only a consultative vote, participation of civil society representatives in procurement procedures will boost transparency and accountability of public authorities.
- ❖ **A new criterion of awarding public procurement contract.** The lowest price is the only criterion applied by CAs in the Republic of Moldova while deciding on contract award. This creates “conditions” that lead to purchasing low quality and reduced reliability goods, high maintenance costs, frequent repairing or even the need to replace them ahead of term, which entail additional cost for the public budget.
- ❖ **Limiting the increase of procurement contract initial value**, which sometimes is used as an „instrument” to increase unduly the contract initial price by contractors. Thus, the aggregate value of post-award contracts for additional works or services must not exceed 15% of the initial contract value.
- ❖ **Improved access to information on public procurement procedure and results.** The new law includes 3 Annexes and Annex 3 contains information which has to be included by CAs in notice of intent, participation notice, simplified contract notice on a dynamic purchasing system and award notice.

Secondary normative framework has to ensure legal framework operability, by providing implementing norms and operational details. Upon approval of the new law on public procurement in July 2015, the authorities had 9 months (before entry into force of the law) to develop and adjust the secondary normative framework to the new provisions. Although a reasonable time frame was set, the normative acts regulating public procurement were developed and approved (some of them) with delays, while others are still being developed or are to be approved by the Ministry of Finance.

The following regulations and standard documentation have been approved by Government Decisions so far:

1. Regulation on the purchase of supply and services by means of call for tenders³.
2. Regulation on public works contracts.
3. Regulation on public procurement using negotiated procedure.
4. Regulation on low-value public procurement.
5. Regulation on the activity of procurement working group.
6. Standard documentation for supply and service public procurement.
7. Standard documentation for works public procurement.

Other 5 regulations and 2 standard documentations were developed and are still to be approved (*published on April 26, 2016 for approval and consultation*) as follows:

1. Regulation on compilation, updating and recording of the List of qualified economic operators.
2. Regulation on the planning of public procurement contracts.
3. Regulation on the organization and functioning of the Public Procurement Agency.
4. Regulation on the framework agreement as a special way of awarding public procurement contract.
5. Regulation on compilation and recording of the exclusion list of economic operators.

³ Government Decision no. 666 of 27 May 2016. Monitorul Oficial no. 150 of 31.05.2016.

6. Pre-selection documentation for public procurements of supply/services and works by competitive dialogue procedure.
7. Standard documentation for public procurements of supply, services and works by negotiated procedure.

Overall, the new legal provisions on procurement ensure **more transparency, better access to information on procurement contracts**, based on public procurement regulation and **value for money**, imply **a more active role of civil society** by participation of its representatives as members of procurement working group and a new system of solving complaints.

However, it is not enough to have a good law. It has to be implemented and enforced accordingly. This responsibility does not lie only with regulatory bodies in this area but with all participants in procurement procedures (contracting authorities and businesses) as well as civil society (media, NGOs and citizens). According to questionnaires analysis, only **9,8%**

of participants believe that the legal framework on public procurement and mechanisms to implement it are adequate. Other 8,2% consider it has numerous drawbacks while 79,4% think it requires improvement. At the same time, only 22,4% of participants consider that the new law copes with current deficiencies of public procurement system. Other 45% deem that the new law can only partly remediate procurement system deficiencies.

A legal gap of the new law is that **public enterprises participation (municipal/state enterprises) and public-private partnerships in public procurement are not subject** to the Law on public procurement. Ensuring transparency of public procurement procedures and efficient use of financial funds is indispensable not only for public institutions but also for entities that are subordinated to them: state and municipal enterprises. In other words, procurement conducted by more than 240 state enterprises and 480 municipal enterprises that have assets worth over 19 billion lei⁴ is not transparent and prone to corruption.

⁴ according to public property register data as of 01.2015.

CONDUCTING PUBLIC PROCUREMENT PROCEDURES

Procurement planning

Every CA is obliged to ensure public procurement planning for the upcoming budgetary year to fulfil a need for goods, services and works. In this respect, under the law, CAs develop annual and quarterly procurement plans. Furthermore, the legislation requires publication of the procurement plan on the website of CAs (under the previous law – within 30 days after its approval, under law no. 131 – within 15 days after its approval).

Nevertheless, one of the biggest problems affecting the national public procurement system is **deficient, inefficient and, particularly, non transparent procurement planning**. Lack of this managerial instrument undermines the **quality of procurement process, appropriateness and priority of public investments**, as well as **opportunity to monitor the use of public money by society**.

In terms of developing annual plans, all 8 CAs either provided their plans or indicated the source where they are published. However, **only 2 of 8 CAs have published their annual plans for 2014-2016 on the institutional web pages** (DC Cahul, DC Soroca). DC Sîngerei claimed that the plans were published on the web page but we were not able to find them there.

One reason for reduced transparency at the stage of procurement planning is that procurement specialists within CAs **are not aware of legal provisions**. Thus, when asked why procurement plans had not been published some of them claimed that under the law they are not required to do so.

At the same time, **only 23,4% of public authorities' representatives** that were monitored said that the CAs they are working for **had developed and published public procurement annual plans**. Other **42,4% claimed that the plan had been developed but had not been**

published. Other 27% stated that there was no public procurement plan in their CAs. In terms of quarterly planning, **none of 8 CAs has quarterly plans**, which are compulsory under legal provisions.

Skills and knowledge of procurement specialists

Adequate and efficient functioning of national public procurement system also depends on training and competences of officials responsible for conducting public procurement procedures. Capacity building and training activities conducted by the PPA are insufficient, especially given the imminent entry into force of the new Law on Public Procurement. Professional training and consultancy are provided only on request by CAs, but not on a regular basis and are not enough targeted. Currently, there is no training provided for economic operators⁵.

Lack of capacity and technical skills within CAs (especially LPAs) in terms of identifying needs, preparation of tender documentation, tender evaluation, implementation and supervision of the execution of procurement contracts has a number of consequences:

- ◆ Numerous requests for clarification from bidders, which leads to delays in project implementation, cancellation of procurement procedures and lengthy time frames and excessive additional resources;
- ◆ Economic operators are discouraged to participate in tenders and lack of tenders submitted against the background of inadequate drafting of technical specifications, which leads to termination of procurement procedures and results in delays in

⁵ Draft of Development Strategy for public procurement system in Moldova for 2016-2020

implementing public investment projects;

- ▶ Numerous appeals filed that are the result of deficient tender documentation or inadequate assessment;
- ▶ Poor quality of results achieved following implementation of public procurement contracts and multiple changes during contract implementation;
- ▶ Waste of public funds by increasing the prices of goods, works, and services purchased as a result of limited competition.

PPA is in charge of training procurement specialists and capacity building of CAs. Under the law, PPA provides contracting authorities with methodological assistance and consulting in public procurement, initiates and holds trainings for contracting authorities staff engaged in planning and conducting public procurement as well as awarding public procurement contracts (art. 9 (k)). However, PPA lacks data on the number of persons involved in public procurement process within CAs and, respectively, their need of training to ensure public procurement efficiency.

Public officials engaged in public procurement do not have sufficient skills and knowledge, due to lack of university programmes in this area. In most case, they are simultaneously responsible for other fields of activity that are not related to public procurement. Currently, there is not a single instrument/programme of training specialists in public procurement.

The PPA admits that it provides professional training and consultancy to CAs only upon request and this activity is not well-targeted and is not provided on a regular basis. They claim that this is due to high turnover of procurement specialists.

More than 56,6% of participants in activities maintain that public procurement specialists have poor knowledge and low skills and only 34% believe they have the required skills and competences.

There was only one CA that said that in 2014-2015 it attended 2 trainings in public procurement. Working group members of other 5 CAs attended only one training, while procurement specialists of 2 CAs did not attend any training. These data provide the reason for reduced institutional

capacity in the area of PP and poor quality of award documentation, which often creates confusion among bidders undermining the quality of public procurement process.

In order to ensure efficient functioning of procurement system it is also very important that economic operators are fully aware of legislation and secondary regulatory framework in procurement. Therefore, given the review of the legal and regulatory framework that occurred over recent months, it is required to pay special attention to the **efforts of PPA seeking to improve and organize training activities** and develop standard instruments (award documentation, etc.) and guides **targeting both categories of participants in public procurement procedures – public entities and economic operators**.

It should be mentioned that recently, in June, the Ministry of Finance and PPA initiated a series of trainings for persons within CAs responsible for conducting public procurement procedures taking into account implementation of the new Law on public procurement.⁶

Amending public procurement contracts by additional agreements

Several sources, including last audit report of public procurement system performance, developed by the Court of Accounts⁷, reveal cases where **additional agreements are used as “tools” to increase unduly the initial contract price**. Internal Document Management System does not record appropriately data on additional agreements. For instance, this can occur when an economic operator offers a very low price initially to be awarded the contract and, subsequently, after signing the contract, requests an increase in the contract price. Under previous law on public procurement, the limit for this type of agreements was set at 30%. Thus, the aggregate value of contracts awarded for additional works or services could not exceed by more than 30% the initial contract price.

⁶ <http://tender.gov.md/ro/content/seminar-de-instruire-persoanelor-responsabile-de-desf%C4%83%C8%99urarea-procedurilor-de-achizi%C8%9Bii>

⁷ <http://www.ccrm.md/hotarireview.php?idh=767&l=ro>

An eloquent example in this respect is the contract signed on 23 July 2014 by DC Soroca and the economic operator LLC "Nostalitserv-Prim" worth 150,9 thousand lei. About 3 months later (on 01.12.2014) was signed an additional agreement that increased the price by 40,9 thousand lei (27% of the initial contract value). Moreover, in 2015 (on 5 January) a new procurement contract was signed with the same economic operator for performing the same works "Repair works for the sidewalk near the Monument of Heroes" worth 87,74 thousand lei (according to www.tender.gov.md). It is worthwhile mentioning that these works had not been planned in the procurement annual plan of CA for 2015. Finally, for repairing one sidewalk near the memorial was allocated the **amount totalling 279,5 thousand lei or the double of the sum of financial resources initially planned.**

At the same time, in the result of the analysis conducted, **41,6% of participants consider that additional agreements increasing the public procurement contract price could be seen as a method of increasing unduly the initial contract price.**

Control and monitoring of public procurement

The control function in the area of public procurement is ensured by CAs, Court of Accounts and Financial Inspection under the Ministry of Finance. The institution responsible for investigating cases of corruption (including corruption in PP), coordinating the development and execution of integrity plans of public authorities) is the National Anti-Corruption Centre (NAC).

The internal control system in public authorities (CAs) is carried out by internal audit units, whose organization and functioning are regulated by the Law on public internal financial control (no. 229 of 23 September 2010).⁸ The internal audit is still poor and specific trainings in the area of PP audit have not been organized yet. The Directorate for harmonization of public internal financial control was created within the Ministry of Finance to regulate and monitor the financial management

⁸ <http://lex.justice.md/md/336794/>

and control system and internal audit activities.⁹

During the assessment, **5 CAs out of 8 CAs monitored** mentioned that in 2014-2015 **procurement procedures underwent a control by competent bodies.** DC Hâncesti stated that PP process underwent inspections 3 times over the last 2 years, one time it was checked by NAC and two times by the Court of Accounts. DC Căușeni mentioned that there were no controls carried out by control bodies over the last two years. DC Anenii Noi said that there were 4 controls of PP procedures (it did not specify by which control bodies.)

There are major deficiencies in **monitoring procurement** as well. The same above-mentioned report by the Court of Accounts found that **none of those 12 contracting authorities that were audited implemented appropriate efficient monitoring procedures of public procurement process.**

Under the amended regulation on procurement working group (approved by Government Decision no. 667 of 27 May 2016), the working group shall ensure monitoring of public procurement contracts execution, by drawing up quarterly / half-yearly and annual reports in this respect. These reports will include mandatory information on contractual obligations execution, reasons for non-execution, complaints lodged and sanctions applied, notes on contract execution quality etc. They will be placed on CAs web pages and in cases the CA lacks a web page they will be published on the official page of the central authority the CA is subordinated to or on the official page of local public authorities of the second level.¹⁰

However, this provision on the **responsibility to monitor procurement contracts by the working group is not accompanied by a clear mechanism of conducting this monitoring procedure,** particularly, under the conditions where local public authorities claim that they are facing a lack of public procurement specialists.

These findings were confirmed by **more than 2/3 (65,6%) of participants in the assessment who consider that at the level of public authorities there are no appropriate monitoring mechanisms of public procurement process.**

⁹ <http://lex.justice.md/md/336794/>

¹⁰ <http://lex.justice.md/index.php?action=view&view=doc&lang=1&cid=365130>

SETTLEMENT AND ANALYSIS OF COMPLAINTS IN THE AREA OF PUBLIC PROCUREMENT

Complaints settlement system in the Republic of Moldova underwent several changes over the last year. From 2007 until entry into force of the new Law on public procurement, examination and settlement of disputes between participants in public procurement procedures was the responsibility of the PPA (art. 9 of the Law no. 96 of 13.04.2007).

On the recommendation of European and international experts, the new Law on Public Procurement (no. 131 of 07.03.2015) provides for the establishment of a new body of public administration - National Agency for Solving Complaints, which is entitled to settle complaints relating to public procurement procedures according to the regulation on its organization and functioning (art. 78). This provision **removed the conflict of competences from the activity of PPA**, which, on the one hand, records the results of procurement procedures and, on the other hand, has jurisdiction in settling disputes between participants in public procurement procedures. This new specialized body had to be an administrative authority under the Ministry of Finance, settling appeals lodged within public procurement procedures.

However, subsequently, by a draft amendment to Law no. 131, in order to implement the provisions of art. 270, Title V, Chapter 8 “Public Procurement” of the Association Agreement between the European Union and the Republic of Moldova, this agency is to be created by the Parliament and shall enjoy organizational, functional, operational and financial independence.

According to the same draft amendment to the law (that was approved by Government Decision on 27 April and submitted for approval to the Parliament), the NASC had to start operating on 1 September 2016 but this has not happened so far.

The number of appeals lodged by economic

operators participating in public procurement procedures may be evidence of poor quality of tender documentation or lack of capacity and technical skills within CAs. According to the activity report of PPA in 2015 it received the amount of **743 appeals meaning 353 appeals fewer than in 2014**. This is due to the decrease in public procurement procedures since the ratio of appeals to total number of procedures is almost the same – 8,43% (in 2014 – 8,27%). Moreover, analysis of appeals reveals weak points and problematic aspects of public procurement process. Thus, we notice that in 2015, **most complaints (579 or 78%) were filed against the results of public procurement procedures**. On the second place we see the appeals referring to *the content of the invitation to tender or tender documents* (137 complaints or about 18,5%). The smallest number of complaints (27 appeals or 3.6%) were filed against the *conduct of procurement procedure*.

During monitoring activities, **3 out of 8 CAs claim that there were no complaints filed over 2014-2015** (DC Soroca, DC Ștefan-Vodă and DC Singerei). However, according to PPA data (tender.gov.md) in 2014, were lodged 7 appeals against the DC Singerei and they all referred to procurement procedure results. 4 of them were rejected and 3 of them were accepted and these 3 public biddings were annulled by the PPA.

Most appeals were filed against DC Anenii Noi. In 2014-2015, 5 appeals were filed against public procurement procedures and they were all accepted by the PPA. There was again a disagreement between data submitted by the CA and those published on the web page of the PPA under the heading “appeals”. Thus, the web page contains information about 3 appeals – one complaint was filed against the tender documents/participation notice while 2 of them relate to the results.

COMPETITION AND BUSINESS SECTOR ACCESS TO PUBLIC PROCUREMENT PROCEDURES

Limited competition is the effect of **limited participation of economic operators in public procurement procedures**, which in turn leads to inefficient allocation of public money. There are examples showing that one product is purchased by a contracting authority for 5 lei while another contracting authority purchased the same product for 15 lei i.e. 2-3 times more expensive. These kinds of situations are unacceptable the more so since they were also revealed by the Audit Report on public procurement system performance developed by the Court of Accounts¹¹.

The findings of our analysis confirm the above statements. Thus, the 8 CAs that were monitored declared that they had from **3 to 19 procedures cancelled over the last 2 years due to lack of competition**.

In terms of **transparency and access to information on PP of the private sector**, 51,0% of participants consider that **public procurement process is not very transparent** for economic operators wishing to participate in public procurement procedures. About **40,6% claim that the information for public sector is accessible and transparent**.

Currently, the legal provisions in force concerning the **exclusion of economic operators involved in anticompetitive agreements from public procurement procedures are inefficient in practice**. On the one hand, the instruments enacted to prevent unfair competition and “agreements” between them are inapplicable given the practical impossibility to prove the anticompetitive character of actions within the short time limits for evaluating tenders.

On the other hand, exclusion of bidders, involved in bid rigging practices, from subsequent procedures is rather troublesome since sanctioning an economic operator for bid rigging by the Competition Council is not sufficient for its exclusion from public procurement procedures. It can be done only following a final court judgement. It is therefore required to adjust our national legislation to European practices in this respect so that enterprises involved in this kind of practices could be excluded both from the present procedure due to anti-competitive behaviour and from subsequent procedures.

Although primary legal and regulatory framework has been amended and improved recently in line with the best European practices, the **access of SMEs to public procurement procedures is limited either due to lack of capacities or lack of appropriate policies to support and encourage them**. Thus, at the moment, there is not any mechanism that would ensure engagement and encourage participation in procurement for SMEs.

Facilitating SMEs’ access to PP procedures and increasing the number of small enterprises having state contracts could be ensured by the **provision in procurement documents of the mandatory requirement to divide contracts into lots**, wherever possible. Also, establishment and effective functioning of an automated database of offers of goods and services by SMEs on e-Procurement portal would allow CAs to considerably extend the database on potential suppliers, which would enhance competition and, ultimately, result in purchasing goods, works and services at a better price-quality ratio.

¹¹ <http://www.ccrm.md/hotarireview.php?idh=767&l=ro>

TRANSPARENCY AND ACCESS TO INFORMATION IN THE AREA OF PUBLIC PROCUREMENT

The economic logic of PP reform has to revolve around the idea that **transparency generates competition and competition generates savings**. Econometric analyses conducted in the framework of impact studies carried out at European level proved that even a **small but incremental increase in public procurement transparency leads to tangible savings**. Thus, according to *Evaluation Report-Impact and Effectiveness of EU Public Procurement Legislation (Part 1)*, published by the European Commission in 2011, **publication of a contract notice results in a saving of 1.2%** compared to contracts where neither contract nor prior information notice was published. According to the same study, **contracting authority that publishes an invitation to tender and uses an open procedure may expect savings of up to 3.8% on the final contract value**, while for restricted procedures the corresponding saving could be around 2.5%.

Savings that are linked to higher competition tend to be higher in services and works, resulting in a directly proportional relationship between savings and competition in these sectors. The more successful the procedures are in mobilising competition, the greater the savings that can be reaped.

In addition, we believe that a novelty for Moldova is the ability to have **consultations with the market prior to the launch of procedure and before finalizing technical specifications**. We consider that this is a tool that will lead to improved quality of tender documentation as well as an open and efficient dialogue between CAs, economic operators and expert community. This is an instrument that has to be used in a constructive way, in good faith and not with a view to develop

tender documentation seeking to encourage or discourage a particular tenderer.

According to a recent report developed by IDIS „Viitorul” - “*Open local government for active and informed citizens*”¹², in which 45 largest localities in the Republic of Moldova were assessed by 9 transparency criteria, **19 web pages of public authorities do not have a section on decisional transparency**. In terms of public procurement local administrations show a certain degree of openness at the stage of initiating public procurement procedures. However, none of the 45 settlements has on its web page the database containing public procurement results over (at least) the last two years.

As regards the rules of publication of notices, procurement outcomes, the previous law on public procurement¹³ stipulated the “right” but not the “obligation” of CAs to ensure the appropriate level of transparency by publishing notices in other sources of information such as the web page of CAs, local press, etc. Thus, the obligation to publish notices in BAP (that can be accessed against payment and not all people have access to it), limits transparency and competition in the area.

As a result, while checking the sources of publishing information on public procurement (notice of intent, invitation to tender, procedures outcomes), all 8 CAs answered that all information is published in BAP, one CA mentioned that procedures results are sent by email to all participants, another CA stated that the information is published in BAP and optionally on the web page

¹² <http://viitorul.org/newsview.php?l=ro&idc=132&id=5237&t=/STIRI-EVENIMENTE-IDIS/Raport-IDIS-Autoritatile-publice-locale-din-Moldova-sunt-restantiere-la-asigurarea-unei-comunitari-deschise-cu-cetatenii>

¹³ Law no. 96-XVI of 13.04.2007 on public procurement. Monitorul Oficial no.107-111/470 of 27.07.2007.

and only one CA said that all information is placed on the web page, published in BAP and local press (DC Ștefan-Vodă).

Findings of the survey conducted among participants in the activities show that **only 20,8% of respondents believe that public procurement in the Republic of Moldova is transparent**, 4,6% think that it is fairly transparent while about 66,8% maintain that it is not transparent. After analysing the three stages of public procurement process – pre-procurement (planning), procurement (conducting procurement procedures) and post-procurement (execution and monitoring of contract) in terms of transparency we obtained the following data: **41,3% of participants believe that procurement itself is the most transparent stage**. Post-procurement stage referring to execution, control and monitoring of public procurement is considered as the least transparent by 38% of participants.

To assess transparency and publication of data on PP conducted we have also analyzed the web pages of 9 public authorities that were monitored. As we can see in table 1, although all authorities have web pages and most of them have a section on public procurement only **half of them publish (even if selectively) under this heading information relevant to public procurement that have been planned/conducted**.

Conducting procedures through e-procurement system (SIA „RSAP”)

The Automated Information System “State Register of public procurement” (SIA RSAP) was launched by Minister of Finance Order no. 103 of 03.09.2012. The list of CAs that shall initiate all public procurement procedures through SIA „RSAP” was published as well.

Currently within SIA RSAP were developed the following basic functional components:

- ◆ registration and publication of notices of intent;
- ◆ submission of invitation to tender;
- ◆ approval for publication and publication of invitation to tender;
- ◆ amendments to tender documents/their approval;
- ◆ submission of the request for participation;
- ◆ communication with bidders;
- ◆ registration of tenders;
- ◆ drawing up the report on procurement procedure and its approval;
- ◆ online access to tender documents;
- ◆ integration with the State Register of Population and the State Register of Legal Entities;
- ◆ control over contract award.

Table 1. Analysis of transparency and publication of PP data by 9 CAs.

Nr.	Contracting authority	Web page	Annual public procurement plan, 2015		Section on public procurement on the site	Publishing information on public procurement (invitation to tender, procurement results)
			Developed	Published		
1	DC Anenii Noi	yes	yes	no	yes, but information is missing	no
2	DC Criuleni	yes	yes	no	no	no
3	DC Hîncești	yes	yes	no	yes	yes
4	DC Soroca	yes	yes	yes	yes	yes
5	DC Sîngerei	yes	yes	no	no	selectiv
6	DC Drochia	yes	yes	no	no	no
7	DC Căușeni	yes	yes	no	yes	no
8	DC Ștefan-Vodă	yes	yes	no	yes	yes
9	DC Cahul	yes	yes	yes	yes	yes, separate section in "Announcements"

Source: Data compiled by the authors based on the analysis of web pages of CAs monitored.

Based on those functionalities the current version of SIA RSAP is able to ensure the full lifecycle of a public procurement procedure such as “Public bidding” or “Call for tenders”.

According to the PPA Report in 2015 the 221 CAs registered in the system initiated and conducted through SIA RSAP **3 121 public procurement procedures** that had as result **6 804 contracts concluded worth 3,3 billion lei.**

Respectiv, **ponderea AP desfășurate prin intermediul sistemului electronic în suma totală a contractelor constituie 51,5%.**

The share of PP conducted by using the electronic system in the total amount of contracts is 51,5%.

The District Councils started to use the e-procurement system only in the second half of 2015. Therefore it is rather premature to carry out an analysis in this respect. We should mention that only one authority of those monitored managed to conduct 9 procedures worth 10,2 million lei using SIA RSAP. Starting with 2017, regulatory authorities are planning to amend the provisions on e-procurement in the Law on public procurement.

INTEGRITY AND CONFLICT OF INTEREST IN THE AREA OF PUBLIC PROCUREMENT

Law no. 131 contains a separate article entitled “Rules to avoid conflict of interest”. However, de facto, it does not differ very much from the provisions of Law 96. Thus, during the application procedure for awarding public procurement contracts, the contracting authority shall take all necessary measures to avoid situations likely to result in a conflict of interest and / or unfair competition.

Every member of the working group is required to sign, under own responsibility, the **declaration of confidentiality and impartiality** by which they unconditionally commit themselves to respect this law and acknowledging, at the same time, that:

- a) he/she is not husband/wife, relative or in-law up to the third degree with one or more employees of the bidder(s) or with one or more founders thereof;
- b) in the past 3 years, did not work under individual employment contract or other agreement proving a working relationship with one of the bidders, and was not part of the board or any other governing body or the administration thereof ;
- c) does not hold shares or part of the share capital of the bidders.

Working group member was required to sign these declarations under the previous law as well but this provision was not complied with. They were many cases where working group members did not comply with this provision, which contributed to increased risks of conflicts of interest and there was no certainty that the award of procurement contracts was conducted impartially and independently. The same report by the Court of Accounts in 2015, which analyzed compliance with procurement procedures of 12 CAs, found that **working groups within contracting authorities did not draw up and sign declarations of confidentiality and**

impartiality, minutes of the opening and evaluation of tenders, while in other cases they were drawn up post factum¹⁴. Thus, the audit revealed that in **10 out of 12 contracting authorities that had been audited, in 56 cases out of 399 cases audited, working group members failed to submit these declarations.**

In addition to specifying the situations likely to result in a conflict of interest, other actions are needed as well. One of them would be the obligation requiring every CA to have a register containing all declarations of confidentiality and impartiality signed by the members of the working group under own responsibility (this information should be available in electronic format and thus make more accountable working group members and in the case of a conflict of interest to resign from the group). Besides this, all conflicts that arise should be recorded with the details on the way they were settled, which could be used as a point of reference for situations that might occur in future. The rules to avoid conflict of interest should be extended over contract execution period and not only over the award stage. We also recommend establishment of an internal sanctions mechanism for cases when there is no action taken so that to avoid conflicts. At the same time, it is necessary to introduce the training and prevention component in order to prevent corruption and situations likely to result in conflict of interest. This also implies sufficient managerial capacity of regulatory bodies and development of policies in the area as well as effective coordination between these institutions and control and audit bodies.

During the assessment participants were asked if they knew any cases of conflict of interest within CAs and procurement working groups, breaches

¹⁴ <http://www.ccrm.md/hotarireview.php?idh=767&l=ro>

of fair competition principles or favouring certain economic operators on grounds of ties of kinship or friendship. **Only 14% of participants claimed that they did not know any cases of conflict of interest**, 32,8% had knowledge of few or very few such cases, while **28,4%** answered that they were aware of **many or very many cases of conflict of interest**.

Out of 8 CAs, **4 maintain that the Declarations of confidentiality and impartiality are signed by all working group members**. They are not published but are included in the public procurement file.

However, under article 5 of the *Regulation on compilation and keeping of public procurement file, approved by Government Decision no.9 of 17.01.2008*¹⁵, **the list of documents that are to be included in public procurement file does not contain these declarations**. This is an example of legislative gap as long as the regulation requires working group members to sign these declarations but does not mention what is then occurring to these documents.

The new secondary legal and regulatory framework does not „shed any light” either in this regard. Although the regulation provides for the requirement to sign these declaration by working group members it fails to regulate the mechanism of keeping them. For instance by keeping a **register**

of these declarations that should be made public. This register would enable anyone to see certain conflicts of interest that have not been declared by working group members.

The Court of Accounts discovered cases of failure to sign these declarations in its audit report in 2015. Contravention Code provides in art. 327 pt. (5) that “*The failure to sign the declarations of confidentiality and impartiality by working group members, to draw up the minutes of the tender opening and assessment of tenders during public procurement procedures, to send, within specified time limits, information on the result of procurement procedure to bidders or other information stipulated in normative acts is punishable by a fine of 25 to 150 conventional units applied to public official*”. Although the Contravention Code provides for sanctions for failure to sign these declarations no one has been penalized so far in this regard.

Lack of declarations of confidentiality and impartiality leads to situations likely to result in conflict of interest and, respectively, lack of certainty that procurement contract award was fair and independent. We believe that it is **necessary to introduce more rigorous checks by control bodies and apply sanctions for non-compliance against both persons involved and public authority** that allows such irregularities.

¹⁵ <http://lex.justice.md/viewdoc.php?action=view&view=doc&tid=326694&lang=1>

MOST COMMON IRREGULARITIES IN PUBLIC PROCUREMENT SYSTEM

In many cases, CAs, to the detriment of their interests, **failed to ensure compliance with contractual provisions regarding delivery deadlines, contract price and other contractual requirements.** Also, **CAs do not penalize economic operators for breach of contractual provisions.** There were several cases where CAs, contrary to legal and contractual requirements, performed advance payment, incurring additional inefficient expenditure.¹⁶

During our evaluation in 2014-2015, **none of the 8 CAs requested the PPA to investigated cases concerning breach of contractual provisions** (meeting delivery/execution deadlines, providing the required quantity quality of goods/services/works at the unit price set in procurement contract) by contractors, claiming that there were no such cases. Only one CA (DC Soroca) requested the PPA to address a case of conflict of interest. Therefore, none of the 8 CAs monitored applied penalties over the last 2 years.

At the same time, **none of the 8 CAs requested the PPA in 2014-2015 to include economic operators that failed to comply with their contractual obligations in the List of excluded economic operators.**

This occurs under the conditions where **inclusion in the list of prohibited suppliers of economic operators is mandatory** if in the aftermath of failure to comply with or improper fulfilment of contractual clauses by the economic operator, the CA has incurred additional expenses or its activity has been affected. This implies submission to the PPA of a corresponding request and the decision of the working group in this respect or control body by attaching all supportive documents. Subsequently, PPA examines the request and within 15 days

takes the decision to include or not the economic operator in the list of prohibited suppliers.

The „blacklist” (list of prohibited suppliers) compiled by PPA should be a **successful practice and useful tool for CAs during the process of procurement contracts award.** An eloquent example in this respect is the World Bank that by drawing up the blacklist excludes, for a specified period, enterprises that have failed to comply with their contractual commitments from contract award procedures funded by the bank. The list of prohibited suppliers managed by PPA is a mere formality, being rather limited and inefficient. Despite a number of cases of poor execution of contracts (according to Court of Accounts reposts, journalistic investigations, etc.) there were only 24 economic operators in that list as of 15 August 2016. One of the most plausible and often cited reasons for this situation that is mentioned during trainings is that **CAs do not request inclusion of economic operators in the list of prohibited suppliers by PPA due to the fact that this procedure is rather lengthy and troublesome process.**

If the full potential of this list was used it would become a **very useful tool for making economic operators more responsible** and preventing many cases of breaches and fraud. Moreover, European legislation does not provide for the requirement to make this list. However, when it is used, **an individualized approach** is recommended, which means that the current measure stipulating that all economic operators shall be excluded from public procurement procedures for three years is not quite fair. This time period should be linked to the amount of damage to the public budget in the aftermath of the failure to comply with contractual provisions.

¹⁶ <http://www.ccrm.md/hotarireview.php?idh=767&l=ro>

BEST PRACTICES OF PUBLIC AUTHORITIES IN THE AREA OF PUBLIC PROCUREMENT

With the aim of promoting best practices in public procurement at the level of local public authorities, we requested their representatives who participated in the training to provide examples of best practices. They are as follows:

- Appoint the best specialists in the working group on procurement;
- Engage in procurement process experts in areas procurement procedures are conducted;
- Inclusion of economic operators that failed to fulfil their commitments under procurement contract in the list of economic operators excluded from procurement procedures;
- Sending invitations to tender to as many qualified economic operators as possible to get more offers;
- Developing thorough and detailed technical specifications;
- Receipt of a record number of 18 tenders submitted as response to a contract notice on the construction of a water supply system;
- Publication of contract notices at least three weeks prior to the tender;
- Developing procurement plans consistent with strategic objectives and goals of public authority;
- Developing and publishing on public authority website the report on the efficient use of public money;
- Publication of contract notices and other relevant information on public authority website and other local media sources;
- PP procedures efficiency of the authority is demonstrated by the lack of complaints from economic operators;
- Ensuring maximum transparency of public procurement process;
- Rejections of contractors requests to increase contract value;
- Providing guidance and information on PP, both for tenderers and persons seeking information;
- Checking the quality of goods delivered and returning poor quality goods to supplier;

CONCLUSIONS AND POLICY RECOMMENDATIONS

In the context of developing a new legislative framework aiming at transposing European directives, **decision makers and public authorities should pay more attention to certain public procurement aspects:**

- ◆ Best use of public money, by **generating value for money** by public procurement system and renouncing the practice of always choosing the lowest price. The main task of public authorities, in this regard, is to choose the most economically advantageous tender, which generates genuine economic value, and not just spend money within the budget planned as it is currently happening.
- ◆ **Focus on the process and not the procedure itself** which is nevertheless important. However, state policy in the area should be oriented towards conducting efficient procurement meeting citizens' expectations, since they are direct beneficiaries of public services and investments. The main goal of an investment project is increasing the standard of living of citizens within a community.
- ◆ **A coherent and easy to apply legislation that is not characterized by over-regulation**, which is hampering CAs activity by various extremely bureaucratic procedures requiring much paper work, even if, de facto, the goods, services or works do not stem from CA needs and, especially, the needs of citizens in the community.
- ◆ Establishment of a **central public procurement unit**, that would conduct procurement for several CAs. Large volumes of purchases could reduce procurement costs due to "economies of scale" and enhanced

competition. Moreover, it would reduce overlapping, administrative costs and increase simplicity and uniformity enabling authorities to focus on citizens and policy delivery. According to OECD data, most states choose to establish these centralized units for the following reasons: better prices for goods and services purchased (100%); lower transaction costs (96%); enhanced capacity and expertise (81%); improved legal, technical, economic and contractual security (81%);

Recommendations put forward by participants in public procurement process (participants in outreach activities, trainings conducted by IDIS "Viitorul") on improving transparency in the area of public procurement:

1. reorganization, automation and computerization of public procurement systems.
2. all information have to be published on the websites of contracting authorities and the contract notice to be published as well in other online sources of information and on information panels of public authorities;
3. ensure transparency at all stages of the procurement process (starting with identification of needs), ex-ante and ex-post controls of procurement process;
4. all contracting authorities (100%) should use SIA RSAP;
5. amend and improve the legal framework in order to make more transparent and public all information on public procurement;

6. ensure free access to BAP for all economic operators;
7. availability of online access to all relevant documents: invitations, technical specifications, tender documents for the call for tenders and tender documents for public bidding;
8. submission of tenders for any type of procedure online;
9. publication of notices, public procurement procedures not only in BAP but also in other mass media;
10. civil society access to information on PP which is currently rather limited;
11. develop a mechanism for monitoring execution of procurement contracts, along with civil society;

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