



European Bank
for Reconstruction and Development

GPA Compliance Assessment:

**a review of the public procurement
legal framework of selected GPA Observers**

EBRD GPA Technical Cooperation Facility



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Compliance diagnostic of the primary public procurement legislation of Observers to the World Trade Organization Agreement on Government Procurement with the Agreement's mandatory legal requirements.



INTRODUCTION

The revised World Trade Organization Agreement on Government Procurement (GPA), as a plurilateral trade instrument, does not only increase reciprocal market access commitments among its Parties, but it also sets out minimum standards for conducting public procurement, ensuring the creation of open and transparent procurement markets, while underscoring the WTO principle of non-discrimination. Its latest renegotiation and revision in 2012 resulted in a modern text, which embraces and incentivizes the use of best practices in government procurement, at an international level. In addition, besides being recognized as a tool of good governance, the Agreement has taken a relevant role in supporting policy reforms particularly in transition economies. Accession to the GPA could, arguably, catalyse and reinforce broader reforms that improve overall governance and, ultimately, strengthen not only the economy but also the legitimacy of governments.

To some extent, experience has shown that countries have sought or seek to join the GPA with the derivative aim of improving governance and strengthening supplier competition in their own procurement markets through better and more inclusive market access opportunities. Building from the aforementioned, and as a sign of the success of the GPA, its membership has grown significantly since the adoption of the revised text in April 2014: seven new Parties¹ and 20 new Observers². Observer status in the Committee on Government Procurement (GPA Committee) provides an opportunity to participate in discussions in the Committee, gain access to relevant information, and become acquainted with the operation and administration of the Agreement, without undertaking any obligations. Specifically, Observer status by itself does not impose an obligation to undertake accession commitments or to formally observe the rules of the Agreement. Notwithstanding, several Observers have initiated and/or are actively negotiating accession (e.g. Brazil, Kazakhstan, North Macedonia, the Kyrgyz Republic, the Russian Federation and Tajikistan) or have undertaken commitments to do so under their WTO accession package (e.g. Afghanistan, Mongolia, Seychelles).

Under the work of the EBRD GPA Technical Cooperation Facility (EBRD GPA TC Facility or the Facility), EBRD experts have been tasked to assess the primary public procurement law (PPL) or existing draft legislation (draft PPL) of GPA Observers (under the region of operation of the Bank) against the “WTO GPA Compliance Questionnaire” (the Questionnaire) a checklist developed by the EBRD with more than 150 questions on the mandatory requirements of the GPA. The assessment seeks to benchmark selected national public procurement legislations with the text of the Agreement in order to facilitate further consultations relating to accession negotiations. This exercise only constitutes a preliminary diagnostic and is not under any circumstance a binding opinion. Notwithstanding, it provides, if applicable, groundwork for the alignment of the Observer's government procurement regime with the requirements of the GPA, before or at the beginning of the accession process.

¹ Armenia, Australia, Croatia, Moldova, Montenegro, New Zealand, and Ukraine.

² Afghanistan, Belarus, Brazil, Costa Rica, Côte d'Ivoire, Ecuador, India, Indonesia, Kazakhstan, Malaysia, North Macedonia, Pakistan, Paraguay, Philippines, Russian Federation, Seychelles, Tajikistan, Thailand, United Kingdom (while negotiating accession to the GPA on its own right after leaving the European Union) and Viet Nam.



In particular, for each one of the assessed jurisdictions, the below indicated procurement legislations have been analysed:

Country	Legislation
Afghanistan	primary law on Public Procurement
Albania	draft primary law on Public Procurement
Belarus	primary law on Public Procurement
Georgia	primary law on Public Procurement
Kazakhstan	primary law on Public Procurement and latest amendments
Kyrgyz Republic	primary law on Public Procurement and amendments
Tajikistan	draft primary law on Public Procurement
North Macedonia	primary law on Public Procurement
Uzbekistan	draft primary law on Public Procurement

While the present report observes some general compliance aspects, it focuses mostly on encountered regulatory gaps between the GPA and the national primary procurement legislation. Provided information on each section may vary from country to country as this diagnostic seeks to identify and point out mainly legal provisions which might need to be later addressed in order to align the national public procurement framework with the requirements of the Agreement, and thus, ensure full implementation of the GPA following accession.

Though the Agreement's minimum legal requirements were benchmarked through the assessment of each legislation against the EBRD's Questionnaire, for organization purposes, this diagnostic report follows the general outline of the WTO's "Checklist of Issues" for provision of information relating to accession to the revised GPA, as adopted by the Committee on Government Procurement on 14 October 2015 (GPA/132). As such, each analysed section observes the following order, while also referring to the below detailed GPA provisions, if applicable:

1. *Legal framework*: summary of the current public procurement framework, Observer status and/or GPA accession;
2. *Scope and coverage*: Articles II; III;
3. *Non-discrimination*: Articles IV:1-2;
4. *Avoidance of conflict of interest and prevention of corrupt practices*: Article IV:4(b) and (c);
5. *Elements specific to procurement procedures*: Article IX; X; XI; XII; XIII;
6. *Information*: Articles VI; VII:1; IX:7; XVI:1-2; XVII:1;
7. *Domestic review procedures*: Article XVIII;
8. *Other matters*: use of electronic procurement, maintenance of documentation.



ISLAMIC REPUBLIC OF AFGHANISTAN

1. Legal framework

Public procurement in Afghanistan is regulated by the Public Procurement Law as published in September 2016 on the National Gazette No. 1223. The PPL is complemented by the rules on “*Procurement Procedures*”, issued by the National Procurement Authority, and the “*Procedures for Addressing Bidders Complaints and Request for Review*,” issued by the National Procurement Authority. The “*Procurement Procedures*” fills in gaps in the primary legislation and adds significant detail to the requirements for public procurement in Afghanistan. On its status with regards to the GPA, Afghanistan gained Observer status in October 2017 and has undertaken commitments, as part of its WTO accession protocol, to initiate accession to the Agreement.³

2. Scope and coverage

- **Exceptions from the scope of application of the national procurement rules**

Article 4 of the PPL provides an exhaustive list of exceptions from its scope and coverage. Though most of these exceptions are comparable to those provided by the GPA, e.g. for security purposes or for procurement conducted under conditions of an international organization, for particular procurement entities, the PPL might extend beyond the exceptions provided by the Agreement. For instance, it excludes from its scope procurement of joint state-private owned corporations in which the government share is less than 25%.

3. Non-discrimination

- **Provisions according to domestic suppliers a treatment more favorable than that accorded to foreign ones**

Though the PPL allows foreign bidders to participate in domestic procurement procedures, it must be noted that according to Rule 24(1) of the Procurement Procedures 'international tendering' may be held solely under the following conditions:

- a) Procured goods, works and services are not available on competitive price terms from at least three (3) bidders in Afghanistan;
- b) National tendering proceeding has failed to identify an acceptable bidder.

Under the GPA, such rule would directly breach the non-discrimination principle,⁴ a cornerstone of the GPA. Considering that in cases of covered procurement, each Party shall accord to the goods and services of any other Party a treatment no less favourable than the treatment accorded to domestic suppliers, foreign participation in procurement procedures should be guaranteed, rather than just being an exception to cases where goods, works and services cannot be domestically procured.

³ WT/ACC/AFG/36, dated 13 November 2015, para. 199.

⁴ See, Articles IV:1 and IV:2 of the GPA.



- **Provisions related to price preferences and set asides favouring domestic suppliers**

Article 7(1) of the PPL establishes that procuring entities shall be obliged to conduct procurement domestically, provided that the price of the domestic procurement is not higher than the imported procurement by a percentage set in Procurement Procedures. By introducing such price preference for domestic suppliers, the PPL provides a more favourable treatment to nationals, clearly discriminating against foreign suppliers. In this sense, this provision would infringe the non-discrimination principle, as set-out in Article IV:1 of the GPA, in case it affects covered procurement. Although transitional measures are available for developing economies and least developed countries negotiating accession to the Agreement, and as such, certain flexibilities could be accepted – including price preferences - nevertheless, eventual consent depends on the accession negotiations with other GPA Parties. Taking into account the broad scope of the price preference in Article 7, this could certainly pose some concerns during accession negotiations.

Furthermore, Article 8 of the PPL stipulates that *“entities are obliged to facilitate participation of small domestic enterprises and individuals in procurement, in accordance with the rules of Procurement Procedure.”* Although indirect measures taken to facilitate the participation of Small and Medium Enterprises (SMEs) are in line with good international procurement practices, however, if this provision is applied in a manner that provides better conditions to domestic suppliers in comparison to those provided to suppliers from other GPA Parties, it could conflict with the GPA provisions on non-discrimination.⁵

The same applies to Article 15(1) of the PPL, which mentions that *“splitting up procurement into lots is permitted only if it is financially and technically more advantageous to the procuring entity or facilitates participation of small domestic enterprises.”* If the value of the contract is structured in order to provide an advantage to local suppliers, then, insofar as it applies to covered procurement, such provision would not be in line with the text of the GPA.

4. Avoidance of conflicts of interest and prevention of corrupt practices

According to the PPL, bidders are prohibited from acting in a manner that contravenes the principles of openness and transparency, namely: providing false information; fabricating documents; directly or indirectly offering a benefit in order to obtain a contract award; colluding with other bidders or procurement staff; engaging in violence, intimidation, or similar behaviour to influence the procurement; making defamatory statements or false accusations; revealing another bidder's confidential information; or otherwise undermining the transparency of the process.

Though the GPA is silent on debarment, as it neither prohibits nor encourages it, the PPL does include a provision on this subject. Article 49(1) stipulates that the National Procurement Authority shall debar a bidder or contractor from participation in a procurement for a period that shall not be less than two and more than five years, under particular cases

⁵ Ibid.



provided by the law. Furthermore, Article 49(2) of the PPL provides that in case of reiterated violations, the debarment period can be extended up to ten years, including also the possibility of permanent debarment from procurement proceedings.

5. Elements specific to procurement procedures

- **Existing procurement methods and procedures:**

Article 18(1) of the PPL provides that procurement is to be conducted through one of the following methods:

- a) Request for quotations;
- b) Open tendering;
- c) Restricted tendering;
- d) Single-source procurement.

Article 18(2) stipulates that the approach and conditions of use of the methods set forth in paragraph (1) shall be regulated in the “Procurement Procedures”. Considering the above-mentioned, the PPL includes procurement methods that largely parallel those provided in the text of the GPA.

- **Time-periods**

According to Rule 60 of the Procurement Procedures, the time period provided for the submission of proposals shall be between twenty-one (21) and ninety (90) working days. Bearing in mind that the GPA mandatorily establishes a minimum of 40 days, the provided time-period falls short on the minimum side. Though for the purpose of GPA compliance, the mentioned minimum tender submission deadline is shorter than the required 40 days, it could nevertheless be in line with the Agreement if procurement is conducted by electronic means or if a notice of planned procurement has been published in advanced.⁶

6. Information

- **Publication of Notices, summary notices, and language**

From this preliminary analysis, though the PPL includes provisions on the publication of notices, should Afghanistan wish to become a Party to the GPA, it would have to ensure publication of procurement notices in accordance to the GPA requirements, i.e. publication in a medium widely disseminated, remaining readily accessible to the public, at least until expiration of the time-period indicated in the notice.⁷

⁶ See, Articles XI:4 and XI:5 of the GPA.

⁷ See, Articles VII:1 of the GPA.



- **Content of the tender notices**

According to Article 19(1) of the PPL, tender notices shall include the following information:

- a) Procurement description;
- b) The means for obtaining bidding documents;
- c) The deadline for the submission of bids, and the time and venue for holding bid opening sessions;
- d) The procuring entity's address;
- e) Requirements for provision of security.
- f) Any other information which clarifies procurement in accordance with the provisions of this Law

Though the abovementioned covers essential information, nonetheless, the GPA requires the disclosure of further type of information, e.g. the time-frame for the delivery of goods or the selection criteria if a procuring entity intends to invite a limited number of qualified suppliers.⁸ Thus, should Afghanistan become a GPA Party, it will be obliged to ensure that procurement notices contain all relevant fields as provided by the GPA.

- **Contract award notice**

While Article 43(1) of the PPL mandatorily requires contracting authorities to advertise contract award notices, Article 43(4) stipulates, however, that single source contracts are not subject to that obligation. Considering that the GPA requires the publication of contract award notices regardless of the conducted procurement method, in order to achieve compliance with the GPA, the obligation to publish contract award notices should be extended to cover as well single source procurement.⁹ Furthermore, such contract award notice shall be drafted in a manner that include the information required by Article XVI:2 of the GPA.

7. Domestic review procedures

- **Time-limit to launch a complaint**

Article 5 of the “Procedures for Addressing Bidders Complaints and Request for Review” stipulates that complaints or challenges are to be filed within seven days after the contract award decision notice. Such time-period does not meet the minimum ten days established by Article XVIII:3 of the GPA, mandatorily set to ensure that each supplier is allowed a sufficient period of time to prepare and submit challenges.

- **Independent, impartial review bodies**

Dissatisfied suppliers may appeal the contracting authorities' decision before the Administrative Review Committee. This body is an independent, ad hoc committee

⁸ See, Articles VII:2 of the GPA.

⁹ See, Articles XVI:2 of the GPA.



established for the purpose of hearing the appeal. The decision of the Administrative Review Committee is the final step in the administrative process; however, bidders may further challenge the contract award through the court system.

Article 50 of the PPL provides grounds for launching complaints before the review body, including “*experiencing a loss as a result of violating the provisions of the PPL*”. The GPA does not point to an occurred loss as a necessary precondition for challenges. Therefore, it should be further analysed if such precondition might be interpreted as unnecessarily restricting the rights of tenderers and their possibility to appeal to administrative or judicial review.

Moreover, it might also be questioned whether the existing Administrative Review Committee is an independent review body in accordance to Article XVIII:4 of the GPA. As the Administrative Review Committee represents also contracting authorities, it can be argued that it is not completely independent nor impartial. Nonetheless, while the possibility of appealing decisions before the Court exists, then, this would ensure that challenges are being reviewed by an impartial and independent authority.

8. Other matters

- **Maintenance of documentation**

Article 54 refers to the maintenance of procurement records. In particular, it stipulates that the procuring entity has to collect and maintain a record of its reports and procurement proceedings. Supplementing this article, and keeping in line with the GPA corresponding provision,¹⁰ Article 111 (2) of the Procurement procedures provides additional information, including the information to be kept and the time period.

- **Collection of statistics**

No provision on the mandatory collection of statistics is present in the PPL.¹¹ Notwithstanding, Afghanistan has been publishing since 2018 Open Contracting Data Standard (OCDS) data in its new public procurement portal, AGEOPS, as part of a campaign to tackle corruption in public procurement.¹² In practice, such initiative would facilitate the collection of statistics.

¹⁰ See, Article XVI:3 of the GPA.

¹¹ See, the GPA related provision, Article XVI:4.

¹² See, Charlie Pinder, What does Afghanistan's open contracting data look like? (Open Contracting, 2 February 2020) www.open-contracting.org/2020/02/02/what-does-afghanistans-open-contracting-data-look-like



ALBANIA

1. Legal framework

Albania's current public procurement framework comprises the primary Law No. 9643 “on Public Procurement”, dated 20.11.2006, and amended subsequently by Law No. 9800 from 2007, Law No. 9855 from 2007, Law No. 10170 from 2009, Law No. 10309 from 2010, Law No. 22 and 131 from 2012 and Law No. 182 from 2014 as well as the corresponding secondary regulations and related decisions.

Currently, a draft public procurement legislation is awaiting adoption by the Government. In order to keep up with the latest regulatory developments in the country, for purposes of this diagnostic report, the latest draft PPL was chosen to be benchmarked against the text of the GPA. On preliminary analysis, the draft PPL of Albania - a law harmonized with the EU Public Procurement Directives¹³ - demonstrates a relatively high level of compliance with the GPA mandatory requirements. Nevertheless, though the draft law is quite comprehensive, some provisions are still to be implemented through secondary public procurement regulations, e.g. provisions related to the content of notices of intended procurement (or notices of planned procurement). It is thus envisaged that in order to produce a complete compliance analysis, these secondary decrees, once adopted, will also be evaluated. On GPA engagement, Albania is an Observer to the Agreement since 2 October 2001. Although Albania formally initiated work on its respective accession to the Agreement, negotiations are currently inactive.

2. Scope and coverage

According to Article 1 of the draft PPL, procurement refers to the purchase of works, supplies, and services through a public contract by one or more contracting authorities or entities from economic operators, including the procurement of mixed contracts. The draft legislation, while broad in the sense of traditional procurement, does not make any reference to concession or public private partnership contracts.

- **Exceptions from the scope of application**

Article 7 of the PPL provides a list of 'special exclusions' from its scope of coverage. The following exceptions, additional to those provided in Article II:3 of the GPA, apply to public contracts:

- a) The acquisition, development, production or co-production of program material intended for audio-visual or radio media services.¹⁴
- b) Research and development services.¹⁵

¹³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and 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.

¹⁴ Article 7(1)(b) of the Albanian PPL.

¹⁵ Article 7(1)(ë) of the Albanian PPL.



To a large extent, the existing exceptions seem to be in line with the ones stipulated by the European Union Public Procurement Directives.¹⁶ Consent to these additional exemptions would eventually depend on the results of future GPA accession negotiations.

In addition, though the draft PPL includes the exception found in Article II:3(a) of the GPA, it does it in a slightly different manner. While the relevant GPA provision provides that the Agreement does not apply to the acquisition or rental of land, “existing” buildings or other immovable property or the rights thereon, the parallel provision of the draft PPL¹⁷ does not employ the term “existing” for buildings. This distinction is relevant because it could lead to some interpretation discussion. The exemption provided by the GPA relates only to buildings that exist at the time of the purchase decision (thus rendering any kind of tender procedure under the rules of the Agreement meaningless). However, if a contracting authority wishes to acquire a new building (that does not exist at the time of the purchase decision), it is obliged to use a competitive procedure to award such contract. In this sense, the wording of Article 7(1)(a) could create the risk of avoiding the use of competitive procedures for the procurement of works, under certain modalities.

3. Non-discrimination

In general terms, the draft PPL stipulates non-discrimination commitments. For example, Article 2(d) ensures “equal and non-discriminatory treatment for all economic operators participating in public procurement procedures”. Specific provisions on price preferences or offsets favouring domestic suppliers are not found in the analysed primary legislation.

4. Avoidance of conflicts of interest and prevention of corrupt practices

Article 18 of the draft PPL refers to provisions on safeguarding the integrity of the procedure as well as general measures to prevent corruption. This Article seeks to ensure that necessary measures are taken to eliminate the harmful consequences of corruption and to maintain the principles of competition. In addition, Article 19, on conflicts of interests, stipulates that contracting authorities 'should' take appropriate measures to properly prevent, identify and remedy conflict of interests, while also detailing actions to be taken when such conflicts arise. A language difference in the translated version of the draft PPL is, nonetheless, the use of 'should' vs. 'shall', as it is found in the text of the GPA. The use of 'shall' expresses the mandatory character of the actions to be taken.

5. Elements specific to procurement procedures

The draft law provides provisions covering the following public procurement procedures, which in general terms, parallel open tendering, selective tendering and limited tendering, as found in the text of the GPA:

¹⁶ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

¹⁷ Article 7(1)(a) of the Albanian PPL.



- a) Open procedures;
- b) Restricted procedures;
- c) Competitive negotiated procedure, which is used only in the case of classic sector contracts;
- d) Innovation partnership;
- e) Competitive dialogue;
- f) Negotiated procedure with prior publication of the contract notice, which is used only in the case of sector contracts;
- g) Negotiated procedures, with or without prior publication of a contract notice
- h) Simplified open procedures;
- i) Consultancy service

- **Qualification systems and multi-use lists**

Article 73 of the draft PPL provides rules regarding qualification systems, which seemingly qualify as multi-use lists, as stipulated in the GPA.¹⁸ Notwithstanding, under the draft PPL, only utility service providers are entitled to use such qualification system.¹⁹ In addition, the general provision does not fully parallel Article IX, paragraphs 7-13 of the GPA. For instance, the requirements regarding contents of notice establishing a multi-use list, the rules on admitting participants to the multi-use list, and rules on rejecting requests to participate are not provided by the text of the draft PPL.

- **Time-periods**

Regarding the proposed timeline for the submission on tenders, Articles XI:3(a) and XI:3(b) of the GPA establishes that the minimum deadline for submission of tenders in open tendering (one stage procedure) and selective tendering (two stage procedure) shall be, in principle, no less than 40 days from the publication of the contract notice, in case of open tendering, or invitation to submit tender, for selective tendering. However, Article 42(2) of the draft PPL, stipulates that the minimum deadline for tender submission in open tender shall be no less than 35 days from publication of a contract notice. Similarly, articles 43(3), 44, 45 and 46 of the PPL, concerning two stage procedures, refer as well to time-periods for tender submission on the second stage of selective tendering that are shorter than the 40 days provided for by the GPA.

Notwithstanding, the GPA provides some flexibility in relation to the above mentioned time-period. The 40 day minimum could be reduced by five days if electronic procurement (e-procurement) is implemented.²⁰ In such case, the PPL's tender submission deadline might comply with the minimum stipulated by the Agreement. However, since the draft PPL references indistinctly both electronic and paper based procurement, it is not possible to confirm this assessment. Therefore, if paper-based procurement is employed, under the

¹⁸ Article IX:7-13 of the GPA.

¹⁹ Utility service providers in the GPA coverage context would potentially qualify as entities listed of Annex 3 of Appendix I to the GPA. Whether they are covered under the GPA for a particular country depends from the results of accession negotiations with GPA Parties.

²⁰ See, Article XI:4-8 of the GPA.



draft PPL submission deadline rules, there is a risk of non-compliance for procurement covered by the GPA.

- **Provisions on tender submission**

Article XV:2 of the GPA stipulates that a procuring entity shall not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity. Seemingly, no parallel provision is found in the draft PPL.

6. Information

- **Information on the Procurement System**

Article VI of the GPA provides that each Party shall publish and make accessible the relevant public procurement framework, in an officially designated electronic or paper medium. In Albania, though the draft PPL does not include a provision mandating such requirement, nevertheless, the website of the Public Procurement Agency²¹ does provide such information and, thus, in practicality implements Article VI.

- **Content of the tender notices**

Article X:7 of the GPA obliges contracting authorities and entities to make available to suppliers 'tender documentation' that includes all information necessary to permit suppliers to prepare and submit responsive tenders. It also provides a list of items that such documentation should contain. Article 74 of the draft PPL provides that contracting authorities or entities must ensure the availability of tender documentation in electronic or paper form. However, the draft PPL does not provide a description of the content of the tender documentation. Instead, Article 74(1) of the draft PPL redirects to provisions in secondary procurement rules. Therefore, complete verification of compliance with Article X:7 of the GPA will be possible upon adoption of the relevant secondary legislation.

- **Contract award notice**

Article XVI:1 of the GPA provides that the procuring entity shall promptly inform participating suppliers, and not later than 72 days after the award of each contract, of the entity's contract award decisions and, on request, provide the unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender. In comparison, Article 96(1) of the draft PPL stipulates only the publication of the entity's contract award decision, which should be published immediately and not later than 5 days after completion of tender evaluation. The draft PPL, seemingly, does not reference the requirement of providing individual information upon request to an unsuccessful supplier, nor does it provide provisions related to the content of the winner's award notice; this information, however, may be provided in a secondary decree.

²¹ Available at www.app.gov.al/home.



7. Domestic review procedures

- **Time-limit to launch a complaint**

Article 109 of the draft PPL references the time period to file a complaint which, in compliance with the GPA, shall be no less than ten days. However, this deadline is shortened to 5 days for case of procurement below a certain threshold. For the purpose of the GPA, since 'covered procurement' would generally be above the determined threshold, this shortened deadline would not affect the Agreement's related legal requirement.

- **Independent, impartial review bodies**

In general terms, the draft PPL ensures the establishment of an independent 'domestic review system', namely, a complaint review mechanism to which both foreign and domestic suppliers may apply for correction of procedural errors. The unsuccessful bidder can file complaints before the contracting authority and, subsequently, appeal before the Public Procurement Commission and the Court. However, particular rules on how to file complaints are to be set out in the secondary public procurement rules.

The draft PPL also provides for the enforcement of interim measures, though mostly for allowing the contracting authority to continue a procurement procedure after having received a complaint.²² On the other hand, the draft PPL does not provide for corrective action or compensation for the loss or damages suffered.²³

8. Other matters

- **Maintenance of documentation**

Article XVI:3 of the GPA stipulates that each contracting authority or entity shall, for a period of at least three years from the date it awards a contract, maintain: (a) the documentation and reports of tendering procedures and contract awards relating to covered procurement, including the reports required under Article XIII; and (b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means. However, in this particular regard, the draft PPL does not stipulate a similar requirement.

²² See, for the related GPA provision, Article XVIII:7 (a).

²³ See, for the related GPA provision, Article XVIII:7 (b).



BELARUS

1. Legal framework

This section benchmarks the primary public procurement legislation of Belarus against the mandatory requirements of the GPA. A relatively recent legislation, the current PPL and its corresponding amendments came into force on 1 July 2019. The latest PPL allows the implementation of a fully electronic public procurement management system, including the possibility of concluding contracts and filing complaints in electronic form. In addition, the PPL also aims to improve existing public procurement procedures and overall transparency in line with the common economic area legislation, the Eurasian Economic Union Treaty (EEUT). On matters related to the GPA, in June 2018, GPA Parties accepted Belarus' Observer status request, becoming the first country to become an Observer to the Agreement while simultaneously negotiating its WTO accession.

2. Scope and coverage

- **Exceptions from the scope of application of the national procurement rules**

It is worth noting that Belarus's primary procurement legislation has very limited exceptions from its coverage. Even procurement for defence purposes (i.e. arms and ammunition) is not excluded per se, but included in the list of procurement that can be procured via single sourcing, and thus, still falls under the scope of the PPL. The same applies to procurement conducted under the conditions of an international treaty or procurement relating to goods or services from organizations employing persons with disabilities or prison labour. In this manner, by not excluding such contracts from the scope of its PPL, Belarus actually provides some form of transparency, given that in accordance to the PPL, the contracting authority must mandatorily publish each case of single source procurement.

3. Non-discrimination

Recognizing the need to accord special treatment to SMEs, the PPL of Belarus gives powers to the Council of Ministers to adopt a list of goods, services and works from which at least one lot should be designed to be set aside for SME production. This lot can be designed for no more than 10% of the total procurement. Seemingly, if implemented, such measure would not be in line with the mandatory non-discrimination requirements set by Article IV of the GPA. In addition, if the set-aside covers only local SMEs, this might be considered an offset, which is also prohibited by the GPA. Notwithstanding, Belarus – as a developing country – is entitled to transitional measures allowing the implementation of such measures. Hence, in case this scheme is included and accepted, for instance, as a General Note of Annex I as an exception, Belarus could potentially implement such provision.

4. Avoidance of conflicts of interest and prevention of corrupt practices

Though the PPL does not include explicit provisions on conflict of interests or the prevention of corrupt practices, as expressed in the text of the GPA, however, this does not exclude the existence of other mechanisms in place to ensure the integrity of the procurement process.



5. Elements specific to procurement procedures

The PPL provides provisions covering the following public procurement procedures, which in general terms, match the concepts of open tendering, selective tendering and limited tendering:

- a) Open tender
- b) Close tender
- c) Single source procurement
- d) Exchange trading
- e) Request for price offers
- f) E-auctions

- **Limited tendering – direct solicitation – single source procurement**

The legislation of Belarus appears to contain an extensive list of cases where direct procurement is allowed. Some of these cases coincide with the existing GPA provisions²⁴ (e.g. procurement in cases of urgency or where IP rights involved), however, most of the additional cases are not contemplated in the GPA. Just to have an understanding of the scale of direct procurement, it is worth mentioning that the PPL contains over 60 cases including, among others, the acquisition of services related to business trips and the acquisition of goods, services and works necessary for the insurance of the protection and security of the President of the Republic of Belarus. Considering that the list contained in the GPA is exhaustive, then, such additional exceptions for single-source procurement could raise some issues as they would exclude further supplier competition.

Arguably, the reason for having such a large number of exceptions stems from procurement related provisions found in the Eurasian Economic Union Treaty²⁵ to which the Republic of Belarus, as a member of the Eurasian Economic Union, is legally bound. Notwithstanding, it is relevant to note that the provisions of the mentioned treaty allow a member country to decrease the number of grounds for single sourcing. Thus, closer compliance to the GPA mandatory provisions could still be achieved. It is also important to notice that some cases for single sourcing are described in a broad manner and might be subject to different interpretations and ways of application.

- **Technical specifications**

The GPA lays down detailed rules on technical specifications, highlighting the fact that the Parties to the Agreement shall use international standards when such exist to facilitate international trade, as stipulated in Article X:2(b). In addition, as a general rule, technical specifications should not refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer or supplier, unless there is no other sufficiently precise

²⁴ See, Article XIII(1) of the GPA.

²⁵ See, Annex 25 and Sub – Annexes of the Eurasian Economic Union Treaty.



or intelligible way of describing procurement requirements. In case there is no other means to describe the procurement subject and the contracting authority has to refer to the specific IP, the wording of technical specification should include “or equivalent”. This is also a recognized international standard found in Article 10(4) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement.

Belarus's PPL seems to contain exceptions on the rule relating to the term “or equivalent”. In accordance to the text of the law, the usage of this word combination is not necessary in case there is a need to ensure compatibility of the purchased goods with other goods of a specific trademark already in use as well as for the purchase of spare details and materials to repair other goods already in use. Another issue with regards to the usage of technical specifications is the absence of the requirement to base the specifications on international standards and/or on national technical regulations and standards.

- **Time-periods**

Article XI:2 of the GPA sets minimum deadlines which should be respected by the Parties to the Agreement. However, it seems that the PPL does not comply with this GPA requirement as the minimum deadline for the submission of tenders for open procedure is 15 calendar days, a time-period significantly shorter than the one required by the GPA²⁶. Notwithstanding, the mentioned time-frame is actually in compliance with Annex 1 to the Protocol on regulation of procurement of the EEUT, and it should be noted as well, that while this provision establishes a minimum period, it does not restrict member states in setting other time-periods compliant with, for instance, the GPA.

The PPL also allows to implement shortened deadlines in case a tender process is repeated. Considering that the whole tender process in Belarus is conducted through electronic means, including the publication of the annual procurement plan, the 40-days minimum time-period could be shortened. Regarding the deadline for bid submission in restricted procedures, as no specific rules are yet in place, it can be deduced that the same deadline for open procedure applies, a minimum of 15 calendar days. Unfortunately, this cannot be confirmed as the details of restricted and two-stage procedures are left to be envisaged by the Council of the Ministers.

6. Information

- **Publication of notices, summary notices, and language**

In order to facilitate the participation of suppliers from other GPA Parties to a given procurement procedure, Article VII:3 of the GPA provides that for each case of intended procurement, a procuring entity shall publish a summary notice that is readily accessible, at the same time as the publication of the notice of intended procurement. Parallel provisions were not found in Belarus's PPL.

²⁶ See, generally, Article XI of the GPA, on 'Time-Periods'.



- **Contract award notice**

The information to be provided in the contract award notice as envisaged by the PPL might also need to be updated to include all information described by Article XVI:2 of the GPA, namely, type of procurement method used, description of the goods, services, works obtained, among others.

7. Domestic review procedures

- **Time-limit to launch a complaint**

The GPA requires a period of at least ten days from the time when the basis of the challenge became known in order for suppliers to submit a complaint. In the case of Belarus, the latest PPL does ensure this 10-day period.

- **Independent, impartial review bodies**

In accordance with Article XVIII:4, GPA Parties are generally expected to establish an independent administrative or judicial body to hear complaints or challenges against decisions of the procuring authority. In addition, according to Article XVIII:5 of the GPA, if a body other than a mentioned independent body initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge. In essence, a GPA Party has a choice between introducing an independent review body already for the first instance review or attaching it to the second instance review.

Belarus' PPL provides for a mixed solution in this regard. At a first stage, suppliers are encouraged to apply to the contracting authority to try and solve the issue before referring to the regulatory and/or judicial bodies. This is not a mandatory stage for the aggrieved suppliers and, thus, can be skipped. The second stage is the complaint to the regulatory body. However, as it forms part of the executive branch, its full independence from the contracting authorities may be questioned. A concern could also be raised in relation to bias when hearing complaints against contracting authorities. As this regulatory body is a contracting authority itself, it cannot be considered as “independent” when hearing complaints against its actions or omissions as a contracting authority. It is also apparent that in this second tier of review, the review and control functions seem to be, to some extent, blurred. Additionally, the Ministry of Antimonopoly Regulation and Trade - acting as a regulating and controlling body - after receiving a complaint, it opens a control procedure against that specific contracting authority. Even in case the aggrieved supplier stops the review proceedings, the control proceedings cannot be stopped, and instructions will be issued describing the exact actions to be taken by the contracting authorities.

On the other hand, in accordance with the GPA, the review body shall have its decision subject to judicial review. In this sense, the decision of the regulatory body, the act of the



control procedure and the issued instruction are all subject to an appeal before the Court. As such, citizens are not deprived from the possibility of resorting to the regulatory body and/or to the Court. The aforementioned demonstrates that the PPL is partially compliant with the requirements of the GPA though some further work in terms of delineating the control/monitoring/regulation/review functions will be welcomed.

8. Other matters

- **Use of information technology systems for procurement**

Though in Belarus the tendering process is conducted through electronic means, the PPL does not contain any provision on general availability and interoperability of the e-procurement system with other generally available systems. Authentication and encryption requirements are not provided in the tender documentation.

- **Recollection of statistics**

While an important element for the GPA²⁷, the collection of statistical data and reporting are not explicitly mentioned in the text of the PPL. Notwithstanding, information on public procurement is made accessible through the procurement website,²⁸ which accumulates information on public procurement as well as statistics.

²⁷ See, Article XVI:4 and XVI:5.

²⁸ See, for more information www.icetrade.by.





GEORGIA

1. Legal framework

Georgia's current primary law on public procurement, modelled on the 1994 UNCITRAL Model Law on Public Procurement, has been amended over the past decade to reflect incorporations and modifications which have significantly improved the procurement regulatory framework. Comprehensive changes in the procurement system were made in 2010, when the unified electronic system of public procurement was introduced. As a result, the public procurement process and environment became considerably more transparent, encouraged fair competition and significantly reduced the risk of corruption. Through several amendments, Georgia introduced a set of different procurement procedures as well as a dispute review body to deal with procurement challenges and complaints. These incorporations, overall, seem to follow international best practices in public procurement. Besides the abovementioned primary legislation, Georgia has enacted secondary decrees which regulate further issues such as the descriptions of procurement methods (processes), qualification requirements, tender notice templates, and the modalities of procurement review.

For the purpose of assessing GPA compliance, this report benchmarks the current PPL. Nonetheless, it is relevant to notice that currently a comprehensive public procurement reform is under way in Georgia and, as a result, a new public procurement legislation is to be adopted in the near future.²⁹ Additionally, the establishment of a new independent and centralised review body for government procurement is under way. After these changes come into force, it will be feasible to provide a more updated and complete diagnostic. Georgia is an Observer to the Agreement since 5 October 1999 and though it already initiated its GPA accession process, negotiations are currently inactive.

2. Scope and coverage

- **Exceptions from the scope of application of the national procurement rules**

Article II:3 of the GPA provides for a list of permitted exceptions from the scope of coverage. In order for a national legislation to be compliant with the mentioned provision, the permitted exceptions at the national level must not exceed those provided for in the GPA.³⁰ However, in this particular case, Article 1 of the Georgian PPL - on the "Scope of the Law" - seems to contain grounds for exceptions which are not provided in parallel article of the GPA. Among others,³¹ these include public procurement to be performed with the funds of the legal entities under public law that are regarded as religious organisations by Georgian legislation; public procurement of motor vehicles for Georgia's diplomatic missions and consular offices abroad, for defence attachés, or for representatives of the Ministry of Defence and Internal

²⁹ It is envisaged that the new PPL will aim to harmonize with the provisions of EU Procurement Directives 2014/24/EU and 2014/25/EU as well as EU Defence Procurement Directive 2009/81/EC.

³⁰ See, Article II: 3 of the GPA.

³¹ See also, Article 1(31)b), Article 1(31)d1), Article 1(31)j), Article 1(31)k), Article 1(31)n), Article 1(31)o), Article 1(31)p)).



Affairs of Georgia and the State Security of Georgia; public procurement of services related to safekeeping of lottery tickets by a lottery organizer; public procurement by a lottery operator of information; and technology support necessary for organizing and/or conducting the lottery.

3. Non-discrimination

In general terms, on its Chapter on “*Monitoring and Control of Procurement*”, the PPL includes a provision which states that in order to ensure transparency of the procurement process, the Agency, during the procurement proceedings, shall monitor the adherence to the principles of publicity, fairness and non-discrimination. It shall also monitor strict adherence to the established procedures and reporting, open and effective competition, and availability of rational and free choice. Overall, no preference for national suppliers over foreign ones is encountered in the text of PPL.

4. Avoidance of conflicts of interest and prevention of corrupt practices

The Georgian PPL largely ensures the accountability and integrity of the procurement system. In particular, Article 8 of the PPL on “*Conditions for Avoiding Conflicts of Interest*” contains provisions regarding conflict of interests at the tender and contract award stages, namely, during the review, selection and evaluation of qualification data and tenders; when holding negotiations; during the monitoring and supervision the performance of the contract; supplier selection under simplified procedure; and on considerations of disputes related to public procurement, among others. It also warns that a bidder or supplier shall not directly or indirectly influence in his favour the person performing one of the above-mentioned acts during the procurement process. Notwithstanding, the PPL does not address aspects related to potential conflict of interests arising from the participation of certain stakeholders during the preparation of the tender documents.

5. Elements specific to procurement procedures

- **Existing procurement methods and procedures**

Along with the adopted legislative modifications, an e-platform was created to allow conducting public procurement through electronic means: paper-based procurement was completely rooted out and electronic procurement became mandatory. In addition, over several amendments, Georgia's current PPL has been expanded to include the following procurement procedures:

- a) Electronic Tender, which in turn has 4 different forms:
 - a. Electronic Tender with reverse auction
 - b. E-tender without Auction (Sealed Bid Auction)
 - c. Electronic Tender with Two-Stages
 - d. Electronic Tender with special rule
- b) Consolidated Tender (equivalent of Framework Agreement)
- c) Direct Procurement/simplified procurement/single source procurement
- d) Design Contest



- **Limited tendering – direct solicitation – single source procurement**

Although Article XIII of the GPA provides for an exhaustive list of cases where limited tendering is allowed, the Georgian PPL seems to contain further grounds³² for single source procurement. Notwithstanding, to ensure a certain level of transparency, the PPL does provide that for limited tendering (simplified procurement, as referenced by the law), a report must be issued, reflecting the requirement set out in Article XIII:2 of the GPA.

6. Information

- **Information on the procurement system**

All public procurement legislation is published on the official webpage of the State Procurement Agency.³³

- **Contract award notice**

Article XVI:1 of the GPA requires a procuring entity to promptly inform participating suppliers of the entity's contract award decisions. In addition, upon request of a supplier, such information must be provided in writing. In turn, Article XVI:2 of the GPA stipulates that not later than 72 days after the contract award, the relevant notice should be published, covering at least some specific information. Georgia's public procurement legislation does not seem to contain corresponding provisions. However, it is understood that, in practice, all relevant information is being circulated within the electronic public procurement system.

7. Domestic review procedures

Overall, the existing domestic review procedure, with the exception of the time-period to file complaints, seems to be in line with the minimum legal standards required by the GPA. Domestic review is overseen by the Dispute Resolution Body of State Procurement (DRB), a specialised public procurement review body regulated by the order N1 of the State Procurement Agency Chairperson – “The rules on operation of the Dispute Resolution Board of State Procurement”. The procurement legislation differentiates between two types of complaints: during the tendering stage (before the evaluation begins) and during the examination and evaluation stage (before concluding the contract). On the subject of deadlines to file complaints, the wording of Articles 23¹ – 23⁴ of the PPL does not allow to fully ascertain compliance of the national legislation with Article XVIII:3 of the GPA. Whereas the GPA establishes a minimum of ten days to file a complaint, the PPL establishes only five calendar days from when the decision is uploaded in the procurement system; for complaints on tender conditions, the period runs until the bid submission deadline. In general, decisions (e.g. decision to disqualify the bidder) or actions (e.g. failure to answer the question related to tender requirements) of the contracting authority can be appealed to the DRB. The decision of the DRB can in turn be appealed in Court.

³² See, for instance, Article 101(3)c), Article 101(3)d), Article 101(3)f), Article 101(3)l).

³³ Available at procurement.gov.ge/ELibrary/LegalActs.aspx



Currently, Georgia's institutional public procurement review system is being reformed. The PPL was amended on 2 July 2020 to introduce a new review body, the Dispute Resolution Council (DRC), which will become fully operational on 1 January 2021. Until then, the existing review body setting will remain in place.

8. Other matters

- **Maintenance of documentation**

Article XVI (3) of GPA stipulates that each procuring entity shall, for a period of at least three years from the date it awards a contract, maintain the documentation and reports of tendering procedures and contract awards relating to covered procurement and data that ensures the appropriate traceability of the conduct of covered procurement by electronic means. Georgia's PPL seemingly does not contain a corresponding provision. However, in practice, all relevant information is being stored in the electronic public procurement system, though the number of years is to be confirmed.





KAZAKHSTAN

1. Legal framework

The present diagnostic has been produced based on Kazakhstan's primary national procurement legislation, Law “On Public Procurement” No. 434-V, dated 4 December 2015, and its latest amendments adopted on 28 December 2018. The public procurement framework also includes secondary regulations, such as the “Rules for the Implementation of Government Procurement”, as approved by the Decree of the Minister of Finance of Kazakhstan No. 648, dated 11 December 2015; “The list of goods works and services whose procurement is conducted through Single Organiser”, as approved by Decree of the Minister of Finance of Kazakhstan No. 1127 dated 29 December 2018; and other secondary decrees of the Minister of Finance of Kazakhstan related to public procurement. Kazakhstan was granted Observer status by the GPA Parties in October 2016. Honouring its 2015 WTO accession commitments, Kazakhstan submitted its application to formally join the GPA in December 2019.³⁴

2. Scope and coverage

- **Exceptions from the scope of application of the national procurement rules**

Article II (3) and Article III of the GPA contain exhaustive lists of exceptions to the general application of the procurement rules to purchases for governmental purposes. Such procurements are automatically and/or justifiably excluded from the scope of application of the Agreement. In comparison, it is worth noting that the Kazakh primary procurement legislation provides an exception from its scope of coverage to the so-called Joint Stock Company Sovereign Wealth Fund «Samruk-Kazyna», a national holding that manages shares (interests) of national development institutions, national companies, and other legal entities, including utilities. For the purpose of this compliance analysis, it would be necessary to determine whether procurements of said entity include procurements for governmental purposes. If that is the case, such procurement would fall within the expected scope of application of the GPA and thus would require further alignment at the national level. Currently, procurement by this SOE is regulated by its own set of rules, the “Procurement rules of Samruk-Kayzna”.³⁵ It is important to notice that, to the extent that «Samruk-Kazyna» operates as a commercial organization, its procurements would not fall within the scope of application of the GPA, given that in accordance with Art. II (2) (II) of the GPA, procurement conducted with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale is not considered 'covered procurement'.

The coverage of other SOEs (besides the above-described Samruk-Kazyna) represents another moot point for the present compliance assessment. In accordance to the amendments to the Law on State Property, SOEs should be covered by the harmonised

³⁴ GPA/150, dated 2 December 2019 and GPA/ACC/KAZ/1, dated 2 December 2019.

³⁵ OECD Public Governance Reviews, “Public Procurement in Kazakhstan, reforming for efficiency” (2019). Available at www.oecd-ilibrary.org/sites/e23e5059-en/index.html?itemId=/content/component/e23e5059-en.



procurement legislation approved by the Authorised Body (Ministry of Finance). The general principle for organising public procurement of SOEs is that public procurement rules affecting SOEs are to be aligned with the Kazakh PPL, even if this law does not directly apply, as the boards of the SOEs adopt their own procurement rules.³⁶ Some national holdings such as KazAgro and Baiterek are covered by this rule. At this point, it is relevant to notice the mentioned procurement rules should also comply with the requirements of the GPA, if Kazakhstan decides to eventually include SOEs into its coverage offer.

In addition, the PPL provides a further exception for procurement by the Central Bank of the Republic of Kazakhstan as well as by its departments, organisations and related legal entities with 50% or more voting shares belonging to the Central Bank. Comparing with the covered entities of other GPA Parties, it becomes evident that some countries, to a greater or lesser extent, do include procurement by Central Banks. For instance, while Norway covers its Central Bank without exceptions, Armenia has a special Note attached to procurement by its Central Bank stating that the country excludes procurement related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities. Once more, it should be mentioned that such kind of specific coverage or lack of is to be determined through bilateral negotiations with other GPA Parties.

- **Valuation of Contracts and Aggregation Rules**

Rules on valuation and aggregation are mandatory for GPA Parties. It should be recalled that these rules refer mainly to recurring contracts, such as the ones under a framework agreement scheme. The only rule related to valuation found in the PPL of Kazakhstan is the requirement not to divide the contract with an aim of applying the rules on request for price quotation (procurement below national threshold for Kazakhstan). Similar to other signatories of the Eurasian Economic Union Treaty, Kazakhstan does not contain rules on framework agreements or alike. In any case, as valuation norms are mandatory for GPA Parties, it is advisable to include them in the corresponding legislation, through possible amendments.

3. Non-discrimination

- **Non-discrimination commitment**

As a party to the EEUT, Kazakhstan observes the 'national treatment principle' in the sphere of public procurement, providing equal treatment to both national products as well as those from other EAEU member countries. This allows, in most cases, suppliers from EAEU member countries to participate in public procurement tenders on equal terms with domestic suppliers. However, other restrictions apply to foreign suppliers.

³⁶ Ibid.



- **Set-asides for special groups**

Article III:2 of the GPA rules that any Party can impose or enforce measures related to goods or services of persons with disabilities, philanthropic institutions or prison labour as long as such measures are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between Parties or a disguised restriction on international trade. Arguably, this means that certain measures, such as set-asides for prisons and organisations of disabled persons, could be in line with the GPA.

In this regard, the Kazakh legislation contains provisions on the procurement from prisons (in which case single sourcing is used) and on procurement from organisations of disabled persons in Kazakhstan (where a set-aside is established)³⁷. Without going into the details of such procurement, it should be noticed that the mere mentioning of the fact that the procurement is carried out only from these group of Kazakh suppliers, already goes against the core non-discrimination principle of the GPA. Notwithstanding, it needs to be mentioned that Article V of the GPA allows developing countries to negotiate transition measures with other GPA Parties, including set-asides. These measures are time-bound and can be applied as far as all other Parties to the GPA agree.

4. Avoidance of conflicts of interest and prevention of corrupt practices

Broadly, the Kazakh PPL includes provisions on preventing corrupt practices during the conduct of the procedures in Art. 4(7), and on prohibiting general conflict of interest as well as conflict of interest of experts involved in the procurement process in Art. 6(1) and Art. 27 (2), respectively.

5. Elements specific to procurement procedures

- **Existing procurement methods and procedures**

Public procurement in Kazakhstan can be performed through one of the following five methods:

- a) competitive tender (open tender, two-stage tender)
- b) auction
- c) requests for quotations
- d) direct award
- e) purchases at commodity exchanges

Under the PPL, public procurement in Kazakhstan shall be conducted electronically and disclosed through the government e-procurement system (web portal: www.goszakup.gov.kz). There are few exceptions, such as 'special orders', procurements involving confidential information and state secrets and purchases at commodity exchanges.

³⁷ Article 39(3)(29).



- **Selective tendering**

The Kazakh PPL does not mention selective tendering as a procurement method.

- **Limited tendering – direct solicitation – single source procurement**

The procurement legislation of Kazakhstan appears to contain in Article 39 (2) an extensive list of cases where direct procurement is allowed. Though some of these coincide with the GPA provided exceptions (e.g. procurement in cases of urgency or where there are IP rights involved), most of these are not included in the Agreement's exhaustive list. Just to have an understanding of the scale of direct procurement, it is worth mentioning that the Kazakh PPL mentions around 56 particular cases. Though amendments adopted in December 2018 did abolish some, however, a further new exception has been added and the scope of at least two others has been expanded. In terms of procurement value, a significant exception now abolished concerned procurements based on proposals by the President. As the list of exceptions of the GPA is exhaustive, these additional cases of single-source procurement arguably go beyond the rules of the Agreement.

- **Registration systems and multi-use lists**

The PPL contains a provision on tender with a so-called 'pre-qualification'. Although the PPL contains very few articles on this method of procurement,³⁸ it is to be conducted for the purchase of goods, works and services contained in a list approved by the Authorised body. Overall, the PPL describes the process as a two-stage procedure where, during the first phase, the Authorized Body with the participation of representatives of National Chamber of Businessmen of the Republic of Kazakhstan and other non-commercial organizations form a register of qualified potential suppliers. Moreover, the decision of the Minister of Finance No. 694 dated 28th of December 2015 (with the amendments dated 29th of February 2016) provides additional details on this procurement method as well as approves forms to be submitted by potential suppliers. For now, these rules apply only to the procurement of construction services of high importance. On the procedure, in order to be added to the list, the supplier should be first qualified. The Decision describes a quite rigorous qualification process where, to be included in the list, potential suppliers should comply with the requirements of Article 9 of the PPL on general qualification requirements *and* the qualification requirements envisaged in the list. Unfortunately, there is no further information on the content of the notice and the frequency of its publication, although point 38 of the Decision states that the acceptance of requests is carried out during the first month of each quarter and the bids are evaluated during the 2nd and 3rd months of the quarter. The suppliers can stay in the list 12 months from the date of inclusion. The request of the potential suppliers that miss the deadline will not be registered in the system.

Seemingly, provisions of the mentioned Decision would match the GPA provisions on multi-use Lists. At first sight, this preliminary analysis reveals some issues in relation to the

³⁸ Main reference is found in Article 13 (1).



abovementioned provision and its compliance with the GPA. For instance, Article IX:10 of the GPA provides that suppliers should have the opportunity to apply for inclusion on a multi-use list at any time and the procuring entity shall include all qualified suppliers within a reasonable short period, something that is limited as described in the above paragraph. Another point to raise is that, while in accordance to Article 3 (2) (2) of the PPL, during the second stage of the process the contracting entity can conduct a tender among the potential suppliers included in the list, nothing indicates the possibility for a supplier, which is not in the list, to submit a request for participation in a procurement based on a multi-use list. In accordance to Article IX:11 of the GPA, if a supplier who is not included in the multi-use list provides all the necessary documents, the contracting authority shall not exclude him/her on the ground that it has insufficient time to examine the request, unless in exceptional cases and/or due to the complexity of the procurement, the contracting authority is not able to complete the examination of the request.

Nonetheless, it is worth noting that some points follow the line of the Agreement. For example, it is clear from point 44 of the Decision that non-resident potential suppliers shall be able to participate in such lists by providing just the same documents as residents of Kazakhstan or documents containing analogous information about the qualification of the potential suppliers with a translation into Russian and Kazakh languages approved by notary public. Hence, to some extent, the qualified suppliers' list complies with the non-discrimination requirement of the GPA.

- **Technical specifications**

As a general rule relating to non-discrimination and in order to create equal opportunities for domestic and foreign suppliers, the GPA lays down detailed rules on the technical specifications, highlighting the fact that Parties to the Agreement shall use international standards when such exist to facilitate international trade, as established in Article X: 2 (b). The Kazakh PPL requires using national standards, if such exist, otherwise inter-state (межгосударственные) standards are to be preferred. As required by the GPA and international best practice, it is forbidden to use references to trademarks, patents, and other types of specifications, with the following notable exception: (1) if the procurement is carried out for the modernisation of the main (installed) equipment and software (licensed software); (2) in case of leasing; and (3) in case of renovation and/or technical maintenance of the acquired product. The PPL currently does not seem to require the use of the term “or equivalent” when appropriate. This requirement should be applied to each case, including to the exceptions to the general rule of not using specific trademarks, patent, and other explicit specifications as described in the PPL.

- **Time-periods**

The PPL mentioned deadline is 15 calendar days after the publication of the preliminary discussion, a time-frame shorter than the one envisaged by the GPA.³⁹ However, it should

³⁹ See, generally, Article XI of the GPA.



be mentioned that in Kazakhstan all procurement procedures are conducted via e-procurement, and thus flexibilities might apply.

6. Information

- **Publication of notices, summary notices, content and language**

Article VII:2 of the GPA lays down requirements on minimum information that should be included in the procurement notice. The Kazakh legislation provides this information in Article 21(2) on tender documents. As clarified by the Kazakh counterparts, in order to comply with the requirements of Article 23 of the Kazakh PPL (*“the Organizer of public procurement shall publish a notice about the conduct of public procurement in web-portal not less than in 3 days after the approval of the draft tender documents”*) a notice containing summary information about the procurement, including the number of procurement, organizer, name of the notice, procurement method, procurement subject (goods, services works), beginning and deadline for bid submission, quantity, value and status, is to be published. Though the notice might indeed be published in the electronic system, no requirement to do it online was found in the PPL or secondary legislation of Kazakhstan.

In order to facilitate the participation of suppliers from other GPA Parties to a given procurement procedure, the Article VII:3 of the GPA provides that for each case of intended procurement, a procuring entity shall publish a summary notice that is readily accessible, at the same time as the publication of the notice of intended procurement, in one of the WTO languages (English, French or Spanish). A provision on the language of the summary notice was unfortunately not found.

- **Contract award notice**

The GPA requires contracting entities to publish a minimum of information after the award of the contract, including a description of the goods or services procured, the value of the successful tender or the highest and lowest offers taken into account in the award of the contract, the date of award, etc. It is advised to include such information in the automatically issued contract award notice.

7. Domestic review procedures

- **Time-limit to launch a complaint**

While Article XVIII:3 of the GPA sets a minimum time-period of at least ten days from the day the basis of the challenge became known in order for suppliers to submit a complaint, in Kazakhstan suppliers have only five days to file a complaint before the Authorized Body. In case the complaint relates to the procurement documents, the file is to be submitted to the contracting authority also within five working days since the publication of the tender documentation. This type of review is carried out within the scope of the so-called 'preliminary discussion of the tender document' found in Article 22 of the PPL.



- **Independent, impartial review bodies**

GPA Parties are generally expected to establish an independent body to hear complaints related to the procurement procedure. According to Article XVIII:4 of the GPA, Parties are required to design at least one impartial administrative or judicial body that is independent from contracting authorities to receive and review a complaint by an aggrieved supplier. In the case of Kazakhstan, the authorized body is part of the executive branch, therefore, its full independence from the contracting authorities may be questioned. Even more, complaints against the information contained in tender documentation are to be submitted to the contracting authority itself.

In Kazakhstan, a three-tier system is created where: the contracting authority is responsible for the pre-award review (though it is not called as such), the Authorised Body deals with post-award review, and there is a judicial review for aggrieved suppliers unhappy with the decisions of either the contracting entity or the Authorised Body. A bias concern could also be raised when hearing complaints against other contracting authorities. The Authorized Body is a contracting authority itself and cannot be considered as “independent” when hearing complaints against its actions or omissions as a contracting authority. After the five day period for filing the complaint to the Authorized Body has elapsed, complaints against contracting authorities can be resolved within the scope of the electronic state audit in accordance with the legislation of the Republic of Kazakhstan on audit and financial control. Decisions of the Authorised Body can be appealed in Court, which is in line with Article XVIII:6 of the GPA. Moreover, (potential) suppliers that did not participate in the tender (auction) and/or preliminary discussion of tender documents, can file a complaint to the Authorised Body; nonetheless, this will not suspend the on-going procurement process.

The GPA also requires each Party to adopt procedures that provide for rapid interim measures to preserve the supplier's opportunity to participate in the procurement. The PPL makes it clear that during the review at the Authorized body the procurement process is suspended. The principle of timeliness of the review proceedings seems to be maintained at the stage of the Authorized Body, which is requested to take a decision on the complaint not later than ten working since the deadline for the submission of complaints is over (Art. 47 (5)). At the preliminary discussion stage, the contracting authority is obliged to amend the tender documents, respond to the potential suppliers or refuse to amend the documents while mentioning the reasons, within five working day since the deadline for the preliminary discussion is over.

Overall, the conditions that the GPA lays down for the establishment of an 'independent' review body, with the responsibility to hear complaints pursuant to certain requirements (e.g. the right of participants to be heard, represented and accompanied, to have access to all proceedings, etc.) are not expressly stipulated in the text of the PPL.



8. Other matters

- **IT, maintenance of documentation**

In Kazakhstan, though the whole procurement process is conducted electronically, the PPL does not contain any direction regarding the general availability and interoperability of the e-procurement system with other generally available systems. It also does not contain provisions on data maintenance to allow for the traceability of the information contained in the system, nor does it require keeping the data at least three years from the date of the award as required by the GPA in Article XVI: 3.

- **Recollection of Statistics**

Statistics are collected as part of the Authorised Body's power to monitor procurement. The data collected from the e-procurement system is analysed, systematised and assessed. Based on this, an annual report is submitted to the Office of the President and the Government of the Republic of Kazakhstan. No further requirements were found on the content of this report.





KYRGYZ REPUBLIC

1. Legal framework

The Kyrgyz Republic has made significant efforts to modernise its legal procurement framework in order to build a public procurement system in line with modern best practice. A key achievement of the enacted reform was the adoption of the current “Law on State Procurement No. 72”, from 2015, based on the internationally recognised standards of the 2011 UNCITRAL Model Law on Public Procurement.⁴⁰ Subsequent amendments to the PPL⁴¹ introduced a series of changes that aim at having positive effects in terms of increasing the transparency and efficiency of public procurement. Notwithstanding, it is to be noted that some of these provisions and/or amendments may be considered as non-compliant with the mandatory requirements of the GPA. The Kyrgyz Republic applied for accession to the GPA, honouring its WTO membership commitment to become a Party to the Agreement⁴². An Observer since October 1999, it currently continues active GPA accession negotiations.

2. Scope and coverage

- **Exceptions from the scope of application of the national procurement rules.**

In general terms, the PPL covers central, sub-central and other entities such as SOEs. Moreover, its latest amendments enhanced the scope of the PPL to include joint-stock companies, where 50% or more of its stock is held by the state. According to Article 32-1, para. 2, such entities must carry out public procurement in accordance with the requirements of the PPL and special terms of public procurement. In this manner, joint-stock companies fall under the regulation of the mentioned procurement legislation.

On the other hand, procurement by the National Bank of the Kyrgyz Republic is exempted and is to be conducted following its internal procurement rules. Under the current GPA accession negotiations, this exception could be subject of discussions with some GPA Parties.

3. Non-discrimination

- **Provisions according to domestic suppliers a treatment more favourable than that accorded to foreign ones**

Article 4(1) states that National Treatment is to be provided on the conditions set by the law and by in-force international treaties. Nevertheless, it should be highlighted that although Article 4(1) states that domestic and foreign suppliers (contractors) shall be provided with equal opportunities to participate in procurement procedures, exceptions for domestic preferences of up to 20% are provided in paragraphs 2 and 3 of this Article for national

⁴⁰ Law on State Procurement No. 72, dated, 3 April 2015.

⁴¹ Amendments by the Laws of the Kyrgyz Republic dated 18 November 2016, No. 182; 10 December 2016, No. 195; 14 February 2017, No. 25; 30 May 2017, No. 93; 29 March 2018, No. 32; 11 January 2019, No. 4; 26 June 2019 and 20 April 2020.

⁴² WT/ACC/KGZ/26, dated 31 July 1998, para. 120.



suppliers and for suppliers from the Eurasian Economic Union. Furthermore, Article 21(1) stipulates an exception from the national treatment principle procedures for specific goods, works and services in relation to other member states of the Eurasian Economic Union. This rule restricts access as well to public procurement carried out in certain sectors of the economy, in exceptional cases, and for a period not exceeding two years. Under the GPA, although exceptions to the National Treatment principle will depend on the terms of accession negotiated by the Kyrgyz Republic, it should be nevertheless underlined that the current provisions in Article 4, paragraph 2, 3 and 6 may be considered not in line with the GPA's own provisions regarding non-discrimination, at least for procurement above GPA thresholds.

- **Provisions related to price preferences and offsets favouring domestic suppliers.**

Article 4(2) and (3) stipulates that when procuring goods produced in the Kyrgyz Republic by domestic suppliers, the procuring entity is obliged to provide incentives for the proposed price of up to 20% when evaluating tender bids, provided that the necessary certificates for the goods supplied confirm the safety and quality of products. In case the subject of procurement are works, which can be carried out by both domestic contractors in the Kyrgyz Republic and by foreign contractors, the procuring entity shall grant preferences of up to 20% to the domestic contractors on a condition that the domestic contractor shall use at least 70% of local workforce, and at least 30% of local raw and other materials. In addition, according to Article 25(3), it is mandatory for the “Notice of Prequalification” to contain “a statement that domestic suppliers (contractors) will enjoy preferences in accordance with part 1 of Article 4 of this Law”.

4. Avoidance of conflicts of interest and prevention of corrupt practices

Such issues are referenced in Article 6(6) of the PPL.

5. Elements specific to procurement procedures

- **Limited tendering and selective tendering**

The GPA provides an exhaustive list of procurement allowed under limited tendering. In order for the national legislation to be compliant with this provision, the exceptions at the national level must not exceed those provided by the GPA. In the case of the Kyrgyz Republic, Article 21, which regulates cases where the procuring entity can independently procure by direct procurement, contains a detailed list of procurement based on direct contracting. Though items in this list mostly parallel the ones allowed by the GPA, some might arguably exceed the permitted scope if applied to covered procurement. The decision to allow such further exceptions is up to the GPA Parties, following accession negotiations.

Amendments from April 2020 have recently affected direct contracting provisions. In a positive manner, an amendment on Article 21, par. 4 (1) and (2) decreased the allowed additional procurement of goods to a maximum 5% of the price of a contract awarded on the basis of a tender, and of additional construction works or services to maximum 5% of the



price of a contract concluded on the bases of a tender (provided that involvement of the same contractor ensures economic efficiency and consistence of the results in terms of quality of the previously completed works or services) correspondingly. On the other hand, Article 21 (9) and Article 21 (20) - added as a result of the latest amendment - foresee direct procurement of goods from local producers with high added value on the territory of Kyrgyz Republic upon a corresponding certificate of origin from Kyrgyz Republic in line with national quality standards.

Also, a June 2019 amendment to the PPL, on article 28(1), introduced a new procurement procedure, the “two-package method.” This particular method is defined as a one stage method conducted in two steps, which - to a certain extent - is similar to “selective tendering” under the GPA.

- **Registration systems**

There is an official government procurement web-portal - www.zakupki.gov.kg - where interested suppliers are required to register and provide certain information in order to participate in future tenders.

- **Time-period**

For paper-based procurement, the PPL does not meet the minimum bid submission deadline set by the GPA. In particular, Article 24, para. 2 foresees that for biddings procedures based on the single- and two-stage methods the time-period should be at least three weeks and for biddings procedures based on the simplified acquisition and reverse auction methods at least one week after publication of a procurement notice. Both time-periods fall short in comparison to the GPA mandatory time-period.⁴³ Still, GPA flexibilities may apply in case of procurement conducted through electronic means.

6. Information

- **Publication of Notices, summary notices and language**

As set forth by Article 23 (1) and 23 (3) of the PPL, tender documents are published together with the procurement notice, free of charge. On summary notices, the PPL provides, as well, the requirement to publish such. Additionally, Article 12 stipulates that procuring entities shall publish annual public procurement plan describing the planned procurement and the time when such procurement will be held. On languages, unlike Article VII (2) GPA, there is no express provision in the PPL on publishing the tender notices in languages of international circulation and/or official WTO languages. The same applies for summary notices.⁴⁴

⁴³ See, generally, Article XI of the GPA.

⁴⁴ See, parallel provision in the GPA, Article VII(3).



- **Contract award notices**

Previously, the procuring entity had up to three days to inform participating suppliers of the entity's contract award decisions. The new amendment, in its Article 32(1) has reduced this time-period to only one day.

7. Domestic review procedures

- **Independent, impartial review bodies**

The public procurement framework of the Kyrgyz Republic does not stipulate a domestic review body as contemplated in the text of the GPA. On the minimum time-frame to file complaints, Article 48 (1) mentions that in case of one-stage method or direct procurement, the deadline is only two working days since the date of publication. As such, this deadline is not in line with the GPA provisions, which foresees at least ten days for preparing and submitting complaints.⁴⁵ Also, as per Article 48(2), the provision of preferences granted to domestic suppliers may not be the subject of an appeal under Article 4 of the Law.

8. Other matters

- **Recollection of statistics**

According to Article 9 (1)(7), the Public Procurement Authority is responsible for compiling statistical and analytical information on public procurement.

⁴⁵ See, Article XVIII(3) of the GPA.





NORTH MACEDONIA

1. Legal framework

North Macedonia has recently reformed its public procurement framework. In 2019, the North Macedonia National Parliament adopted a new PPL which entered into force on 1 April 2019. As an EU candidate country, the new legislation embodies the EU public procurement directives.⁴⁶ In particular, the harmonisation of the PPL with the EU Directives on Public Procurement is considered one of the most powerful instruments for the improvement and development of the Macedonian procurement market.

Pursuant to a commitment it undertook in the course of its WTO accession in 2002,⁴⁷ the Republic of North Macedonia applied for GPA accession in March 2017. North Macedonia gained Observer status in June 2013.

2. Scope and coverage

Overall, the list of covered entities - including central, sub-central and others, such as SOEs - is quite comprehensive. On excluded contracts, the PPL seemingly refers to a list of exceptions, from which several are already foreseen in the text of the GPA⁴⁸. For example, these include: procurement contracts classified as 'state secrets' or contracts that require special security measures to be enforced; contracts that refer to the acquisition or rental of land, buildings or other immovable property or the rights thereon; public contracts for which funds have been provided by international organisations; and employment contracts.

Notwithstanding, the PPL does stipulate some further exceptions that might go beyond the scope allowed for by the GPA. In this regard, it excludes the procurement for the purchase, development, production or co-production of programme material by radio or TV broadcasters as well as leasing space to media and electronic portals, arbitration and conciliation services, and representation by lawyers. The recognition of these exceptions is subject to the result of the accession negotiations with the existing GPA Parties.

3. Non-discrimination

The PPL stipulates the impartiality of the contracting authority. In particular, the PPL sets forth that equal treatment and non-discrimination of bidders is one of the basic principles of public procurement. Overall, public procurement is open to international competition.

4. Avoidance of conflicts of interest and prevention of corrupt practices

The procurement legislation contains several provisions related to preventing conflicts of interest, e.g., Articles 62 and 63. Among others, the PPL provides that persons who have

⁴⁶ See, above note 16.

⁴⁷ WT/ACC/807/27, dated 26 September 2002, para. 177.

⁴⁸ See, Article II(3) and III of the GPA.



participated in the preparation of the bid documentation cannot participate as bidders; persons who have taken part or assist in the evaluation of the bids, as well as the head person at the contracting authority, cannot act as candidates, bidders, subcontractors or members in a group of bidders in the respective contract award procedure; and when executing the public contract, the contractor shall not appoint persons involved in the evaluation of bids submitted in the respective contract award procedure during the period of the validity of the contract. If any of such circumstances occurs, the public contract shall be null and void. Furthermore, the PPL refers as well to the “*Law on Prevention of Conflicts of Interest*”, which shall accordingly apply to contract award procedures.

5. Elements specific to procurement procedures

- **Existing procurement methods and procedures**

The following types of procedure are available under the PPL, largely reflecting the EU directives:

- a) Open procedure
- b) Restricted procedure
- c) Competitive dialogue
- d) Negotiated procedure with prior publication of a contract notice
- e) Negotiated procedure without prior publication of a contract notice
- f) Simplified competitive procedure
- g) Design contest

- **Registration systems**

Seemingly, the PPL does not establish a registration system for suppliers. According to the GPA, registration systems are optional and not mandatory, thus, this would not be a cause of concern.

- **Multi-use lists**

According to Article 198(d), the PPL envisages a qualification system of tenderers only as regards of awarding utilities contracts. On this subject, the PPL does prescribe that the form and content of the template for the notice for establishment of a qualification system shall be prescribed by the Minister of Finance. However, currently such a template is not available.

- **Technical specifications**

The PPL provides, in Article 36, that the contracting authority shall not define the technical specifications of the subject matter of the procurement - such as indicating a specific manufacturer, production - a particular process, or trademarks, patents, types or a specific origin which may have the effect of favouring or disqualifying certain economic operators or certain products.



- **Time-periods**

The minimum time-period accorded by the law to submit tenders under an open procedure is 52 days. As the GPA requires 40 days,⁴⁹ the North Macedonian legislations is, therefore, compliant with this mandatory requirement.

6. Information

- **Publication of Notices, summary notices, and language**

Though tender notices are accessible through electronic means, however, a fee shall be paid by the procuring entity and/or economic operator for using the Electronic System for Public Procurement (ESPP) where the tender notices are being published. On summary notices, the PPL does not include a provision on such obligation, nonetheless, publications in English on the EU TED – tenders electronics daily – webpage would be available for above threshold procurement.

- **Content of the tender notices**

The content of the tender notice is foreseen in the secondary legislation drafted by the Ministry of Finance. In particular, the Rulebook on the form and the contents of contract notices and contract award notices does not specify that such notices shall contain specific information on the procuring entity. Only the subject-matter of the public contract is mentioned as the element of the contract notice.

- **Contract award notice**

Article 167(1) of the PPL stipulates the requirement for contracting authorities to publish its contract award decisions. However, according to paragraph 4 of the same article, the form and content of such notification shall be prescribed by the Minister of Finance. Currently this information is not available.

7. Domestic review procedures

- **Time-limit to launch a complaint**

According to Article 216, appeals are to be filed within eight days from the publication of the contract notice or the opening of tenders; or three days if a simplified competitive procedure was conducted. This provision, seemingly, would not be in line with the GPA's minimum time-period to submit challenges.⁵⁰

⁴⁹ See, generally, Article XI of the GPA.

⁵⁰ See, Article XVIII(3).



- **Independent, impartial review bodies**

The State Appeals Commission for Public Procurement is the review body responsible for reviewing procurement complaints and making decisions that are administratively final. It is an independent state body appointed by the National Parliament. Concerning procedures before this body, a significant change from the previous version of the law is the possibility to submit complaints by electronic means, via the Electronic System for Public Procurements, as well as, the possibility of issuing interim measures. The decisions of the State Appeals Commission are subject to judicial scrutiny before the Administrative Court.

8. Other matters

- **Maintenance of documentation and recollection of statistics**

The PPL requires the contracting authority, as per Article 14 (1), to keep and update records of the public contracts awarded, and make them available on its website. Moreover, Article 175 establishes that when the contracting authority applies a contract award procedure by electronic means, or uses electronic auctions, it shall be obliged to ensure complete traceability of the actions it carries out during the award procedure.





TAJIKISTAN

1. Legal framework

Within the framework of the second part of the “State Finance Management Reform Project” the Republic of Tajikistan drafted a new public procurement legislation, taking into consideration Tajikistan's commitments to join the GPA. Considering the upcoming adoption of the new law, the current diagnostic assessment is based on the latest draft of the PPL. Nonetheless, until its formal adoption, public procurement in Tajikistan is regulated by the Law of the Republic of Tajikistan on Public Procurement of Goods, Works and Services adopted in March 2006, based on the 1994 UNCITRAL Model Law. The procurement framework, which includes also a set of enacted by-laws, was subsequently amended in later years. An Observer since June 2014, Tajikistan applied for accession to the GPA in February 2015, to honour its commitment to initiate GPA accession negotiations made in the context of its accession to the WTO in March 2013.⁵¹

2. Scope and coverage

- **Exceptions from the scope of application of the national procurement rules**

From the preliminary analysis, it is observed that the draft law includes a limited number of excluded contracts, namely on the following matters:

- Procurement for diplomatic missions and consulates abroad:* Article 11 of the draft PPL states that procurement for diplomatic missions and consulates abroad are made in accordance with a secondary legislation adopted by the Ministry of Foreign Affairs of the Republic of Tajikistan in consultation with the State authorised body.
- Public investment projects:* Article 8 of the draft PPL states that the Government of Tajikistan sets rules for public procurement in public investment projects, subject to international treaties.
- Procurement under the Law of the Republic of Tajikistan “On Public-Private Partnership”:* Article 2 of the draft PPL states that this Law applies to all public procurement, with the exception of procurement regulated by the Law of the Republic of Tajikistan “On Public-Private Partnership”.
- Procurement under international treaties of the Republic of Tajikistan:* Article 2(2) of the draft PPL states that when purchasing goods, works and services in the framework of international treaties of the Republic of Tajikistan, the rules of international treaties apply, unless international treaties provide for a different procedure.

⁵¹ WT/ACC/TJK/30, dated 6 November 2012, para. 244.



Overall, these exceptions do not seem to constitute an issue in relation to the expected scope of coverage of the GPA, and parallel as well exceptions provided by the text of the Agreement.⁵²

3. Non-discrimination

- **Provisions according to domestic suppliers a treatment more favourable than that accorded to foreign ones**

Article 25(2) of the draft PPL on “*Admission criteria*” states that, “*except under this Law or other regulations, the procuring entity has no right to impose any other requirements aimed at limiting the participation of suppliers in the procurement procedures that discriminate against suppliers or their categories.*” However, at the same time, Articles 25 (2), (3) and 22 of the draft PPL foresee the possibility of imposing some restrictions (domestic preferences). In particular, Article 25(3) provides that “*Suppliers (contractors) should be allowed to participate in procurement procedures regardless of country of origin, with the exception of procurement procedures, which impose restrictions on part of the country of origin for reasons specified in the normative legal acts.*” Article 25(4) sets out that in case requirements or restrictions apply, these should be informed in the invitation to participate as well as in the tender documentation.

Seemingly, the mentioned provisions do include, the possibility of discriminating between suppliers. However, as is, it is not clear the applicability of these provisions, given that the restrictions to which the articles refer to could still not correspond to procurement covered by the GPA. The relevance of these concerns depends on the accession negotiations with GPA Parties.

- **Provisions related to price preferences, set asides, and offsets favouring domestic suppliers**

Although the draft PPL does not include express provisions on offsets, price preferences or set-asides, however, possible measures under Article 22 could raise some concerns. In particular, this article, while seeking to contribute to the sustainable and social development of the Republic of Tajikistan, it allows certain measures aimed at expanding procurement opportunities for small and medium-sized businesses, including for business-engaged women, institutions and businesses, organizations with disabilities, assistance social responsibility, health and social well-being.

In this sense, though the overall objective is laudable, Article 22 can be construed as a provision that allows procuring entities to impose certain offsets for sustainable and social development. For this particular case, though offsets are strictly forbidden, under the GPA, transitional measures for developing countries might be accepted, subject to negotiations with the GPA Parties.

⁵² See, Articles II(3) and III of the GPA.



4. Avoidance of conflicts of interest and prevention of corrupt practices

The draft PPL does include an entire chapter entitled “*Standards of ethics and behaviour when conducting public procurement*”.⁵³ In particular, it includes provisions on professional and ethical responsibilities of public servants and employees of procuring entities (Art. 78); conflicts of interests (Art. 79); declaration and disclosure of conflicts of interest (Art. 80); Professional and ethical obligations of suppliers (Art. 82); prevention of conflicts of interest for suppliers (Art. 83); and suspension from participation in public procurement (Art. 84).

5. Elements specific to procurement procedures

- **Existing procurement methods and procedures**

Article 21 of the draft PPL states that although the main method of public procurement is open tender, the use of any other method is allowed in cases stipulated by the Law. This seemingly broad provision is complemented with the specific cases under which limited tendering is allowed.

- **Registration systems**

Article 31(7) and Article 31(9) of the draft PPL do contain references to registered users, for example, for technological software tools. However, on the subject of the maintenance of a registration system for procurement purposes, the draft Law does not provide special provisions on this matter. Notwithstanding, it is relevant to notice that under the GPA, a registration system is optional and not mandatory.

- **Time-periods**

The draft PPL, specifically Article 32(1), does not provide a specific time-period but it references the secondary legislation in which such deadlines are to be provided. Notwithstanding, Article 32(2) of the draft PPL does state that in the case of procurement in accordance with paragraph 2 of Article 2 of the PPL (Procurement of goods, works and services under international treaties of the Republic of Tajikistan), deadlines should be set in accordance with the requirements of relevant international agreements. This provision should suffice to demonstrate future compliance with the minimum time-period requirement set by the GPA.

6. Information

- **Publication of Notices, summary notices, and language**

The draft PPL does not stipulate the mandatory requirement to publish a summary notice for each case of intended procurement. Notwithstanding, in accordance to Article 39, it requires the publication of procurement notices on a single electronic portal. In addition, the draft PPL

⁵³ See, Chapter 9 of the draft PPL.



states that procurement or pre-qualification invitations must also be published on the single portal as well as in international sources, if international publication is required in accordance with existing international agreements, of which the Republic of Tajikistan is a Party. Also, while public procurement is conducted in the state language, if necessary, the procedure may also be carried out in Russian or English. If documents are available in more than one language, they should indicate which language version is the main one, in case of potential divergences between the different languages.

- **Award criteria**

There are no provisions in the draft Law ensuring that a procuring entity will not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.

7. Domestic review procedures

- **Independent, impartial review bodies**

Although the draft PPL complies with the requirements of establishing both administrative and judicial review procedures, it nevertheless does not provide provisions on resolving complaints through consultations.





UZBEKISTAN

1. Legal framework

The present assessment benchmarks the draft public procurement law of the Republic of Uzbekistan against the GPA mandatory requirements. The draft PPL, a more comprehensive text than its previous iteration, includes further provisions on anti-corruption measures, expands on electronic forms of procurement, and includes details on an independent appeal mechanism. Up until the adoption of the draft PPL, the current government procurement framework comprises the Law of the Republic of Uzbekistan on “Public Procurement”, adopted on 9 April 2018, and other secondary legislation such as the Resolution of the President of the Republic of Uzbekistan No. PP-3953 dated 27.09.2018 on “the measures for implementation of the Law of the Republic of Uzbekistan on public procurement” and the Resolution of the President of the Republic of Uzbekistan No. PP-3487 dated 22.01.2018 on “measures for supporting the activities of the business and strategic entities”.

Uzbekistan is currently an Observer to the WTO. Earlier this year, it relaunched its respective Accession Working Party after a prolonged period of inactivity. Though Uzbekistan is not an Observer to the GPA, notwithstanding, it was chosen as this legal diagnostic could serve as a basis of discussion to assess the consistency of the draft primary law with the GPA mandatory provisions, and as such, facilitate any potential accession to the Agreement from the very outset.

2. Scope and coverage

- **Exceptions from the scope of application of the national procurement rules.**

The draft primary legislation of Uzbekistan contains a very limited list of exceptions from its coverage. For example, some transactions such as defence procurement and procurement financed by international organisations are understandably exempted and, as these grounds are already provided in the text of the GPA, they do not raise any issues.⁵⁴ On the other hand, the PPL does provide additional exceptions related to ensuring the security of persons under state control, procurement related to the state secret and procurement for organising and conducting elections and referendums. In such cases, these grounds seem to be absent from the GPA list of allowed exceptions, and further consideration should be paid. It is worth noting that the draft PPL includes under its scope procurement normally excluded by other national procurement legislations or even by the GPA. For instance, the acquisition or rental of land, exempted under Article II:3 of the GPA, is listed to be procured through single sourcing. This means that such type of procurement could receive more visibility and overseeing, since single source contracts are required to be published as well as to be included in online contract registers.

⁵⁴ See, Articles II(3) and III of the GPA.



On covered entities, overall, the coverage of the draft PPL Law is very comprehensive, including not only the central and sub-central government entities but also public entities with more than 50% of state participation. It is to be seen whether such entities would be included in Appendix I offer of Uzbekistan when negotiating its terms of accession, but coverage of such entities by the draft PPL should be praised at this stage.

3. Non-discrimination

- **Provisions favouring domestic suppliers**

Non-discrimination between local and foreign suppliers and equal treatment provided to goods and services originating from other GPA Parties are considered the cornerstone of the GPA. On this matter, although the Uzbek draft PPL follows the principle of non-discrimination, it does contain a clause, Article 16, which allows the use of preferences for local suppliers during evaluation. At the time of writing, there are no further details related to the type of preference or the percentage, in case a price preference is applied.

Under the existing flexibilities of Article V of the GPA, this provision could be 'negotiated' as a transitional measure, if amended to not exceed beyond an agreed time-limit and/or be applied to a specific sector. Therefore, in order to comply with the GPA rules, Uzbek authorities are recommended to either eliminate/amend this provision or apply it to procurement not covered by the Agreement.

4. Avoidance of conflicts of interest and prevention of corrupt practices

Overall, the draft PPL contains several articles that refer to both the prevention of corrupt practices and the avoidance of conflict of interests.⁵⁵

5. Elements specific to procurement procedures

- **Existing procurement methods and procedures**

The draft PPL provides a non-exhaustive list of procurement methods including, among others, open tender, single sourcing, electronic reverse auctions and electronic catalogues. Negotiations, on the other hand, are generally prohibited by Article 38 and selective tendering is not explicitly included.

- **Limited tendering – direct solicitation – single source procurement**

The draft PPL considers the application of limited tendering only as an exceptional method of conducting procurement. In this sense, though the Law contains a list of grounds for procurement from a single supplier, it is not exhaustive. Moreover, in accordance with Art. 71, the Authorised Body, together with the Cabinet of Ministers might lay down other grounds for single source procurement. This provision was operationalised in an order of the President of

⁵⁵ See, for example Art. 4, Art. 14, Art. 20, Art. 44.



Uzbekistan, "On the measures of realisation of the Law "On Public Procurement" № ПП-3953, dated 28.09.2019, laying down 33 cases of single sourcing in opposition to the very narrow list of single sourcing established by the GPA.

The draft legislation also contains in Article 69 a list of goods and services to be procured through direct contracting. For this purpose, the law mentions grounds such as procurement during urgent situations, procurement based on the orders of the President and decisions of the Government of Uzbekistan, among others. This list, unlike the list found under Art. 71, is exhaustive. Nevertheless, it is unclear the actual difference between procurement from a single supplier and procurement from a single source as the draft PPL does not give any other details on how the procedures should be conducted. It is also relevant to note that the fact that cases for single sourcing and procurement from single supplier are described very generally and might be subject to different interpretations and ways of application.

- **Registration systems**

Though the PPL contains provisions on a registry of single source suppliers, no provision was identified regarding the criteria to be included in the list or whether both domestic and foreign suppliers can be included on equal grounds. It would be useful to clarify in the draft PPL or in the secondary legislation what this registration system entails and how suppliers are to be included.

- **Technical specifications**

The draft PPL seems to be largely compliant with the GPA requirements on technical specifications. For instance, it explicitly forbids the use of specific trademarks on tender documents. In case it is necessary to use specific trademarks, equivalent products should be accepted. However, a slight difference is that the PPL does not require to base the technical specifications on international and/or national standards. In addition, procuring entities are not explicitly prohibited, or in other words, there is no provision that forbids these entities from seeking or accepting advice when drafting technical specifications in a manner that would have the effect of precluding competition from a person that may have a commercial interest in the procurement.

- **Time-periods**

The timelines provided for in the draft PPL differ depending on the complexity of the procurement and the employed method. For example, in the case of e-catalogues for low-value procurement of standardised goods, services and works, the PPL requires only 48h to be given to the suppliers to submit their corresponding bids. Though such restricted time limit seems to contrast the GPA provisions on the time-frame for bid submission,⁵⁶ nevertheless, since it applies to low-value procurement, then, it might fall outside the scope of covered procurement under the Agreement.

⁵⁶ See, generally, Article XI of the GPA.



For high-value tender procedure, the deadline for submitting bids can be 15-45 working days. For all other procedures the deadline for bid submission is less than ten days. Concerning the draft PPL, it is fair to note that e-catalogues and e-auctions are to be used via e-tools, however, e-tendering as such is not mandatory. Even though the GPA allows the reduction of time limits when electronic procurement is used and in cases when other specific grounds arise, e.g. such as urgency, the mentioned short periods might create some concerns during accession negotiations.

6. Information

- **Publication of Notices, summary notices, and language**

The Uzbek draft PPL largely complies with the requirements of the GPA related to the content of the notice of intended procurement. In addition, even though the PPL does not require to publish a summary notice, in accordance to Art. 33, information on procurement notices should be nevertheless published in both an official language and in other languages, if the procuring entity wishes to do so. This means, that such information might be also published in a WTO language. In any case, a clear provision to this end might be advisable to keep the draft PPL in line with the GPA mandatory requirements on this matter.⁵⁷

7. Domestic review procedures

- **Time-limit to launch a complaint**

Seemingly, the Uzbek draft PPL does not ensure the minimum 10-day period to submit challenges. The only reference in relation to the deadline to bring complaints is found in Article 60, which states that when the method of selection of “best tender” is chosen and the protocol on contract award is published, suppliers are given 2 working days to appeal its content to the evaluation commission. In case of tenders as stipulated in Art. 67, after the protocol is published suppliers can ask the procuring entity to provide clarifications on the results of the tender. The procuring entity has to provide such clarifications within 3 working days.

- **Independent, impartial review bodies**

A GPA Party has a choice between introducing an independent review body already for the first instance review or attaching it to the second instance. The latter option is usually understood as legitimizing the cases where a country decides to entrust the first instance review to the procuring entities. In this sense, it seeks to decrease the cases before the second instance review body or the Courts, while allowing the contracting authorities to correct their own mistakes.

In Uzbekistan a special standing Committee was established specifically to hear complaints against acts (or omissions) of the procuring entities. There is no provision encouraging the

⁵⁷ See, generally, Article VII of the GPA.



aggrieved suppliers to seek consultation with the procuring entity though as mentioned earlier, in case the “best tender” procurement method is employed, suppliers may ask the procuring entities for clarification on the contract award notice. The suppliers also have a choice to either refer to the Court or to the standing Committee. In addition, the decisions of the Committee are also judicially reviewable. Hence, if suppliers refer directly to Court, no issue can be raised in relation to the independence of the review body as the Courts are generally admitted to be independent from procuring entities and from the government as a whole. The independence of the standing Committee though is under doubt. The members of the Committee are appointed by the Cabinet of Ministers. No other provision related to the appointment, background, remuneration and dismissal of the members could be found either in the PPL or in the secondary legislation (“*Order of the Director of National Agency for Project Management adjunct to the President of Uzbekistan*”). Notwithstanding, from the institutional point of view, Uzbekistan review system arguably complies with the GPA as the suppliers have the right to file an appeal before the Court if they do not agree with the findings of the Committee.

Corrective actions, in accordance with the draft PPL, include (1) prohibiting illegal actions, decisions and illegal procedures conducted by the procuring entity; (2) setting aside illegal decisions of the procuring entity partially or wholly, including when they violate the conditions laid down in procurement documents; (3) deciding to end the procurement procedure; (4) “blacklisting” the supplier; and (5) taking other actions in accordance with legislation. On the matter of damages, no related provision was found although the GPA sets out that these should be available. Also, the Standing Committee can rule as well on disputes related to post-contractual stage in order to decide on the compliance of the contract with the requirements of the procurement legislation. In addition, on interim measures, such as the suspension of the procedure, might not be easily granted and there are no further details on the possible grounds for rejection, e.g. overriding public interest.

8. Other matters

- **Use of information technology systems for procurement**

The two electronic procurement procedures used in Uzbekistan are e-catalogues and e-auctions. Contract notice, tender documents and contract award notices are published online together with the contract register, register of single suppliers and the so-called “blacklist”. Although in Uzbekistan the tendering process is allowed to be conducted electronically, it is unclear whether in practice a wide range of procuring entities make use of electronic tools such as e-tendering. In addition, the draft PPL does not contain any conditions regarding the general availability and interoperability of the electronic procurement system with other generally available systems. Also, there is no mention on authentication and encryption requirements, nor are provided in tender documentation.

- **Recollection of statistics and maintenance of documentation**

Though an important element of the GPA, the collection of statistical data and reporting is not mentioned in the draft PPL. In addition, the PPL does not mandatorily oblige contracting



entities to provide for traceability of all the procurement transactions for at least 3 years. Overall, though the implementation of e-procurement is not mandatory, it is recommended since it provides significant benefits, including being able to comprehensively trace procurement process while contributing as well to the collection of reliable data for reporting and monitoring.

CONCLUSION

Although GPA accession initiates with standard steps, namely, the application to join and the replies to the checklist of issues on government procurement legislation, afterwards, the process is not straightforward. Negotiation strategies differ from one country to the other given not only the different levels of economic development but also the market access expectations from both the acceding country and the other GPA Parties, the current level of government engagement and, fundamentally, the degree to which the negotiating country's public procurement framework complies with the GPA's minimum mandatory requirements. In this regard, the present GPA compliance diagnostic succeeded in providing a preliminary assessment of the main procurement legislation of nine different Observers to the Agreement, the majority either in the process of accession or under the commitment to do so in the near future. Though this exercise detailed some general compliance aspects, and as such these are most welcome, it focused mostly on encountered regulatory gaps between the GPA and the national legislation.

A common observation across the assessed jurisdictions is the implementation, to a large extent, of digital tools to conduct procurement. Recognizing that the digital transformation of procurement regimes can enhance administrative efficiency in terms of both time and costs as well as transparency in- and traceability of the procurement process, the GPA facilitates and, where appropriate, encourages its introduction and use. In this regard, the reforms enacted in Belarus and Georgia, where paper-based proceedings have been replaced by end-to-end electronic procurement, are salutary. All in all, the digitalization of public procurement should not be viewed as simply enacting a platform for communications and/or submitting tenders electronically, but as an opportunity to reform the entire procurement system and keep up with international modern practices through the integration of new digital tools for procurement and oversight, documentary record-keeping, information and knowledge-sharing.

Another point of convergence refers to the establishment of domestic review bodies. To a large extent, assessed economies comply with the obligation of administrative and judicial review of decisions enacted by the contracting authority arising in the context of covered procurement. Notwithstanding, as detailed in the above country-specific sections, the independence and impartiality of certain administrative review bodies requires further adjustments in order to avoid unwarranted bias.

Furthermore, discerned discrepancies are mainly encountered on two sections: on 'scope and coverage' and on measures which could affect the 'non-discrimination general principle'



of the GPA. On the former, the Agreement enables Parties to exclude from its application elements of their procurements that are deemed sensitive for policy or political reasons. Notwithstanding, in several jurisdictions, the scope of the included exceptions extends beyond those found in the GPA. While it is noted that individual restrictions can be made in regard to specific parts of the procurement market in which Parties would like to derogate from the mandatory rules set in the Agreement, this is still a matter of negotiation with the other GPA Parties. On non-discrimination, issues might arise due to the domestic implementation of specific measures that discriminate on the basis of nationality. For instance, existing price preference programmes, off-sets or set-asides benefitting solely the local industry could infringe the GPA's main non-discrimination provision. Still, though the implementation of such is prohibited for procurement covered by the Agreement, the possibility of enacting certain transitional measures could nevertheless provide a window of justification, if these are, among others, enacted following the established limited time-period as well as accepted by the GPA Parties at the negotiation stage.

While this compliance assessment diagnostic should not to be taken as providing a binding or final opinion, it provides, nonetheless, groundwork for the alignment of the Observer's government procurement regime with the stipulated mandatory requirements of the GPA. As such, the assessment has helped identify possible regulatory discrepancies with the text of the Agreement, facilitating further consultations relating to accession negotiations.



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