Commentary on the Law on Public Procurement

Foreword

The subject of the present commentary is the Law on Public Procurement, which became effective from 1 January 2006.

This subject matter and arrangement in the Law on Public Procurement is assessed in terms of the relevant European legislation, not only with respect to the Framework for the procurement, but also with regard to the special treatment of public procurement in the field of water management.

The purpose of the assessment of the Law on Public Procurement is to suggest some adjustments and changes in the Law.

Abbreviations and Acronyms

NGO – non-governmental organization

TFEU – Treaty on the Functioning of the European Union

Commentary

Due to **Article 1 Sub-Article 1** - This Law determines the general legal, organisational and economic principles for conducting public procurement.

Due to **Article 2**, the purpose of this Law is to:
a) ensure rational spending of monetary funds designated for public procurement;
b) promote effective competition in the area of production of goods, performance of services and construction works necessary for the State;
c) ensure a fair and non-discriminatory approach to participants of a procurement when performing public procurement;
d) ensure publicity of public procurement;
e) create a Unified Electronic System of Public Procurement and build public confidence in the System.

In terms of secondary law of the European Union, it is

1. DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC
2. DIRECTIVE 2014/25/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.
2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.
3. The application of this Directive is subject to Article 346 TFEU.
4. This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.
5. This Directive does not affect the way in which the Member States organise their social security systems.
6. Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or groupings of contracting authorities and do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive.

The aim of this directive is to establish the national procurement procedures to ensure that the principles of public procurement are given practical effect and public procurement is opened up to competition and to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals.

DIRECTIVE 2014/25/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

1. This Directive establishes rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15.
2. Procurement within the meaning of this Directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 8 to 14.
3. The application of this Directive is subject to Article 346 of TFEU.
4. This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.
5. This Directive does not affect the way in which the Member States organise their social security systems.
6. The scope of this Directive shall not include non-economic services of general interest.

The aim of this directive is to maintain rules on procurement by entities operating in the water, energy, transport and postal services sectors, since national authorities continue to be able to influence the behaviour of those entities, including participation in their capital and representation in the entities' administrative, managerial or supervisory bodies.

Object and purpose of the Law on Public Procurement corresponds to the object and purpose of the Act, as follows from European legislation. In this context, however, it is necessary to draw attention to the treatment of exceptions contained in the Law on Public Procurement in **Art. 1 Sub-Article 3.1** Generally speaking, the exceptions to the application of public procurement rules are not exceptional and it is not unusual or non-standard treatment. Also the above mentioned Directive on public procurement recognizes exceptions to public procurement. On the other hand, it is necessary to access to the exceptions from public procurement rules sensitively so that they laid down in areas where they are appropriate - eg. in the field of national security or civil protection. Setting too wide exemptions could lead to the fact that the purpose of the Act would not be fully achieved and fulfilled, especially when it comes to efficient, effective and rational use of public resources and to promote competition in the market.

It is important not only to evaluate the unfounded nature of every exception, but also its formulation. Should this wording be vague and undefined, respectively the formulation would be too wide, it would allow circumvention of the law.

A large group of exemptions in the Law on Public Procurement is in order and constitute exceptions in areas where also the European legislation allows exemptions from public procurement rules. In terms of the exemptions in the Law can thus be considered the treatment in –
Letter a) - Exemption for audit firms for conduction of the external audit of the accounting records of the National Bank of Georgia. Right here it would be appropriate that the audit firm would be procured in the competition in order to achieve an objective choice. The audit makes sense if it is carried out objectively and independently, what would be achieved in the choice of an audit firm in the free competition.
Letter e) – It is a less standard exemption from the public procurement. Subject to the exceptions is a standard advisory service for state president, speaker of parliament and the government and its members - thus the selection of advisors. Other services relating to the activities of protocol for the highest constitutional bodies - the organization of receptions and meetings - would be in terms of public resources and its effective spending better purchase through the public procurement. This would achieve a saving of competitive prices for provided services.

Special attention should be paid to **Art 4** of the Law. This Article regulates the status of Public Procurement Agency, which is in paragraph 1 defined as "*an independent legal entity under public law*".

The establishment and activity of specific public administration body for public procurement is important. It must be a body that has competence in the field of public procurement, legislative, methodical, controlling, as well as sanctions. For the proper and adequate functioning of such a body, it is important to be independent. But independence is not an empty concept, nor it provides only a formal independence by writing into law. Independence in the area of public administration is mainly political independence.

From Art 4 of the Law can be concluded that the independence of the Agency is more formal, but about its real independence is necessary to express serious doubts.

For the Law is characterized strong position of the Government and the Prime Minister in the public procurement system. Strong position of Prime Minister is manifested in the appointment and dismissal of the Chairman of the Agency. The Law says that the Chairman of the Agency is appointed and dismissed by the Prime Minister. Even, if we abandon the consideration that why even the Prime Minister (and not another constitutional body), raises questions the absence of more detailed conditions for exercise of that power.

The Law does not state who may be appointed to the post of the Chairman of the Agency. There are no prerequisites - age, education, experience. Based on what the Prime Minister will appoint the Chairman of the Agency? It looks that it's his personal decision, which needs no approval by the government, but suffice his individual decision. The Law does not envisage any tender for this position. The law does not foresee the term of office of the Chairman of the Agency. Determination of the term is an important guarantee of independence of the Agency.

The Law also regulates any rules for dismissal of the Chairman of the Agency. The absence of preconditions for the performance of this function, length of office term and grounds of dismiss indicates that it is not a professional function, but purely political nomination. This fundamentally doubts that the Agency is independent.

The Law also regulates the disproportionately strong position in the Government –
- The Government approves the structure of the Agency - this should be subject to internal decision of the Agency.
- The government decides to liquidate the Agency - Agency is established by Law, but it can be liquidate by the ordinance of the Government, and the Law does not provide any criteria for the decision of the Government. This is a totally inadequate competence. Independence of the Agency, which can be liquid by the ordinance of the Government is illusory.
- The Government carries out state control over the activities of the Agency.
- Agency submits to the Government annual report on its activities - for example, why not to the Parliament or the State Audit Office?

The wording of Art 4 of the Law seriously calls into question the independence of the Agency.

Simplified procurement in Art **10.1** is not something unusual, and as such can not be considered as nonstandard. In formulating the terms of simplified procurement is to be considered that there will not be contested the nature of public procurement. This may be e.g. the encouragement of competition, as provided by the Law and the Article 2. In this context it is need to mention the Paragraph 3 a) that does not support competitive behavior, but on the contrary, strengthens monopoly position on the market. If such contractor did not exist in Georgia, it is possible to obtain it from abroad. This provision should be considered.

Article **15.1** of the Law regulates the Procedure for conducting an electronic tender. The e-procurement system, which is broadly consistent with good public procurement practices, has increased competition among suppliers. In addition, by bringing processes online, it has made the procurement system more transparent, less bureaucratic, and less discriminative. As a

result, the system has significantly minimized corruption risks and brought substantial savings to the government. This system has become in Georgia a tradition and is proven.

In Article **16.1 Sub-Article 1.1** of the Law is based the irresponsibility of the contracting authority for the unilateral termination of the contract. The Law states that if a contracting authority terminates the contract unilaterally, it shall not be liable for damages caused by termination of the contract. The Law also provides certain exceptions to this irresponsibility. Such arrangement is from the point of view of the State undoubtedly advantageous. It relieves it of responsibility for any caused damage. On the other hand, it is necessary to highlight the situation of the successful tenderer. The legal certainty as part of the Rule of Law is violated. By default, the State must bear responsibility for the caused damage, if it is caused by his unlawful act or maladministration. Otherwise can such legislation discourage potential bidders from participating in the tender, which reduces the competition.

In connection with the role of the Government in public procurement it is also necessary to mention its competence under **Art 20.2** of the Law. The Government decides on the conduction of a consolidated tender. It is true that subsequent operations are carried out by Agency, but on the basis of documents provided by the Government.

Positive should be evaluated treatment of conflicts of interest in public procurement in **Art 8** of the Law. Prevent and eliminate conflict of interest in public procurement is an important prerequisite for its proper execution. Otherwise, it can not be expected to achieve the objectives of proper public procurement. The fact that should be mentioned in regard to the arrangement of the conflict of interest is the lack of sanctions. Duties, prohibitions and instructions provided in Art. 8 of the Law shall be enforceable. For this serve the penalties for its non-compliance. Otherwise the arrangement will be uncollectible and its actual effect fails. We therefore recommend for failure of the Art 8 of the Law to fulfill penalties for its violation.

Transparency and openness of the public procurement process and public control are important prerequisites for the successful functioning and fulfillment of its objectives. According to **Art 22** Paragraph 8, the Agency shall during the procurement proceedings monitor the adherence to 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. Such a competition is very important in the public procurement process and it is important that the Agency carried it out properly and impartially. In particular, it should be observed because, Art 22 points to a strong position of the Government in the public procurement process.

According to paragraph 5, if the value of the procurement object is more than GEL 2 000 000 the head of a contracting authority shall submit a written procurement report on the object of procurement to the Prime Minister of Georgia within 20 days after the public procurement contract is awarded. There is no known reason for such practices and the need to inform the Prime Minister about such public procurement. This information should be public, accessible to the public and not only to the Government, respectively its Prime Minister. This decrees the transparency of the public procurement process and increases the possibility of political interference.

Accessing to the procurement report pursuant to paragraph 4 is very limited. This is available only for interested persons and only upon their request. Such restriction of access to the

information from the procurement process is not correct. Public procurement must be transparent and must be under public control because the contracting authority is spending money of the public, it is spending money of the citizens. If the public procurement process will be more transparent, more information will be available for the public, thus is possible to achieve a greater and fairer competition and more affordable price. Procurement report should therefore be made public. Generally is possible to refer to the requirements of Art 48 to 55 of the Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC.

Article **23** of the Law provides Procedures for appeal and for considering disputes. In this regard, the Law envisages creation of a special board for considering procurement related disputes. The establishment of such a board should be viewed positively as it increases the transparency of the public procurement process. This is achieved also by the participation of the public in solving disputes of public procurement. In Paragraph 4.1, half of the members of the board is formed of representatives of NGOs. The involvement of the public and NGOs in the process of public procurement and dispute in the process of public procurement is an important sign of its transparency. This leads to the fulfillment of the purpose of public procurement, in particular the rational and economical use of public funds. This arrangement must therefore be appreciated.

Paragraph 13 deals with compensation. Its wording restricts the claim for damages and excludes from it the reimbursement of the estimated profit. This is a strictly regulates, but based on experience needs to be assessed positively. The strict definition of the extent of damages will prevent possible speculation intentionally promote a situation of non-existent and fictitious damages for loss of profits. This provision is the protection of State against such behavior. Although, it may dissuade certain candidates, but otherwise is more positive. Based on experience, I consider this as a good treatment.

The Law on Public Procurement contains a lot of duties and rules in public procurement. In the Law it is not possible to identify a clear mechanism for their enforcement through **sanctions**. In respect of every duty which the Law regulates, there should be the sanction for its violation. This ensures that the duties are assigned.

The Law should regulate the nature of sanctions. In public procurement come generally two types of sanctions in consideration –
- Nullity of a contract concluded in breach of public procurement rules,
- Financial penalties.

The Law should clearly establish who imposed penalties (Agency), for which act, in what amount and in what process procedure.

Strengths and Weakness of the law, Barriers and how to overcome them -

1. The Law generally considered is a very short, simple and frame peace of legislation. It does not contain detailed rules for public procurement, but contain a lot of links to governmental decrees, which complete the rules. Simple arrangement in the Law can be seen as an advantage, but in public procurement it presents rather a risk.

2. The scope of exemptions is too bright. We suggest to review it to avoid undermining the objectives of public procurement.

3. The status of the Agency, which in the current rules is not politically independent. The position and the creation of the Agency is necessary rebuild from the button. The Rules of its functioning must be clear, in the Law, without political interfere.

4. The strong position of the Government and its competence in public procurement.

5. Absence of a clear catalog of sanctions for breach of the obligations established in the Law. We recommend the introduction of penalties for each obligation in the Law.