

The Practice of Competition Regulation in the International Procurement and State Procurement Administration in Georgia

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Under conditions of the emerging economy, together with the mobilization of the state income, it becomes increasingly important to rationalize the expenses. Under the market economy the government has to intervene in the market functioning in order to protect competitive mechanisms that ensure democratic choice. The regulations of the government includes the implementation of state economic policy, as well as addressing the issues that otherwise are impossible to be solved with self-regulating market mechanisms. The function of supervision the competition legislation is shifting to the judiciary and the special regulatory institutions, but the state procurement administration and anti-monopoly regulations still remain the prerogative of the executive body (the government).

In the international practice the systems of the international procurement differs from each other, though they have common characteristics mainly regarding the general principles and applied methods. In addition, the level of procurement centralization and the administration quality varies from country to country. Also in each state there is at least one governmental body (in form of an agency, department, office, etc) that regulates and exercises the overall coordination of the procurement policy throughout the country. Generally this very body is responsible for the monitoring state procurement and administrating the signed contracts. In some countries additionally a special governmental office of public provision is made up that carries out the procurement of standard products and services through tenders on the basis of orders placed by state managing bodies and different organizations and then supply appropriate companies. As it turned out, the similar body is to be established in the near future in Georgia.

In order to successfully introduce in Georgia the positive experience existing in the international procurement-management practice, it is equally important to have high quality law, also appropriate institutional infrastructure, the support from the authorities. In addition, it is essential to ensure the availability of the information necessary for public monitoring and the professionalism of the parties participating in the procurement process. In Georgia the law regulating the state procurement is mainly harmonized with international standards, though some indirect related legal acts need further refinement. The experience of the international procurement proves that it is equally important to correctly plan the state procurement, as well as correctly organize the procurement procedures and sign fair contracts. In addition, it is important that obligations written in the contracts are fully implemented and public monitoring requires that the accountability system is strictly defined.

Under the market economy the government has to intervene in the market functioning in order to protect competitive mechanisms that ensure democratic choice. Competition is not only resource-saving means for national economic development, but is also the precondition for ensuring the public welfare. The regulations of the government includes the implementation of state economic policy, as well as addressing the issues that otherwise are impossible to be solved with self-regulating market mechanisms. This is admitted by all economic ideologies from classical to institutionalist, neoclassical and neo-Keynesian schools (Mark Blaug, *Economic theory in retrospect*, Cambridge university press, 1994).

Adam Smith was one of the first to emphasize the balancing role of the competition in the optimal division of inputs that was recognized as the foundation for the commercial activity. D. Ricardo described the theoretical model of the perfect competition where there was no place left for the state regulation. J. S. Mill and other classics further perfected the above mentioned model, while the neo-classical school led by A. Marshall drew attention to the competition impact on price system and the importance of economies of scale. All above mentioned approaches focused only on price competition and a coordinating role of prices on market balance that did not describe the real context of the phenomenon. J. Schumpeter discussed the production innovation and product quality indicators as the foundation for entrepreneur success and competitive advantage. As for J. Robinson, he placed emphasis on so called "natural monopolies" where because of certain industry's technical exceptionalism, it was doubtful to achieve efficiency if rival companies operated on the market. The idea believed by classics that self-regulated economy functioned more efficiently if the state did not get involved, was undermined by the economic crisis in 30s and the Great Depression. J. Keinz came up with the fundamentally revolutionary theory about the state role in market economy: unlike classics, he believed that the state could regulate the economic development by influencing the aggregate demand. According to this notion, the increase of state investments and expenses (expanding the procurement) would entail consequent GDP growth and in the end the rise of employment. From economic tools more preference was given to budget regulations rather than monetary ones. In the 70-80s of the previous century the followers of the monetarism presented new principles about state-regulated economy. Under the stagflation of that period, inflation together with the unemployment caused serious problems that Keinzinas failed to overcome. Milton Friedman regarded monetary relationships as the starting point and he believed that with the regulation of money supply it was possible to stabilize the economy, of course under free market primacy. According to F. Hayek market balance is a static state and the competition process is its

dynamic model, which, as he believed, was the basis for the social progress. Therefore, the role of the state is not only to correct the market tools, but also to promote the competition and only with this in view utilize the regulating influences. Otherwise the state will create a noncompetitive environment. Certainly on macro, meso and micro levels the concrete tools and scales of economic regulations are determined with the national economic development levels and with those social-economic problems that exist in the country at a certain period.

In the modern mixed economy more and more western researchers emphasize the inability of the market self-regulation in the global development and agree that in cases where market failure is expected, the regulating leverages should be taken by the state and civil sectors. This leads us to recognize the democratic values and the primacy of the social policy of the welfare. In this circumstances it becomes essential to make better living standards and quality for the population, to protect customers' rights, to protect the environment and to ensure the sustainable development, and etc. All these require a strong authority in all directions: legislative, judicial and executive. Naturally, the strength of the government does not exclude flexibility, relevance and adaptability of state entities' system under effective management.

Under conditions of the emerging economy, together with the mobilization of the state income, it becomes increasingly important to rationalize the expenses. Though most of the foreign leading countries have worked out their own principles of procurement for effective management of state resources by generalizing the state procurement practice, international regulating laws in this field becomes increasingly harmonized that is set forth in the international agreements and acts. In this respect especially important is the framework law on "Product (Labor) and Service Procurement" passed by the United Nations Commission on International Trade Law (UNCITRAL), the agreement on governmental procurement reached by the World Trade Organization and the European guidelines and guiding rules set out by the World Bank. All above mentioned serves for the formation of united market of state orders in a specific geo-economic space.

Different terminology is used for describing the state procurement process and procurement system: together with the State Procurement, the terms of Public Purchasing and Government Procurement are also used. However, in any case State Procurement stands for all expenditures by governmental bodies or the public offices at any level that are spent on purchasing the products or service necessary to meet the public needs. The term "State Procurement" no longer describes the specific meaning in the modern situation, as today it means not only the efficiency of state spending, but also the public welfare and consequently has certain social implication, too. Government procurement is even more limited term as it

is only applied to the purchase done by only the executive body. Therefore, today no-one argues against establishing the term “public procurement” as it is adopted in the EU countries. Thus, according to the 2nd paragraph of the UN UNCITRAL Model Law, State Procurement is defined as procurement of any goods, services and construction works by a procuring entity in the cases through any means. The Law of Georgia on State Procurement is mainly developed on the basis of UN Model Law and the rules defined in this law are applied to any state procurement except for the state procurement related to a state secret set forth in the Law of Georgia on State Secret.

In terms of Euro integration, it is essential for Georgia to make its system of state procurement in accordance with the general rules and guidelines of EU public purchase. These guidelines require to be implemented at the level of member states and they aim at coordinating those procedures that EU Members must follow in case they want to make purchase that in value exceed the monetary limits set by those guidelines. The set standards include construction works, agreements on purchasing products and service which are required by all state organizations, as well as public, semi-public and private entrepreneurships working in water, power, transport and communication field. The fact that one side is regarded as the representative of the social interest determines the specific character of the contracts related to the public purchase compared to the private agreements. The process of formulating state order of public purchase, limited budget and political factors of the contractual relationships, social interest and the need of social monitoring represents the reason for introducing specific regulatory rules and principles. It is noteworthy that the European guidelines are aimed not at harmonization all national rules of public purchase sphere, but through setting minimal common requirements for those contracts that exceed certain limits, coordinate national procedures for reaching contracts. These requirements include conducting the procedures related to public procurement on non-discriminative bases, rationally distributing public funds through selecting the best offer by tender, strengthening the healthy competition among European enterprises so that taxpayers’ money are saved. All companies should enjoy the equal right to obtain state order. All above said is beneficial for governments as well as for business entities and population who will believe that state funds will be spent efficiently and the service will be of high quality. Thus, economic, political and legal factors are equally important for the state purchase.

It is vital for Georgia as for Member State of the World Trade Organization to timely join the Government Procurement Agreement (GPA), where since 2000 Georgia has the status of an Observer. According to the obligations, Georgian side first started negotiations with the parties and presented the project of annexes of the agreement to the WTO secretariat, however, later this project was stopped. WTO agreement on state pro-

curement first of all promotes free trade including in government purchase and envisages the establishment of the regime that will foster market economy in the member states. According to those high monetary levels that are affected by standards and procedures related to state purchase, it can be said that joining the agreement will not restrict local suppliers and will enable successful local entrepreneurs to get orders of different countries. The agreement envisages fostering national regimes, especially for developing and emerging countries, however, at the same time excludes the discrimination against the foreign suppliers. It also envisages technical support from the developed countries and promotion of transparency through establishing information-methodology centers in the member parties. In addition, to consult and help inexperienced suppliers make and translate all necessary documents.

In Georgia the law regulating the state procurement is mainly harmonized with international standards, though some indirect related legal acts need further refinement. In most cases certain laws refer to the state procurement system and do not consider the specificity of the sphere or lack of capacity. Certain governmental bodies still pass the normative acts that are not in accordance with the valid legislation. It is clear that in such situation there is no point to take new international responsibilities until there is no appropriate political will and the supremacy of the law. Otherwise, the international economic sanctions will overlap all the effect reached by joining the above mentioned agreement.

The reform of state procurement, as well as national economic restructuring, is carried out with the support of the World Bank who helps Georgia with quite a big amount of money. The concessional loans as well as grants given by the World Bank are defined in details for urgent activities and are spent in accordance with the plans approved by the government. The main objective of the World Bank regarding these purchases is to ensure that they are done economically, efficiently and transparently; to foster the economic development of the fund receiver country; to make sure that the potential suppliers participate in the procurement procedures. In this respect so called "procurement guidebook" was worked out and standard tender documentation was developed for competitive bidding done by the Bank. Though the World Bank requires from the order contractor that goods or service are purchased on the bases of the international standards, in certain circumstances it is still possible that the contracts are tied up through price quoting, direct procurement or limited tender. The simplified methods of procurement are mainly used for small scale purchase.

The experience of the international procurement proves that it is equally important to correctly plan the state procurement, as well as correctly organize the procurement procedures and sign fair contracts. In addition, it is important that obligations written in the contracts are fully

implemented and public monitoring requires that the accountability system is strictly defined. This issue has its mental side too, as during the Soviet Union all state procurement was done in accordance with strictly developed plan through state orders, in the post-Soviet period procurement retained the same character and it became necessary to develop special laws regulating this sector. At the same time in the developed countries the role of the public sector was more and more increasing. In most countries the laws regulating state procurement first of all protected national entrepreneurship and only after that fostered legally defined preferences.

In the second half of the 20th century with increase of state spending, the tendency of the international relationships on the national procurement system became more obvious. Exactly at this time the Agreement on Tariffs and Trade was developed, and in 1979 under this agreement the main players signed the special Agreement on Government Procurement (GPA) that was quite limited in the beginning. In 1994 at the Uruguay Round within the framework of the World Trade organization, The Government Procurement Agreement was further perfected and it entered into force on January 1, 1994. At the same time the regional integration schemes were developing and its logical result became the establishment of European Economic Community in 1957 by the Treaty of Rome. Though it did not contain separate provisions on public purchase, but it forbade the member states to discriminate against suppliers and to restrict the free trade. The special standards related to public purchase were adopted since the 70s of the previous century: At first in 1971 European standards were adopted for labor procurement and in 1976 the same standards were recognized for products. These standards were mainly based on the regime of informing the Community about the purchase, neutrality principle on giving the technical specification and the necessity of using impartial criteria while selecting the contractor. In the 80s European countries developed laws regulating public purchase and constantly monitored how the commitments were met by the parties. Within the EU even more attention was given in order to increase transparency level, to impose a strict control on implementation of the requirements defined in the guidelines, to widen the working area of the state procurement rules among which the emphasis were made on service purchase, too.

International fiscal institutions and UN played a huge role in forming a modern state procurement system in the countries with emerging economy. UN Commission on International Trade Law started working on state procurement in 1986 and finished its work in 1994 with the adoption of UNCITRAL Model Law that together with general provisions defined procurement methods and procedures in details. This document comes with the guiding recommendations which significantly simplified

the process of developing procurement regulating laws in Georgia. As the result of the harmonization of the national legislation with the international standards, the World Bank makes more and more procurement in accordance with the laws working in beneficiary countries if these laws do not collide with the rules of the World Bank. On the other hand, more and more international tenders are held in conformity with the procedures set by the World Bank. Lately there are less and less bureaucracy barriers in procurements carried out by the World Bank and governments promptly get correspondent technical support.

As for the international procurement, it represents the unity of practical methods and procedures that ensure maximal protection of the interests of buyer organizations and the society through tender selection. It is based on the principles of publicity, equality, economy, effectiveness and accountability and at the same time widely uses international standards and rules.

In the international practice the systems of the international procurement differs from each other, though they have common characteristics mainly regarding the general principles and applied methods. In addition, the level of procurement centralization and the administration quality varies from country to country. Also in each state there is at least one governmental body (in form of an agency, department, office, etc) that regulates and exercises the overall coordination of the procurement policy throughout the country. Generally this very body is responsible for the monitoring state procurement and administrating the signed contracts. However, in some countries these responsibilities are taken by controlling bodies and /or auditors.

In some countries additionally a special governmental office of public provision is made up that carries out the procurement of standard products and services through tenders on the basis of orders placed by state managing bodies and different organizations and then supply appropriate companies. As it turned out, the similar body is to be established in the near future in Georgia. Besides the above-mentioned, in all state procuring organizations the office of state procurement functions (for example in ministries there are departments) which conducts the purchase of specific products, labor and service for this state institution. Clearly, on the one hand, with this policy the problem of procurement staff qualification is solved for the procuring organizations and by conducting big-scale purchases through tenders the spending per product is cheapened. However, on the other hand, all these require well organization and big managerial expenses. In most countries there are procurement staff preparing and training centers, also consultancy bureaus and in some places consulting methodology centers too. Besides, at least one specialized weekly newspaper is regularly issued, where announcements on forthcoming procurement are published and periodic bulletins offer reviews, reports and oth-

er information about procurement environment. Exchanging the information and also doing e-commerce through global nets (the Internet) represent huge technical resources for further development of the state procurement system. However, unlike the commercial firms, the striking the governmental contracts is characterized with significant procedural restrictions and formal rules.

In Georgia the present state procurement system is decentralized and state procurement organization is in charge of its implementation. This organization is responsible for lawfully carrying out the state purchase.

At the initial stage of the formation of the state procurement system (in 1998-2000) it was important to create a legal basis for the state procurement in Georgia and for this end the law on "State Procurement" was adopted, the state procurement department was set up in the Ministry of Economy and appropriate normative acts were published. Although this document was developed with the participation of the international experts, at the initial stage of the reform, most of the procuring organizations ignored the standards defined in the state procurement regulating laws. It was often caused by the fact that there were not set standards for conducting the state procurement and in most cases procuring parties differently interpreted the law. At that time because of budget limitations budget cuts were very common and practically organizations were not funded under the articles of "other products and services", as well as "capital expenses" (mainly salaries were given), and the country mostly existed with credits and grants allocated by the international organizations. As a result, the law on state procurement was practically unimplemented in the economic life of the country. Considering the above mentioned, by 2001 the program of procurement system institutionalization was agreed to the World Bank and the action plan for reforming the state procurement system was determined. Within the framework of the World Bank structural reformation credit - SAC III, at the initial stage the Georgian side took the responsibility to refine the state procurement regulating law in order to harmonize it with the international legal standards and to implement is in reality. Thus, the bill of "amendments and additions to the law on state procurement" was prepared, which was adopted in March, 2001 by the Parliament of Georgia. In 2001-2004 the agency of state procurement organized the training-workshops for procurement specialists. They also published and distributed the methodology materials and legal normative documents related to the state procurement. In order to share leading foreign experience business visits and learning tours were organized in Lithuania, Poland, the USA, Italy and Kyrgyzstan; in addition, the office of the state procurement was equipped with modern facilities, the provision on "the implementation rule of state procurement" was developed with the participation of the international expert-consultants, the provisions of state procurement agency and its Supervi-

sory board were passed. The normative act of “the provision on the implementation of state procurement and its documentary appendix” adopted in October, 2001 together with the general provisions determined the standard forms of the documentation related to conducting the state procurement. It also contained instructions, methodology and rules connected to the state procurement and the ways of their implementation. On the basis of researching Georgian state procurement environment, the World Bank experts wrote an evaluating report the final recommendations of which were specified on June 4-6, 2002 at the joint workshop of Georgia and the World Bank with the name of “Perfection of State Procurement in Georgia” and were reflected in the action plan of the agency. In 2002-2003 with the participation of the World Bank experts the national strategy of trainings was developed for purchase coordination, as well as for procurement specialists. Moreover, the web-site of the state procurement agency was created where all important information about the agency, state procurement regulating legislation, also about the different normative and methodology materials, tender announcements, supplier lists, the weekly analysis of the state procurement throughout the country, the annual report of the state procurement agency, etc, could be seen.

After the Rose Revolution, as a result of ambitious and subjective attitude and nonqualified and in certain cases provocative actions of some politicians, qualified staff were fired and staff protectionism policy was carried out that caused the censure of the ongoing reform and breaching the international commitments. The purchasing standards were reviewed according to the bill prepared by the Soros Fund. The rules recognized in the international procurement practice were ignored, the autonomous agency was abolished and it was turned into an average governmental subdivision. It became a common practice to show favoritism towards the procuring entities, to destroy the system of accountability and monitoring, to ignore the market principles and incorrectly interpret the legislation, to discredit the existing positive experience and to support the dishonest staff, to justify the facts of competition restrictions and to abuse the public trust. As a result in 2005-2011 the people working in this system were focused on carrying out the political orders and the publicity and transparency of the implemented procurements were limited.

The “updated law” which entered into force in 2006 enabled the government to use the funds on various pretext in order to finance interested spheres, meetings and visits of the president of Georgia, the chairman of the Georgian parliament, the prime minister, the minister, the state minister of Georgia and/or Tbilisi mayor, also to organize the delegation receptions in the Parliament of Georgia, the visits of the Georgian parliamentary delegations abroad, the delegation reception in the Ministry of Foreign Affairs of Georgia and the visits of delegations of the Ministry of

Foreign Affairs of Georgia abroad, also money allocated from the reserve funds of the President of Georgia, the Georgian government and Tbilisi mayor office for state procurement; state purchasing of electricity, guaranteed power, natural gas and water supply; state procurements related to the implementation of monetary-credit and monetary fund policy by the National Bank of Georgia in accordance with the organic law of Georgia on “the National bank of Georgia” and also for ensuring the state economy with the cash; state purchasing of real estate; also the state procurements of granting the right of utilization of the real estate; the purchase of certain service by the legal entity of the public law – the Georgia Public Broadcaster; the procurements of sovereign rating service and credit – rating service related to the bonds and also covering the costs connected to the credit-rating service to the service supplier; state procuring of the service related to the keeping of lottery ticket, realization and/or free distribution of promoting materials by the lottery organizer or an agent envisaged by the law of Georgia on “organizing lottery, gambling and other winning games”; and other similar procurements during which by granting the exclusive contracts on the noncompetitive basis the environment of illegal agreements was created. Certain officials violating the law with negotiating only with one person lobby the large-scale contracts and then without any arguments try to justify it with different circumstances. As a result, the market of state procurement is divided among competitors on unhealthy basis. Under such conditions because of the lack of the proper transparency the facts of bribery were quite common. There were the facts of favoritism based on different reasons and other unhealthy practice. There is still a significant distrust towards the state procurement system in the society.

Although by introducing the electronic procurement system in 2011 the availability of the information on tenders increased, but important procurements (almost the same quantity that are in this base) are still conducted in non-transparent way. Since December 1, 2010, the paper tender was abolished and all state tenders are held electronically. According to the information provided by the state procurement agency, at the end of 2011 already 10,417 users were registered in the e-system, 3,052 of which are procuring organizations and 7,365 suppliers. As a result of the tenders announced during 2011, 17,717 contracts were granted, the total value of these contracts is 1,156,191,457 GEL.

In 2011 the agreements on state procurement are reached on 2,662,663,113 GEL and 66% of which were made through e-tender. E-system is bilingual and the data there is available to any user of the system in Georgian and English languages. In particular it provides the following:

- the annual plan of the procurement;
- tender announcements;
- the estimated value of the procurement;
- tender documentations and their amendments;
- the tender offer of the supplier and the offer price;
- minutes of the tender committee and the correspondence with the supplier;
- agreements and their amendments;
- information on the payment.

In order to identify the procurement objects, the state procurement service introduced procurement object search system designed by the EU (before it was done according to the UN classification on economic activity). In this system each object has its own identification code. These codes are arranged hierarchically. The uniformity of procurement objects and monetary margins are determined according to this hierarchy.

In order to successfully introduce in Georgia the positive experience existing in the international procurement-management practice, it is equally important to have high quality law, also appropriate institutional infrastructure, the support from the authorities. In addition, it is essential to ensure the availability of the information necessary for public monitoring and the professionalism of the parties participating in the procurement process. Procurement transparency and protection of the rights of the participants are equally vital under the liberal legislation.

The present legislation defines general legal, organizational and economic principles for state procurement implementation. The body responsible for carrying out these principles is the independent legal entity of the public law the chairman of which is appointed and dismissed by the Prime Minister. The main functions of the agency are: develop and pass sub-legal acts and standard tender documents required for the operation of this Law, harmonization thereof with international standards; on the basis of reports received from procuring entity perform study; analysis of situation in the field of procurement within the country on a regular basis and submission of suggestions to the Government of Georgia to inform the making of relevant decisions; develop special training programs, training-methodological materials and standard forms of documentation, holding workshops and trainings for central authorities and local self-governing bodies, mass media representatives and other interested entities; develop, refine and exercise oversight over the unified procurement information base; provide advisory-counseling services to procuring entities; provide support in the introduction of modern information and communication technologies within the procurement system; ensure availability of relevant sub-legal acts and special bulletin manual to ensure the publicity of procurement; consideration of disputes arising during pro-

curement; conduct oversight over the legitimacy of procurement procedures and establish the policy for regulation of procurement process; Maintenance of the Black and the White List of the suppliers; in special cases, under a written request by a procuring entity or at own decision, under an individual administrative-legal act perform the identification of a procurement object and/or integration in the classification; identification of the facts of artificial splitting of state procurement and taking relevant response measures.

Under the present legislation the State Procurement Agency was replaced by the Competition and Procurement Agency and with this the latter became responsible for ensuring the implementation of the law on competition as well as the law on state procurement. However, overseeing the implementation of the law on competition, organizing and monitoring of the state procurement process, except for regulation of the natural monopoly, is conceptually different and imposing these responsibilities on one agency hinders the effective implementation of the appropriate policies. It should be also considered that EU countries (the Czech Republic, Sweden, Denmark, etc) where we have such practice are absolutely different from Georgia. Georgia represents the country with small-scale economy. According to the data of the National Statistics Office, the territory of Georgia is 69.7 thousand square kilometers and the population is 4,497.6 thousand people. In 2011 GDP per capita was 3231 USD Dollar and the increase of GDP was 7.2%. The infrastructure still needs development, import exceeds export much; the membership of the World Trade Organization obliges the country to ensure free market that in case of abusing market power by certain corporations causes inefficiency of the market structure. The production capacity of the country is quite small and it faces technological lagging, the availability of resources is quite limited and the level of poverty and inequality of income significantly decreases the purchasing power of the population. Unlike the countries mentioned above, Georgia is characterized by specificity of rules and applied tools for anti-monopoly regulations and state procurement administrations. As it is mentioned in the strategy document of the competition policy developed by the Georgian government on the basis of the European Commission recommendations, at present the institutional framework of the competition in Georgia consists of the following institutions:

- Competition and State Procurement Agency.
- Sector regulators in the non-liberal field:
 - The Georgian National Communication Commission which represents the sector regulator in the field of electronic communication and postal service. It was established in 2000.
 - Georgian National Energy and Water Supply Regulatory Commission represents the sector regulator in the field of energy, natural gas and water supply. It was established in 1997.

The competition policy in the non-liberal sectors (for example, electronic communications, electricity power, gas and water supply) is regulated by the sector laws that are executed by relevant sector regulators. Because of the absence of the liberalization, the tariffs and other market terms in these sectors are determined by the sector regulators who are responsible for economic and technical regulations and protection of the competition in the non-liberal sectors. In addition, they must ensure the regulation of agreed activities and misuse of the dominated position. Thus, the function of supervision the competition legislation is shifting to the judiciary and the special regulatory institutions, but the state procurement administration and anti-monopoly regulations still remain the prerogative of the executive body (the government).

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