

Georgia's Public Procurement System



Auction

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Executive Summary

Background

The waste of public money through corruption and bad practices within public procurement is a challenge worldwide, but especially in developing countries such as Georgia. In order to tackle these problems and increase efficiency, Georgia radically modernized its procurement system with the introduction of a fully electronic procurement system in late 2010. This assessment of TI Georgia aims at identifying the strengths and weaknesses of the system with a view to working to improve the procurement system in Georgia. In this task we have received very close cooperation and assistance from all levels of the procurement agency and welcome this cooperation as a crucial element in securing a well functioning procurement system.

The new procurement system has been a very positive development that has had a marked impact on decreasing corruption, increasing efficiency and stimulating competition. The legislative framework aligns largely with European Union (EU) regulations, and in many instances it sets a higher standard than systems at work in most EU countries. The current deficiencies within the system are largely due to political factors. For example, the Ministry of Defense and the reserve funds of the President and the government have been granted legal exemptions from using the electronic procurement system of the Competition and State Procurement Agency (CSPA).

In general the procurement system can be regarded as a leading, illustrative example to be followed by other countries, including the EU. With the changes we indicate we believe the CSPA's electronic procurement platform is likely to be the most efficient, transparent and competitive system that we have identified internationally.

These are our main findings:

Strengths

- **Transparency:** The procurement process, from when the tender is announced until the contract is awarded, and all eight stages in between, is publicly visible on the E-procurement website. Tenders and awarded contracts under the Simplified Electronic Tender and the Electronic Tender procedures are publicly available for registered users and for guest users. Recently, the agency published all the contracts awarded under Simplified Procurement rules, which is a very positive development that could function as an example for other countries.
- **Efficient Appeal Mechanism:** When a participant or any observer of a tender suspects a violation of the law, there is an appeal mechanism allowing participants to file an appeal through the electronic system. Every appeal is reviewed by a Dispute Resolution Board, which can oblige the procuring entity to adjust or cancel the tender. The Board consists of three representatives from the CSPA and three representatives of civil society, including a representative of Transparency International Georgia. This range of representatives helps ensure impartiality, independence, and transparency.
- **Efficiency:** The electronic system increases the efficiency of procurement for participants as well as for government institutions, as the whole procedure of

submitting and assessing technical specifications of companies, payments and the bidding happens on the online platform. As a result, red tape and wasted time has been severely reduced. According to the Agency's calculations up to date more than GEL 400 million have been saved since the introduction of the platform in late 2010.

- **Equal treatment and competition:** This is a fundamental requirement for a procurement system. The electronic system has removed the burden for regional companies having to visit Tbilisi at least four times to submit documents and do the bidding, which gave Tbilisi based companies an advantage. There are several provisions in the law to prohibit the usage of overly specific, tailored requirements that only allow a single product or bidder to compete.
- **Value for money and quality assurance:** While the Georgian law does not ban the use of other criteria, it is price which in practice seems to be the decisive factor during auctions. Several respondents from the business community have commented that using both price and quality as requirements in the evaluation would enhance the efficiency of procurement. The Agency as well as procuring entities we talked with oppose this view, as such an evaluation increases subjectivity and would this be more subject to corruption. Furthermore, do not all the procuring entities have the resources to do such an evaluation. In the current system procuring entities set the terms of the tender which takes qualifications into consideration. Thus if companies meet the qualification criteria, they are capable of fulfilling the assignment. The evaluation of the proposal on the lowest price leaves the least chance for subjectivity or corruption, but does ensure quality is guaranteed. The Agency has told TI Georgia that they developed a Two Staged Electronic Tenders Module into the system to attach more weight to quality which has yet to be launched officially. TI Georgia highly welcomes this initiative and looks forward to its details and implementation into the system, acknowledging that the current system leaves least possibility for corruption.

Weaknesses

- **President / government consent clause:** According to a provision under Simplified Procurement, contracts approved by the president or government can bypass the unified electronic system and be of any value. Due to this classification these expenditures are thus exempt from public and competitive procurement procedures. This clause is extremely vulnerable to corruption. In 2011, GEL 600 million (representing two thirds) of Simplified Procurement tenders consisted of procurement conducted via the president/government consent clause. In 2012 this amount increased to GEL 800 million. This loophole violates the fundamental principles of procurement and should be eliminated by removing this clause entirely for the procurement law.
- **The minimum time limit for Simplified Electronic Tender procedure:** for tenders with a value between GEL 5,000 and GEL 200,000, the minimum time limit between the announcement and the end of a tender is currently three working days, which is significantly shorter than similar procedures in EU member states. We see that procuring entities in most cases keep to this minimum. This short deadline is likely to prevent companies from participating and weakens competition.
- **Exempted funds:** The Presidential Reserve Fund and the Governmental Reserve Fund are contingency funds with a budget of GEL 50 million each in 2012, the Tbilisi City contingency fund accounted for GEL 2 million in the same year. The original purpose of these contingency funds is to cover expenses that are unpredictable and/or are caused by emergency situations. On 28 December 2005, amendments to the law on the budget code were adopted, permitting a usage of money from the Funds for other purposes than unforeseen emergency situations. However, due to limited transparency and

oversight requirements, it remains largely unknown what exactly money from the Funds is spent on.

- **The TI Government Defence Anti-Corruption Index 2013** underlines the high risk of corruption in defence contracting. In past years, there has been hardly any public information about the expenditures of the Ministry of Defence and thus no public scrutiny. In recent months, the Ministry of Defense has started to use the e-procurement platform for a number of tenders, recognizing that fully transparent tendering in most cases does not endanger national security.
- **Overly specific tender requirements:** Our analysis of several tenders shows how specifications were stipulated in tender requirements that were unnecessarily specific and even tailor-made to certain companies. While the law prohibits such tailored criteria and the particular tender was cancelled, we found overly narrow criteria in several sectors. This tailor-made tenders occur in every procurement system. The Georgian system allows to appeal against the tenders, freeze them, and based on the decision of the Dispute Resolution Board have them changed or cancelled.
- **Tender review:** The CSPA is responsible for monitoring e-tenders for violations of the law. But due to a lack of resources, the procurement agency has neither the financial nor human capacity to assess all but a small proportion of tenders. The system the agency currently uses is still being developed and assesses tenders on several risk factors that might indicate a violation of the law. When the system reports a risk, agency staff further assessed the case to see if a tender does indeed violate the law. At present around 20% of the tenders are assessed in this system while the remaining 80% are assessed randomly. The agency is currently trying to further improve its review system so that it can assess a larger number of tenders. Still, as human resources are crucial in a certain stage of assessment, resources for the agency should be increased.
- **Black list:** The CSPA can put a company on its Black List and ban it from participating in public contracting for one year. Companies are blacklisted after a government entity files a complaint against a supplier that has failed to deliver on its contract. Numerous interviews with Slovakian practitioners and experts have revealed that a Black List would be a welcome attribute to their procurement system. Georgia's current Black List, however, has two aspects that could be improved: It remains possible for the owners and management of a blacklisted company to register a new entity and continue participating in public procurement. Furthermore, the criteria that result in the blacklisting of an entity are not fully transparent, raising concerns among several interviewed company representatives that the mechanism might be vulnerable for abuse. The head of the CSPA told TI Georgia that the agency is considering to allow companies to apply for removal from the Black List if they can provide evidence that a business has taken measures to better mitigate risks and address problems that led to its ban from procurement – an idea that, if well-implemented, would provide incentives for companies to improve their conduct.

Recommendations

1. **Remove the clause which allows a tender to bypass the procurement system with presidential or government consent:** The elimination of this clause will reduce the risk of funds being spent in non-competitive processes and without public scrutiny, for the possible private gain of government members and their associates.
2. **Reserve Funds:** In order to bring the Reserve Funds back to their initial goal the legislation should be narrowed down in which the Funds can only be used in unforeseen emergency

situations. Expenditures from the Funds should be included in the budget execution reports to allow review by the public over the funds.

3. **Increase the minimum time limit for Simplified Electronic Tenders:** This will increase participation amongst all interested parties, stimulate competition, and consequently bring down prices. This is more in line with practices in EU member states. While this extension of time limits would increase the length of time that an entity has to wait for its goods or services, our report shows that this increased competition consequently brings higher quality and lower prices, and is of greater benefit overall.
4. **Increase public awareness:** Public awareness and trust in the system has increased due to the system's openness, but is stated to be relatively low, according to a recent report by the PMC Research Center. Yet the system offers the chance for everyone to monitor the process and tenders. This potential for public scrutiny is unique and could highly increase the accountability of procuring entities and thus decrease opportunities for corruption. Furthermore, the effectiveness of the appeal system depends on participation by companies and members of the public. To maximize its full potential, it is necessary that it becomes more widely known and trusted.
5. **Award criteria:** Using both price and quality in the evaluation increases efficiency of procurement, given that procuring entities have the 1) right qualifications 2) and are not corrupt. The current system should be seen in this light where the previous procurement system was corrupted and procuring entities do not always have the resources to assess quality sufficiently. However, having price as the decisive factor is problematic when it concerns complex tenders. When awarding the contract, the entity should have the expertise to evaluate whether the potential candidates' proposal meets the requirements. If the proposal is found to be inadequate, the procuring entity could then enter negotiations with the second potential supplier – something that rarely happens now. It is therefore important an institution is created within the agency to assist procuring entities in setting the right criteria. TI Georgia is furthermore positive about the announcement of the Agency to launch the two Staged Electronic Tenders Module into the system to attach more weight to quality.
6. **In the Government Defence Anti-Corruption Index 2013** published by Transparency International UK, it is stated that the risk of corruption in defence expenditures is high. According to Tamar Karosanidze, Deputy Minister of Defence; the Defence and Security Committee initiated changes to the law, stating that expenditures for goods above GEL 2 million and services above GEL 4 million, should be reported to the Defence and Security Committee by the Ministry of Defence.¹ As well as to annually present the activities and finances of the Ministry to the Parliament. This is a positive start of creating accountability of the expenditures of the Ministry that should be continued.
7. **Black list:** In order to deal with the problems the black list currently shows we recommend that:
 1. The Blacklist should also record the owners and directors of entities that have a record of misconduct, to prevent that the same individuals continue bidding for public contracts under a newly created entity;
 2. Full transparency of the criteria on which a company can be blacklisted.

¹ Disclosure: Tamar Karosanidze is a former Executive Director and former Board member of Transparency International Georgia.

3. We support the consideration of the head of the CSPA to allow companies to apply for removal from the Black List if they can provide evidence that a business has taken measures to better mitigate risks and address problems that led to its ban from procurement.

Introduction

Georgia is among the few countries in the world that have introduced a centralized and comprehensive electronic procurement system. The system is very innovative and aligns at large with EU procurement standards, with relatively few discrepancies. The new procurement system and the CSPA's commitment to make it transparent has furthermore been part of the Open Government Partnership Action plan of Georgia. Georgia is expected to sign a deep and comprehensive free trade agreement with the EU later this year, which will require Georgia to move towards compliance with EU directives. Therefore, we have used principles of EU procurement regulation as a benchmark, and complemented this with reference to practices in EU member states when they do align. In this respect we assess the system with reference to the principles underlying procurement in the EU Directive on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts (short: EU Directive) and the Treaty on the Functioning of the European Union (TFEU), complemented with the World Bank procurement guidelines.

According to *EU Public Procurement Law: An Introduction* (a publication supported by the EU), there are four central principles underlying the EU legislation for procurement:²

- 1. The principle of equal treatment:** Prohibiting discrimination between companies.
- 2. The principle of transparency:** Given weak systems of checks and balances and the limited resources and capacity of many government entities, a high level of transparency can help to reduce risks of corruption, fraud, collusion, and of wasteful and politically motivated spending.
- 3. Removing restrictions to market access:** This is in reference to technical specifications that might limit the participation of companies, transparency of the procurement process, time limits and the wider framework of the procurement system.
- 4. Value for money:** The most important goal of a procurement system is also the most difficult to achieve. As procurement is the expenditure of taxpayers' money, it's of crucial importance the best value is achieved.

This report is divided into five main sections: The first will analyze the institutional structure of public procurement and the bodies involved; the second will examine the processes by which procurement is conducted by the state; the third will look at fairness and transparency and the mechanisms to manage these; the fourth will describe exemptions to the current procurement law. This will be followed by an overall assessment of the strengths and weaknesses of the Georgian system and recommendations for improvement. The reference throughout is with the European practice and to the ways in which the principles of transparency and competition are upheld.

² Europe Aid Co-operation Office (2011) *EU Public Procurement Law: An Introduction*, in cooperation with the Copenhagen Business School, The University of Nottingham, University of Malaya, University of Copenhagen.

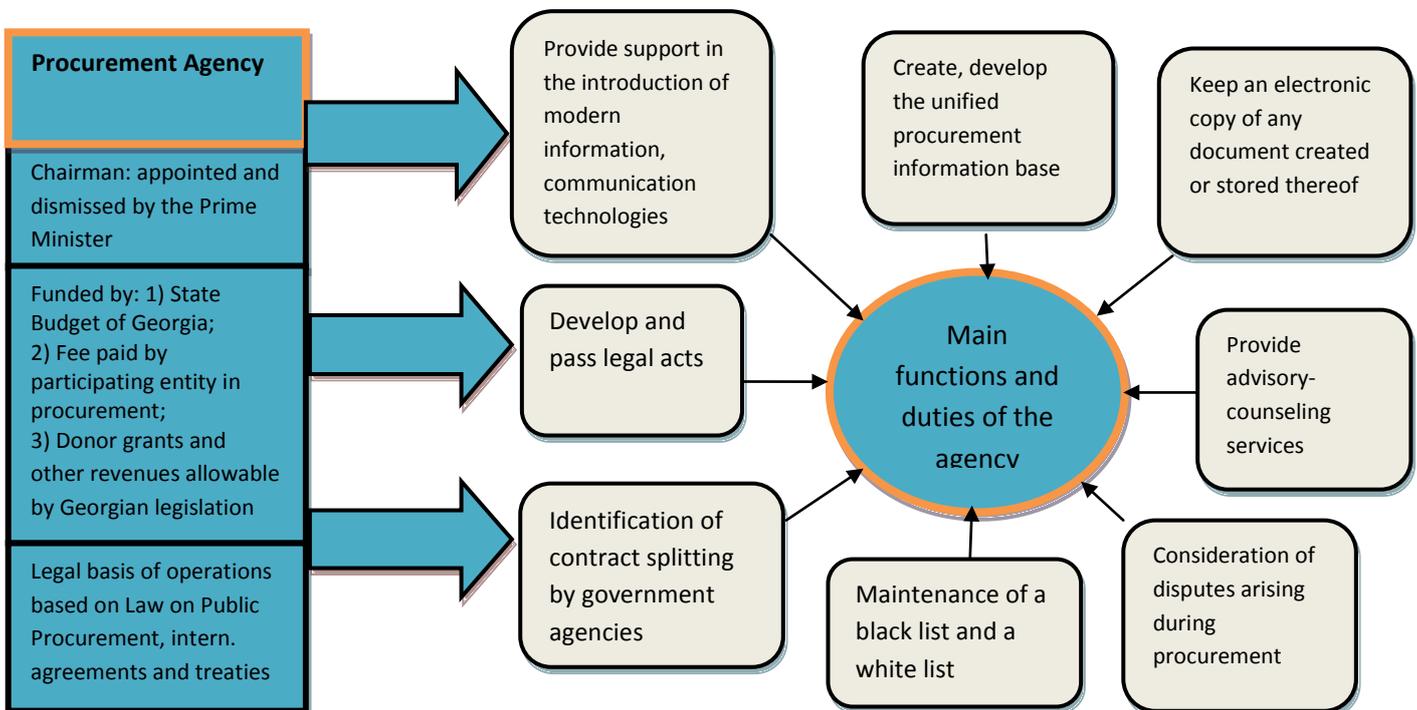
1. Institutional Structure

1.1 Competition and State Procurement Agency

The Competition and State Procurement Agency (CSPA) is the central body in the procurement system. The CSPA develops and passes sub-legal acts and standard tender documents; develops and monitors the process and maintains the unified procurement database (<https://tenders.procurement.gov.ge>); provides advisory services to procuring entities; and maintains a black list of entities that are banned from participating in government procurement. It monitors the electronic tendering process for violations, and houses a Dispute Resolution Board that reviews complaints filed by stakeholders (see section 1.4). The CSPA is an independent legal entity of public law and is accountable to the government of Georgia. The CSPA's mandate is defined by the Georgian Law on Public Procurement. The agency is financed through the state budget of Georgia, bidding fees paid by participating entity in procurement, and other revenues such as grants from international donors. In 2012 the allocation from the state budget was GEL 1.2 million, in 2013 it is GEL 680,000.³

In 2011 the supervisory board of the Agency was dissolved. Its main function – to ensure transparency of the procurement system – is now the responsibility of both the CSPA and the tender committees, which publish an annual report about their practices and procurement data.

Chart 1: The Procurement Agency⁴



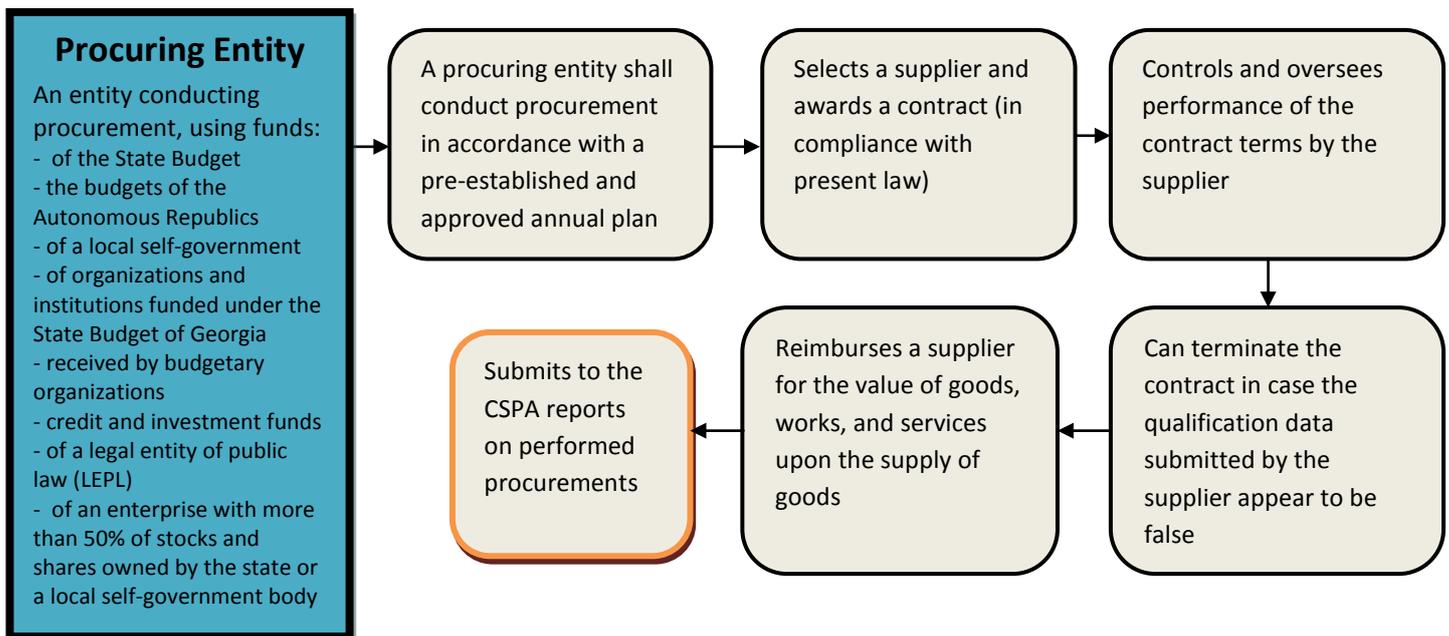
³ Ministry of Finance State Budget 2013, published on: <http://mof.ge/5109>

⁴ Chart based on the State Procurement Agency (2010) *Unified Electronic System of State Procurement; Users Manual*, Published on http://procurement.gov.ge/files/_data/geo/publication/e-tenders_guideline_eng_v3.0.pdf

1.2 Procuring Entity

Procuring entities conduct procurement using the funds of the organizations and institutions funded under the State Budget of Georgia, budgets of the Autonomous Republics of Abkhazia and Adjara, and organizations and institutions funded under the budgets of local self-government bodies. A government body can start a tender through the E-procurement system after it has registered as a procuring entity on the procurement platform. After the bidding is over, the procuring entity selects the winning supplier and awards a contract or undertakes disqualification of bidders. It has the right to terminate the contract in case the qualification data submitted by the supplier appears to be false.

Chart 2: Procuring Entity⁵



1.3 Tender Committee

A tender committee is responsible for conducting an electronic tender. The committee is formed by the head of a procuring entity and should consist of at least three members, usually the deputy head of the entity, and/or heads of structural sub-units. In case the number of relevant candidates is not sufficient, other employees of the procuring entity may also be designated as members of the committee. If necessary, experts may be invited to the committee to hold a consultative vote. In case of a simplified electronic tender or electronic tender, the committee takes decisions by a majority of the committee members on the list.

1.4 Dispute Resolution Board

The Dispute Resolution Board deals with appeals made on the E-procurement system about a specific tender. Interested participants or bidders who suspect there may be a violation with a

⁵ Chart based on the State Procurement Agency (2010) *Unified Electronic System of State Procurement; Users Manual*, Published on http://procurement.gov.ge/files/data/geo/publication/e-tenders_guideline_eng_v3.0.pdf

tender have the right to appeal a tender by filling out a form on the tender page. The Board has also considered appeals filed by interested citizens who monitored a tender but were not directly related to it, making it in practice possible for every registered user to appeal. The board also reviews complaints made to a procuring entity or procuring committee on the indicated violation of the law as stated in the complaint. Complaints are searchable online (categorized by type) and linked to the unique tender number.⁶ Additionally, a participant in a tender can ask online questions to the procuring entity before the bidding starts, and the procuring entity must answer within a reasonable time before the bidding starts. This communication is also publicly visible on the tender page.

When the legitimacy of a complaint is confirmed, the board may:

1. Inform the procuring entity about the error and require a correction to comply with the law;
2. Require a total revision or cancellation of the tender;
3. To report the case to law enforcement and other relevant bodies in case of a serious violation.⁷

Three members of the Board are appointed by the Chairman of the CSPA, three members are elected by non-governmental organizations that express their interest in participating. Board members are selected for a one-year term based on a rotation principle from a number of NGOs. One of the problems with the short termed rotation principle is that it might harm institutional memory, which is assessed to be very important for the development of the board.⁸

The work of the board members is not reimbursed and is on a voluntary basis. Currently two of the three civil society representatives are from the business associations – the Georgian Business Association and the Association of Oil Importers. The members from civil society are selected from a large group of NGO's that are pre-scanned on their knowledge on the subject and their qualifications. In the election conducted in 2011, 20 NGO's participated; Transparency International Georgia was elected as a member of the board.

Board members take decisions independent of the organization they work for. An evaluation has recommended that several provisions to guarantee the impartiality of decisions should be included into the Rules of Operation of Procurement related to the Dispute Review Board.⁹

Decisions are taken with the majority of votes of the present members, and no member can refrain from voting. When the voting is tied, the Board Chairman has the decisive vote. Until now there has not been a situation in which the Board Chairman has used the right of a decisive vote.

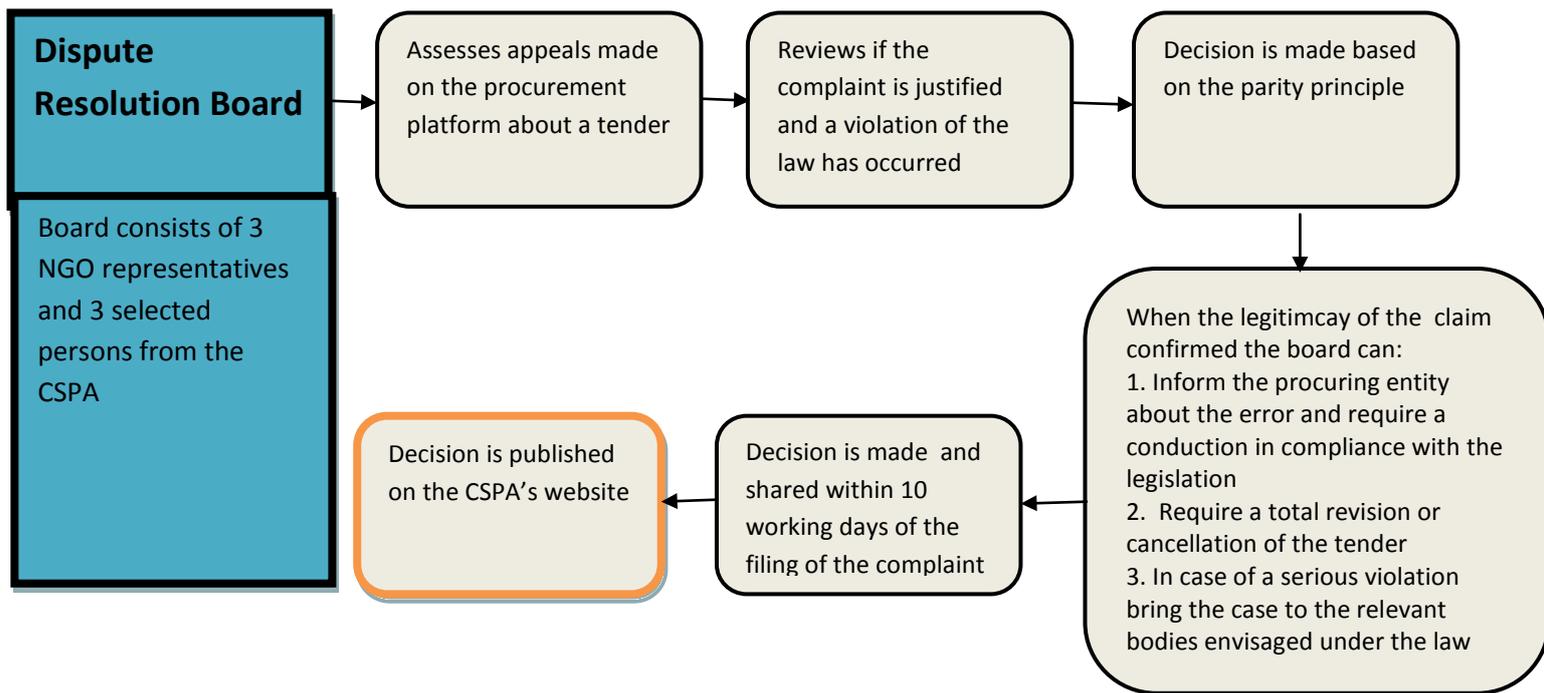
⁶ PMC Research Center (2012) *The Study of Processes and Procedures of and Strengthening the Communications Function of the Dispute Review Board of the Competition and State Procurement Agency*, http://procurement.gov.ge/files/_data/eng/publications/SPA_DRB_Business_processes_review_eng.pdf

⁷ The Order of the Chairman of the State Procurement Agency No 11 (2010) *On the Rules of Activity of the Procurement Related Disputes Resolution Board under the State Procurement Agency*, published on: http://procurement.gov.ge/files/_data/eng/legalacts/order_no_11_20111130.pdf

⁸ PMC Research Center (2012) *The Study of Processes and Procedures of and Strengthening the Communications Function of the Dispute Review Board of the Competition and State Procurement Agency*, http://procurement.gov.ge/files/_data/eng/publications/SPA_DRB_Business_processes_review_eng.pdf

⁹ Ibidem footnote 7

Chart 3: Dispute Resolution board¹⁰



1.5 Tender Review Process

The procurement agency is responsible for monitoring E-tenders for violations of the law. Due to a lack of resources the procurement agency does not have the financial or the human capacity to assess all tenders. The system the Agency currently uses is still being developed and is a digital system that assesses tenders on several risk factors that might indicate a violation of the law. When the system reports a risk within a tender, this is further assessed by the agency themselves to see if a tender violates the law. Currently around 20 per cent of tenders are assessed in this system while a sample of the remaining tenders is scrutinized randomly. The system in itself is innovative and the agency is currently trying to develop it further, so that it can assess a larger number of tenders and reduce the need of human intervention since the system is better able to assess whether there is an actual violation of the law. However, due to the lack of human and financial resources not all tenders can be scrutinized.

1.6 Appeal System

An extra safeguard is the electronic appeals mechanism. According to the law, potential suppliers are able to submit appeals electronically at any stage of the tender process until the contract has been awarded. If they are submitted in the correct format and concern the conduct of procuring entities, complaints must be considered by the dispute resolution board, and the tender is then suspended for ten days.

¹⁰ Chart based on: The Order of the Chairman of the State Procurement Agency No 11 (2010) *On the Rules of Activity of the Procurement Related Disputes Resolution Board under the State Procurement Agency*, published on: http://procurement.gov.ge/files/_data/eng/legalacts/order_no_11_20111130.pdf

The dispute resolution board gives every company or entity interested in participation the chance to appeal against a violation of the law. The transparency of the tenders at every stage, along with the easy and immediate possibility of appealing when the law is violated, provides an extra security mechanism against corruption that does not exist in most EU states and other countries.

The Law on State Procurement, Article 23, defines a person that has the right to file a complaint vaguely as an entity interested in participation.¹¹ In practice, the CSPA interprets this provision in a broad sense, allowing any interested organization or citizen who might be spotting a violation of the law to file a complaint (for this, registration on the website is required).

Interviews with company representatives suggest that not many enterprises are fully aware of the opportunity to file a complaint against alleged misconduct and appeal to the Dispute Resolution Board. However, since the new complains review board was introduced, the number of complaints has been steadily increasing, indicating increasing trust in the mechanism.

While the appeal system is a very innovative initiative, its effect solely depends on the participation of parties. TI Georgia highly welcomes the system, not as a substitution of the tender review process, but rather as a good addition against corruption, and a guarantee of accountability. The system furthermore gives civil society the opportunity to review all the tenders and appeal them when a violation is spotted.

1.7 Black List

The CSPA maintains a Black List of companies that previously did not fulfill a contract or that provided wrong information when participating in tenders. The Black List is publicly accessible on the front-page of the CSPA's website. As stated in Article 3.1 of the Law on State Procurement

“The Black List includes the data on those dishonest entities, bidders and suppliers participating in state procurement, which are not authorized to participate in state procurement and award a contract on state procurement for a one-year period after their entry into the Black List. The Black List is available for any person.”

The Black List is an easy way to exclude “dishonest participants” from entering procurement competitions. Numerous interviews with Slovakian practitioners and experts have revealed that a Black List would be a welcome attribute to their procurement system. Georgia's current Black List, however, has several weaknesses which prevent it from functioning as intended.

1. There have been cases (see case study 2 below), where owners of a blacklisted company started a new company, with the same shareholders, management and address as the blacklisted entity – and even with a very similar name. This new entity can then participate in tenders. The ease of this possibility reduces the Black List's relevance since dishonest participants are not, in fact, entirely excluded from the system. The efficiency of the Black List excludes a company only based on the entity's ID number, this makes it very easy in Georgia to register and set up a company alongside the listed one. Thus, the Black List should also take into account the shareholders and/or directors of a company to avoid this circumvention.

¹¹ The Law of Georgia on State Procurement, published on:
http://procurement.gov.ge/files/data/eng/legalacts/Law_of_Georgia_on_State_Procurement.pdf

Several business representatives TI Georgia spoke stated their concern that blacklisting could potentially be misused because any complaint from a government entity might trigger a yearlong ban from public procurement. It thus seems advisable for the CSPA to publish guidelines based on which the decision is made whether an entity is blacklisted from public procurement. Tato Urjumelashvili, the head of the CSPA, who has been the driving force behind the reform of public procurement in Georgia, told TI Georgia that the Agency is considering to allow companies to apply for a removal from the Black List if they provide evidence that problems that triggered the ban have been sufficiently addressed, e.g. through new rules, policies, trainings or staff changes. If implemented well, this step could mitigate risks that blacklisting is misused, and the mechanism could also provide additional incentives for companies to reform and improve their business conduct.

2: The Public Procurement Process in Georgia

2.1 Overview of Procurement Methods

The public procurement framework in Georgia allows procurement governed by the procurement law and related secondary legislation to be conducted in four ways. These methods do not cover procurement that is exempted from these laws: the exemptions and the size of funds spent through them will be discussed below. Table 1 provides an overview of the different types of procurement and their specifications.

The first method, known as ‘simplified procurement’, does not go through the electronic system and is used for purchases under GEL 5,000 (in many cases, government entities also procure purchases of less than GEL 5,000 using a competitive E-tender process). Simplified procurement can also be used for other reasons, summarized in the table below. It is intended to streamline small purchases or those needed quickly, where it would be too cumbersome and inefficient to conduct a competitive, electronic tender. This threshold is typical in most procurement systems, and indeed the Georgian threshold is set lower than most EU countries.¹²

There is little legislation governing conduct of simplified procurement – procuring entities can decide about their purchasing procedures and are not required to obtain several quotes from potential suppliers. There are currently few rules to ensure transparency for spending through this method. However, the Agency recently started to publish all the contracts awarded under the simplified procurement online going back to 2003 on its website. Such an initiative is a very positive development to improve transparency of procurement and cover what has been a major loophole.

A worrisome clause that allows for the use of simplified procurement rules that appears to have been excessively used is by consent of the president or the government, even if the value of the procurement is beyond GEL 5,000.

There are two types of tenders conducted through the e-procurement system: 1) simplified electronic tenders – a procedure with shorter deadlines that can be used for smaller purchases

¹² OECD (2010), “Public Procurement in EU Member States - The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives”, *Sigma Papers*, No. 45, OECD Publishing. <http://dx.doi.org/10.1787/5km91p7s1mxv-en>

of no more than GEL 200,000 – and 2) electronic tenders, which are used for larger procurements.

A fourth method is the design contest, used to procure design-related services. Its main feature is that it has wider evaluation criteria that can be specified (such as the most appealing design of a public building to a tender commission), and can take into account broader factors other than the lowest price.

The CSPA has also started to use consolidated tenders in a limited number of areas – for the delivery of fuel, mobile telecommunication services, computers and printing paper – whereby qualified bidders bid not on the overall value of the contract but of the price of a unit of the product or service, for example the price per liter of fuel. For these tenders, special requirements apply. By mid-June 2013, a total of 15 such consolidated tenders had been awarded.¹³

The thresholds, bidding time, and bidding procedures of the different procurement types, are discussed from chapter 2.2, as well as their compatibility with the practices of EU member states.

¹³ Procurement website: <http://tenders.gov.ge>, accessed June 12, 2013.

Table 1: Details of Different Public Procurement Procedures in the Georgian Law on Procurement

	Simplified Procurement	Simplified Electronic Tender (SET)	Electronic Tender (ET)	Design Contest
When is it Used?	<ol style="list-style-type: none"> 1. procurement under GEL 5,000 2. With special presidential and governmental authorization 3. In cases of 'urgent necessity' 4. procurement up to GEL 20,000 by Georgia's diplomatic missions and the Ministries of Interior and Defence 5. procurement related to business expenses 	Procurement of homogenous objects between GEL 5,000 to GEL 200,000 (where exemptions for simplified procurement don't apply)	Procurement homogenous objects of GEL 200,000 and higher (where exemptions for simplified procurement don't apply)	Can be used for procurement of design related projects and services, based on decision of a procuring entity
Goes Through Electronic Tender System?	NO	YES		No, published in a different section of the CSPA website
Announcement of Tender (requirements)	N/A	<ul style="list-style-type: none"> • Tender documentation must include: requirements bidder must meet; quantity/timeframe; technical details; methods used to estimate value of bid; how to request clarification • Between 'tender announced' and 'bidding commenced' procurer can modify details of the tender • 1 day for bidders to familiarize themselves documentation, bidding starts within 2 days of this (3 days total between first announcement and end of bidding) • There should be a reason provided to request extra documents from bidders and keep them to a minimum 	<ul style="list-style-type: none"> • Tender documentation must include: requirements bidder must meet; quantity/timeframe; technical details; methods used to estimate value of bid; how to request clarification • Between 'tender announced' and 'bidding commenced' procurer can modify details of the tender • 15 days to familiarize, bidding starts within 5 days of this (20 days total) • Illegal to add discriminator qualifications/ specify a particular trademark, pattern, model, or producer 	<ol style="list-style-type: none"> 1) Flat fee of GEL 50 for submission of bid (non-refundable) 2) Specific criteria published at Published at http://contest.procurement.gov.ge/?act=1.
Bidder Rights and Requirements	N/A	<ul style="list-style-type: none"> • Must be registered user to bid • Can only post bids after: 1) signing affidavit 2) paying electronic guarantee to SPA. • Between tender announced and bidding completed, supplier can request clarification of the tender documents, and they are obliged to give clarification 'within reasonable timeframe' giving the bidder enough time to adjust his bid. 		
Translation to English	N/A	Threshold for mandatory translation of documents by to English: <ul style="list-style-type: none"> • Over GEL 500,000 for goods/services • Over GEL 1,000,000 for construction works 		

Payment to Participate	N/A	<ol style="list-style-type: none"> 1) Flat fee of GEL 50 for submission of bid (non-refundable) 2) 'electronic guarantee' – 1% of value of object paid to SPA. Valid for 30 days after bidding commenced. Returned after bidding stopped/ tender cancelled 	<ol style="list-style-type: none"> 3) Flat fee of GEL 50 for submission of bid (non-refundable) 4) 'electronic guarantee' – 1% of value of object paid to SPA. Valid for 60 days after bidding commenced. Returned after bidding stopped/ tender cancelled 	
Bidding Process	N/A	<ul style="list-style-type: none"> • A 'general time of electronic reverse auction' specified in tender documents for bidding is followed by three additional rounds of ERA. • Bids can be reduced only by the 'bid reduction step' – between 0.4 and 2% of estimated value, specified in tender notice. • In general time bids can be reduced as often as wished, and then once more in each additional round. • A maximum starting price is set by the procuring entity. 		
When/how can tender be cancelled?	N/A	<ul style="list-style-type: none"> • Process can be cancelled at any stage of the tender process except when the contract has already been awarded • Tender Committee must inform the SPA and the bidders within 3 days • They must upload minutes of the meeting deciding to cancel, giving grounds for the cancellation. • They do not have to reimburse them for costs of participation or give 'specific evidence or detailed information on the basis of which such decision was taken' 		
Selection/Evaluation/Disqualification Process	Supplier selected by procuring entity/ price quote obtained directly.	<ol style="list-style-type: none"> 1) No quality component of evaluation – simply lowest bidder whose technical proposal meets specification and send qualification documents on time/ in correct format: 2) Lowest bidder conforming to specification and tender documents is selected by system when bidding completed. If lowest bids are identical, the first person to submit that bid is selected 3) Tender committee then considers technical proposal, and uploads the minutes of their discussions to system on same day as sitting. 4) It can disqualify the lowest bid if the technical proposal is not in conformity with tender specifications or they fail to submit qualification docs. However, they cannot disqualify when information could easily be supplied without changing fundamentals of bid. It must request for clarification or more information in these cases. 5) Then request qualification documents. Bidders have 'reasonable timeframe', but no more than 5 days, to send these. 	The evaluation of proposals and the identification of a winning applicant is performed by a design contest committee in accordance with the criteria established under the design contest conditions, the committee consists of experts and board members	
Awarding of Contract	<ul style="list-style-type: none"> • Contract Mandatory; Not Mandatory through internet through simplified procurement Can be substituted for document 'proving state procurement' 	Contract Mandatory <ul style="list-style-type: none"> • Contract awarded no more than 5 working days after submission of qualification docs 	Contract and Contract Performance Guarantee Mandatory <ul style="list-style-type: none"> • Must have contract performance guarantee of 2%-10% contract value 	
Appeals Process	N/A	<ol style="list-style-type: none"> 1. Bidder has right to appeal actions of tender committee. Complaint submitted electronically to SPA, and must be discussed by the Dispute Resolution Board if a valid complaint. 2. Tender is suspended for 10 days if complaint is accepted. 3. Complaint must be about the actions of procuring entity/tender committee – not considered if about other bidders or technical faults with website. It must be made between the tender starting until either the tender fails, is cancelled or the contract is awarded. 		
Contract Performance Control	N/A	<ul style="list-style-type: none"> • Procuring entity is authorized to entrust an employee/group of employees with the control over compliance with the terms and conditions of a Contract. • A supplier is obliged to ensure at own cost the allocation of staff/ technical facilities necessary for performing control over Contract performance, as well as ensure necessary working conditions. • If faults have to be eliminated = costs borne by supplier 		

2.2 Thresholds

Simplified Procurement (SP) can be used for state procurement of homogeneous procurement objects with value up to GEL 5,000, urgent necessity, and several other cases stipulated above. The simplified electronic tender (SET) procedure should be used for objects ranging between GEL 5,000 and 200,000, and is based on an open competition, similar to the electronic tender but with a shorter time limit for bidding.

The thresholds used in Georgia for Simplified Electronic Tenders or Electronic Tenders are lower than those used in EU member states for similar procedures. Within the EU, member states use different thresholds to determine which procedure and regulations apply to a tender. Tenders that fall under the lowest thresholds determine whether the regulation applies at all, and if direct purchasing is allowed. The thresholds after that are similar to the SET and use simplified procedures. In general for these procedures the threshold is normally fixed between EUR 50,000 to 70,000.¹⁴

The thresholds in the Georgian system are similar to those used in Latvia where direct purchasing is allowed below thresholds of EUR 4,500 to EUR 14,000.¹⁵ Between EUR 30,000 and EUR 137,000, a simplified competitive procedure can be used. Above these thresholds open competition procedures are used.

2.3 Bidding

Users must be registered in the system to bid. On 12 June 2013, a total of 13,305 individuals and entities were registered on the e-procurement system as potential suppliers. There is some concern about low levels of registration among limited liability companies (the most common participants): By the end of 2012, 13% of the companies in Georgia are registered.¹⁶ More information and awareness-raising for companies who do not use or trust the electronic system could therefore be beneficial, and help increase the competitiveness of tenders.¹⁷

Before being able to submit a bid on a tender, a bidder is required to pay a bid submission fee of GEL 50, through the electronic system, via an electronic payment.

In order to participate in a tender only the procurement related technical documentation – data concerning the procurement object and the bidder – must be uploaded. The data required is specified in the tender notice and tender documentation, along with qualification documents that only the potential winner should submit.

Bidding is conducted in a prime time period where bidders can lower their bid as often as desired, and the bids of the other participants are not shown. When this process closes, there are three additional rounds in which bidders can lower their bid once more each round, and

¹⁴ OECD (2010), "Public Procurement in EU Member States - The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives", *Sigma Papers*, No. 45, OECD Publishing. <http://dx.doi.org/10.1787/5km91p7s1mxv-en>

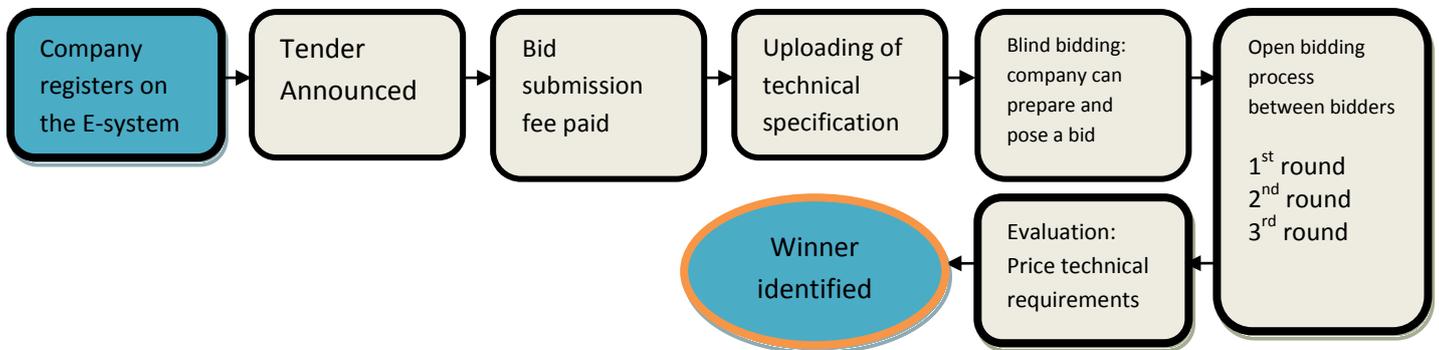
¹⁵ Ibidem footnote 13

¹⁶ Annual Report (2011) *Competition and State Procurement Agency*, published on; http://procurement.gov.ge/files/_data/eng/about_agency/cspa_report_2011_eng.pdf

¹⁷ PMC Research Center (2012) *The Study of Processes and Procedures of and Strengthening the Communications Function of the Dispute Review Board of the Competition and State Procurement Agency*, http://procurement.gov.ge/files/_data/eng/publications/SPA_DRB_Business_processes_review_eng.pdf

view the bids of the other participants (but not their identities). Bids must be lowered by at least the amount of the ‘bid reduction step’ – which is specified in the tender documents. The participants that submitted the lowest bid in the previous round make the last bid, creating a competitive advantage and pressuring other companies to pose a lower bid.

Chart 4: The Bidding process ¹⁸



2.4 Selection/ Evaluation

Once bidding is complete, the tender committee reviews the lowest bid to ensure it conforms to the details of the tender documentation. The committee must request additional information and clarification before disqualifying suppliers, as long as this would not fundamentally change the bid or the technical aspects. The tender committee then requests qualification documents and, if they are valid and in the correct format, awards the contract.¹⁹ If the winning bidder is disqualified the procuring entity holds negotiations with the next lowest bidder.²⁰

The procurement process is structured in such a way to stimulate bidding on the lowest price. This suggests that once it meets the technical requirements, the winner is identified on the lowest price.

2.5 Time limits

Time limits need to ensure that all companies willing to participate in a tender have sufficient time to familiarize themselves with a tender and to prepare a bid. A time limit that is too short could be used to exclude foreign companies, for example, which need time to translate a document, or Georgian companies that need a few days to prepare a bid.²¹ Time periods which are too short can be abused by a procuring agency to exclude companies if a deal has already been made. Thus, a minimum time limit is important for equal participation in the tendering process.

In Georgia, the minimum time limit for the Simplified Electronic Tender procedure is 3 days; for the Electronic Tender procedure this is 20 days. The minimum time limits in EU member states

¹⁸ Chart based on information from: State Procurement Agency (2010) *Unified Electronic System of State Procurement; Users Manual*, Published on http://procurement.gov.ge/files/_data/geo/publication/e-tenders_guideline_eng_v3.0.pdf

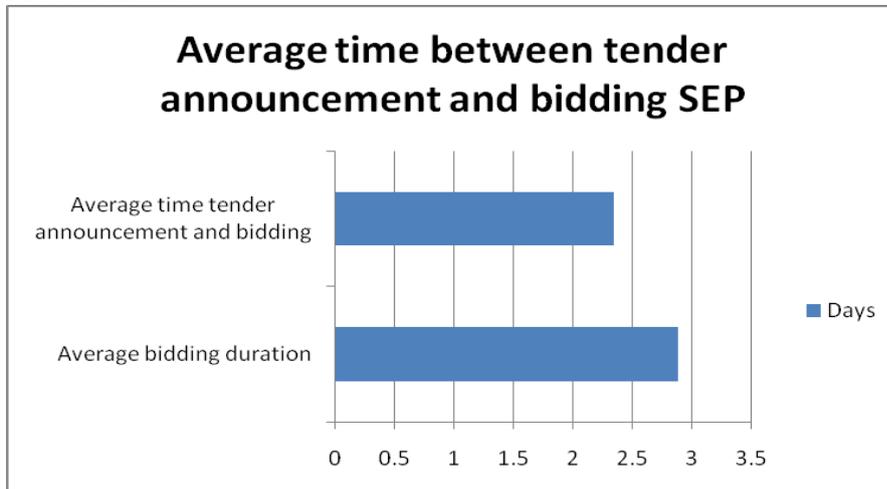
¹⁹ State Procurement Agency (2010) *Unified Electronic System of State Procurement; Users Manual*, Published on http://procurement.gov.ge/files/_data/geo/publication/e-tenders_guideline_eng_v3.0.pdf

²⁰ http://procurement.gov.ge/files/_data/eng/legalacts/Law_of_Georgia_on_State_Procurement.pdf

²¹ Europe Aid Co-operation Office (2011) *EU Public Procurement Law: An Introduction*, in cooperation with the Copenhagen Business School, The University of Nottingham, University of Malaya, University of Copenhagen.

are similar for the ET procedure but for SET-like procedures are significantly longer: 10 days as opposed to 3.²² In general the time limit for procurement processes similar to the ET is around 20 days, but ranges between 14 to 30 days.²³

Chart 5: Average Bidding and Tender announced Time used in the Simplified Electronic Procurements²⁴



The SET time limits used in Georgia are significantly shorter than those in most of the EU member states, even taking into consideration the fact that they are processed electronically. In Romania time limits are also shortened for simplified procedures from 15 to 10 days when done electronically.²⁵

Our analysis shows that the average bidding time used for the Simplified Electronic Tenders by procuring entities is almost the same as the minimum time limit set in the law. The average time between the tender announcement and the start of the bidding meanwhile, is shown as almost 2 days in the chart depicting the average duration of tenders during 2012.

²² OECD (2010), "Public Procurement in EU Member States - The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives", *Sigma Papers*, No. 45, OECD Publishing.

<http://dx.doi.org/10.1787/5km91p7s1mxv-en>

²³ Ibidem footnote 21; page: 16.

²⁴ Chart is based on an analysis of the procurement website.

²⁵ Ibidem footnote 21

Chart 6: Correlation Duration Time and Number of Bids²⁶

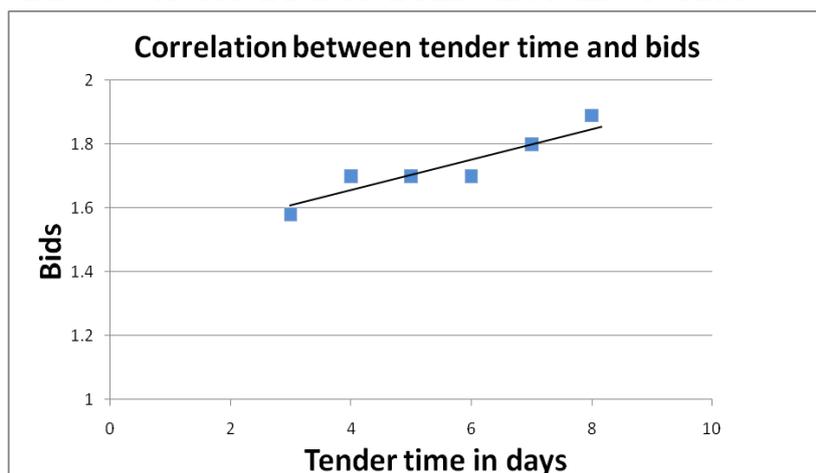


Chart 6 shows the relationship between the increasing and decreasing bidding time and the corresponding number of bidders to a tender in Georgia. We analyzed the bidding time and the amount of bidders that participated in all the tenders procured under the SET procedure in 2012. The data shows that the number of participating suppliers increases by 7.5% when the bidding time is extended by just one day, from three to four days. When extended to 8 days, the number of participating bidders increases by 16%. Procurement under SET procedure is thus shown to become more competitive when the bidding time is lengthened. More competition results in a decrease in prices.

As mentioned above, foreign companies who wish to prepare a bid find the time limits for SET too short to translate and familiarize themselves with the tender and submit a bid. Foreign business representatives interviewed for this report mentioned that the bidding time for them is very tight because they cannot devote all their time for the preparation of a tender.²⁷

Furthermore, even Georgian companies need sufficient time to prepare a bid. Procuring entities in most cases use just the minimum time periods allowed by law. In 2011, 84% of the tenders under the SET used the minimum time of bidding; in 2012 this number decreased to 51.7%.

2.6 Simplified Procurement

Simplified Procurement is exempt from the electronic procurement platform and is in effect direct purchasing. This procedure is used for: purchases below GEL 5,000; purchases of urgent necessity; expenditures made during diplomatic missions; and procurement approved with government and president consent. The Agency has recently begun to publish the contracts awarded under this procedure, a fact which, compared to standard EU practices, is unique and establishes, to our best knowledge, a much higher level of transparency than in any EU member state.

EU member states have higher thresholds for the publication of contracts than Georgia. Hungary's threshold starts at EUR 27,000; Lithuania's is EUR 30,000; Denmark's is EUR 63,000; and in France it lies at EUR 90,000.

²⁶ TI Georgia analysis of procurement data downloaded in March 2013 from tenders.gov.ge. More detailed data has been made available on TI Georgia's procurement monitoring website, <http://tendermonitor.ge>.

²⁷ Interview with an international consultancy company, a foreign company based in Georgia that prefers to stay anonymous.

2.7 Presidential and Governmental Consent

The clause that allows tenders, of any value, to be classified as Simplified Procurement if they have Presidential or governmental consent, is a serious issue for concern.

According to the procurement rules:

*“The conducting of procurement was prescribed under the President of Georgia and/or the Government of Georgia legal act in order to implement an event of state and public importance without hindrance within the restricted timeframes”.*²⁸

Chart 7: Break up of procurement means²⁹

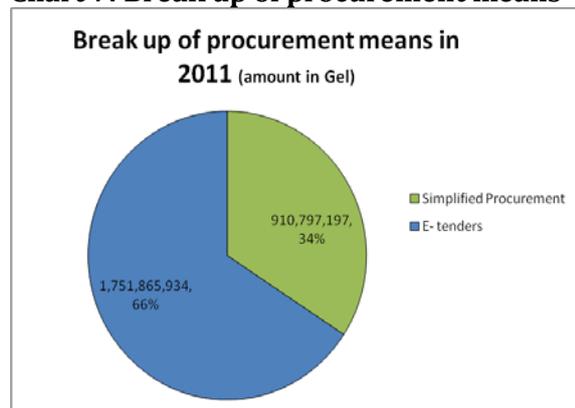


Chart 8: Types of SP categorized³⁰

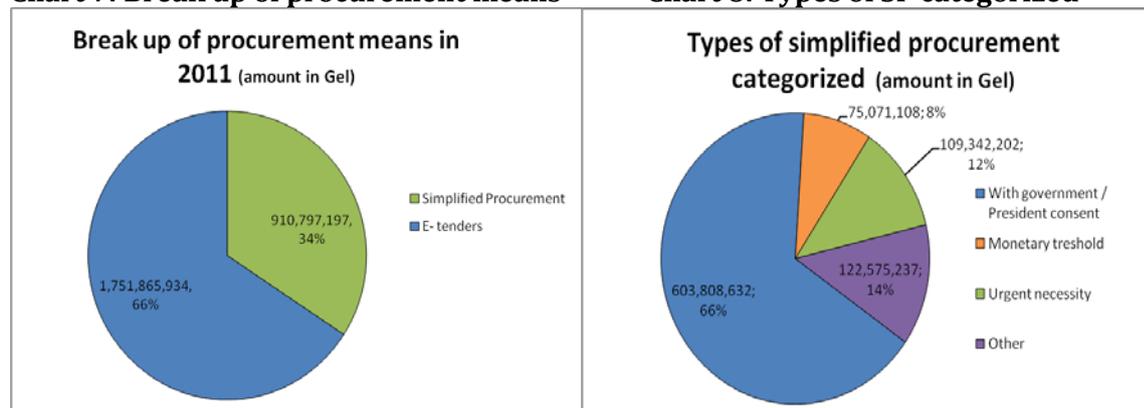


Chart 8 shows that GEL 600 million, one third of all procurement, was spent via the governmental / presidential consent clause in 2011. This amount increased to GEL 800 million in 2012.

Most if not all of these tenders should have been processed through the electronic website to stimulate competition, get the lowest price, and to be subject to public scrutiny and tender review of the CSPA. But this did not occur.

TI Georgia strongly believes this clause should be taken out of the SP since it prevents tenders being rightfully processed through the electronic platform, and evidence implies that it has been highly abused for the goal of personal enrichment.

2.8 CPV 999999999:

The Common Procurement Vocabulary Codes (CPV), the classification codes used for tendering supplies, works and services in the Georgian procurement system, are the same as those used in the EU. However, in the Georgian system there is one additional code - CPV 999 - which is not used in other procurement systems.

According to the CSPA, this code used in cases that cannot be classified under other CPV codes. However, CPVs are meant to cover all possible classifications, and should provide for the procurement of all goods and services. Therefore, it is unclear why it is necessary to use this in

²⁸ Stated in Article 3 (2d) the Order No 9 of the Chairman of the State Procurement Agency on Approving the Rules for Conducting Simplified Procurement, Simplified Electronic Tender and Electronic Tender

²⁹ Annual Report (2011) *Competition and State Procurement Agency*, published on; http://procurement.gov.ge/files/_data/eng/about_agency/cspa_report_2011_eng.pdf

³⁰ Ibidem footnote 29

Georgia. Currently there are 51 tenders that fall under the CPV 999 code. This is problematic for two main reasons. Firstly, CPV 999, is ambiguous and suppliers are likely to not be aware of tenders that are posted under it, decreasing competition and increasing the risk for corruption and inside-deals.

3: Competition and Equal Treatment in Georgian Public Procurement

3.1 Qualifications Requirements

In this section we assess the qualification requirements set out in the law and the E-procurement system, as well as the weight given to quality when choosing the winner. In several of the interviews conducted for this report, respondents mentioned that in Georgia too much importance is attached to the lowest price and that, in line with international practices, insufficient weight is given to the qualifications of companies in proposal evaluations.³¹

According to the State Procurement Law, the procuring entity has to set qualification requirements and technical requirements that bidders have to meet in order to participate in a tender.³² The qualification requirements may relate to professional skills, financial resources, experience and reputation, technical facilities, and other aspects of a prospective supplier. In awarding a contract, the selection criteria is the lowest price, given that a bidder is required to fulfill the qualification as well as the technical criteria demanded by the procuring entity.³³

The qualification requirements set out in the EU Public Sector Directive (PSD) are broadly similar to the Georgian procurement legislation, although in some cases they are more detailed (Article 44).³⁴ Instead of setting out every article as noted in the PSD, we have focused on the four primary principles guiding the directives on which suppliers can be excluded: ³⁵

1. Economic and financial standing;
2. Professional honesty, solvency, and reliability;
3. Enrolment on a trade or professional register, and possession of a license;
4. Technical and professional ability.

As in Georgia, these rules do not oblige an authority to take into account specific details, but rather set an overall standard to guide procuring entities.

³¹ Interview with a representative of the German Business Association Georgia, interview conducted with the Georgian branch of an international consultancy company, interview conducted with a foreign company that prefers to stay anonymous.

³² Order No 9 of the Chairman of the State Procurement Agency on Approving the Rules for Conducting Simplified Procurement, Simplified Electronic Tender and Electronic Tender, Article 11 (1).

³³ Ibidem footnote 32; Tender Article 12.

³⁴ Directive 2004/18/EC Of The European Parliament And Of the Council, (2004) on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts, Official Journal of the European Union, L 134/114.

³⁵ Europe Aid Co-operation Office (2011) *EU Public Procurement Law: An Introduction*, in cooperation with the Copenhagen Business School, The University of Nottingham, University of Malaya, University of Copenhagen.

Although the EU directives do set out more detailed qualification requirements on procurement than the Georgian law, there is no significant gap between the two systems. Especially when considering the freedom that national systems in the EU have in deciding whether their selection should be based on the lowest price or should prioritize other requirements.

It is evident that a procuring entity (rather than the legislation) is responsible for detailing qualification requirements, especially when it involves a complex tender. In the Georgian system, however, if two companies meet the criteria set out in the tender, it is the company with the lowest priced bid, even if less qualified, that will be chosen. The question here is to what extent is this ultimately problematic if both companies are able to fulfill the contract as well as meet the minimum requirements?

3.2 Quality Evaluation

The best value for money is often considered to be the ultimate goal of procurement. The weight contributed to the quality of the proposal, however, should also be carefully considered. Several company representatives told TI Georgia that the evaluation of shortlisted candidates is basically a competition in which the lowest bidder wins.³⁶ This is especially true when it concerns non-standard products or complex contracts, in sectors such as construction and consultancy services, where it is clear that selecting the shortlisted companies on the price alone does not ensure sustainability or value for money.

Several respondents have mentioned the World Bank procurement guidelines and Consultant Guidelines for Quality- and Cost-Based Selection (QCBS) as a good alternative to having only the lowest price as the main criterion.³⁷ According to these guidelines, the evaluation of proposals are based on a score in which the quality is separately assessed from the costs. The evaluation of the quality is based on: the consultant's specific experience; methodology; key personnel; transfer of knowledge; participation by nationals.

Only those companies that meet the minimum quality requirements are then assessed on the costs of their proposal. The selection of the company is based on a final combined score of the quality and the costs. The weight for the costs is decided on the complexity of the assignment and the relative importance of the quality. The cost for the weight is normally in the range of 10 to 20, and never exceeds 30 points.³⁸ The company with the highest score is then selected for a further negotiation of the contract.

The main difference between the procedures used in Georgia and those applied by the World Bank lies in the evaluation of the shortlisted companies. In the Georgian system, when companies meet the minimum qualification requirements, the winner is selected on the lowest price. In the World Bank procedure, however, the winner is selected on a combined evaluation of the quality and price, where the quality, especially for complex assignments, holds the higher weight.

³⁶ Interview German business association and director of an international Georgian based consultancy company.

³⁷ Consultant Guidelines - II. Quality- and Cost-Based Selection (QCBS), found at: <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060635~menuPK:92323~pagePK:84269~piPK:84286~theSitePK:84266,00.html#2.4>.

³⁸ Consultant Guidelines - II. Quality- and Cost-Based Selection (QCBS), found at: <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060635~menuPK:92323~pagePK:84269~piPK:84286~theSitePK:84266,00.html#2.4>.

3.2.1 The Risk of Subjectivity

While our respondents from the private sector are more in favor of a procurement system in which more weight is attached to quality, procurement officers at ministries that were interviewed seemed to support the current system. The procurement officers are wary of a system where quality and cost were weighted equally, since it is more vulnerable to corruption and more dependent on the subjective judgment of the assessors.

They went on to state that the terms of the tender also takes qualifications into consideration. Thus, if companies meet the qualification criteria, they are capable of fulfilling the assignment. The evaluation of the proposal on the lowest price leaves the least chance for subjectivity and thus the least opportunity for corruption.

3.3 Competition and Discrimination

If set too strictly, qualification requirements may limit competition. If professional and technical requirements are – deliberately or not – made overly specific so that only a certain company can comply with them, this undermines competition. Therefore the EU Directives stipulate that procuring entities have to provide for fair opportunities for participation. The EU rules establish guarantees that procedures for assessing qualifications are not unduly burdensome and do not provide opportunities for authorities to conceal discrimination.³⁹

Equal treatment is one of the fundamental principles for a procurement system. A tender should neither discriminate between national and foreign firms, nor between different national firms.

Some respondents mentioned that they have encountered tenders with requirements so specific that it was impossible to prepare a bid if the company did not meet the exact requirements, of which examples are given in the case studies below. Based on this complaint we analyzed how vulnerable the law was to over-specification, what a company can do about this when it is encountered, and what the guidelines are in international practice.

3.3.1 Non-discrimination requirements in Georgia

The issue of fair and non-discriminatory procurement as a result of specific requirements is set out in general terms in Article 13 on the Georgian law on state procurement:⁴⁰

“Requirements for qualification data must be fair and non-discriminatory and be conducive to the promotion of healthy competition.”

This is further specified in specific rules:

“A procuring entity shall be obligated to make a reference to the relevant used standard (if applicable). It shall be inadmissible to specify a trademark, patent, model, source of origin or a producer in the description of a procurement object.”⁴¹

³⁹ Europe Aid Co-operation Office (2011) *EU Public Procurement Law: An Introduction*, in cooperation with the Copenhagen Business School, The University of Nottingham, University of Malaya, University of Copenhagen.

⁴⁰ The Law of Georgia on State Procurement, published on:
http://procurement.gov.ge/files/data/eng/legalacts/Law_of_Georgia_on_State_Procurement.pdf

⁴¹ Order No 9 Article 11 (6) of the Chairman of the State Procurement Agency on Approving the Rules for Conducting Simplified Procurement, Simplified Electronic Tender and Electronic Tender

3.3.2 Non-Discrimination: International Practices

Within the EU Directives and the Treaty on the Functioning of the European Union, discrimination is prohibited between member states and in member states.⁴² These guidelines aim at making sure specifications are not intentionally or unintentionally used to limit competition.⁴³ A decision made by the Court of Justice of the European Union based on article 34 of the TFEU has stated that: specifications are prohibited which are (not) discriminatory on grounds of nationality, even when these exclude products which can meet the purchaser's requirements.⁴⁴ This means that either:

1. Specifications must be drawn up in reference to “performance” requirements, rather than by a detailed description of the product's characteristics;
2. If a detailed description of product characteristics is used, it must be stated expressly that products that are functionally “equivalent” will be accepted.⁴⁵

Transparency plays a crucial role in guaranteeing non-discrimination and competition. Open advertising and ensuring that the procurement process and the bodies involved can be reviewed by the public are essential.

Case Study 1: Car Procurement

Car procurement vividly reveals discrimination at work in the deliberate setting of very specific requirements in tenders. We found several cases in which there were clear indications that a deal had already been pre-arranged, such as the requirements in the tender for a car sale being directly copied from the description on the dealer's website, there being only one bidder, and the price being overly specified.

One illustrative example occurred in Zugdidi Municipality. In total the municipality spent GEL 687,710 on cars in 2011 and 2012. In one case, a Toyota Land Cruiser 200 was purchased. The tender documents for this purchase had required: wooden interior, a steering wheel of combined wood and leather, a 9-inch screen attached to the roof, a 14-speaker sound system with USB connectivity, and a fridge.⁴⁶

Another example was Ilia State University's tender to buy a hatchback car for GEL 39,650. The requirements prescribed that the car should not weigh less than 1300 kg (despite the fact that lighter cars are usually more efficient) and have an additional electric engine.⁴⁷ There was only one bidder for this car, and the price list price for that particular car was identical with the price set in the tender.

⁴² Consolidated Version Of The Treaty On The Functioning Of the European Union (2010) Official Journal of the European Union, C 83/49, Article 34 and 56.

⁴³ Directive 2004/18/EC Of The European Parliament And Of the Council, (2004) on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Official Journal of the European Union, L 134/114.

⁴⁴ PWC et. Al. (2011) *Public Procurement in Europe; Cost and Effectiveness*, A study on procurement regulation. Prepared for the European Commission, March 2011, in cooperation with London Economics, and Ecorys Research and Consulting.

⁴⁵ Ibidem footnote 44; page 124.

⁴⁶ TI Georgia (2013) Fancy Cars for Zugdidi Municipality, published at: <http://transparency.ge/en/blog/fancy-cars-zugdidi-municipality>

⁴⁷ Procurement website, <https://tenders.procurement.gov.ge/public/?go=66199&lang=ge>

TI Georgia believes that the very detailed specification of criteria set out in the car tenders has violated Article 13 of the law on state procurement:

“Requirements for qualification data must be fair and non-discriminatory and be conducive to the promotion of healthy competition.”

Case Study 2: Trees

On 24 April 2012, TI Georgia reported about a tender for the purchase of trees that were to be planted on Tbilisi’s Baratashvili Street on 8 February, with an allocated budget of GEL 225,000.⁴⁸ Tender documents showed that City Hall intended to buy 120 cypress plants. The technical requirements referred to a specific type of cypress: *Cupressus Pyramidalis*. The expected cost of the purchase was GEL 225,000.

There was only one company in Georgia capable of, or indeed willing, to provide this type of plant: Greenservice LTD. According to the Georgian company registry, Greenservice is owned by Lasha Purtskhvanidze and Koba Kharshiladze. Lasha Purtskhvanidze is a former deputy mayor of Tbilisi and former head of the Old Tbilisi district administration, Koba Kharshiladze served as its former deputy head. Greenservice has won 17 tenders worth more than GEL 4 million from the state since 2010 (the electronic system does not contain information about tenders conducted before December 2010).

Greenservice’s initial bid was identical to the preliminary cost announced by City Hall. Since Greenservice was the sole bidder, this amount (GEL 225,000) did not subsequently change. Tbilisi City Hall and Greenservice signed a contract on 13 March. Under the contract, City Hall paid Greenservice GEL 990 for each plant; a total of GEL 118,800 for 120 plants.⁴⁹ After TI Georgia highlighted this wasteful spending, City Hall, cancelled the contracts signed with Greenservice and sent the case to the law enforcement agencies for further examination.

In July 2012, Greenservice was put on the black list of the State Procurement Agency and thus banned from participating in public procurement for one year. This was due to a complaint by Batumi City Hall, which claimed that the company had only partly fulfilled the agreed obligations.

Nevertheless, a company named Greenservice+ continues to participate in tenders and often wins contracts. Pursuant to the public registry, the director, shareholders and legal address of Greenservice+ are identical with those of Greenservice.⁵⁰ Moreover, many of the agreements won by Greenservice+ are tenders issued by Tbilisi City Hall – the very agency that just one year ago accused this same group of businessmen of dishonest behavior and requested the law-enforcement agencies to probe into their activities.

⁴⁸ Transparency International Georgia (2012) Expensive Trees for Baratashvili Street, at: <http://transparency.ge/en/blog/expensive-trees-baratashvili-street>.

⁴⁹ Procurement website, tenders, link: https://tenders.procurement.gov.ge/public/?go=43872&lang=ge#state_last_events and <https://tenders.procurement.gov.ge/public/?go=73116&lang=ge>.

⁵⁰ Public registry Georgia Greenservice+, foundat: https://enreg.reestri.gov.ge/main.php?c=mortgage&m=get_output_by_id&scandoc_id=471426&app_id=547134

The first three months of this year alone, Greenservice+ won five tenders, with a total amount of over half a million GEL in Tbilisi. The agreements of two of the tenders have already been executed, while the other three are pending execution.

This case reveals the deficiencies within procurement since the owner of a blacklisted company managed very easily to set up a new company. In this case it was obvious the company was identical to the last since not only was the legal address the same, but its name, bar the “+” tacked onto the end, was unchanged.

3.4 Tender Criteria

The examples mentioned above show a problem that is apparent in every procurement system, and clearly Georgia is no exception. Not only problematic, they also result in the waste of public money. Tender criteria that are too specific occur for two reasons:

- 1) Corruption, where the procuring entity benefits in awarding the tender to a certain company;
- 2) A lack of capacity within procuring entities.

Several of our respondents from the private sector, especially international and foreign companies, mentioned the issue of the qualifications set in the tender by a procuring entity. The main complaint was that they believed the procuring entity and the people that write the tender did not seem to be well acquainted with the industry for which they wrote the tender.

One example was given by a large international consultancy firm with its own branch in Tbilisi. They participated in a tender where one of the criteria was that the company should have a turnover of GEL 4 million over the last year.⁵¹ The director declared that using turnover as a benchmark for selecting a qualified firm is fundamentally flawed, since it is not a benchmark for quality. This was further aggravated by the lack of criteria in the tender relating to good indicators of the quality such as the experience and qualification of the key people working on the assignment, or the methodology proposed for the assignment.

A representative of the German Business Association and another company, which prefers to stay anonymous, voiced similar concerns. They stated that the main problem was that tenders often used strange benchmarks that would not guarantee quality and would thus rarely select the right business.

A big problem in this regard is that procuring entities are unlikely to have the essential resources, such as experts in each industry on their staff. Thus, when a large tender has to be written, it is not necessarily conducted by people qualified or even knowledgeable about the specifics of the industry.

A solution could be to have a body within the Agency, however, comprised of experts to conduct trainings and to provide assistance in writing complex tenders. Although experts can now be involved in drawing up tenders, the anecdotal evidence suggests this doesn't happen sufficiently. This kind of trainings and assistance provided by a body in the agency, in setting the benchmarks for complex tenders would highly increase the quality of tenders and improve the skills of procuring entities.

⁵¹ Interview with the Director of a consultancy company and interview with a foreign company, both of whom prefer to stay anonymous.

4: Exemptions to the Procurement Law

The following types of purchases are exempt from procurement rules:

- Procurement 'related to **performing money-and-credit and currency policy** by the National Bank of Georgia, except for the procurement under the administrative and capital expenditures budget;
- Procurement of **electricity, reserve capacity, natural gas and water supply**;
- Procurement **to support organizing meetings and visits** of the President of Georgia, Chairman of the Parliament of Georgia, Prime Minister of Georgia, a minister of Georgia, the mayor of Tbilisi, receptions for the delegations at the Parliament of Georgia and visits of parliamentary delegations abroad;
- State procurement to be effected using the funds allocated from **Reserve Funds of the President of Georgia, Government of Georgia (GoG) and Tbilisi City Hall**;
- State procurements related to the **purchase of TV/radio air time for advertising**;
- State procurement **related to defence or state secrets**;
- Under the law on state procurement, Article 3, 1.82 (h), the government can approve special procurement rules for state-owned enterprises. The largest state-owned companies in Georgia are currently exempt from using the electronic procurement system and can resort to more opaque, alternative procurement procedures. These companies include:
 - The Partnership Fund
 - Georgian Railways and
 - Georgian Oil and Gas Corporation.

While some of these exemptions are common in procurement systems in Europe, there are concerns about procurement through the Reserve Funds.

4.1 Reserve Funds

According to Article 1 (3e) of the Georgian Law on State Procurement, the funds allocated from the Reserve Funds of the President of Georgia, Government of Georgia, and Tbilisi City Hall are automatically exempt from public procurement rules. Spending from these funds is not subject to competitive tendering requirements, transparency or independent oversight; the result of which is a high risk of wasteful spending, misuse and corruption.

The Presidential Funds and the Governmental Fund are both “contingency funds” that in 2012 accounted for GEL 50 million each.⁵² Additionally, the Tbilisi contingency fund accounted for

⁵² Transparency International Georgia (2012) Electorally public motivated spending, state budget analysis, published on: <http://transparency.ge/en/post/report/new-report-electorally-motivated-spending>.

GEL 2 million in 2012 and GEL 3 Million in 2013.⁵³ According to the TI Georgia report on, electorally public motivated spending, state budget analysis:⁵⁴

“The purpose of a contingency fund is to cover expenses that are impossible or difficult to predict, e.g. damage caused by natural disasters, delinquency on loans guaranteed by the government, etc.”⁵⁵

The accounts for contingency spending are not made public, and even internal (Treasury) accounting does not give details of the purpose appropriations from the funds. Despite the lack of transparency surrounding these funds, the available evidence does suggest that there have been cases in which the funds were used for things such as cultural events.⁵⁶

The crediting and debiting of these funds create further problems due to their lack of transparency. If, for example, a spending institution did not plan its spending appropriately, or had to incur some unforeseen expenses, it will receive money from a contingency fund. The spending institution later has its shortfall made up from the normal state funds (i.e. the shortfall initially funded by the contingency fund), after which, the money the contingency fund gave to the spending institution is then credited back to the contingency fund.

The initial goals of the Reserve Funds were that they should be used in cases of unforeseen emergency situations. In order to bring the Reserve Funds back to their initial goal the legislation should be narrowed down in which the funds can only be used in unforeseen emergency situations. Second do the expenditures need to be included in the budget execution reports to allow review by the public over the funds.⁵⁷

4.2 State Owned Enterprises

Currently, Under Public Procurement Law 3, 1.82 (h) the government can approve special procurement rules for state-owned enterprises. The enterprises currently excluded from the Public Law on Procurement are:

- Partnership Fund
- Georgian Railways and
- Georgian Oil and Gas Corporation

These companies are allowed to arrange their own procurement and thus do not have to follow the procedures set out in the law or the E-procurement.

By excluding these entities from public procurement requirements, their tenders are not published on the CSPA website; this lack of transparency and scrutiny makes these transactions more vulnerable to corruption. In May 2013, the Tbilisi city court sentenced the former head of

⁵³ http://www.tbilisi.gov.ge/index.php?lang_id=GEO&sec_id=174

⁵⁴ The legislative acts that appropriate funds from the contingency funds are not accessible through the legislative search engine.

⁵⁵ Transparency International Georgia (2012) *Electorally public motivated spending, state budget analysis*, published on: <http://transparency.ge/en/post/report/new-report-electorally-motivated-spending>.

⁵⁶ Watchdog: Presidential Reserve Funds misuses at <http://www.civil.ge/eng/article.php?id=10417>

⁵⁷ TI Georgia (2012) *Electorally public motivated spending, state budget analysis*, published on: <http://transparency.ge/en/post/report/new-report-electorally-motivated-spending>

Georgian Railways and the Partnership Fund, Irakli Ezugbaia, to pre-trial detention in absentia – he is currently in the UK. Ezugbaia and several other Georgian Railways employees are under investigation for alleged large-scale embezzlement and misappropriation of public funds in connection with tenders conducted by the Railways. They are accused of having artificially inflated the prices of tenders causing financial damages to Georgian Railways to a value of GEL 65 million.⁵⁸ According to a Tbilisi-based international expert on procurement who regularly monitors the Georgian Railways website for tender opportunities for foreign businesses, many of the tenders he sees are highly suspicious and are only, in his opinion, available to certain businesses, excluding many other participants from the market.

5. Overall Assessment: Strengths, Weaknesses, Opportunities, Threats (SWOT Analysis)

The new procurement system has been a very positive development that has had a marked impact on decreasing corruption, increasing efficiency and stimulating competition. The legislative framework aligns largely with EU regulations, and in many instances it sets a higher standard than systems at work in most EU countries.

Some areas of procurement remain fully exempted from the use of the E-procurement platform – including Reserve Funds, major state-owned companies, and procurement conducted with presidential or government approval – resulting in opaque purchasing practices with little oversight and an increased risk of wasteful spending, abuse and corruption.

This assessment of TI Georgia aims at identifying the strengths and weaknesses of the system with a view to working to improve the procurement system in Georgia. In this task we have received very close cooperation and assistance from all levels of the procurement agency, this is welcomed as a crucial element in securing a well functioning procurement system. In general the procurement system can be regarded as a leading, illustrative example to be followed by other countries, including the EU. With the changes we indicate we the Georgian E-procurement platform could serve as a role model for other countries, including EU member states, in terms of transparency and opportunities for public scrutiny of government contracting.

⁵⁸ Former General Director of JSC Georgian Railways accused of embezzlement of public funds in large amount, found at:<http://en.trend.az/regions/scaucasus/georgia/2152099.html>

Strengths:

I. Transparency

1. The full transparency of the system, from bid announcement to award of the contract, is one of the greatest strengths of the E-procurement system, allowing for scrutiny by stakeholders and any interested citizen.
2. The publishing threshold for the Simplified Electronic Tender and the Electronic Tender Procedure is of a lower value than in most other EU countries. Thus, more tenders of a lower value procured in a competitive and transparent way.
3. The recent publication of the contracts awarded under Simplified Procurement is a great step forward, allowing the public to review these often very substantial contracts that were originally procured in a secret, non-competitive process. To our knowledge, this level of transparency is unique in Europe and should be internationally regarded as a best practice.
4. The system allows for easy reporting of alleged violations and a quick and independent review of these complaints. The Dispute Resolution Board has become a key component to build stakeholder confidence in the system.

II. Efficiency

The E-procurement system has increased the administrative efficiency of the procurement process. This saves resources for both the government and for companies, creates better competition, which further decreases the costs of contracting.

III. Equal Treatment

As a result of the transparency, and the low thresholds for competitive electronic procurement, equal treatment of companies is high for the Simplified Electronic Tenders and the Electronic Tenders.

IV. Reduced Risks for Corruption

1. Easy, accessible and immediate right to appeal a tender.
2. Screening tenders for certain risk factors gives the Agency a good basis on which to monitor tenders (these factors should be carefully monitored for efficacy and accuracy).
3. The current composition of the dispute Resolution Board is innovative, and so far has ensured a high degree of professionalism, independence and transparency.

Weakness

I. Transparency

1. The president / government consent clause under simplified procurement obstructs competition and might be used for corrupt ends. In 2011-2012 GEL 1.4 billion was spend under this clause. There is no explanation why these contracts cannot be procured under standard procedures.
2. The Reserve Funds are exempted from the procurement law, allowing for spending with very limited or no public accountability and independent oversight.
3. The use of the CPV code 99999999 should be discontinued, as it might be abused for inside deals and undermines competition.
4. There are strong indications that the procurement law exceptions granted to state owned entities such as the Partnership Fund, Georgian Railways and Georgian Oil and Gas Company, have resulted in misconduct and corruption. These exceptions should be revised. However the situation concerning utility sectors which are mostly served by monopolists does not differ significantly from practices in the EU.

II. Minimum Time Limit SET

The time limit for the Simplified Electronic Tender procedure of three days is fairly short compared to similar procedures in other EU member states. With longer deadlines, the number of bidders and thus competition would likely increase.

III. Tender Review

While the Agency has set up an innovative electronic system to review possible violations of tenders, it lacks the human and financial resources to review a sufficient number of tenders. Therefore the resources of the Agency should be increased, as stronger internal oversight would likely result in overall savings for taxpayers through a decrease in fraud and corruption.

Opportunities

I. Transparency:

The publication of Simplified Procurement contracts by the Agency is a great step forward in enhancing transparency and accountability. This initiative should continue. In some areas, the Agency could further improve the format in which data is made available, so that it can be more easily searched and reused by stakeholders. Better usability of the data would likely increase public scrutiny, public trust and the rate of participating bidders.

II. Quality Assurance, Value for Money

Using both price and quality in the evaluation increases efficiency of procurement, given that procuring entities have the 1) right qualifications 2) and are not corrupt. The current system should be seen in this light where the previous procurement system was corrupted and procuring entities do not always have the resources to assess quality sufficiently. However, having price as the decisive factor is problematic when it concerns complex tenders. When awarding the contract, the entity should have the expertise to evaluate whether the potential candidates' proposal meets the requirements. If the proposal is found

to be inadequate, the procuring entity could then enter negotiations with the second potential supplier – something that rarely happens now. It is therefore important an institution is created within the agency to assist procuring entities in setting the right criteria. TI Georgia is furthermore positive about the announcement of the Agency to launch the two Staged Electronic Tenders Module into the system to attach more weight to quality.

III. Transparency versus Confidentiality

The high degree of transparency in the Georgian E-procurement system is sometimes claimed to pose threats to a businesses commercial secrets. However, in Georgia businesses by and large do not seem to be concerned about the fact that all documentation is publicly accessible. As described above, the high transparency of the current system leads to fewer opportunities for corruption, less chance of legal violations, and guarantees the equal participation of companies. The advantages of the high degree of transparency make the procurement system to score high on the fundamental principles of a procurement system set out by the EU .

Threats

II. President / Government consent

A number of positive approaches and policies that are currently implemented by the CSPA are not narrowly defined by law. A change in the Agency's leadership could thus have significant impact on the conduct of the CSPA. As the E-procurement system matures, the law should be amended to fully reflect all the procedures that have been developed and that have proven to be successful.

The fact that the Dispute Resolution Board consists partly of non-paid NGO representatives, while facing a steadily increasing workload, the current mechanism might not be sustainable in the mid-run.