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WEIGHTS AND MEASURES

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Acronyms and Abbreviations

AC	Accounting Chamber (the supreme audit institution)	PFM	Public Financial Management
AA	Authorized Agency (the oversight and support body for procurement in the Ministry of Economy)	PPL	Public Procurement Law
AMC	Antimonopoly Committee	SAI	Supreme audit institution
COM	Cabinet of Ministers	SBD	Standard bidding documents
CPAR	Country Procurement Assessment Report	SCC	Special Control Commission
CTP	Center of Tender Procedure, a private-sector entity with ties to the TC	Sida	Swedish International Development Cooperation Agency
DCSP	Department of Coordination of State Procurement	SMEs	Small and medium enterprises
DFID	U.K. Department for International Development	SOE	State-owned enterprise
ECA	European Consulting Agency, a private-sector entity that has assumed a dominant position in public procurement	Tacis	EC/EU technical assistance program for Eastern Europe and Central Asia
e-GP	Electronic government procurement	TC	Tender Chamber of Ukraine, an NGO that has granted public procurement functions
EU	European Union	UNCITRAL	United Nations Commission for International Trade Law
FIAS	Foreign Investment Advisory Service	USAID	United States Agency for International Development
GOU	Government of Ukraine	VDZ	<i>Visnyk Derzhavnyh Zakupiviel (Public Procurement Bulletin)</i>
GPA	Government Procurement Agreement, a WTO plurilateral instrument	WTO	World Trade Organization
KRU	Department of Audit and Review		
MoE	Ministry of Economy		
MoF	Ministry of Finance		
NBU	National Bank of Ukraine		
NGO	Nongovernmental organization		
Oblast	A subnational regional political entity, like a province		
OECD/DAC	Development Assistance Committee, Organization for Economic Cooperation and Development		

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UKRAINE
COUNTRY PROCUREMENT ASSESSMENT REPORT 2006

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Ukraine Country Procurement Assessment Report 2006

Executive Summary¹ and Addendum of March 30, 2007

In 2005, Ukraine spent more than US\$4 billion, about 5 percent of its GDP, on public procurement. Since 1996, the World Bank, the EU Tacis Program, and USAID have worked with the Government of Ukraine to put a fair, open public procurement system in place. A comprehensive Public Procurement Law (PPL) was enacted in February 2000.

The World Bank reviewed and prepared a detailed Country Procurement Assessment Report (CPAR) in 2001. The report recognized both achievements and remaining challenges—in particular, the need for a stronger legislative framework, improved procedures and practices, implementation of the existing law, improved institutional capacity, compatibility with international best practice, and an end to corruption. The report cited the need for transparent rules, standard bidding documents, strengthening of institutional and organizational resources, expanded responsibility for the Authorized Agency (the oversight and support body in the Ministry of Economy, known as AA), and increased capacity among procuring entities. The present CPAR continues the Bank’s commitment to reform in light of the political and economic changes of the past five years. The assessment was conducted within the framework of the OECD/DAC pillars for public procurement.

Among the many positive developments discussed herein, the report points to many World Bank recommendations that were implemented through amendments to the PPL. In 2002, only 7 percent of tenders (just under 50 percent in value) were awarded on an open basis. By 2005, that number had increased to 26 percent (69 percent of value). The percentage of sole-source contracts was reduced correspondingly from 21 percent in 2000 (24 percent of value) to 10 percent (15 percent by value) in 2005. The same positive pattern holds in price quotations and restricted tendering.²

Among negative developments, amendments to the PPL in November 2004, June 2005, and December 2005, seriously diluted and fragmented government procurement authority. Important functions were transferred to non-governmental organizations despite the reasonable progress toward international standards being made by the Authorizing Agency within the Ministry of Economy. This reorganization not only cost the country many years of expertise gained by the AA, it resulted in an abrupt departure from acceptable standards. Moreover, the shift of oversight responsibility to the Department of Audit and Review (KRU) and to the Accounting Chamber (AC) has created a conflict of interests—because the same bodies that supervise the procuring entities are now also auditing them.

Several recent EU member countries offer successful models on approximation with EU of procurement legislation and regulatory framework. These countries provide useful experience

¹ The World Bank team would like to thank its counterpart team in the Ministry of Economy, which ceased to exist as an Authorized Agency when the December 2005 amendment to the PPL took effect. The Bank team also thanks the many representatives of public and private sector agencies for their excellent cooperation in preparing this report.

² Sole-sourced procurement is still high in Ukraine. These figures do not include sole-source contracts by state-owned enterprises (SOEs) and those that are excluded from the PPL.

on how to approximate a PPL with acceptable EU norms, including measures for the organization of public procurement and the resolution of complaints.

Ukraine has nearly completed its negotiations on WTO membership and negotiations for accession are now being underway. In order to accede to the WTO Government Procurement Agreement, Ukraine will have to resolve several issues (discussed in this report) that arise from its current public procurement environment.

This analysis covers the current legal and regulatory framework, organization of procurement, procuring entities' capacity to conduct procurement, internal and external controls, anticorruption measures, and prevailing practices. In brief, it says that the public procurement environment is now at "high risk." Major findings and corresponding recommendations are summarized below.

Before the three major amendments came into force in late 2004, 2005 and early 2006, Ukraine had a reasonably good public procurement law. The amendments reversed the situation. The November 2004 amendment started the deterioration by removing important functions from the Authorized Agency, for example, responsibility to provide methodological advice and Standard Bidding Documents (SBDs). The amendment in June 2005 transferred functions normally exercised by the state (for example, Public Procurement Office) to the Tender Chamber of Ukraine (TC), an NGO that is not subject to the controls routinely imposed on bodies and individuals responsible for public administration. The amendment in December 2005 set new rules on the organization, oversight, and control of public procurement, which simply led to further fragmentation of government authority over public procurement.

Several private organizations have come to dominate public procurement. These include the Center for Tender Procedures and Business Planning (CTP) an NGO; and the European Consulting Agency (ECA), an enterprise related to CTP. The CTP officially holds patents and copyrights for numerous bidding documents and methodologies, including SBDs that are nearly identical to those of the World Bank. Market participants frequently assert that CTP pressures them to use these "copyrighted" documents for a fee, and that potential bidders must pay CTP for questionable services, including commissions on successful bids.

Procuring entities cannot implement the PPL effectively. The fully decentralized public procurement system distributes functional responsibility to procuring entities at all levels of government. Each of these procuring entities currently conducts procurement through a permanent five-member tender committee whose members receive just two weeks of mandatory training. Procuring entities thus have little opportunity to build permanent or specialized capacity internally. Logistics departments of the large entities do little beyond assigning their member to the permanent tender committee, with these staff members expected to perform their usual jobs in addition to their committee responsibilities. Private sector representatives assert that the permanent tender committee reinforces potential for collusion, corruption, illicit alliances, and conflicts of interest.

Consultants, contractors, and suppliers interviewed for this assessment expressed dissatisfaction with many procurement practices, especially the ascendance of TC as the Authorized Agency and its role in complaint resolution. They cite the need for more information sources on tenders, and criticize bidding documents with unclear technical specifications, insufficient time for preparing bids, unjustified cancellation of tender procedures, frequent delays in contractual payments, etc. Such practices have discouraged competition—only 2 or 3 bids per tender on average in 2005.

Public procurement is integrated with budget planning and execution but needs to be improved. Planning is usually limited to a list of contracts and estimated budgets, with little attention to timing, contract packaging, procurement methods, and scheduling. Funds are often not available to spending units until late November or December, leaving little time for procurement before the fiscal deadline runs out.

Capacity in controls and auditing is weak, though improving. The Department of Audit and Review (or KRU, of the Cabinet of Ministers), the Accounting Chamber (the supreme audit institution), the Treasury, and the Internal Audit Department of the procuring entity are responsible for controls and auditing. In principle, controls can be carried out either before or after procurement; but in practice, they are frequently carried out after. The functions of KRU and AC overlap, though both entities generally limit themselves to compliance. The procurement auditing system has major gaps; indeed, the only systematic reviews are those carried out by Treasury prior to contractual payments.

Anticorruption rules are scattered and poorly enforced. Anticorruption policy does not clearly define offenses, due process, sanctions, or enforcement.

The Ministry of Economy has provided leadership in modernizing the public procurement system, including electronic government procurement (e-GP). Electronic transactions and information disclosure is in line with the integrated Electronic Ukraine program, which is supported by the PPL, the nascent e-signature law, and the electronic document law. Use of the Internet grew by more than 2,500 percent between 2000 and 2005. However, there is a need for a stronger e-GP standards framework to provide clearer procedures and formats for online publication. Several technical issues (discussed in the body of this report) need resolution so as not to jeopardize the progress already achieved in this area.

A countrywide campaign on procurement is necessary to raise awareness in the private sector and among the public at large. This campaign should cover the contents, implications, and benefits of an efficient, open public procurement system, and it should stimulate political support. Because the mere official publication of regulations does not raise public awareness, an outreach program through newspapers, television, and radio would help achieve this objective. The Authorized Agency would need strengthening to orchestrate this broader campaign.

Recommendations

The detailed implementation plan in this report includes short-, medium-, and long-term recommendations. However, the most pressing concern is the current procurement legal framework and institutional structure. Once the legal framework and institutional structure has been streamlined, the public procurement system would need to be strengthened as a whole. Towards that objective, the Bank team strongly recommends the following measures:

Primary Recommendation — Repair the Legal, Regulatory, and Institutional Framework

- Seek parliamentary approval to revoke or substantially rework the December 2005 amendment of the PPL, considering in particular the inappropriate role that is assigned to the Tender Chamber and other nongovernmental entities.
- Reorganize the institutional structure for public procurement to conform to international standards and the principle of separation of powers.

- Establish an independent mechanism to review bidder complaints.
- Establish a central Authorized Agency whose responsibilities include policymaking, the authority to draft primary and secondary legislation, preparation and updating of standard bidding documents, provision of free legal and professional advice, publication of tender opportunities and contract awards, and monitoring and oversight. This body would report directly to the Cabinet of Ministers, or it could be part of another government body.
- Finalize and make available to procuring entities the standard bidding documents prepared by the former Authorized Agency in the Ministry of Economy.
- Create conditions favorable for a competitive market for procurement. Advisory services not provided by public entities should be provided by private firms, but subject to competition in accordance with the PPL.

Secondary Recommendations — Strengthen the Public Procurement System

- Install permanent procurement capacity within the structure of procuring entities, including the use of ad hoc tender committees through appropriate provisions in the amended or the new law.
- Consolidate legislation and regulations on anticorruption, including real enforcement.
- Introduce ex-ante controls as well as continue the present ex-post controls.
- Implement a strategy for electronic government procurement (e-GP).
- Establish a single, official, free of charge e-GP portal and a corresponding hard-copy publication managed by the Authorized Agency.
- Enhance capacity and skills of the Authorized Agency to undertake a countrywide public awareness campaign.

Status as of March 30, 2007

The World Bank submitted the draft CPAR to the GOU in December 2006. In late January 2007, the Ministry of Economy informed the Bank that the government officials from the Ministries of Economy, Finance, and Health Protection; National Bank of Ukraine, and the Antimonopoly Committee had completed their review of the Report and were prepared to discuss their observations with the World Bank team. The Ministry of Economy also provided the Bank with detailed written comments. The introductory paragraph of the document containing these comments said: “The information contained in the Report reflects on the whole the real state of public procurement in Ukraine in 2006”. The document also referred to further amendments to the Law that the Verkhovna Rada passed on December 1, 2006, and which came into effect on March 12, 2007. The Bank team arrived in Kiev on March 25 and discussed with the Government team representing the agencies listed above on March 26 and 28 their comments on the draft report. A representative of SIGMA also participated in the discussions. The discussions mainly related to the application of the public procurement law and its amendments to state-owned enterprises, and the role of commercial banks in public procurement. The changes introduced by the December 2006 amendment to the PPL as well as the President’s instruction that a new draft law be enacted and promulgated by August 15, 2007 were also discussed. The following Addendum dated March 30, 2007, deals with the amendment to the PPL dated December 1, 2006, and the major comments received from the GOU on the draft report. Finally, the Bank hopes for the implementation of the recommendations of this report in the draft public procurement law under preparation.

Addendum March 30, 2007

After the submission of the Draft CPAR to the Government for review and comments, the Parliament of Ukraine, on December 1, 2006, enacted Law No. 424.V on amendments to the PPL. Most parts of this law became effective on March 12, 2007, following the President's signature. When signing the amendment, the President emphasized the need for further improving public procurement and to enact by August 15, 2007, a new PPL based on the best international practice. The Speaker of Parliament has already established a standing working group for improving the public procurement legislation.

This Addendum deals with the issues that the Government team raised after reviewing the Draft CPAR. The Government and the World Bank teams discussed these issues in Kiev on March 26 and 28, 2007. It also deals with the main features of the amendment of December 1, 2006, referred to above.

In the opinion of the World Bank team, the December 2006 amendment negatively impacts the PPL as it substantially increases the power of the Tender Chamber, which is a non-governmental entity, and expands its role in public procurement even further. This Addendum does not reflect the provisions of the December 2006 amendment, enacted after the submission of this Report to the GOU. Instead, it briefly explains below two major sets of issues as dealt with in the amendment.

- The first set of issues results from an amendment of Article. 3-3, which, in a major reorganization of the supervisory function over public procurement, replaces the “Special Control Commission (SCC) on Public Procurement Issues under the Accounting Chamber” with a newly created entity called the “Interdepartmental Commission on Public Procurement”. The SCC, under the previous amendment, had partially replaced the functions of the former Authorized Agency (See para. 20 of this Report). In addition to three representatives of the Tender Chamber, the Interdepartmental Commission will consist of representatives of the Accounting Chamber, the State Auditing and Inspection Service, the Antimonopoly Committee, the Ministry of Economy, and four representatives from two parliamentary committees. Like its predecessor, the Interdepartmental Commission may also “decide to include representatives of social organizations, scientists, and so on”. It is not clear whether these “representatives...scientists, etc.” are entitled to participate in the decision-making of the new Commission, nor is it clear to whom the new Commission reports. The Commission (see Art. 3-3 (7)), “in order to ensure public control in the public procurement area...shall furnish the Tender Chamber...with copies of all decisions and conclusions in the course of two days from the date of adoption”. This means that the Commission, as a governmental entity, has to report about its activities to a non-governmental entity (i.e., the Tender Chamber). In this context, the Tender Chamber (see Art. 17-3(8) even has the right, “in order to exert public control”...to initiate a lawsuit in order to appeal decisions....of the Commission...” to the court. The additional functions of the new Commission include: (i) a “register of unscrupulous bidders” without any indication of who decides, under what rules of due process that a bidder has been unscrupulous (See Art. 16-1) on the grounds for declaring a bidder unscrupulous), and (ii) a “register of participants in procurement procedures” (Art. 16-1). The difference between this

“register” and the “thematic catalogue of participants of procurement procedures” to be published by the Tender Chamber (see below, and Art. 17-3(10)) remains unclear.

- The second major set of issues results from a substantial increase of the functions of the Tender Chamber (See paragraphs 16 through 19 of this Report). The most important of these seems to be its newly established right (See Art. 17-3(10), third sub-paragraph), “...to study the commodity market and promote atmosphere of competition in the public procurement area”. The amendment explains this function as “to put out a thematic catalogue of participants of procurement procedures...with nationwide distribution, also published in which should be information on bidders, markets and prices on goods, works and services....” Information on potential “participants” is to be included in the catalogue upon application of the person or firm concerned. An applicant can appeal to the Commission a refusal by the Tender Chamber to include any such information in the catalogue. This appears to be acceptable, but it should be recalled that (i) the Tender Chamber has the right to appeal the Commission’s decisions to the court; (ii) only “participants, information on whom is included in the catalogue”, can submit tender proposals; and (iii) the listing of such information has to be renewed annually (Article 17-3(10), fifth sub-paragraph). As a result, the Tender Chamber (as a non-governmental entity without any apparent public oversight) will have the power to delay the participation of any bidder in public procurement with impunity. This does not appear to be in the public interest. In this context, it is worth mentioning that evaluation of tenders (see Article 26 (7)) must now include “rating of the bidder in the register of participants...” referring directly to Article 16-1.

With reference to the comment on the draft CPAR on the inclusion of state owned enterprises, irrespective of their nature of operations, under the application of the public procurement law, the Bank maintains its position as expressed in paragraphs 109 and 110 of the CPAR. These paragraphs state that a general coverage of the entire sector of state owned enterprises is inappropriate and will adversely affect their efficiency and damage the national economy. However, taking into account Ukraine's interest in approximation of its procurement legislation with the European Union directives on public procurement, the World Bank recommends to make a distinction between entities operating in the water, energy, transport, telecommunication and postal services, on the one hand, and entities of a commercial and industrial nature, on the other. The group of utilities (whether public or private undertakings) should be covered by the public procurement law since (i) they are established for the specific purpose of meeting needs in the general interest, (ii) do not have an industrial or commercial character, and (iii) operate on a monopoly basis activities related to the utilities sector. The other group of state owned enterprises of a typical industrial and commercial nature should be excluded from the procurement legislation and be allowed to apply common commercial practices. The PPL for many reasons is not designed to include the public commercial and industrial sector. It should more precisely define the activities in the utilities sectors to be covered as well as the exemptions allowed, and a list of entities covered by the law should be established.

On the comment regarding the bid resolution mechanism, as changed by the amendment of December 2006, the World Bank considers that though there are some procedural changes about lodging a complaint, the mechanism itself still needs further improvement. Now the complaint is lodged with the Commission only and a copy has to be sent to the procuring entity, Tender Chamber and Treasury (commercial bank). The Commission has to send a copy of the received complaint to the above-mentioned institutions as well, which is duplication. The Commission makes a decision, and the Tender Chamber has the right to provide the Commission with its own

conclusion. At the same time, the Tender Chamber has a strong representation (three members) in the Commission.

With reference to the National Bank of Ukraine's comments on the role of commercial banks of checking procurement documents of their clients for compliance with the provisions of the PPL before making payments, the World Bank believes that this function belongs to executive bodies, such as State Treasury and not to commercial banks. Because of this requirement, the use of client-bank electronic systems to process payments becomes impossible, which results in reduced efficiency and extra charges to the bank for the verification process. Furthermore, such a control by commercial banks cannot be efficient from the view of public procurement as it provides for a formal check of the availability of a certain set of documents without analyzing the contents. It is recommended that all references to the obligations of commercial banks to perform control functions under the PPL be removed.

The Government provided the Bank with the latest information on the status of the Interagency Commission on public procurement following the December 2006 amendment

In accordance with Article 3-3 of the PPL, the Commission operates under the AMC. The Commission members include: one representative each of the Accounting Chamber, Department of Audit and Review (KRU), State Treasury, AMC, MoE; three representatives from the parliamentary committee dealing with public procurement market issues, and three representatives of the Tender Chamber. Thus, 11 members of the Commission are appointed. The Commission is a public collective body and is vested with powers that are set out in the Statute of the Interagency Commission on Public Procurement, approved by Resolution #01/1rsh of 03.21.2007 and is posted on the site of the AMC of Ukraine (www.amc.gov.ua).

The Commission has a series of responsibilities, the major ones being: examination of protests concerning tender violations on the part of the procuring entity; issuing of conclusions to the procuring entity as to the application of restricted tendering and single-source procurement procedures. The scope of the Commission's authority (concerning the binding nature of decisions) applies to public authorities, and decisions and opinions issued within its jurisdiction are mandatory for execution by procuring agencies, bidders and other entities whom they concern. Decisions or opinions that are placed before the Commission are approved by a Commission meeting after discussion, the Commission members enjoying an equal vote in taking decisions (each member has one vote). Only Commission members, or persons substituting them on a temporary basis, may vote. The meetings are considered valid when at least two thirds of the members are in attendance (8 persons.)

Country Procurement Assessment Report 2006

1. INTRODUCTION

Background

1. **Countries spend between 5 to 15 percent of their GDP on procurement.** Efficiency in public procurement achieves substantial savings in public expenditure. Public procurement assessments are a regular feature of World Bank technical assistance to member countries, including Ukraine. Country procurement assessments often support public procurement reform, including legislation and regulations and institutional strengthening.

2. **Ukraine enacted a comprehensive Public Procurement Law (PPL) on February 22, 2000.** The first World Bank Country Procurement Assessment Report (CPAR) for Ukraine finalized in November 2001 included an action plan for improving systemic efficiency of public procurement. Since the 2001 CPAR, the country has undergone numerous political and economic changes with natural concurrent evolution of the public procurement system. In light of these changes, the Government and the World Bank jointly undertook the present review of the legal and regulatory framework for procurement, institutional capacities, actual practice, and the integrity of the system as a whole. This assessment was undertaken with a view toward further improvements.

Methodology

3. **The World Bank team and the Government worked closely in carrying out this assessment.** The Bank's counterpart team comprised senior staff of the Department for Coordination of State Procurement (DCSP), also known as the Authorized Agency (AA) in the Ministry of Economy (MoE). In addition to in-depth review of all procurement-related legislation, laws, and regulations, the joint team interviewed a wide spectrum of procuring entity representatives and other interested parties. This included ministries, committees, municipalities, state-owned enterprises, manufacturers, suppliers, contractors, and representatives from civil society. The World Bank team held separate workshops on the assessment for procuring entities and the private sector. Interviews and wide-ranging discussions provided a broad view of how the system works. Initially, case studies were planned for a select group of procurement items. However, with the abolition of the DCSP in the Ministry of Economy, the Bank team was not able to obtain the necessary data for the case studies.

4. **The findings and recommendations contained in this report are derived from analyses of procurement and related legislation, as well as information from the interviews and workshops.** The report adopts the format of the OECD/DAC³ pillars for public procurement, which are based on well-accepted international procurement practices. The CPAR team also collaborated closely with the World Bank Public Financial Management (PFM) team, which prepared the Ukraine Public Financial Management Report (PFM).

³ DAC Guidelines and Reference Series—Harmonizing Donor Practices for Effective Aid Delivery (Volume 3). "Strengthening Procurement Capacities in Developing Countries," OECD/DAC Roundtable on Procurement. Paper presented at the Paris High-Level Forum on Aid Effectiveness, February 2005.

Cooperation among donors

5. **The World Bank and Sigma, a joint OECD–EU initiative⁴, reviewed the public procurement system of Ukraine in parallel.** Findings and drafts were regularly shared. Although the reports differ slightly in emphases and detail, the main conclusions and recommendations are consistent. In addition, the Bank team met with major donors in Ukraine before undertaking the assessment. These included the U.K. Department for International Development (DFID), the Swedish Development Cooperation Agency (Sida), the EU Commission, UNDP, and USAID. These donors were debriefed on findings and preliminary recommendations.

Public procurement in Ukraine before and after the 2004–05 amendments

6. **Before the amendments of November 2004, June and December 2005,** the PPL and the organization of procurement in Ukraine was broadly consistent with international practice (see Annex 3). Procuring entities were essentially responsible for their own procurement. As the Authorized Agency (located within the Ministry of Economy), the Department of Coordination of State Procurement (DCSP) provided support to these entities and was responsible for training and bid complaint resolution. This system was moving steadily towards meeting international standards for procurement.

7. **Following the amendments (See Annex 4), certain public procurement functions were assigned to an NGO, the Tender Chamber (TC).** The TC was granted authority to publish tenders and contract award notices; to play a major role in bid complaint resolution; and to approve the use of single-source and restricted tendering. These amendments distributed public procurement authority among several government and nongovernmental bodies. The result was fragmentation of public procurement authority. The amendment of December 15, 2005, came into effect on March 17, 2006, leading to the transfer of the Authorizing Agency's functions from DCSP to the Antimonopoly Committee (AMC) and to other government bodies. As a result, DCSP's expertise, acquired through hard years of experience, was lost.

Implementation status of the 2001 CPAR Action Plan

8. **The 2001 World Bank CPAR provided input to the government on the strengths and weaknesses of the system.** It included an action plan for improvement, including strengthening institutional arrangements; improving DCSP oversight, monitoring, and support roles; improving procedures and practices; empowering procuring entities through capacity building; and enhancing accountability of public servants.

9. **Since the passage of the Public Procurement Law in 2000, Parliament has adopted nine amendments.** The first major amendment in 2001 implemented World Bank recommendations in some areas. The next four amendments were the result of a compliance process related to changes initiated by other pieces of legislation; and one amendment added preferences to domestic agricultural producers. The final three amendments led to the transfer of significant public procurement functions—normally the domain of government—to the private sector. The four “positive” amendments included: (a) changes in the PPL to facilitate publication of bidding opportunities and contract awards in a procurement bulletin; (b) extension of limits on

⁴ Sigma is principally financed by the EU. This particular work was financed by the U.K. Department for International Development (DFID) and the Swedish International Development Cooperation Authority (Sida).

contracts without competition for works by 50 percent of the initial contract value, subject to approval by the AA; (c) deletion of Article 35 of the PPL, which specified that an entity reimburse a contractor for “unreceived” revenues if a procuring entity terminates its contract; and (d) provisions enabling multiyear contracts for procurement of works.

10. **Most recommendations on procurement capacity building were implemented.** These included development of training institutions; training trainers at the national level; development of materials; and training at all levels for procuring entities.

11. **Several recommendations of the 2001 CPAR Action Plan were not implemented as of mid 2006.** These include lowering of thresholds, which restrict participation of foreign firms in competition; establishment of an independent public procurement agency under the Cabinet of Ministers; and strengthening of the DCSP. Procedures for selecting consulting services yet to be specified in the PPL. Standard bidding documents are still not mandated. Regulations for blacklisting companies engaged in corrupt practices have not been drafted. License and permit registration is still a condition of bidding, not a condition of contract award.

Organization of this report

12. **The analysis and main findings of this report are presented as follows:** Section 2 analyzes the legislative and regulatory framework of late 2005 through this writing in 2006. Section 3 analyzes institutional framework and management capacity. Section 4 covers procurement operations, including functionality of the public procurement market, contract administration, and provisions for dispute resolution. The report then discusses integrity and transparency of the system (Section 5), e-procurement (Section 6), public procurement contract performance (Section 7), and gradual harmonization with the EU directives and eventual accession to the WTO (Section 8). Section 9 presents risk analysis and the 2006 action plan. Recommendations in respective sections of the report are highlighted with bulleted arrows (➤). Key recommendations are summarized in Section 9 and repeated in the executive summary. The four annexes provide more detailed information—the detailed implementation plan (Annex 1), performance indicators in accordance with OECD/DAC “pillars” (Annex 2), graphic representation of the organization of procurement before the 2005 amendments (Annex 3), and a graphic representation of the organization of procurement after the 2005 amendments (Annex 4).

2. LEGISLATIVE AND REGULATORY FRAMEWORK

Issues in the current legislative framework

13. **Until November 2004, Ukraine had a reasonably good Public Procurement Law in general conformity to internationally accepted good practices.** However, three major amendments—drafted by parliamentary committees and passed by Parliament in 2004 and 2005—introduced fundamental changes. The amendment of November 18, 2004, altered the responsibilities of the AA in several ways, and introduced the concept of using paid consultancy services for public procurement. The amendment of June 16, 2005, transferred functions normally exercised by a state body to an NGO called the Tender Chamber of Ukraine. The amendment (passed on December 15, 2005; in effect March 17, 2006) included provisions for public procurement organization, oversight, and control that are unusual, ambiguous, and inconsistent with internationally accepted practice. Furthermore, the legislative process excluded stakeholder discussion and participation, including the then Authorized Agency.

14. **The new provisions benefit two groups.** First, those who created and operate the Tender Chamber, now exercise undue power over the public procurement process. Second, other private sector entities have profited at public expense through their ties to the Chamber.

Issues under the November 2004 amendment of the PPL

15. **The November 2004 amendment relieved the AA of its responsibilities for providing consultancy and methodological support, standard bidding documents, and other information to entities involved in public procurement.** The amendment mandated the use of “certified” information technology systems for publishing tender notices (even though no such IT systems were in place at the time), and payment for tender documents. Finally, “experts” were authorized to assist in bid evaluation, subject to contracts (with implied payment of fees).

Issues under the June 2005 amendment of the PPL

16. **Established under the law governing public control of public procurement, the Tender Chamber is described as a “nonprofit union of public organizations operating in compliance with operative Ukrainian legislation.”** The meaning of this description has defied clarification. Despite repeated efforts, the Bank team could not obtain a list of TC members or copy of the statutes that regulate the TC decision-making mechanisms [Article 17(4) of the PPL]. The June 2005 amendment endowed the TC with three governmental functions (discussed below). Although its Supervisory Council includes a number of parliamentarians and representatives of public bodies, the council is a mere “advisory body” [Article 17(4) and 17(6) of the PPL]. Its members serve “on a voluntary basis” (Article 17.4 and 17.5). An arrangement of this sort might arguably be acceptable were TC a “common NGO” dealing with typical matters of NGO concern. But this is not the case. TC is operating as a policymaking body. It has operational authority for public procurement, yet it is outside public supervision or control.

17. **The first function assigned to the TC is restricted tendering and single-source procurement.** If procuring entities were left to their own discretion, many would probably opt for the least competitive procurement method—and that is precisely why they are guided by procurement laws. In letter of law, the PPL requires AA approval to bypass or limit competition. TC management says that it does so. However, its “right” to make exceptions was made explicit in a letter from the Treasury to its regional offices on August 12, 2005, as well as in a TC

document, “Conclusion” (August 15, 2005), which is essentially a commentary on the June 2005 amendment.

18. **The second public function assigned to the TC is the right to control publication of the official procurement bulletin.** Under the June 2005 amendment to the PPL, a procuring entity must publish an announcement in either the *Procurement Herald* (published by the State Owned Enterprise created by the MoE) or the information bulletin published by the TC. This is to be done *before* carrying out “the procurement procedure” (which otherwise implies open tendering). This needlessly increases the costs for bidders, because the only way to know about all bidding opportunities would be to subscribe to both publications. (Further changes would occur because of the December 2005 amendment, as discussed below).

19. **The third function usually belonging to the AA is the right to issue “opinions” regarding complaints by aggrieved bidders.** Although these opinions were technically nonbinding on the AA (which retained the prerogative of making a decision), the PPL provision created ambiguity. Even if the Tender Chamber “opinion” is said to be merely advisory, a favorable recommendation is sufficient for a bidder to appeal a negative ruling by the AA. The court often sides with arguments based on the TC view. The opinion of an NGO not apparently subject to public oversight effectively overturns the decisions by the public body.

Recommendation

Articles 17.1 through 17.5—as well as any other references to the Tender Chamber and its powers and responsibilities under Ukraine’s February 22, 2000 Law on Procurement of Goods, Works, and Services for Public Funds (as amended on June 16 and December 15, 2005)—should be deleted without substitution. Essentially, the notion of *public* procurement is incompatible with the allocation of core government functions to a private sector entity not accountable to the public. The provisions of Article 37—now unclear at best—will become even less clear once all reference to the TC is deleted. Therefore, the article will need to be redrafted.

Issues under the December 2005 amendment of the PPL

20. **Parliament amended the PPL again on December 15, 2005.** This created unusual new rules for organizing, overseeing, and controlling public procurement. These rules do not enhance transparency or a sound institutional arrangement, nor are they consistent with generally accepted norms for separation of powers within democratic governments. With several senior Ukrainian lawyers expressing concerns over the constitutional implications, the president vetoed the amendment on January 13, 2006. The parliament, however, overrode that veto on February 21, 2006. The president then signed the amendment on March 10, 2006, and it came into force upon publication on March 17, 2006.

21. **Several features of the December 2005 amendment adversely affected the institutional integrity and transparency of public procurement.** These are as follows:

- The amendment abolished the AA functions exercised by the MoE Department of Coordination of State Procurement (DCSP) with no transition period. Some but not all of DCSP’s public procurement responsibilities were transferred to the Antimonopoly Committee (AMC), which was set up for another purpose under another law and has little experience with procurement. With one or two possible European exceptions, no country has placed an agency such as the AMC in charge of public procurement, and with such limited powers. Executive functions do not usually fall within the competence of a

competition policy agency, and furthermore become less effective because of fragmentation.

- Parliament has assumed control of state supervision of public procurement. A fundamental conflict is created by granting responsibilities that normally belong to the executive to the legislative branch.
- The Special Control Commission (SCC) on Public Procurement Issues established under the Accounting Chamber (AC) to oversee the public procurement function has created a conflict of interest. This is inconsistent with the international practice in which a body such as the supreme auditing institution provides independent oversight of the state budget and is therefore not involved in budget execution.
- As noted, the June amendment sets up a second procurement periodical under the Tender Chamber. This amendment no longer cites the original publication circulated by the AA (via the MoE Joint Stock Company), making the TC information bulletin in effect the sole mandatory publication. A new “specialized publication” (presumably produced by the private sector) may be potentially authorized, with the proviso that all announcements must be published in both publications. This raises the question of which version would prevail were textual discrepancies to appear simultaneously. This is important because certain deadlines begin on the publication date. It is, therefore, not surprising that the TC has already issued its “conclusion” that its publication is mandatory.
- Single-source and restricted tendering permission can be obtained either from the AMC or from the TC. However, most procuring entities are likely to seek this permission from the TC, which has the authority to grant it on its own, rather than from the AMC, which must first receive the SCC approval.
- The mechanism for bid dispute resolution is unclear. Bidders or third parties lodge protests with the TC and the procuring entity or the SCC. The latter takes a decision “with due regard to the TC’s opinion.” In terms of the legislation, it is not clear whether the opinion is binding or merely advisory. This situation is further aggravated by two unclear, conflicting provisions on court appeals over administrative decisions.
- Article 17-3 (12) states that “the activity of the Tender Chamber of Ukraine, as well as the results of such activity including conclusions and other documents of the Tender Chamber of Ukraine, may be appealed only by judicial procedure in compliance with the Law.” This represents a far-reaching change. It implies that conclusions and opinions of the TC *are* binding unless otherwise challenged through a judicial procedure. In other words, TC can make “administrative decisions” without being held accountable under the Administrative Law or Code.
- Application of the law to all state-owned enterprises (where the state’s share exceeds 50 percent) is inconsistent with the broader principle that SOEs operate by the rules of normal commercial practice. The introduction of additional domestic preferences, both implicit and explicit, could well affect Ukraine’s membership of the GPA arising from its commitments in the WTO.
- The law places additional responsibilities on other bodies under Articles 3-2 and 17 (Part 2). However, the enabling legislation of these bodies, which otherwise governs their roles and responsibilities, has not been amended. This places them in an unclear situation regarding their own activities.

Recommendations

- The December 2005 amendment of the PPL contains provisions conducive to inefficiencies in public expenditure. These provisions need to be reconsidered.
- Since the 2004 and 2005 amendments substantially changed the PPL, preparation of a new draft PPL would help procuring entities to comply more effectively with their legal obligations. It would also allow consideration of recommendations of the 2001 CPAR as well as those of other international donors.

3. INSTITUTIONAL FRAMEWORK AND MANAGEMENT CAPACITY

Institutional organization of public procurement as of March 2006

22. **Before its abolition, the public procurement functions assigned to the Department of Coordination of State Procurement (DCSP) were considered appropriate for a government agency, and generally consistent with international practice.** The DCSP issued bylaws, provided methodological guidance and support to procuring entities, approved noncompetitive exemptions, published a public procurement bulletin, and resolved bid complaints. The economic departments in oblast administrations carried out some ancillary procurement functions. The state treasury was responsible for reviewing bid evaluation reports to ensure that these provided correct and complete information before it made contractual payments. The State Statistics Committee collected and processed public procurement information.

23. **The three amendments described in the previous section have had the following effect:**

- TC has become integral to the public procurement framework.
- The transformation of the institutional and organizational structure of public procurement (see Annex 3 and Annex 4) has fragmented the public procurement authority.
- The private sector has taken over certain public functions that usually belong to the government.

24. **Following the December 2005 amendment, DCSP functions were fragmented.** In descending order of authority and influence, they were reassigned to the following entities:

- The Tender Chamber (an NGO)
- The Special Control Commission (SCC) under the Accounting Chamber
- The Accounting Chamber (AC)
- Parliament (responsible also for overall supervision)
- The Antimonopoly Committee (AMC)
- Central executive bodies, including the Cabinet of Ministers

See Annex 4 for a schematic diagram showing the relationship of entities following the amendment of 2005.

25. **The Antimonopoly Committee is now the nominal Authorized Agency, but its functions are limited to providing general oversight and writing reports.** The AMC can authorize restricted tendering and single-source procurement only after the SCC or TC has signed off. The AMC role in handling complaints has been reduced to recording results.

26. **TC appears to have taken over the key functions of the DCSP.** TC can authorize restricted tendering and single-source procurement, publish a procurement bulletin, and issue opinions on disputes by aggrieved bidders. It develops methodological materials for procuring entities, proposes improvements to legislation, provides guidance on application of procedures, and issues opinions and conclusions on public procurement.

27. **The PPL defines TC as a nonprofit association of NGOs that is prohibited from charging fees for services.** Officially, TC's goals are to promote a transparent and efficient

public procurement system. However, the representatives of TC member associations told the Bank team that their objective is to promote the business interest of their membership. TC has yet to make public a list of its member NGOs. TC management has a close relationship with consulting firms providing public procurement services and with the only company that can serve as an Internet outlet for mandatory procurement announcements. Such relationships undermine the transparency and integrity of an “open” system.

28. **The SCC is a collective body.** It consists of three TC representatives, three parliamentary representatives, one representative from the Accounting Chamber (AC), one from the State Treasury, and one from the Department of Audit and Review. Since the Special Control Commission on Public Procurement is under the Accounting Chamber, the AC is simultaneously supervising and executing the state budget, which creates a conflict of interest. Other countries assign these oversight procurement functions to a single government body such as a ministry or to an independent public procurement agency.

29. **Several state authorities supervise public procurement.** These include the Cabinet of Ministers, the State Treasury, the State Statistics Committee, the Ministry of Agrarian Policy, and law enforcement authorities. Parliament is responsible for controlling AA activities.

30. **The distribution of public procurement functions among TC, SCC, and AMC has created conflicts of interest.** The public responsibility of TC and its role to protect the commercial interests of its members cannot allow it to promote transparency and fairness in the procurement process. The AC’s responsibility as the supreme auditor of the country conflicts with its new role in budget execution processes. Moreover, the parliament’s hands-on involvement in the work of the executive branch contradicts the principle of separation of powers, as stated in Article 6 of the Constitution.

Recommendation

- Further to the recommendations in Section 2, the Government should immediately revisit the institutional arrangement for public procurement with a view to eliminating conflicts of interest. In this regard, the institutional arrangements in several new EU member countries—for example, Estonia, Hungary, and Poland, as shown in Box 1—can serve as good examples.

Box 1. Organization of Public Procurement in Estonia, Hungary, and Poland

Estonia

The Public Procurement Office (PPO), established in March 1996, is responsible for all public purchasing. Since the end of 2002, PPO has been a separate governmental agency that answers directly to the Ministry of Finance (MoF). The director general of the office is nominated (and may be dismissed) by the minister of finance. The PPO's responsibilities are to assess system operations and prepare proposals to improve performance; implement and maintain information systems for purchasing (a public procurement register); cooperate with other countries through provision of data, including to international organizations carrying out international agreements; advise contractors and operators on procedures; review complaints by bidders; supervise public procurement procedures; terminate contracts in violation of rules and regulations; initiate disciplinary proceedings against persons or public officials responsible for breaches in the law; and levy fines against contracting entities for serious violations.

The PPO has two departments, each composed of two divisions: the Information Department (Analysis Division and Register Division) and the Management Department (Management Division and Supervision Division). The Analysis Division prepares research and evaluation studies and is responsible for overall monitoring of the procurement system. The Register Division is responsible for maintaining an electronic record of procurements—entering data, checking the accuracy of information, and so forth. The Management Division is responsible for reviewing complaints submitted to the PPO. The Supervision Division monitors the contracting authorities for compliance with procurement rules. This is a new task, added last September.

Hungary

The Public Procurement Council (PPC), established in 1995, reports directly to Parliament. It has independent management and serves as a central budgetary body. The PPC comprises the Council, the Arbitration Committee, and a Secretariat. The council has a president. Council seats are apportioned equally among three groups with six members each—those representing the public interest, procuring entities, and bidders. The Public Procurement Act establishes the framework of organizations eligible for appointing members to the council. Members are appointed for at least two-year terms. They receive no salary. The council elects its president for a five-year term, with reelection possible to a second term. The council elects a vice president from its ranks for a two-year term of service. The council has an administrative arm to carry out its duties—the Secretariat of the Council for Public Procurement. The secretariat is headed by a secretary general. Staff members are civil servants under the council.

The PPC's role is spelled out in Article 15 of the Public Procurement Act—to monitor and enforce the Act and initiate amendments; express opinions on draft legislation on public purchasing and council activities; recommend steps to better execute implementation rules; monitor contract performance for compliance with the Act and define qualification criteria; be present at the opening of tenders when the contracting authority has been subsidized from the central budget; determine the number of members on the Arbitration Committee, appoint and relieve its chair and commissioners; judge conflicts of interest involving public procurement commissioners; publish a public procurement bulletin, including announcements, resolutions of the Arbitration Committee, recommendations for following relevant purchasing rules, and any other notice about public procurement; promote education and training for personnel involved in procurement procedures; maintain relationships with foreign public procurement bodies and international organizations; approve its own internal regulations and prepare its annual budget report; maintain records on public procurement purchases, including the annual volume of public procurement procedures and prices paid; and carry out tasks specified in other pieces of legislation.

Poland

The Public Procurement Office (PPO) of Poland was created on January 1, 1995, following adoption of the Public Procurement Act on June 10, 1994, based on a model of central offices in the Polish administration. The PPO plays a policymaking and coordinating role for the entire public procurement system. It is an independent unit within the government. The president of PPO is appointed for five years by Poland's prime minister, who chooses from a field selected in an open competition. A number of external bodies supplements PPO procurement oversight and support activities. The most crucial of these are the Council for Public Procurement, arbiters, and observers. The Council for Public Procurement is a consultative and advisory body to the PPO president, who appoints its members.

The key duties of PPO are to publish the official Public Procurement Bulletin in which contract notices (of value above thresholds defined in the Public Procurement Law) are published; to prepare legislative drafts for public procurement; to issue administrative rulings for requests to use a procedure other than open tendering or restricted tendering; to arrange appeal proceedings under the Public Procurement Law; to check the regularity of conducted procedures; and to prepare public procurement training programs and organize and promote training sessions.

Source: Sigma reports, June 2003.

Accelerated transfer of public procurement functions to private sector

31. **Following the aforementioned amendments to the PPL several private sector entities with links to each other have assumed dominance in public procurement.** The Center for Tender Procedure and Business Planning, nominally an NGO, is a founding entity of the Tender Chamber and officially holds patents and copyrights for numerous bidding documents and methodologies. A registered business, the Center for Tender Procedures, is heavily involved in “advising” entities and bidders on public procurement through a network of consultants. Registration documents indicate that these same officials are or were among the founders and directors of the Tender Chamber, the Center for Tender Procedure and Business Planning (the NGO), the Center for Tender Procedures (the business), the European Consulting Agency (consultants), and other related entities. Private sector representatives in a seminar for this assessment complained about the manner in which these private sector entities were adversely affecting the open and fair conduct of public procurement.

32. **In 2003–04, CTP and its related NGO managed to obtain “patents” and “copyrights” for several standard bidding documents and procurement manuals.** This is most irregular, since nearly every other country uses a government agency to disseminate such materials free of charge. This service is normally considered a support function to procuring entities. Indeed, a closer look at the CTP-copyrighted bidding documents shows that they are nearly identical to the World Bank’s standard bidding documents—in fact, some sections seem to be direct translations.

33. **With help from several high officials, CTP has apparently forced procuring entities to use its copyrighted documents for a fee.** The Bank team obtained copies of at least four letters to this effect, as well as copies of contracts with CTP and its associates showing the terms under which procurement procedures are administered. In most instances, CTP consultants help carry out the operations. CTP reportedly threatens lawsuits if procuring entities make use of these standard bidding documents without paying.

34. **CTP or associated consultants reportedly tell potential bidders that they must use the Center’s services in order to participate in tenders.** Bidders who agree to use the Center’s services are billed for “legal assistance” that is not provided. In addition to paying for the copyrighted bidding documents, a successful bidder must pay the CTP a percentage of the eventual contract price. These costs add up and are passed on by bidders to the purchaser, i.e., the government in this case, resulting in inefficient use of public funds. Contractors’ need for a bid security—a promissory credit backed by a liquid mortgage to the purchaser—has also become a point of leverage. When the CTP administers the bidding process for a procuring entity, it makes it difficult for a bidder to obtain a bid security from its own bank by insisting on documentation that most lending institutions are unlikely to release. It appears that contractors are then obliged to buy the needed ‘security’ from the TK-Credit Bank, which issues unenforceable “notes” not backed by assets.

35. **Bidders seeking relief from questionable procurement practices are unlikely to find help in the new electronic filing system.** Internet publication of notices is now mandatory (Article 4–1). ECA (a company associated with the CTP) owns a website where such information is posted. Procuring entities are *required* to sign a contract for a range of services in order to publish notices “free of charge” through a “certified” Internet system. This requirement has helped to stall the public procurement system, because very few entities have the necessary funds to publish such notices.

36. **Certain provisions in the amended PPL support these practices.** Corresponding costs (without additional funds) are thus levied on procuring entities if they wish to conduct public procurement in accordance with the law. The agencies must choose between conducting procurement outside the law, or not conducting procurement at all.

Recommendations

- The takeover of public procurement by private sector interests needs to be promptly reversed.
- Recent actions by the AMC to redress the monopolistic practices of ECA are commendable; however, the AMC needs to examine whether any other private sector entities are limiting competition in public procurement.
- Procuring agencies should not use consultant companies as intermediaries. They should not promote standard procurement documents offered by commercial companies, or by entities affiliated, associated, or otherwise connected with such companies.
- The AA should prepare a set of frequently used standard bidding documents. These should be made available on the web free of charge. Procuring entities should be required to use these documents.
- If copyrighted CTP bidding documents, forms and manuals are identical to World Bank standard bidding documents or to documents otherwise available in the public domain, all associated copyrights or patents in CTP's name should be voided.

Recent events suggest that some of the more egregious aspects of institutional structure are starting to be addressed. First, individuals having relations with business entities (as discussed above) left the board of TC at the most recent Annual Congress of the Tender Chamber. The board of the Tender Chamber now consists only of members of parliament. Nevertheless, the activities of a nominally independent NGO are still being watched over by members of the parliament who voted to introduce this "NGO" into the public procurement system in the first place. In September 2006, the prime minister authorized and entrusted the Council of Ministers with improving the public procurement system. The deputy prime minister announced that the Cabinet has agreed to a draft law on public procurement and that this draft "destroys the absolute power of the Tender Chamber and opaque system created by enterprising members of Parliament of the previous convocation." The Speaker signed an instruction (September 29, 2006) to create a working group to draft a Public Procurement Law involving all parties interested in this process.

Mainstreaming and integrating procurement into governance

37. **Procurement planning and cost estimates are integral to budget formulation and execution.** According to the Budget Code, Ukraine's budgetary system consists of a state budget annually approved by Parliament (and updated periodically during the fiscal year) and local budgets approved annually by elected local governments. Spending units, or procurement entities, develop cost estimates for the goods, works, and services required during the coming fiscal year. Budget decision makers then use these projections to set priorities and decide on the distribution of public funds among spending units.

38. **There are two types of spending units: main and lower level.** A main spending unit develops an activities plan and cost projections for implementation. Based on these estimates, the spending unit then submits a request for financing to the Ministry of Finance (for preparing the central budget) or to a local financial body (for preparing local budgets). A main spending unit then receives allocations from state/local budgets approved by the respective legislative authorities. The spending unit allocates funds to meet its own requirements and those of lower-

level spending units. These allocations are based on the original activities plan. They are revised according to the availability of funds. Recent amendments (2005) to the PPL have strengthened this process, requiring all spending units to publish an annual procurement plan within a month of budget approval.

39. **Public works often require multiyear procurement planning.** Expenditures for goods and services are normally planned for one budget year (a calendar year), except for special government programs. This strengthens the process because procurement planning was typically limited to a list of contracts and estimated budgets. In general, little or no consideration was given to timing, contract packaging, procurement methods, or even scheduling and interdependence between procurement actions. In order to address this problem, it will be necessary to make changes to several major regulatory documents governing the budget system of Ukraine.

40. **Despite agreement on an annual budget and improved predictability of disbursements, gaps remain in the system.** Numerous interviews reiterated that release of funds to meet contractual obligations is still irregular. Consequently, payments for goods, works, and services are frequently delayed, suggesting that problems with procurement planning discussed in the 2001 CPAR are ongoing.

41. **Observations also show that spending units sometimes do not receive funds until the end of the financial year in November–December.** The funds must then be disbursed quickly, which strains adherence to procedures. Choices in procurement method are limited because of the insufficient time for open tendering. If more restricted procedures are not approved (shortage of time being the weak justification), financial resources go unused.

42. **The links between procurement planning, budget planning, allocation, and the release of funds needs strengthening.** Current practices require line ministries and other procuring entities to submit budget estimates and procurement schedules in August/September for the coming fiscal year's goods, works, and services. Detailed planning and procurement begins only after the parliament approves the national budget, in December at the earliest. Despite the perceived planning exercise performed earlier, tight revenue streams and frequently shifting priorities make it impossible to release monthly procurement allocations in full or on time. The result is delays in the procurement schedule—and the situation referred to in the preceding paragraph.

Recommendation

- The government should consider a rolling three-year budget allocation plan in which the following year's allocation is approved in October/November and some tentative funds are available for an additional two years. Procurement could then be undertaken for long-term contracts, particularly for civil works. In addition, bid invitations should cite a specific budgeted fund commitment. This would enable prospective contractors to identify the funding source and the relevant line-item appropriation, thereby encouraging competition.

Developing capacity within procuring institutions

43. **The public procurement system is fully decentralized, and procuring entities at all governmental levels are responsible for managing expenditures in compliance with the law.** Each procuring entity creates a tender committee of at least five members, including a secretary. While the entity can have more than one tender committee, depending on its business needs, a single permanent tender committee of five or more members is the norm. As a rule, the head of the committee is the first deputy chief of the procuring entity, and the other members are from

legal, economic, financial, and logistics departments. The secretary of the committee is usually from either the logistics or the finance department. External experts and consultants can be used to help with sophisticated or highly specialized procurement. Each member of the tender committee is supposed to receive a two-week training course within six months of joining the committee.

44. **Although nearly every large procuring entity has a logistics department, the department's role is largely limited to assigning a single representative to the tender committee.** Staff assigned to tender committees perform those functions in addition to their usual duties. During interviews with private sector representatives, the Bank team was told that the existence of permanent tender committees creates the *potential* for collusion, corruption, illicit alliances, and conflict of interest, although this was not highlighted as something that commonly materializes.

Recommendations

- Sizable procuring entities (such as ministries, municipalities, oblast administrations, and so forth) should be encouraged to reorganize their activities to develop internal procurement management capacity. This could be achieved by assigning procurement responsibility to an entity's administrative, logistical, or financial departments. The department would establish tender committees (see below), prepare procurement documents, obtain contract signature(s), and supervise implementation in cooperation with end-user departments. The department carrying out this responsibility should be staffed with qualified certified personnel.
- For every procurement action, an ad hoc tender committee of up to five members (each of whom would receive mandatory training) should be set up. This committee would consist of a procurement officer, a technical specialist/engineer from the relevant discipline, a finance/economics/accounting specialist, and a representative from the end user's department. Some members of each committee would change from one tender to another, depending on the subject matter.

45. **Fifteen institutions have licenses from the Ministry of Education for procurement training, as well as a curriculum and a list of instructors approved by the Ministry of Economy.** In practice, four institutions have provided most of the training, which has been limited to tender committees. Six of the 15 certified institutions are in Kiev, and nine are in other cities. These are affiliated with either well-known universities or regional training centers for public servants and state enterprises. Trainees receive certificates and provide feedback to the ministry on course quality. Completion of the two-week regimen has grown from 86 public officials in 2002 to 3,456 in 2003, and 5,489 in 2004. Ukraine is among the few countries to introduce accreditation and certification of trainers, but these measures are inadequate. More procurement training opportunities must be created to meet the needs of approximately 80,000 procuring entities nationwide, excluding state-owned enterprises.

46. **Short briefings and seminars on PPL requirements should be offered regularly to contractors, suppliers, and consulting firms.** This would help to ensure complete and responsive bidding. With greater efficiency, fewer bids would be rejected. This would also limit public officials' discretion in awarding contracts to incomplete and nonresponsive bids. Few such interactions have taken place between the AA and bidders.

Recommendations

- An analysis of training needs should be conducted, with basic, intermediate, and advanced courses to be provided.

- The capacity of institutions previously accredited by the Ministry of Economy and the Ministry of Education should be reviewed. Additional public and private sector institutions should be accredited. Train-the-trainer courses are also needed for accredited institutions.
- Short information and training workshops should be held for potential contractors. These would cover the availability of contract opportunities, the bidding process, procurement legislation, and new regulations. Training would be provided on the preparation of responsive bids.

47. **Systems and procedures for collecting and monitoring national procurement statistics need to be strengthened.** The State Statistics Committee collects and processes procurement data from Statistical Form No. 1 “Tenders.” Procuring entities are obliged to fill out the form and regularly submit the data and information to the State Statistics Committee. This process does not provide a full record of public procurement because it depends on “self reporting.” A more streamlined, automated monitoring system should be established.

4. PROCUREMENT OPERATIONS

Overview

48. **The legislative regulatory framework sets the scope of application and coverage for procurement.** Three laws regulate public procurement in Ukraine: (a) the Law on Public Procurement, enacted on February 22, 2000 (last amended on December 15, 2005 as discussed earlier); (b) the Law on Supply of Products for State Needs, enacted on December 22, 1995 (dealing with government reserve, education, and services); and (c) the Law on Defense Contracts for Government Account (enacted on March 3, 1999) covering security and military purchases. The PPL (as amended in December 15, 2005) applies to all expenditures for goods, works, and services financed fully or partially with public funds whose value equals or exceeds HRV 30,000 (US\$6,000), HRV 300,000 (US\$60,000) in the case of works. Enterprises in which the state-owned share exceeds 50 percent (postal services among others) are also subject to the PPL. The PPL does not apply to water, heat, and power supply; waste-water disposal and sewerage system maintenance; postal services such as stamps; procurement of goods, works, and services by customers located outside of Ukraine; telecommunications services, including relay of radio and television signals (except for mobile telephone and Internet services); railway transportation services; professional training, retraining, and qualification improvement of workers in state-owned technical/vocational education institutions; education of staff by higher education institutions of accreditation levels I to IV; and procurement of goods, works, or services that are state secrets for some special reason.

Recommendations for key elements of public procurement

Procurement methods

49. **The PPL provides for six internally accepted procurement methods.** They are: open tendering, restricted tendering, two-stage tendering, a request for price proposals (quotations), single-source assignment, and price reduction (negotiation) with a modified two-stage procedure. The default method is either price reduction or open tendering. The use of the other “restricted” methods is governed by floor thresholds (more than HRV 500,000, approximately US\$100,000) for restricted tendering and more than HRV 30,000 (approximately US\$6,000) when for goods and services; and more than HRV 300,000 (approximately US\$60,000) for single source (works). Approval is required from either the Authorized Agency or the Tender Chamber. The use of quotations is governed by a ceiling threshold (under HRV 100,000, or approximately US\$20,000).

50. **In addition to the five PPL procurement procedures discussed in the 2001 CPAR, the June 16 amendment (Article 29-3) introduced a sixth—the Procedure of Price Reduction.** This applies to goods or services for contracts above HRV 100,000 (approximately US\$20,000) “for which there is a permanent operating market and which are not manufactured, performed, or provided under separately designed specifications....” In essence, this provides for a two-stage tender procedure similar to the one described in Article 30 of the PPL, except there will be a public reverse auction at the end of the second stage. This resembles an electronic procedure of reverse auctioning, with a significant difference—that “auctioning” is public and bidder anonymity is not preserved.

Recommendation

- The procedure of price reduction may result in higher prices and encourage collusion among bidders. Knowing that a reverse auction will eventually force reduction of prices, bidders typically quote inflated prices. This method should be substantially revised to ensure bidder anonymity.

Rules on participation and qualitative selection

51. **Some PPL provisions imply nondiscrimination in treatment of bidders (for example, Article 5).** However, others provide explicitly for domestic preference—particularly for agricultural produce, for which domestic producers only are eligible—and for protection of enterprises that employ disabled people. In addition, the PPL can require foreign bidders to provide services or perform work with “national raw materials and labor.” This is clearly restrictive, and deters participation by foreign competitors.

Recommendation

- The rules concerning participation and free trade should be clear in the PPL. (This subject is further discussed in sections below concerning WTO accession.)

Advertising rules and time limits

52. **All procurement tenders or prequalification announcements must be advertised.** Article 29.1 of the procurement law requires detailed publication of “tender results” within 10 calendar days of the conclusion of contracts. Publication in English is mandatory for procurement above €200,000 for goods, €300,000 for services, and €4 million for works.

53. **Most recent amendments to the PPL require that announcements should bear a code or “ID number” assigned by a certified information system.** Although this would appear to be the precursor of an e-procurement system and for systematized registration of procurement, the mandatory requirement for an ID number should be postponed until parliament establishes a full legal framework for introducing e-procurement. The current legal status of a certified information system is unclear since www.zakupivli.com lost its certification. Because a printed bulletin cannot be published without an electronic ID number, many spending units simply made up a number. Our understanding is that the control has been tightened and this practice is no longer possible.

Recommendation

- Although there are clear benefits from each procurement activity having its own identification number, assignment of an ID should be the responsibility of the AA, not a commercial enterprise.

Publication of bidding data

54. **The amended PPL provisions (2005) mandate that bidding data and results be published on the Internet.** This creates a potential bottleneck because posting is allowed only on certified or authorized websites. Failure to comply with this requirement can potentially annul a procurement procedure. These provisions may appear sound in principle; however, in light of the restrictions on acceptable sites, the requirement is misused. It is simply a way to generate income using the PPL.

Recommendation

- Advertising of tender notices, contract awards, and other procurement data needs to be streamlined. The AA should publish a single, official online and print bulletin in which procuring entities publish their notices. In addition to mandatory use of the official

bulletin, prospective bidders' access to procurement information would improve if procuring entities were allowed to freely publish notices in general-circulation newspapers and on their own websites.

Tender documentation and technical specifications

55. **The quality of technical specifications in tender documentation is among the weakest elements in the present system.** Although the PPL provides detailed instructions for the content of bidding documents and technical specifications, this part of the PPL was not amended in 2005. No standard bidding documents have been disseminated. Inadequate technical specification is among the most frequently cited causes of contract disputes, suspension, and cancellation of bidding procedures.

Recommendation

- Provide a guidance note on how to prepare technical specifications and train public officials in preparing clear, concise technical specifications.

Model tender documents

56. **In 2001, the Ministry of Economy published standard bidding documents for goods, works, and services based on the World Bank SBDs.** The DCSP prepared standard bidding documents under the PAL Dutch Grant and placed these on its website for discussion. However, with the abolition of DCSP, these standard bidding documents were not finalized. As discussed, between 2002 and 2004 individuals associated with the CTP “copyrighted” and imposed documents upon procuring entities through letters and “recommendations” signed by high-ranking government officials. Currently, the Antimonopoly Committee does not have responsibility for mandating the use of standard bidding documents.

Recommendation

- In common international practice, public agencies are responsible for preparing and distributing SBDs to procuring entities. Assigning this responsibility to a public agency would improve the efficiency and transparency of the procurement system.

Tender evaluation and award criteria

57. **Evaluation criteria are applied according to the nature of procurement.** Price is the only factor for off-the-shelf goods, works, and services. For complex and specialized procurement (including consultant services), factors such as the bidder's experience and qualifications, operating cost, and the transfer of technology are considered. These “other” factors cannot offset more than 30 percent of the bid, and calculation of a “cost equivalent” is recommended. However, neither PPL nor secondary regulations provide full guidance on the application of criteria or cost substitution.

58. **The lowest bid price is normally the most frequently used contract award criterion.** The lowest evaluated bidder is defined as the one whose bid not only complies with technical requirements in bidding documents but also offers the lowest price for the goods, works, and services to be procured. A contract based on lowest price helps procuring entities avoid adverse opinions by internal and external auditors. In addition, selection based on price simplifies the procuring entities' job, because other evaluation factors might require considerably more time and effort.

59. **The lowest-price criterion may be acceptable for simple procurement of goods and services, but not necessarily for a complex plant or for equipment in which life-cycle costs**

are major factors. Broader evaluation of price factors takes into account, among others, delivery schedules, cost of spare parts, training, and life cycle costs. The law is sufficiently flexible to consider total cost in the evaluation process; however, procuring entities often ignore the broader view because they lack guidance on performing the complex calculations.

Recommendation

- Prices of only substantially responsive bids should be considered, and the lowest of those evaluated bidders should be selected.
- Evaluation factors used for determining the lowest evaluated bidder must be objective and quantifiable in monetary terms. Specific provisions should be added to the PPL for mandating the disclosure of evaluation factors in bidding documents along with the methods to convert non-price evaluation criteria into monetary terms.

Submission, receipt, and opening of tenders

60. Under open and restricted tenders, the minimum bid submission time should be 45 calendar days. When justified, this may be reduced to 21 days (or 15 for a restricted procedure). The two-stage “reduction” procedure provides that the bid submission for the first and second stages should be a minimum of 21 and 10 days respectively, allowing this procedure to be used to reduce the total bidding time without resorting to special justification. This can result in inadequate bidder response. In the two-stage procedure, first-stage bidders should be given a minimum of 30 days. For the second stage, which might include modified technical specifications, the PPL provides for a maximum of 15 days. This is considered seriously inadequate. The quotation procedure has no prescribed deadline.

61. **The PPL has clear provisions covering submission, inadmissibility of late bids, validity of bids, prevention of changes after the deadline, and bid securities.** It provides for a public bid opening on the day the tender proposal is submitted in the presence of bidders. The time lag between the opening and formal bid submission perceived as a weakness subject to potential abuse. The PPL does provide for electronic posting of the minutes of the bid opening. This would be best practice were it not for the present cost implications of using the Internet, as discussed above. A few cases were reported in which bidders were prevented from entering government buildings to participate in public bid openings.

Complaints

62. **Dispute resolution has undergone significant change from the PPL amendment of June 2005, but at best is inefficient, unclear, and distrusted by bidders (see paragraph 19.** The PPL states that a bidder (or anyone else) has the right to appeal a decision, act, or failure to act by the purchaser *to the purchaser or the Special Control Commission, or to a court of justice.* However, the PPL stipulates that the complaint should be filed with the purchaser or SCC, *as well as* with the Tender Chamber. Receipt of a complaint by the purchaser or SCC suspends the procurement procedure for up to 20 days. The purchaser and the TC are to be notified when a complaint is lodged with the SCC—an apparent redundancy because the complainant is also obliged to initially file with the TC.

63. **Delaying the conclusion of a bid procedure for at least 20 days until a complaint is resolved is quite irregular.** Bidders can use this PPL provision to gain extra time for preparing bids since the subject and nature of the dispute does not really matter, nor is there any requirement that complaints be substantiated. A complaint serves simply to postpone an inconvenient deadline.

64. **The TC has ten working days from the date of the complaint to issue an opinion and then one day to forward it to the SCC.** In the June 2005 amendment, rendering opinions was addressed as a “right.” Under the December 2005 amendment, TC was given the right to render opinions. However, procuring entities and the Special Control Commission are instructed to arrive at their decisions “with due regard for the Tender Chamber’s opinion.” The TC opinion is nominally nonbinding; however, according to Article 17–3 (12) of the PPL, “the activity of the Tender Chamber as well as results of such activity including conclusions and other documents . . . may be appealed exclusively by judicial procedure in compliance with the law.” By implication, this makes a “nonbinding” opinion binding. The Antimonopoly Committee is not given a significant role in bid complaint resolution.

65. **A decision on bid complaint can be appealed to a court of law.** The appeal must be filed within three days. Copies must be sent to Treasury, AA, the customer, and TC. A copy of the court decision-initiating proceedings is to be forwarded within 20 days. The procuring agency must suspend the procurement procedure when this happens. It cannot enter into a contract until a decision is made by the SCC. This suspension can only be lifted if a copy of the court decision is not forwarded within 20 days.

66. **In 2004, 405 complaints were lodged with the Ministry of Economy.** Only 59 were resolved in favor of the complainants. The remainder were rejected as unsubstantiated. During the first six months of 2005, 281 complaints were lodged, with 72 resolved in favor of the complainants. No data are available on how well the mechanism has worked since the PPL amendments; nor is it possible to determine whether the *perception* of the system has improved, other than that the “suspension mechanism” is widely viewed as a means to extend deadlines. Without doubt, an independent complaint resolution mechanism administered by an independent body without vested interests would inspire more trust among bidders and result in increased competition. A sound complaint resolution mechanism should include the following elements: (i) publication of contract award details⁵; (ii) access by all interested parties; (iii) independent review; (iv) timely disposal of complaints, including reversal of contract award decisions; and (v) coverage of all aspects of procurement, including choice of procurement method.

Recommendation

- The current complaint resolution mechanism needs streamlining taking into account the five essential elements discussed above. For this purpose, the GOU might wish to consider the EU Remedy Directive, which has been adopted by members of the European Union as part of the approximation process. In considering the complaint resolution mechanism described by the EU Remedy Directive, the government should review various implementation models—for example by Slovenia, Hungary, and Poland, as shown in Box 2.

⁵ These details should include the following: (a) name of each bidder; (b) bid price as read out at bid opening; (c) name and evaluated prices of each bid that was evaluated; (d) name of bidders whose bid were rejected and the reason for the rejection; and (e) name of the winning bidder and the price offered, as well as the duration and summary scope of the contract that was awarded.

Box 2. Bid Complaint Resolution in Slovenia, Hungary, and Poland

Slovenia

Remedies are regulated by a separate law—the Act on the Review of Public Procurement Procedures (450-02/99-10/2) of July 22, 1999. It sets up essentially a two-stage review process. The first possibility is a complaint by a disappointed bidder to the contracting entity itself. The review expert who hears the complaint must provide an opinion within eight days, after which the contracting entity has three days to decide how to act upon the opinion. If the contracting entity does not amend its position, the bidder is given a further three days in which to file a claim with the second-tier review body, the National Review Commission (NRC). The NRC must provide its judgment as quickly as possible, generally within 15 days, although this may be extended by a further 20 days if justified. Decisions are final. There is no appeal.

Hungary

The Arbitration Committee may open a procedure upon a claim. The claim can be submitted by a contracting entity, a bidder, or other interested party. If the proceedings do not start within 15 days of learning of the legal infringement and no later than 90 days after the alleged violation, the right to claim expires. The committee may hold a public hearing if requested by any interested party. Decisions are delivered before the disputants, and are published in the Public Procurement Bulletin. No direct appeal can be lodged against the committee verdict. The courts can review a decision only if requested in a statement of claim. The court may overrule the committee's decision, and the court's decision can be appealed within eight days. No further appeal is allowed.

Poland

Above the threshold value of €30,000, the review procedure may consist of three stages. The first stage is the filing of a protest to the contracting entity; the second stage is filing to an arbitration committee; and the third stage is appeal to the court. A protest shall be filed within seven days from the day the bidders learned of the circumstance giving grounds to the filing and only before the contract award. The contracting entity must review the protest within seven days of its filing and suspend the tender proceedings during the review until final resolution of the complaint. The chairperson of the Public Procurement Office (PPO) may permit conclusion of the contract in certain circumstances. Below the estimated contract value of €30,000, only ordinary legal remedies for civil cases are available.

Source: Based on the Sigma reports, June 2003

Implementing regulations

67. **All regulations were to have been amended for consistency with the PPL within a month of its publication on March 17, 2006.** After becoming the AA, the Antimonopoly Committee posted two draft regulations on its website on March 29—the approval of forms of advertisement and the approval of forms of evaluation reports. These are identical to the Ministry of Economy Orders No. 130 and 129 respectively, except that references to the MoE were replaced with AMC. Before taking effect, the regulations will have to be approved by AMC orders and registered by the Ministry of Justice.

Procedure for prequalification

68. **The PPL does not identify procurements for which bidder prequalification would be suitable.** The current provisions indicate which qualifications may be considered. They list requirements such as the authority or license to carry out the required works and services, the availability of equipment or staff (resources or financial standing are not mentioned other than not being bankrupt), and proof that participants have paid requisite taxes and fees. The PPL further

stipulates that details of prequalification should appear in the bidding documents. Secondary legislation should be prepared to provide clear instructions or guidance on how prequalification of contractors or suppliers should be conducted. This invites misapplication, because the PPL also says that bidders can be rejected for failing to meet the required qualifications.

Recommendation

- Include clear criteria for prequalification of bidders in the PPL. This might consist of experience and past performance on contracts; capabilities including personnel, equipment, construction or manufacturing facilities; and financial position. Also, prepare and introduce a detailed implementation regulation on prequalification.

Procedures for contracting intellectual services

69. **The PPL deals with the procurement of goods, works, and services; but it includes no provisions for intellectual services.** This is a problem because the procurement methods included in the PPL are not otherwise appropriate for procurement of intellectual services. In the absence of explicit provisions, procuring entities use the methods intended for goods and works. This may lead to undesirable practices—for example, using price too narrowly as the major factor of evaluation, requirement of bid and performance securities, and so forth.

Recommendation

- The PPL should include provisions for the procurement of intellectual services. Box 3 suggests model clauses for this purpose.

Box 3. Model Provisions for Procurement of Intellectual Services

Article 1. “Intellectual services” refers to activities of an intellectual and immaterial nature that do not lead to a measurable physical output. They include training, auditing, software development, and similar services. They are awarded following a competitive selection process among preselected candidates, subject to the provisions of Article 6.

Article 2. A short list of preselected candidates is established after a public solicitation of expressions of interest has been advertised in accordance with Articles and The candidates are chosen by the competent Tender Evaluation Committee for their capacity to perform the required services, as indicated in the prequalification document.

Article 3. Selection of the consultant is based on the criteria disclosed in the request for proposals. The request for proposals sets forth the detailed manner in which the selection criteria will be applied, and includes the draft contract. The request for proposals discloses the grounds for potential disqualifications from future participation in procurement of goods, services, or construction works that may result from the assignment under consideration.

Article 4. The award is based on the technical quality of the proposal—that is, the consultant’s relevant experience, the expertise of its staff, and the proposed work methodology—as well as the price of the proposal. Alternatively, the selection may be based on the quality of the technical proposal submitted within a predetermined fixed budget, or based on the best financial proposal submitted by candidates that obtained an acceptable technical score predisclosed in the request for proposals.

Article 5. When the services are of an exceptionally complex nature or have considerable impact on future projects or when they may lead to the submission of proposals that are difficult to compare, the consultant may be selected exclusively based on the technical quality of the proposal.

Article 6. Direct contracting may be used when the services require a particular, uniquely qualified consultant or when continuing with the same consultant is indispensable.

Article 7. The contract may be negotiated with the selected candidate. Negotiations may not be simultaneously engaged with several candidates.

Article 8. Contracts referred to in Articles 5 and 6 may only be awarded to candidates willing to be subjected to price verification during the performance of the services, in accordance with the provisions of Article The provisions of Article ... apply to contracts awarded on the basis of Articles 1 and 4.

User’s guide or manual for contracting entities

70. **Despite detailed guidance in the PPL on conducting procurement, many items are still open to interpretation.** A particular weakness is the lack of a manual that clearly explains procedures for administering regulations and laws, particularly for bid evaluation and confirmation of qualifications. The former DCSP had actually prepared such a manual (with the assistance of Sida) in 2002, which was distributed to procuring entities. However, the provisions authorizing the AA to issue such guidance were removed from the PPL in November 2004. This function was delegated to TC, with individuals associated with TC then copyrighting the materials.

Recommendation

- The AA should prepare a procurement manual promptly and disseminate it to procuring entities free of charge.

Safekeeping of procurement records and documents

71. **Written records for all stages of procurement are maintained for three years.** Records are available to the public, except for disclosure that would harm the state and information relating to examination, evaluation, and comparison of bids. Purchases of less than €10,000 need not be documented. Documents relating to a bidding process are normally kept in locked boxes (safes) since this information is considered confidential.

The risks of adverse procurement practices

72. **The efficiency of the public procurement system was examined critically, including the risks of adverse practices.** Between November 2005 and February 2006, interviews were held with several procuring entities, consultants, contractors and suppliers, associations of contractors, entrepreneurs, pharmaceutical wholesalers, and manufacturers. Findings in this section are based on those interviews.

73. **Several undesirable practices that are listed in Table 1 have resulted from the perceived deficiencies in the PPL.** Other undesirable practices stem from insufficient training in public procurement, inadequate understanding of PPL provisions, and weak oversight and supervision of the system. These practices affect systemic efficiency, and they waste public expenditure. The risks and steps to mitigate such risks are discussed below. Some of the practices listed below have already been discussed in some detail in preceding paragraphs, but are summarized here for ready reference.

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Table 1. Summary of Procurement Risk Factors and Recommended Remedies

Risk	What can happen	Remedial actions (Recommendations)
General risk		
Inadequate interaction and absence of regular dialogue between the AA and procuring entities, on the one hand, and the private sector, on the other; weak oversight and supervision of the public procurement process.	Noncompliance with the procurement law and regulations, resulting in loss of benefits from economic and efficient procurement.	AA to proactively increase interaction with procuring entities and to interact with private sector more actively.
Procuring entities sometimes receive budgetary funds at the end of the financial year (November–December).	Because of the time constraint (funds must be spent before the fiscal year ends), hasty procurement actions, including use of inappropriate procurement methods, results in higher prices. Payment delays lead to lack of trust by potential bidders who do business with the state, causing lack of competition.	Revisit the budget code to improve the budget cycle, including procurement planning to ensure timely flow of funds to procuring entities.
Often procuring entities issue tender notices, receive, and evaluate bids and award contracts without ensuring whether or not funds are actually available for contractual payments.	Payment delays lead to lack of trust by potential bidders who do business with the state, causing lack of competition.	Create closer ties between the actual needs of procuring entities and the availability of funds in the Treasury to meet these obligations, that is, ensure that the Treasury transfers funds according to actual needs (based on contracts signed) and not on planned budgets.
Bidding opportunities are not advertised in a national newspaper of general circulation, only in procurement bulletins.	Information on tenders likely does not reach all potential bidders throughout the country, resulting in inadequate competition.	In addition to procurement bulletins, tenders and contract awards should also be published in at least one national newspaper.
Required formal documents to participate in tendering are hard to obtain. For example, bidders must apply for the note from the tax authority on absence of debts three weeks in advance.	Lack of competition.	Establish a simplified procedure to facilitate the task of obtaining and submitting the required documents by potential bidders.
Technical specifications are ambiguous; requirements are unclear and unrealistic—such as requirement of delivery/completion time that bidders cannot meet and frequently absence of qualification and experience requirements.	Bids are based on poor quality; and cheap goods, works, and workmanship are offered by unqualified and inexperienced bidders.	Prepare a detailed guidance note on preparation of technical specifications. Train staff in preparing clear technical specifications. Create and maintain a database of sample specifications and prepare standard technical specifications for items procured frequently.

Risk	What can happen	Remedial actions (Recommendations)
Frequently bidders have very short bid preparation time because some procuring entities provide tender documentation long after the bidding announcement is published. Sometimes bid preparation time is only four days.	Limited participation of potential bidders, leading to higher prices and loss of economies.	Require procuring entities to start the bid submission period on the date when the bidding documents are actually made available to bidders. Strengthen AA control to declare tenders null and void when bidders are not allowed the bid preparation time stipulated in the PPL.
Legal possibility of payment for the bid security by an entity other than the concerned bidder.	This does not secure procuring entities' interests and leads to unnecessary complication of the procurement procedure. Furthermore, requirement of bid security for all contracts puts excessive burden on bidders and restricts competition.	Abolish such possibility. Require bid and performance securities only for large contracts.
Some procuring entities create conditions on the date of bid opening that do not allow all bidders to submit their bids personally before the deadline and to participate in the bid opening. Such conditions include lack of arrangements for bidders to enter government buildings hosting a bid opening, arbitrary postponement of a bid opening time and date.	Lack of competition and transparency since this seemingly deliberate attempt may exclude bidders and their bids from the process.	Require procuring entities to take the necessary steps to avoid any obstacles hindering bidder participation in a public bid opening.
Insufficient and unrealistic time for bidders to deliver complex goods and works. For example, sometimes contract conditions in bidding documents specify no delivery or completion period.	Bidders submit bids based on unrealistic delivery and completion times to be selected, and if selected, fail to perform or perform poorly.	Allow adequate delivery time and specify these clearly in bidding documents.
Procuring entities cancel tenders without informing bidders of the reason why. This possibility is provided by Article 27 (2) of the PPL.	Bidders lose trust in government business and withdraw from participation in public tenders. This helps explain the low average number (3) of bids per tender in Ukraine.	Establish clear rules for cancellation of a tender process.
Contracts are awarded solely based on the lowest bid price without taking into account other commercial and technical factors.. Often bids do not comply with the requirements of bidding documents.	Poor quality of goods, works, and services procured for public projects.	Prohibit procuring entities from accepting bids that do not meet the technical specification requirements. Lowest evaluated price, rather than the lowest price, should be a major selection criterion.

Risk	What can happen	Remedial actions (Recommendations)
Contracting Standard public procurement contract for goods, works, and services does not exist. Each procuring entity uses a different contract form.	Poor and imbalanced contractual conditions result in inefficient procurement because of potential contractual disputes.	Prepare standard contract conditions for goods, works, and services, and include these in the SBDs.
Procuring entities sometimes cancel contracts without justification.	Cancellation of a contract without justification points to a lack of seriousness in the way government does business.	Introduce procedures that require procuring entities to fully justify cancellation of contracts.

Functionality of the public procurement market

74. **The current institutional framework does not provide a mechanism for effective partnership between public and private sectors.** Neither the previous AA nor those involved in the current institutional framework have shown willingness, much less developed a mechanism, for such interaction. The exception is that the former AA conducted periodic roundtables and the Tender Chamber has offered a series of paid seminars on public procurement.

Recommendation

- The Antimonopoly Committee should develop and implement an ongoing partnership program with private sector.

75. **A firm's commercial procurement and purchasing practices tend to be determined by its business activity, size, and contract values.** For the most part, the companies interviewed for this assessment embraced procurement structures and procedures aligned to good international practice. Most large companies have dedicated procurement or purchasing departments—some of which are subdivided along product lines (raw materials, components, and so forth); fixed assets (buildings, manufacturing facilities, and so forth); and logistics/consumables. An increasing number of companies are obtaining ISO 9000 certification and implementing sound quality-management systems. Most firms use purchasing practices with the following characteristics:

- A set of corporate ethics, policies, and procedures, including published internal purchasing guidelines or rules for purchasing by employees
- Computerized purchasing management systems in some cases
- Award of contracts through a quasi-competitive tender, typically inviting three to five firms (more for higher-value contracts), based on a combination of price, quality, performance, delivery, and commercial conditions
- Post-quotation negotiations with two or more firms
- Use of standard contract conditions

76. **Companies source most new suppliers primarily through trade journals, visits to specialist exhibitions or trade fairs, and the Internet.** Many large companies periodically advertise new tender opportunities in national newspapers. Smaller companies often favor awarding contracts by direct negotiations.

77. **The consulting industry comprises mostly small firms with less than 10 professional staff and freelancing individuals.** The lack of specific procedures for procurement of consultancy services and the resort to open tendering has hurt the consulting industry, since price tends to be favored over quality. Furthermore, restricted (sole source) procedures tend to be applied when hiring consultants.

78. **Several constraints systematically hinder the private sector's capacity to access the procurement market.** Foreign Investment Advisory Service (FIAS) statistics on "Doing Business in Ukraine" point to significant challenges in starting a business. According to the 2005 information, it takes 15 steps and at least 34 days to start a business. It may take up to 18 steps and 265 days to obtain a license or permit.

79. **The FIAS also found significant barriers in registering property (10 procedures and 93 days).** Securing connections to utility services was also found to be highly problematic and required "facilitation payments." An estimated 22 days were needed to obtain an electricity connection, and 19 days for a telephone connection. Furthermore, there are relatively few business associations, and their membership is small.

80. **In general, firms interviewed understand the principles and practices that should govern public procurement, and they are well aware of shortcomings in the present system.** The problem is that the legal framework is still incomplete—for example, the absence of freely available standard bidding documents. A common perception is that the public sector has not adopted a unified approach to procurement. This results in lack of competition. Evidence suggests that competitiveness is rather low. In 2004 and 2005, the average number of received bids per tender was 3, only marginally better than the 2.3 recorded in 2003. Five bidders submitting bids in a tendering process are considered satisfactory competition. (See Annex 2).

81. **Firms consulted indicate that they regularly follow up on public procurement opportunities.** However, they typically voice the following concerns:

- The poor quality of technical specifications in bidding documents. (This is the most frequent complaint.)
- The use of subjective requirements for prequalification and subjective criteria in the evaluation of bids based on point systems.
- Smaller firms cannot participate in public tenders because of their inability to obtain required bank securities. The tender documents often impose unrealistic requirements for documents to be presented by banks.
- Exorbitant charges for bidding documents along with unwanted and unsolicited involvement of "consulting companies" in the bidding process.
- An apparently arbitrary process for award of contracts, sometimes even including post-tender bargaining for price reduction. (This has now been allowed legally through a procedure described as "Price Reduction.")
- Delays in payment in breach of contract payment terms.

Contract administration and dispute resolution provisions

82. **Once a contract is signed, it must be registered by the local treasury department.** This is the responsibility accounting department of the procuring entity, which is also responsible for processing payments. The receipt and acceptance of goods/works/services is the responsibility of either the logistics department or the unit that is the end user of the contracted goods, works, or services.

83. **There is no standard contract form with clauses to help resolve contractual disputes.** Disputes among domestic suppliers, contractors, and consultants are usually resolved according to national legislation. UNCITRAL arbitration rules are applied for foreign suppliers, contractors, and consultants.

5. INTEGRITY AND TRANSPARENCY OF THE PUBLIC PROCUREMENT SYSTEM

Control and audit systems

84. **Ukraine has internal and external controls as well as audit systems for public procurement.** Theoretically, the full range of procurement implementation is covered. These mechanisms include prior review, review of ongoing procedures, and ex post examination (by far the most common mechanism). Government agencies responsible for internal and external audits are as follow:

- The Department of Audit and Review (KRU) of the Cabinet of Ministers is responsible for internal audits. There are 27 branches at the regional (oblast) level and 588 units in regions and cities.
- The Accounting Chamber is the supreme audit institution (SAI) of Ukraine. It reports to Parliament and is responsible for external audits, including monitoring for compliance with the PPL.
- The Treasury of Ukraine performs some audit functions during contract disbursements in accordance with Treasury Order No. 89. The Treasury has 129 local branches at the regional (oblast) level and 27 units in regions and cities. The December 2005 amendment to the PPL further enhanced the Treasury's role in procurement.
- Prior to the December 2005 amendment, the Ministry of Economy (DCSP) acted as the authorized government agency in public procurement, in accordance with MoE Order No. 238.
- Internal review departments in each procuring entity are mainly responsible for financial controls and audits.

85. **Prior to its dissolution in December 2005, DCSP was responsible for prior reviews of procurement.** These reviews focused mainly on proposals for sole sourcing and restricted tendering. These reviews ceased with the abolition of the DCSP. The Treasury audits the procurement process before making payments under signed contracts. Order 89 (Item 12.3) of the State Treasury requires officials who process transactions to check the following documents: evaluation reports, contracts, acceptance certificates, approval by the AA of single-source and limited bidding, invoices, and so forth.

86. **The Treasury generally provides effective audits when processing contract payments.** The country's internal and external auditors (KRU and AC) are strengthening their capacities by adopting international auditing standards, training their staff, and introducing modern techniques. Adoption of risk-based methodology will ensure that auditors focus on the areas with most likely problems rather than simply conducting routine checks for compliance with regulations. Procurement will receive targeted attention because it is currently an area of high risk.

87. **Discussion with KRU and the AC report indicate that the two organizations overlap functionally.** Both conduct ex post audits that are primarily limited to compliance checks. Targeted procurement audits are rare. Procurement is audited as part of the general entity audit. KRU carries these out on a schedule. AC usually conducts them as part of targeted investigations.

88. **Enforcement of recommendations is weak because of poor guidance and limited follow-up.** KRU and AC provided the Bank team with information on the most common violations found during recent routine controls. Analysis indicates that many problems could have been avoided if procuring entities knew more about the PPL and if the AA provided better implementation guidance. AC does not disclose information on enforcement; and KRU rarely follows up with enforcement unless sanctions are actually recommended (this requires reports to legal authorities). Treasury reports that refusal to make payment is its most effective and frequent sanction. It is clear payments are not made in some cases; however, Treasury data do not show how often applications were resubmitted before payment was made.

89. **The December 2005 amendment reorganized the procurement control and auditing structure.** In general, the amendment diluted significant oversight, supervisory, and control functions by distributing procurement responsibilities across several government bodies. The following analysis examines the practical implications of this distribution of functions.

90. **Although the Antimonopoly Committee is the Authorized Agency, it is only responsible for coordination and monitoring.** Its supervision is limited to (a) approval of single-source and restricted tender procedures (and then only with the prior opinion of the SCC) and (b) review of procuring entity's compliance with the PPL. KRU is now responsible for procuring entities' compliance with the PPL, with other agencies also playing supervisory roles. The State Treasury exercises budget control. The State Statistics Committee collects and maintains procurement figures. The Ministry of Agrarian Policy supports protection of national agricultural producers through interaction with the AA, other public authorities, and customers. Law enforcement agencies are responsible for monitoring illegal procurement. The SCC issues opinions to the AMC and the procuring entity on restricted tendering and single-source procurement. SCC considers complaints of violations. The Tender Chamber has been assigned the most important functions that usually otherwise belong to the AA—methodological guidance, authorization of restricted tendering, and the key role in complaint resolution.

91. **The Treasury needs further strengthening and integration with public financial management system.** Databases of the entities responsible for public finances should be integrated. For example, Treasury should be able confirm the existence of tender notices online and then query basic contextual data. If so, decisions about limited tendering could be registered at the AA. Treasury could confirm information automatically. Once published, Treasury could access information about contract values. With contracts registered by Treasury, procuring entities could receive resources in a far more timely fashion.

Recommendation

- Strengthen Treasury by introducing an integrated public financial management system. Treasury and others government agencies should implement a module to interact with existing information systems.

Ease of information access

92. **Legal instruments dealing with citizen rights, freedoms, and responsibilities must be published officially.** Unless otherwise stipulated by statute, a law comes into force 10 days after its publication. The government's disclosure policy requires all legislation and regulations to be disseminated in the media. Several publications contain the new laws, decrees, and other legal normative acts. The Law on International Agreements of Ukraine (L1906-IV of June 29, 2004;

Article 21, Paragraph 1) mandates that all laws and international treaties be published in publications specializing in the relevant topic.

93. **The PPL requires publication of information on procurement in official journals and on the Internet.** However, no media initiative has informed citizens and businesses of the benefits and implications of public procurement reforms. To build broader awareness, the AA needs to carry out outreach campaigns through improved newspapers, television, radio, and other media.

Recommendations

- Improve capacity and communications skills in the AA for effective educational outreach.
- Implement a countrywide public awareness campaign that uses radio, television, the Internet, and print media. This would include regular information briefings, seminars, and forums.

Ethics and anticorruption measures

94. **Several laws contain scattered references to corruption, including the following:**

- The Criminal Code of Ukraine penalizes both the taking (Article 368) and giving (Article 369) of bribes.
- Article 7.2 of the PPL specifies that a bid must be rejected if the bidder has offered a bribe (there is no provision for blacklisting of bidders).
- The 1995 Law of Ukraine on Combating Corruption (not mentioned in the 2001 CPAR) penalizes corrupt activities by public officials, but it is silent on corrupt activities by bidders.

95. **A presidential decree dated November 18, 2005 on Priority Measures for De-Shadowing the Economy and Counteracting Corruption** mandates the Cabinet of Ministers to submit “urgent draft laws” to the president on such matters as: (a) defining corruption and types of corrupt practices; (b) defining conflicts of interest for state officials; (c) improving procedures for state officials to declare income and property; and (d) “ensuring provision of state services . . . with electronic informational systems to individuals and legal entities.” This decree (paragraph 2.4) also calls for the involvement of, among others, international organizations in preparing the necessary legislation. Implementation and enforcement of anticorruption measures is an area for assistance that the Bank might wish to pursue.

Recommendations

- Formulate clearer policy on procurement violation. This would include (a) definition of specific abuses (such as collusion, misrepresenting past experience); (b) differentiation among legal instruments (criminal code, statute of civil servants, procurement law); (c) better definition of related sanctions (for example, blacklisting); (d) due process in imposing sanctions; and (e) even-handedness in enforcement of sanctions.
- Strengthen deterrence by publication of all violation cases in the electronic and paper versions of the *Public Procurement Bulletin*. If feasible, this would include publication of violators’ names and the penalties.

In a recent television program on corruption in the context of the Ukraine–EU project, Yuriy Lutsenko, Minister of the Interior, pointed to public procurement as classic example of how high officials protect their shadow business interests. He described one experience in which he received allegations of the Tender Chamber collecting and channelling money through quasi-firms. According to his account, he sent officers to withdraw documents to be passed to the Office of the Public Prosecutor. Unfortunately, he was told, MPs had already withdrawn these documents to be examined by the special control commission. When he inquired about this commission to the Speaker of the parliament, he was told that the commission had ceased to exist *before* the documents disappeared.

6. E-PROCUREMENT

96. **Promising steps have been taken toward rollout of electronic government procurement (e-GP) in Ukraine.** This assessment focused on the following components: government leadership, policy and legal framework, buyer and supplier activation, infrastructure and standards, and systems and procedures.⁶

97. **Considerable evidence points to strong government leadership as the key to e-GP.** Cabinet of Ministers Resolution No. 1469 defined the former DCSP as the lead agency. It endorsed the leadership of the Ministry of Economy in modernizing the public procurement system, including e-GP. The draft strategy for Public Procurement Reform additionally assigned responsibility for information technology to the DCSP. All government institutions that were interviewed for this assessment acknowledged the DCSP lead in electronic public purchasing. In the aftermath of the December 2005 amendment, it is unclear which agency, if any, is now spearheading e-GP.

Recommendation

- The mandate of the Authorized Agency (or whichever agency is selected to take the lead) should be strengthened in adopting e-GP. All relevant stakeholders should be involved in the strategic planning process.

98. **The present policy and legal framework provides a solid foundation for broad adoption of information technology.** The government's "Action Program Toward the People" highlights the integrated Electronic Ukraine program. More specifically, the draft strategy for Public Procurement Reform suggests an e-GP implementation strategy and single online procurement portal. The current PPL refers directly to electronic venues for disclosing information for public procurement and e-Procurement for transactions. However, the legal requirement of promoting competition among multiple information systems for e-GP does not conform to best practice. Potentially, more confusion, administrative costs, duplication of effort, and inconvenience could be generated. Additional legislation in this area—such as the electronic document law or the electronic signature law, which would benefit from clarification on the use of electronic versus digital signatures—addresses the legal validity of electronic procurement documents.

Recommendations

- Develop an e-GP implementation strategy, including a phased action plan; and organize an e-GP learning workshop with international participation before the strategy is finalized.
- Revise the relevant e-GP text of the PPL. Detailed reference to the conditions for using information systems in public procurement could be included in secondary legislation
- Consider the use of a single e-GP portal for mandatory publications and transactions.
- In reviewing the PPL and the electronic signature law, take into account the relevant e-GP legislation of the European Commission.

99. **e-GP systems and procedures need to be improved.** The PPL requires contracting agencies to advertise "at least in one of the Internet network information systems" under

⁶ The assessment was based on an e-GP readiness evaluation tool jointly developed by a working group of multilateral development banks (<http://www.mdb-egp.org/data/docs/Questionnaire.pdf>).

procedures specified by those systems. Further, the law (Article 4-2, through an amendment introduced in November 2004) stipulates that an information system must be certified in conformance to comprehensive safeguards designed by the Department of Special Telecommunications Systems and Information Protection under the Security Service of Ukraine. However, the Security Service of Ukraine (in a letter dated December 28, 2005) states that no current Ukrainian sites (two are named: www.zakupivli.com of the European Consulting Agency, and www.tender.net.ua of the Visnyk Dzierzawnych Zakupiviel) meet the requirements of Article 4-1, Clause 2; or Article 4-2, Clause 1. Another website, www.e-tenders.kiev.ua, has merged with www.zakupivli.com. Considering that other portals are also posting procurement notices, the situation is understandably confusing for both buyers and suppliers.

Recommendations

- The AA should reduce the multiple public procurement websites to a single, official, user-friendly e-GP portal.
- The AA should incrementally add more options, such as e-Tendering, e-Catalogue, e-Reverse Auction, e-Ordering, and e-Payment transactions, in line with the strategy for rolling out a full e-GP system.

7. PUBLIC PROCUREMENT CONTRACT PERFORMANCE

100. **The number and value of open (competitive) tenders has steadily increased.** In 2002, only 7 percent of tenders (just under 50 percent in terms of value) were awarded on an open basis. By 2005, this number had increased to 26 percent (69 percent by value). Correspondingly, the percentage of sole-source contracts fell from 21 percent to 10 percent between 2000 and 2005 (from 24 percent to 15 percent by value). The same level of reduction occurred in price quotations and restricted tendering. These figures, however, do not include the sole-source contracts of state-owned enterprises or procurement exempted under Article 2 (3) of the Public Procurement Law.

101. **Table 2 shows the changes and trends in use of the five tendering methods.** An important caveat is that data from the State Statistical Office may not include comprehensive information for all procuring entities.

Table 2. Trends in Tendering Methods, 2002–05 (in percent)

	2002		2003		2004		2005	
	By number	By value						
Open tender	7.1	49.7	11.2	56.0	11.9	50.4	25.8	68.9
Restricted tender	1.6	6.7	1.1	4.9	2.3	5.3	2.5	3.4
Two-stage bidding	0.1	0.5	0.1	0.5	0.1	2.0	0.1	1.3
Price quotations	70.5	18.7	71.1	14.8	74.0	15.9	63.1	11.4
Sole source	20.8	23.3	16.5	23.9	11.7	26.3	8.5	15.3

Source: State Statistical Office.

102. **Table 2 shows a positive trend toward more competitive methods.** Nevertheless, the use of the sole-source method of procurement is relatively high—15.3 percent of the total 2005 volume (estimated at US\$4.1 billion). These data do not include exempted items listed in Article 2, Clause 3 of the PPL. The figures also do not include the large volume of procurement through state-owned enterprises, which for one reason or another do not always apply the PPL rules. Were the state-owned sector fully taken into account, the percentage of sole-sourcing in Ukraine would almost certainly look unacceptably high.

103. **Annex 2 lists the performance indicators against which the efficiency of the public procurement system has been measured.** These indicators cover important factors such as the procurement cycle, use of procurement methods, direct contracting, bid protest resolution, late payments, price increases, and selection methods for consultants. Comparing actual levels of achievement in Ukraine with satisfactory benchmark thresholds shows that the country needs to improve its procedures and practices.

104. **In a transparent and open procurement system, at least 95 percent or more of tender notices and contract awards should be published.** In 2004, Ukraine published notices

for 70 percent of tenders and contract awards. A minimum of 21 days should be allowed between the invitation to bid and the bid opening. The PPL stipulates 45 calendar days, which may be reduced to 21 calendar days (or, up to 10 calendar days when using the limited participation bidding procedure).

Recommendation

- The AA should establish a data collection and maintenance system using the performance indicators in Annex 2. These indicators should be used to assess how well the system is working and corrective measures should be taken periodically.

8. APPROXIMATION WITH EU PROCUREMENT DIRECTIVES AND ACCESSION TO WTO

EU Procurement Practices

105. **Ukraine is making efforts to align its public procurement legislation with European practices as part of its desire for closer integration.** As shown by the recent experience, approximation in procurement with the European practices normally takes several years before the candidate country enjoys reciprocity with other EU countries. While the EU directives are binding for objectives and time limits, national authorities can determine the form and means of fulfilling the requirements.

106. Countries such as Hungary, Poland, and Slovakia enacted their public procurement laws in the early 1990s based on the UNCITRAL model public procurement law and EU directives. They gradually brought themselves into alignment. They each amended their respective PPLs several times before they were able to become full members of the European Union.

Recommendation

- Undertake a study on the approximation process followed by recently admitted EU countries, including Hungary, Slovakia, and Poland.

Accession to WTO, free trade, and state-owned enterprises

107. **Ukraine applied for membership in the World Trade Organization (WTO) on November 30, 1993.** By 2006, Ukraine had almost completed its negotiations on becoming a member. However, several items in the amended PPL could interfere with its' membership commitments, in particular negotiation of the GPA.

108. **First, the preference margins provided under Article 6, particularly the provision affecting the agricultural sector, may be viewed as unduly restrictive.** As noted earlier, the provision empowering procuring entities to mandate use of local goods and labor for works carried out in Ukraine may not be acceptable to GPA members.

109. **The provision expanding the scope of the PPL to state-owned, non-corporate communal enterprises, and businesses in which the government ownership exceeds 50 percent is potentially more significant.** WTO members could be concerned that subjecting these enterprises to normal government procurement practices might restrict their purchases largely or only to domestic goods, services, and works. These enterprises normally procure for commercial rather than public policy purposes. This issue might be resolved by an amendment stipulating that the law applies only to procurement for state needs.

110. **The inclusion of all SOEs under the PPL could adversely affect their efficiency and damage the national economy.** Over time, state-owned enterprises have adapted to normal commercial procedures for obtaining essential raw materials. If PPL requirements force greater domestic preference, inflation could be driven upward. This would place upward pressure on the cost of raw materials and the final price of produced goods. In addition, following the law's procedural requirements could snag production since "adequate" time for bidders to respond

could be set aside. Further delays might be caused by the increasingly common forced 20-day suspensions stemming from complaints.

111. **The government plans to begin negotiations to join the Government Procurement Agreement (GPA) after Ukraine accedes to the WTO.** Before completing the basic WTO accession negotiations, Ukraine is expected to submit a factual report called the Checklist of Issues. This checklist includes data on government procurement for the past three years and descriptions of all current laws and regulations.

112. **The USAID WTO accession project is helping the Government produce the "Checklist of Issues" and a final draft is expected in 2006.** The Government is unlikely to finalize the report until the end of accession negotiations. Potentially, several areas could prove troublesome—for example, the fine tuning of legal terminology in order to ensure transparency, discriminatory provisions concerning preference, time periods for submission of tenders (which are not in line with GPA), and that the current law forbids administrative challenges once a contract is signed.

113. **Other GPA members will have the right to submit questions to Ukraine on its factual report, just as they do on general trade-related laws.** The Bank team was informed, however, that GPA is not a top government priority. The GPA is voluntary and subject to post-accession agreement and negotiation. The process is expected to be time consuming and may require significant effort.

9. RISK ANALYSIS AND THE CPAR 2006 ACTION PLAN

Risk analysis

114. **Analyses in the preceding sections of this report all point to the same bottom line: The public procurement environment in Ukraine is now at high risk.** Despite positive effort by the Government of Ukraine following the 2001 CPAR, the process was set back with the structure that emerged in the aftermath of the 2005 and 2006 amendments. In short, the emerging system does not allow efficient and economic use of public resources.

115. **The recent fragmentation of government authority—with corresponding loss of oversight and support—is a direct consequence of the 2005 amendments to the PPL.** Some private sector entities now have the public procurement authority and responsibilities that usually belong to a government entity. A nongovernmental agency has become the de facto Authorized Agency, inappropriately inheriting status, functions, and authority from the DCSP in the Ministry of Economy, which was responsible for these functions. This reorganization has cost Ukraine years of procurement expertise and experience in the DCSP that ceased to exist as the Authorized Agency. Furthermore, allocation of certain oversight procurement functions to the Department of Audit and Review (KRU) and to the Accounting Chamber has created clear conflicts of interest in which these bodies now audit the procuring entities that they also supervise. This unacceptable situation requires immediate correction.

Action plan

116. **The government needs to put the public procurement system back on track.** This report includes a detailed implementation plan (Annex 1) that combines the unimplemented recommendations of the 2001 CPAR with new recommendations from this assessment. As a first step, measures are called for to repair the current legal and regulatory framework. This would require correction of the problematic provisions in the PPL and its amendments, and then proper reorganization of the public procurement function. To achieve this objective, this assessment recommends two sets of government actions—priority recommendations to repair the legal, regulatory, and institutional framework, and secondary recommendations to strengthen the system.

117. **Primary Recommendations—Repairing the Legal, Regulatory, and Institutional Framework**

- Revoke or substantially rework the December 2005 Amendment of the PPL. This might best be achieved by enacting a new law entirely, thereby ending the undesirable practice of constantly amending the PPL and its associated secondary legislation. In particular, the role of the Tender Chamber should be reconsidered. Because a privately run NGO should not be accorded the responsibilities of a fully accountable public body, Articles 17.1 through 17.5 of the PPL (as amended June 16 and December 15, 2005) should be rescinded, as well as the provisions that give power and responsibilities to the TC in its present form.
- Reorganize the institutional structure for public procurement. Following the amendments in the PPL, establish a sound, credible institutional structure that meets international

standards in procurement practice, eliminates dilution and fragmentation of responsibilities, and respects the principle of separation of powers.

- Establish an independent mechanism to review complaints. When amending the PPL, include suitable provisions establishing a clear, effective, impartial, and trustworthy complaint resolution mechanism. This should be separate from the Authorized Agency.
- Establish a central Authorized Agency. The new AA should be independent and accorded all rights and functions customarily granted to such a body. These include policymaking, the authority to draft primary and secondary legislation, preparation and updating of standard bidding documents, provision of free legal and professional advice, publication of tender opportunities and of contract awards, and monitoring and oversight of the procurement process. This body would report directly to the Cabinet of Ministers; or alternatively, it would be part of another government body (as when the Authorized Agency was located within the Ministry of Economy).
- Finalize the standard bidding documents (SBDs) prepared by the former Authorized Agency in the Ministry of Economy. Make these documents available without charge to all procuring entities through a website and require that they be used.
- Create conditions favorable to a competitive market for procurement advisory services. The market for procurement advisory services—which public entities do not provide and should therefore be provided by private firms—should be subject to competition in accordance with the PPL.

118. **Secondary Recommendations—Strengthening Public Procurement System**

- Enhance the Authorized Agency’s capacity and skills to undertake a countrywide public awareness campaign. This would make both the public at large and private enterprises aware of the contents, implications, and benefits of public procurement legislation.
- Install permanent procurement capacity within the structure of procuring entities through provisions in the new or amended law, including the use of ad hoc tender committees.
- Consolidate the different pieces of legislation and regulations on anticorruption. Enforcement of anticorruption measures throughout legislation would also strengthen procurement through greater overall accountability by public officials.
- Strengthen ex-post controls. The Department of Audit and Review (KRU), the Accounting Chamber, and the Treasury each play important roles to ensure the accountability of public officials. Strengthen these institutions within the framework of international and bilateral donors’ public financial management activities in Ukraine, including activities of the World Bank.
- Implement a strategy for electronic government procurement (e-GP). Introduction of e-procurement would further ensure transparency and would lead to savings in public expenditure.
- Establish a single, official, free e-GP portal and a corresponding hard-copy publication. The Authorized Agency should manage this e-GP portal.

119. **Implementation of these major recommendations and the implementation plan in Annex A should reestablish a sound public procurement organization in Ukraine.** An Authorized Agency could be either an independent body reporting directly to the Cabinet of Ministers, as in several European countries, or it could be attached to another government body. Implementation of the measures to reorganize procuring entities would develop their internal capacity to make efficient, timely purchases in compliance with procurement law. Implementing the recommendation for e-procurement would ensure greater transparency and would lead to savings in public expenditure.

120. **Internal and external controls (KRU, the Accounting Chamber, and the Treasury) play important and effective roles in keeping public procurement officials accountable.** Plans to strengthen these institutions are part of the World Bank's public financial management activities in Ukraine. Consolidating and enforcing the piecemeal legislation and regulations on anticorruption would strengthen public procurement performance.

121. **Finally, strengthening the Authorized Agency to design and manage a national public awareness campaign would make citizens and private sector enterprises aware of the contents, implications, and benefits of public procurement legislation.** Ultimately, an informed and interested public that demands high standards of performance is the best way ensure efficiency in the public procurement system.

Annex 1. Detailed Implementation Plan (Based on 2001 and 2006 Recommendations)

Legislative and Regulatory Framework Actions

Amend the PPL as follows:

- Remove any references to the TC and its bulletin from the PPL (without substitution).
- Streamline advertisement of tender notices, contract awards, and other data. Require their publication in a public procurement bulletin online and in print; allow procuring entities to publish these notices in at least one newspaper of general circulation.
- Remove prior approval obligation for single source, restricted tendering, and allow procuring entities to select their own selection most suitable procurement method, and then be fully accountable for that selection.
- Require procuring entities to install procurement capacity in one of their departments.
- Strengthen the mandate of the AA.
- Delete the provision on the price reduction method of procurement.
- Use a single e-GP portal for mandatory online public procurement publications and transactions.
- Include clear criteria for prequalification of bidders.
- Include methods for selection of consultants (2001 CPAR).
- Introduce a complaint resolution mechanism that is administered by an independent neutral body of prominent members without vested interests.
- Reduce the restriction thresholds for participation of foreign firms (2001 CPAR).
- Modify the “restricted tendering” procurement method by adding language that all known specialized firms shall be invited to participate in the “restricted tendering” process (2001 CPAR).
- Provide a clearer, more precise definition for restricted tendering and two-stage tendering (2001 CPAR).
- Add the need for prior AA approval when contracts for works are extended by 50 percent of the initial contract value without competition (2001 CPAR).
- Establish longer period for preparation of prequalification application (2001 CPAR).
- Define the evaluation system and confine criteria only to monetarily convertible factors, with no consideration for subjective provisions (2001 CPAR).
- Extend the mandatory bid submission period when amendments to the bidding documents are introduced by the procuring entity (2001 CPAR).

Delete provisions (2001 CPAR) on the following:

- Optional requirements for use of local materials and labor by foreign firms
- Evaluation criteria that procuring entities cannot apply objectively
- Submission of the bid security by another entity on behalf of a bidder
- Provisions that make business license/permit/registration a condition of bidding instead of contracting.

The AA is to do the following:

- Finalize standard bidding documents with sample contract provisions.
- Develop and introduce a set of clear transparent rules and regulations for applying the Public Procurement Law (2001 CPAR).
- Provide guidance on bid evaluation.
- Assemble and disseminate a procurement manual.
- Provide guidance on eligibility and application procedures for domestic preference under the PPL (2001 CPAR).
- Devise a clear guidance note for preparation of technical specifications.
- Develop an e-GP implementation strategy.
- Develop an e-GP program for raising awareness and building capacity.
Explore possible partnerships to set up a network of business centers in remote locations to Ensure Internet access, particularly for SMEs.

Institutional Framework and Management Capacity Actions

- Develop a rolling three-year budget allocation plan (2001 CPAR) to allocate available funds to procuring entities in a timely manner; this should include revisiting the budget cycle, including procurement planning to ensure timely flow of funds to procuring entities.
- Introduce an integrated public financial management system that would interconnect the major players in management of public finances, including improvement in the Treasury to control procurement.
- Create closer ties between the actual needs of procuring entities (based on contracts signed) and the availability of Treasury funds to meet these obligations.
- Strengthen Accounting Chamber activities in procurement auditing (2001 CPAR).
- Train Accounting Chamber staff in international practices, auditing standards, audit methodology, and application of PPL (2001 CPAR).
- Formulate a clear policy on handling offences, including (a) definition of specific procurement offences, such as collusion, misrepresentation of past experience; (b) differentiation of available instruments, including the criminal code, statute of civil servants, procurement law; (c) definition and application of related sanctions, including blacklisting; (d) fair enforcement of sanctions; and (e) due process in imposing sanctions.

Assign the AA with all appropriate functions, including:

- The right to run a publishing enterprise to place required procurement data in one mandatory place (both hard copy and online)
- The right and responsibility to provide advice on procurement methodology and how to apply relevant legal provisions
- The right and obligation to elaborate bidding documents (2001 CPAR)
- Staff training to prepare clear technical specifications, to create and maintain a database of sample specifications, and to prepare standard technical specifications for items procured frequently
- Implementation of a needs analysis for fulfilling the country's procurement training needs, including training of private sector firms
- A review of accredited institutions' capacity to carry out training, and accreditation of more public bodies and private sector firms to add capacity

Procurement Operation and Market Practice Actions

The AA is to do the following:

- Proactively increase collaboration with procuring entities throughout the country.
- Hold regular seminars for private sector firms and acquire the required communications skills to design and conduct information campaigns on public procurement system performance.
- Ensure that tenders and contract awards are published in at least one national newspaper in addition to official procurement bulletins.
- Prohibit procuring entities from accepting bids that do not meet the required technical specifications.

Procuring entities are to do the following:

- Take the necessary steps to remove obstacles limiting bidders' participation in public bid openings.
- Be fully responsible and accountable for selection of the procurement method (including restricted tendering)
- Check the submitted securities.
- Evaluate bids based on lowest-evaluated-price criteria, rather than the lowest price.
- Fully justify cancellation of contracts.
- Allow adequate delivery/completion time in bidding documents.

Bid submission procedures are to ensure the following:

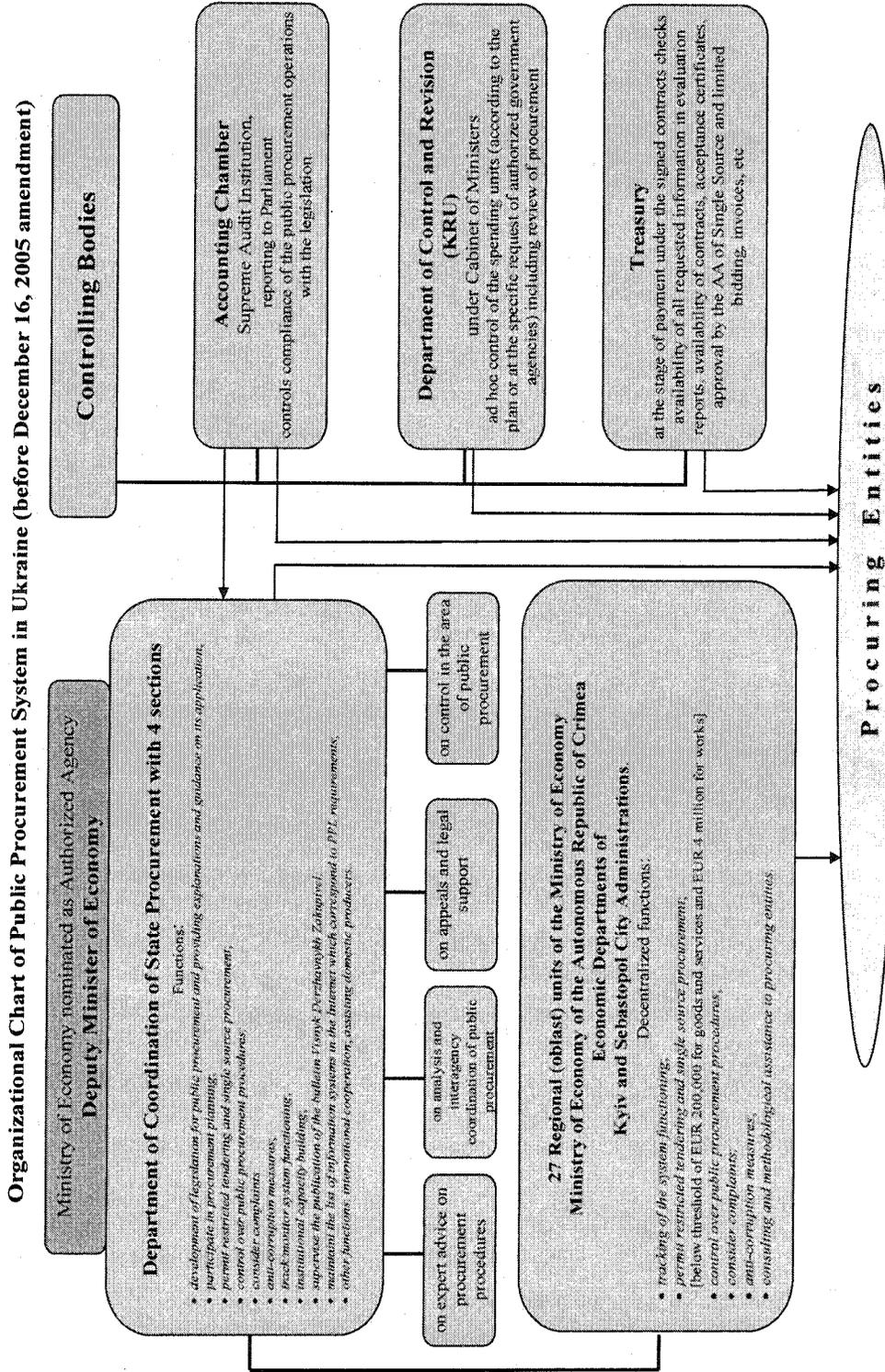
- Provide for the bid submission period to start on the date when bidding documents are actually made available to bidders.
- Establish 30 days as the minimum bid submission time, except in extraordinary circumstances.
- Declare the process null and void if the AA determines that bidders were not allowed the bid preparation time stipulated in the PPL.

Annex 2. Performance Indicators

Indicator name	Indicates	Measured by	Actual in 2005
Advertisement of bids and publication of awards	Transparency and openness of system	Number of tenders (%) for which bid invitation and contract award results are publicly advertised (Satisfactory: 95% or more)	Approximately 70%
Time for preparation of bids	Real opportunity for bidders to submit bids	Number of days between invitation to bid and bid opening (Satisfactory: 21 days or more)	Generally 21 days (can be less). According to the PPL, this period is 45 calendar days but it may be reduced to 21 days (up to 15 calendar days in case of limited participation bidding procedure)
Time for bid evaluation	Efficiency of bidding process	Number of days between bid opening and publication of award (Satisfactory: 90% or less)	The law does not establish a period of time during which the bid evaluation must be finalized.
Bidder participation	Level of confidence by private sector in the process	Number of bidders submitting bids in each tendering process (Satisfactory: 5 bids or more)	On average, 3 bids (in 2003: 2.3 bids)
Method of procurement used	Level of competition	Number of bidding processes using a method less competitive than the process recommended for the estimated contract amount.	None
Direct contracting	Transparency and level of competition	Percent of contracts (by number and value) awarded on a sole-source basis (Satisfactory: 10% or less of number of contracts and 5% or less of total value of contracts)	8.4% of contracts and 21% of total value of contracts.

Processes cancelled	Quality of bidding process	Number (%) of bid processes declared null before contract signature (Satisfactory: 5% or less)	5% (because of unreliable data, this percentage may be higher)
Number of protests	Quality and fairness of process	Ratio (%) between the number of protests posted and the number of bids submitted (Satisfactory: Not less than 10% and not more than 50%)	No available data
Time to answer protests	Efficiency and fairness of protest system	Number of days between submission and final response to protests (Satisfactory: 21 days)	Data unavailable or unreliable. The period may be long because of the multiple adjudicating parties created by the 2005 amendment to the PPL.
Protest results	Effectiveness of protest system	Number (%) of contracts with award recommendation modified because of a protest (Satisfactory: 5% or less)	No data
Late payments	Quality and consistency of payment process	Number (%) of payments made more than 45 days late (Satisfactory: 10% or less)	No data. But bidders did not complain, implying generally on-time payments.
Price increase	Quality of bidding and contract management	Percentage increase of final contract amount due to changes and amendments (Satisfactory: 15% or less)	According to the law, the terms and conditions of the procurement contract must not be changed after it is signed, other than legally stipulated exceptions.
Restricted competition for consultants	Quality of advice	Number (%) of processes for selection of consultants using open competition instead of a shortlist methodology (Satisfactory: 5% or less)	PPL does not include suitable provisions for selection of consultants, whose services are procured in the same manner as goods and works.
Selection method for consultants	Weight of quality to price ratio used in selection	Number (%) of processes for selection of consultants having price weighted more than 20% of the total scoring points	See above.

Annex 3. Organizational Chart of Public Procurement System



Annex 4. Procurement Organization after 2005 Amendments

Annex 4 – Procurement Organization After 2005 Amendments

