



Institute for Development
of Freedom of Information

Independence of Public Procurement Review Body



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Introduction

On June 27, 2014, the Association Agreement was signed between Georgia and the European Union, within the framework of which Georgia is obliged to ensure its economical integration with the European Union, i.e. bring Georgia closer to the European standards of the institutional and legislative framework.

In this document we will examine, whether Georgia has duly complied with the obligations dwelling from Article 143 of the Association Agreement. Precisely, establishing/maintaining the impartial and independent procurement review body. Such a body is essential for the due functioning of the public procurement system.

According to Article 143 Paragraph 2, the independent and impartial body should have the following function: “[...] review of decisions taken by contracting authorities or entities during the award of contracts. In this context, ‘independent’ means that that body shall be a public authority which is separate from all contracting entities and economic operators [...]”.¹

According to the Agreement², Georgia was given the timeframe of 3 years (effective immediately after signing the Agreement) to establish/ strengthen the impartial and independent procurement review body.

This institution plays an important role: the main purpose of elaborating a dispute resolution system related to public procurement is to address intentional or unintentional errors of procurement parties and to eliminate illegal conduct³. Besides, the existence of a procurement review body is also important for the prevention purposes, decisions of the reviewing body send an important message to potential offenders, implying that their actions will have relevant legal consequences and that the body will respond accordingly.

Therefore, it is important to analyze to what degree Georgia has fulfilled the obligation to establish an independent procurement review body, nearly 6 years after undertaking the above-mentioned obligation.

¹ ASSOCIATION AGREEMENT between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, Article 143. Available at: [https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830\(02\)](https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02))

² Annex XVI-B to the Agreement.

³SIGMA, Brief 25 “Establishing Procurement Review Bodies”, 2013, p. 2. Available at: http://www.sigmaweb.org/publications/Brief25_EstablishingReviewBodiesinPP_2013.pdf

EU Standards Related to Procurement Review Bodies

Public Procurement review body - Dispute Resolution Council was established in Georgia in 2010. Thus, after signing the Association Agreement the main obligation of Georgia was reforming the body in a way that would meet the standards set by the European Union.

In addition to Article 143 of the Association Agreement itself, EU standards for procurement review bodies are regulated by relevant directives (in particular, the so-called Remedies Directives)⁴, the Treaty on the Functioning of the European Union and the case-law of the European Court of Justice.⁵

The 'Remedies Directives' oblige member states to provide review procedures in the field of public procurement.⁶ One of the main requirements of these directives, which also constitutes the best international practice, is **to ensure the independence of the review body.** Independence entails both, institutional independence as well as operational independence of employees within the body.⁷ Independence of the body is the main factor ensuring the legitimacy and credibility of the review procedures.⁸

The member states of the European Union are free to choose what type of body they entrust with the function of review: the common courts, the specialized administrative bodies, or the combination of both.⁹ However, a joint initiative of the Organisation for Economic Co-operation and Development ([OECD](#)) and the [European Union](#), SIGMA (Support for Improvement in Governance and Management) argue that, the specialized bodies have several advantages, especially for EU member or candidate states.

As a rule, in case of specialized bodies, litigation is simpler and faster than it would normally be in courts. Moreover, due to shorter review procedures and the less stringent rules on legal representation, here, the cost of litigation is likely to be lower.¹⁰

According to The European Bank for Reconstruction and Development (EBRD), the advantage of such bodies is that they create institutional memory, collect expertise and disseminate knowledge and information. At the same time, they perform a kind of disburdening role for the

⁴ Directive 89/665/EEC; Directive 92/13/EEC; Directive 2007/66/EC.

⁵C-54/96 Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH; C-203/14 Consorci Sanitari del Maresme v Corporacio de Salut del Maresme i la Selva.

⁶Directive 2007/66/EC Article 1 Paragraph 3. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007L0066&from=EN>

⁷ SIGMA, Brief 25 "Establishing Procurement Review Bodies", 2013, p 7.

⁸ Idem.

⁹ SIGMA, Brief 25 "Establishing Procurement Review Bodies", 2013, p 3.

¹⁰ Ibid, p.4.

court cases. Independent review bodies strengthen the confidence of the system thanks to its consistent practice.¹¹

According to the Directive 2007/66/EC, “Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given”. Moreover, decisions must be subject to review.¹² The directive states, that the rules of appointment and removal of the members of an independent review body should be subject to the same rules as those applied to judges. **“At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary.”**¹³

It is interesting to ascertain, to what degree the ‘reformed’ procurement review body in Georgia meets the above-mentioned requirements. As mentioned, by the time of signing the Association Agreement, the right of the review was already guaranteed in Georgia, although, the body itself operated within the framework of the State Procurement Agency.¹⁴ Three months after signing the Agreement, an amendment was made to the Decree of the Chairman of the State Procurement Agency on the Rules of Functioning of the Procurement Dispute Resolution Council. The amendment merely indicates that the Council is independent in its activities.¹⁵

Independent body

Georgia started to work towards meeting the obligation on the institutional independence of the procurement review body, as foreseen by the Association Agreement and relevant directives only in December 2017 (after the expiration of the specified period in the Appendix XVI-B to the Association Agreement). Relevant provision was added to the legislation, which is in force to-date. Namely, according to the legislation, dispute over the state procurement process is heard by an independent and impartial Dispute Resolution Council, the purpose of which is to resolve cases "in a timely, efficient and fair manner." **The Council "[...] is not a subsidiary of any state entity and / or official.”**¹⁶ The amendments made to the decree of the Chairman of the State Procurement Agency merely repeated the provision of the law and reiterated that **"the Council is an impartial and independent body established based on existing legislation.”**¹⁷

¹¹European Bank for Reconstruction and Development (EBRD), “Review of laws and practice in the EBRD region”, 2011, p. 159. Available at: <https://www.ebrd.com/downloads/legal/procurement/ppreport.pdf>

¹² Directive 2007/66/EC, Article 2 Paragraph 9

¹³ Idem.

¹⁴ Law of Georgia on Public Procurement, consolidated version (21/03/2014 - 31/10/2014).

¹⁵By the amendment of 25 September of 2014 year

¹⁶ Law of Georgia on Public Procurement, article 23 paragraph 1

¹⁷ Order No. 1 of the Chairman of the State Procurement Agency of February 8, 2018

At first glance, the state has taken steps to reform the body in line with the requirements of the Association Agreement and relevant EU directives. The law clearly states that the body is independent, its decisions are in writing and are subject to appeal in court. However, these changes should not confuse us. The question must be asked: how much has the reality changed since the legislative amendments, is the independence granted by the few legislative sentences sufficient, or is it the independence that the state is obliged to guarantee based on the Association Agreement?

We consider the answer to be negative. In fact, the state has simply expressed already implied independence in writing. Nothing has changed from a legal point of view. These changes are "cosmetic". The review body continues to be composed in the same way as it was in 2010. The apparatus of the review body has the same functions as it did before 2014.

In order to assess the effectiveness of the Procurement Review Body, it may not be sufficient for it to comply with the rules established by the law. The structure and the composition of the body should not raise questions about its independence from an independent observer's point of view.

The legal status of an "independent body" may remain only a status written on a piece of paper if relevant important factors are not taken into consideration. Namely, institutional and internal independence, financial autonomy, rules of appointment, education of its members, etc.

Rules of Appointing Members of the Review Body

One of the most important aspects of independence is the rules of appointing and dismissing its member. As noted earlier, EU standards foresee that the rules for appointment and removal of the reviewing body members, shall be the same as the rules applicable to judges.

For illustration, we can consider the examples of two countries, Slovenia and Croatia. In the recent past, these countries faced the challenge to harmonize their systems with the same legal commitments and take the same steps that apply to Georgia. Thus, these countries are particularly relevant to our study.

Although the procurement review body, National Commission for Reviewing Public Procurement Award Procedures, has existed in Slovenia since 1999, under an agreement with the European Union, the procurement system, including the Commission, underwent significant reforms in 2013-2014. The Croatian State Commission for Supervision of Public Procurement (DKOM) was established in 2003 on the basis of an agreement between the European Union and Croatia and the so-called 'Remedy Treaties'.

Slovenia's National Commission for Reviewing Public Procurement Award Procedures is a specialized, independent and autonomous body. The Commission is composed of seven members. The members are appointed with the term of eight years by the legislative branch on the proposal of the commission responsible for mandates and elections (with the possibility of reappointment for another term).¹⁸ The Croatian DKOM has nine members appointed for the term of five years by the legislative branch on the proposal of the government (with the possibility of reappointment for another term).¹⁹

Meanwhile, in Georgia, the Council usually operates with the composition of six-members.²⁰ Under special circumstances cases can be heard by the composition of ten members, that is if "[...] the estimated cost of public procurement exceeds the monetary threshold set by EU directives in the field of public procurement."²¹

The head of the Council is the chairman of the State Procurement Agency. The Council takes decisions by the majority of votes, and in the event of a split vote, the vote of the Chairman is decisive (this shall be taken into account in the light of the fact that the Chairman of the Council is also the Chairman of the Agency).²² **Members of the Council are appointed for the term of a year.**²³

Order No. 1 of the Chairman of the State Procurement Agency of February 8, 2018 further states that three members of the Council are representatives of the Agency, one of them is the Chairman of the Agency, and two are employees of the Agency appointed by the Chairman. Additional three members are the representatives of the civil society elected by NGOs.

We find that, unlike Slovenia and Croatia, in Georgia the term of office of the Dispute Resolution Council members, is inadequate and disproportionately short compared to the responsibilities of the members. Moreover short term appointment of the Council members may have a negative impact on their sense of responsibility.

Most importantly, the Council is set up by the body whose main functions inter alia are: developing relevant normative acts related to public procurement, setting up and supervising procurement database, providing procuring organizations with consultative services, supervising the legality of procurement procedures, detecting illegal acts and taking relevant legal measures,

¹⁸Law on Legal Protection in Public Procurement Procedures, Article 61-61e. Available at: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5975>

¹⁹Law About the State Commission for Control of Public Procurement Procedures, Article 7-8. Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2013_02_18_293.html

²⁰Law of Georgia on Public Procurement, Article 23 paragraph 2

²¹Ibid, Article 23.3.

²² Ibid, Article 24.2.

²³Ibid, Article 23.4, Order No. 1 of the Chairman of the State Procurement Agency of February 8, 2018, Article 6.2

etc.²⁴ Moreover, the representatives of this body are at the same time members of the Council. Consequently, even with the untrained eye the problem is obvious, which also raises questions regarding the institutional independence of the Council.

This problem is exacerbated by the fact that according to Article 4 (6) (t) of the Law of Georgia on State Procurement, one of the main functions of the Agency is to provide technical support to the Council. To this end, the Agency's "relevant structural unit performs the functions of the Council's secretariat." The definition of technical support is vague and confusing.²⁵ It is clear that the staff of the Council has been given more authority than is expected from the usual interpretation of the term 'technical'. In particular, the unit considers the issue of complaint admissibility; Leads dispute preparation procedures; Organizes sessions; Draws up protocols and internal documents; Provides technical support to the process of electing the Council members.²⁶

We consider, that while the chairman of the Agency is responsible for the appointment of the Council members, while at least half of the members of the Council are the employees of the Agency and while the structural unit of the Agency provides "technical support" of the Council, it will be highly challenging to argue that inappropriate political influence on the Council is minimized. If tender participants are left with the perception that the Council is part of a government hierarchy, it will be questionable whether the main purpose of establishing a dispute resolution board is met.

We face the reality, where the member of the regulatory body (who, in theory, is also authorized to consult tender participants during the performance of the duties provided by law), is at the same time the decision-maker on the disputed case, where s/he provided the consultation. The situation becomes even more complicated, if the dispute has started due to the incorrect recommendation issued by the regulatory body.

"Furthermore, when applying one of the procurement methods - consolidated tender, the agency is directly involved in supporting the procurement process - drafting contract provisions, uploading them in electronic system and announcing consolidated tender. In case of a dispute, the Agency appears to be one of the parties [...]"²⁷ Thus, the Council becomes a regulator, a subordinate, a controlling body and an adjudicator at the same time, in which case the existence of the conflict of interest is inevitable.²⁸

The government proposes to appoint representatives of the non-governmental sector to the Council as a way to insure or balance these risks. Moreover, the government states that "Georgia

²⁴Law of Georgia on Public Procurement, Article 4.

²⁵Order No. 1 of the Chairman of the State Procurement Agency of February 8, 2018, Article 15.1.

²⁶ Ibid, Article 15.

²⁷"Implementation of Public Procurement Related Obligations by Georgia during 2014-2019 - Analytical Overview", Natalia Baratashvili, p. 21.

²⁸SIGMA, Brief 25 "Establishing Procurement Review Bodies", 2013, 83 8.

used an innovative approach when it made possible for half of the Council members to be members of civil society.”²⁹ This innovation, and the rules of appointing three Council members from civil society, for example cannot insure the Council from being composed of the GONGO members, which will further increase the government's influence over the council.

Rules of Dismissing Members of the Procurement Review Body

Regarding the dismissal of the procurement review body members, in Slovenia the legislative branch has the relevant authority. General grounds for dismissal are a personal statement, loss of Slovenian citizenship, death or loss of legal capacity.³⁰

The basis for the early dismissal of a member is the inability to meet the qualification requirements provided by law, a conviction in committing a crime linked with the official capacities of the member, a conviction of a crime which foresees sentence of imprisonment for more than 6 months or a conviction of a crime which foresees sentence of imprisonment for less than 6 months but renders the person unfit to perform its official duties.³¹

Similarly, in Croatia, the Parliament dismisses the member of the Commission on the basis of a relevant request from him/her, in case if a member no longer meets the qualification requirements established by law, if a member can no longer perform official duties for unjustified reasons, or if in the course of performing duties the member violates the reputation, impartiality and independence of the Commission and its members.³²

For comparison, in Georgia, in addition to the general grounds for dismissing public officials (e.g. death, application, loss of legal capacity, etc.), Order N1 provides additional grounds for early termination of the office term: dismissal of the Council member from the relevant nominating body.³³

It should be noted that the cases of dismissing members before the expiration of their term must be highly limited and must have clear preconditions prescribed in law. In Georgia, the issue of the authority of the Council members is briefly described in the by-law, rather than a law (which, in itself, is also problematic).

²⁹Roadmap and Action Plan for the Implementation of the Public Procurement Chapter of the EU-Georgia Association Agreement, pg 27 available: <http://www.dcfra.gov.ge/public/filemanager/implimentation/Roadmap%20and%20Action%20Plan%20in%20Public%20Procurement.pdf>

³⁰ Law on Legal Protection in Public Procurement Procedures, Article 61g.

³¹ Ibid, Article 61h.

³² Law About the State Commission for Control of Public Procurement Procedures, Article 12.

³³Order No. 1 of the Chairman of the State Procurement Agency of February 8, 2018, Article 14

According to SIGMA, “[t]he person/institution officially appointing members of the review body should be the same as the one with the power to dismiss them [...]”.³⁴ In our case, a person can be dismissed by a person/body who was not responsible for her/his appointment. At the same time, it is fairly easy to dismiss a person from the office, in order to terminate his/her term as a member of the Council as well. A detailed description of the given process is not regulated even by secondary legislation. In general, a high level of independence of an appointing person/body, ensures less risky and impartial decision-making regarding the dismissal of the Council members.³⁵ In the case of the Agency the risk is not minimized. Moreover, it may itself become the source of concern since the Agency is not organizationally independent, and is directly subjected to the so-called government hierarchy.

The Court of Justice of the European Union, while addressing the issue of the independence of the Greek Competition Agency, considered it to be of the utmost importance that, regardless of the personal and operational independence of the members of the agency, and the fact that they “are bound in the exercise of their duties only by the law”, there still were not effective guarantees and safeguards against “undue intervention or pressure from the executive on the members”.

The Court noted that such a system would be unable to mitigate the risk of unjustified government interference in the activities of the agency or protect the members of the agency from government pressure. In assessing the independence, the court ruled that under the Greek legislation, the chairman of the agency was the person responsible for coordinating the activities of the secretariat and determining its policy directions, which authorized him/her to supervise the employees and be responsible for conducting disciplinary proceedings against them.³⁶

Qualification of the Procurement Review Body Members

Education and professional qualifications of the Council members are crucial for ensuring the independence of the Council. Not only are they responsible to have extensive knowledge of public procurement issues, but they are also obliged to evaluate the evidence and produce well-substantiated decisions.³⁷ That is why the Directives set particularly high qualification requirements (as mentioned above, the rules of appointment must be similar to the rules for

³⁴ SIGMA, Brief 25 “Establishing Procurement Review Bodies”, 2013, p 10.

³⁵Ibid, p 9.

³⁶Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE, paragraphs 30-32. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62003CJ0053&from=en>

³⁷ SIGMA, Brief 25 “Establishing Procurement Review Bodies”, 2013, p 12.

appointing judges, and at least the chairman of the body must meet the legal and professional qualifications applicable to judges).

In Slovenia, in order to be eligible for the membership of the Commission a candidate must be at least 35 years old, a citizen of Slovenia who has the legal and medical capacity, with no criminal record. The candidate should not have a history of involvement in the activities of a political party for at least 3 years before the date of the vacancy announcement. Moreover, he/she must have at least 9 years of experience in public procurement and have a reasonable expectation that he or she will perform relevant duties professionally, with high dignity, independence and impartiality.³⁸ The chairperson and three members of the commission should have higher education in law³⁹ or its adjacent professions.

A member of the Croatian DKOM must be a Croatian citizen who has no criminal record and is not a member of a political party, or an association, that may create a conflict of interest. A member of the DKOM should not own more than 0.5% of the shares in a company and should not be a member of the Executive Board of a Company.⁴⁰

In addition, the chairperson and at least 4 members must have a law degree, must have passed bar examinations and must have acquired at least 10 years of professional experience after passing the bar examinations, three years out of which must be in the field of public procurement.⁴¹

For comparison, Georgia is guided by a much lower standard. In particular, the Council members must be fluent in Georgian and have a bachelor's degree in law, economics or business administration.⁴² As for the chairperson, all we know is that he/she is appointed and dismissed by the Prime Minister since he/she is also the chairperson of the Agency.

Financial Independence of the Procurement Review Body

Another important factor is the funding of the council. SIGMA believes that a specialized review body should be financially independent and have a separate budget. Sufficient funding is essential for employing much-needed professionals and guaranteeing the independence of the body. Financial autonomy does not only strengthen the independence of the institution but also guarantees the impartiality of individual members of the council. Members may be subjected to

³⁸ Law on Legal Protection in Public Procurement Procedures, Article 61b.

³⁹ Ibid, Article 61a.

⁴⁰ Law About the State Commission for Control of Public Procurement Procedures, Article 12.

⁴¹ Ibid, Article 9.

⁴² Order No. 1 of the Chairman of the State Procurement Agency of February 8, 2018, Article 2.

the risk of leaving the mandate for the reason of better financial provisions, especially in countries with low public sector salaries.⁴³

In Slovenia, the Commission has its budget and is fully independent at budget management.⁴⁴ Its members receive a salary and have the status of a civil servant, which further creates guarantees of their independence.⁴⁵ In Croatia, the DKOM is funded from the state budget, which covers salary expenses, costs of employing experts and purchasing technical equipment.⁴⁶

For comparison, the Council in Georgia does not have independent financial resources, i.e. its own budget. Moreover, the members of the Council fulfill their duties without relevant remuneration, which further increases the risks and dangers discussed above.

Conclusion

Based on the above-discussed, it is questionable whether Georgia succeeded to comply with the obligation undertaken by Article 143 of the Association Agreement. We believe, that the institutional framework for the independence of the Dispute Resolution Council is still far from complying with the standards required by the agreement signed with the European Union.

It is of utmost importance, that the structure of the Council and the rules of appointing its members do not raise questions over its independence from the viewpoint of an objective observer. Even if the body is technically independent from all the actors involved in the procurement process, it is important to ascertain what place it occupies within the hierarchy of public institutions. It is necessary to set up the dispute resolution system in a way that minimizes the doubts over its independence. Otherwise, the loss of trust in the institution could have a tangible negative impact on the entire procurement system. The public will give up on the benefits, for which a well-functioning and efficient system should be created in the first place.⁴⁷ As a result, the main goal of the public procurement dispute resolution system, that is taking relevant measures against misconduct and delinquency, will remain unattainable.

Different countries are continuously improving the transparency standards of procurement review bodies in order to answer questions of the interested parties and in general, to ensure the fairness of the public procurement system and gain the trust of stakeholders. For instance, since 2015 the Armenian Dispute Resolution Council has been conducting online broadcasting of the Dispute Resolution Council hearings in order to dispel doubts regarding its independence.⁴⁸

⁴³ SIGMA, Brief 25 “Establishing Procurement Review Bodies”, 2013, pp 9-10.

⁴⁴ Law on Legal Protection in Public Procurement Procedures, Article 60 (3).

⁴⁵ Ibid, Article 61.

⁴⁶ Law About the State Commission for Control of Public Procurement Procedures, Article 17.

⁴⁷ SIGMA, Brief 25 “Establishing Procurement Review Bodies”, 2013, p. 8.

⁴⁸ <https://www.tpp-rating.org/page/eng/publications/12?fbclid=IwAR1h4-SrR-ptmi5CIzQPQOKsXBWPmMEBGrprMVYk9umgPX3ugJBrLTDp0w>

Georgia should also set another precedent of openness in the field of public procurement, especially since the live online broadcasting of dispute resolution hearings is not an innovation for our reality. This method is already used by the National Communications Commission.

A public institution that is separate from all procuring organizations and economic operators	?
Decisions are made in writing	√
Decisions are subject to appeal to the court	√
The rules of appointing and dismissing the members are equivalent to those applicable to judges	×
At least the chairperson of the body must meet the legal and professional qualifications applicable to judges.	×
Financial independence	×
High level of qualification	×

Recommendations:

In order to fulfill the obligations undertaken by Article 143 of the Association Agreement between Georgia and the European Union, and ensure public trust towards the independence and impartiality of the Dispute Resolution Council it is necessary to take a number of legislative steps, namely:

- New rules for the appointment and removal of members of the Council should be developed, which will facilitate the institutional and operational independence of the Council. Unlike the existing practice, detailed rules of appointment and dismissal should be regulated by a legal rather than a sub-legal act;
- High qualification requirements for the Council members should be developed. At least the chairperson of the Council should meet the qualification requirements applicable to judges. While developing the requirements, it should be taken into consideration that this minimum standard of qualification should ensure that the Council members make well-reasoned decisions based on in-depth assessment of evidence;
- The term of office of the Council members should be extended. The term should be proportional to the important role and function assigned by the legislature to the Council;
- The existing rules for appointing the members of the Council should be changed to minimize conflicts of interest;

- One of the grounds for the early dismissal of the Council members, namely his/her dismissal from the nominating body, should not be the ground for terminating his/her office term as the member of the Council;
- The Council should have an own structural unit which will provide it with relevant administrative and technical support. The Council should not be obliged to rely on the human resources of the Agency;
- It is necessary for the Council to have independent financial resources, which will be spent on the salaries of the Council members, remuneration of experts and other necessary expenses.