

State Secret Procurement Rule

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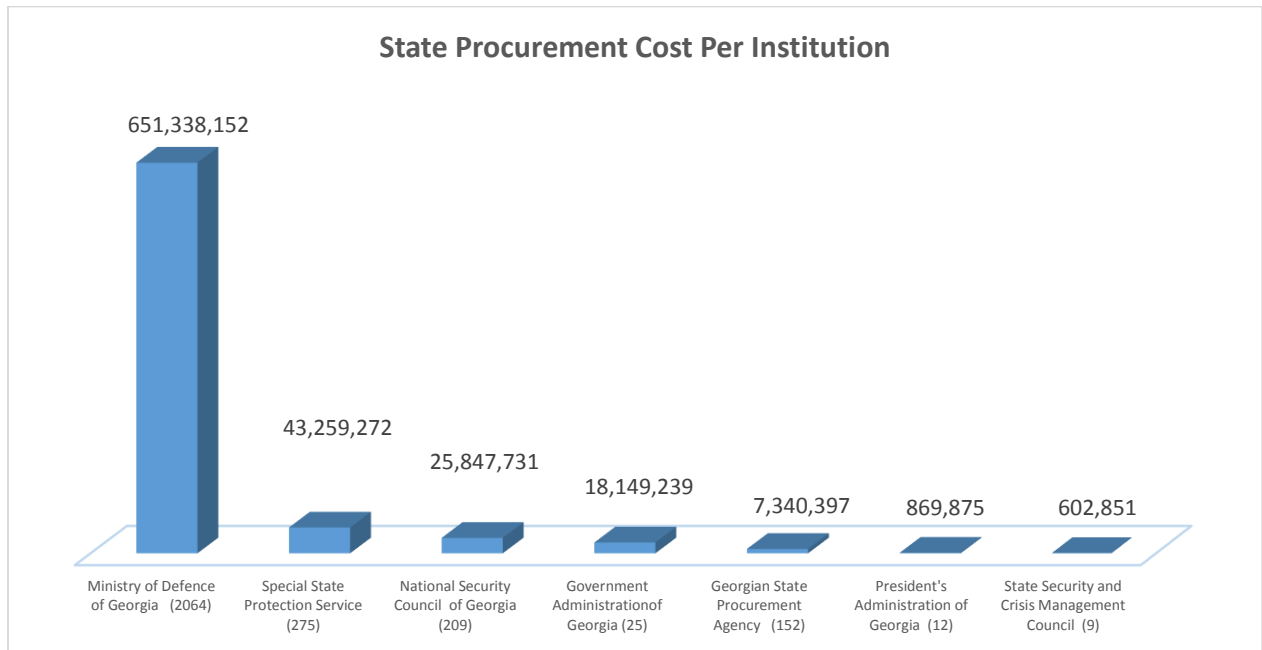
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INTRODUCTION

Since the adoption of the Law of Georgia “On State Procurement”, the first Article of the Law has regulated the agencies responsible for the elaboration of the list of the state procurement objects and the rule for conducting procurement related to the state secrecy as defined by the Law of Georgia on State Secrets.¹ Since 2005 up to present, two amendments have been made to the law and the developer and recipient agencies have been changed only. Despite the above provision, no procedure was adopted until 2016 to provide the rules for secret state procurement.

Over the years, despite the absence of the regulation, state secret procurements have been conducted uninterruptedly. According to the information² obtained by the Georgian Young Lawyers' Association (GYLA), in 2010-2015 only seven administrative agencies concluded 2752 unregulated secret procurement contracts worth more than 747 000 000 GEL.



NEW RULE- SCOPE AND OBJECTIVES

On July 11, 2016, the Government of Georgia adopted a Decree,³ pursuant to which the list of the state objects related to state secrecy defined by the Law of Georgia on "State Secrets" and the rule for conducting such procurements was approved.⁴

The purpose of the rule was to:

¹ The list of state procurement objects related to the state secrets defined in the Law of Georgia on State Secrets and the rule of conducting procurement of such objects shall be developed by the State Security and Crisis Management Council and approved by the Government of Georgia.

² GYLA's Research – “Unregulated State Secret Procurement.” Available at https://gyla.ge/files/news/saidumlo%20Sesyidvebi%20wesis%20gareSe_ge.pdf;

³ <https://matsne.gov.ge/ka/document/view/3337616>

⁴ The regulation shall not apply to the expenses incurred by the relevant authorities in connection with the activities envisaged by the Chapter XVII of the Criminal Procedure Code of Georgia and Laws of Georgia "On Operative-Investigative Activities", "On Intelligence Activities", "On Counter- Intelligence Activities".

- Ensure the protection of the information related to state secret/classified procurement;
- Ensure the rationality of spending of funds designated for state secret procurement;
- Ensure a fair and non-discriminatory approach to participants of state secret procurement;
- Promote effective competition within state secret procurement.

The above rule also regulates the rights and obligations of the procuring entity and the supplier; conditions for avoiding conflicts of interest; the list of state secret procurement objects; the means of state procurement, the rules of its implementation and procedure for selecting the winner; the issues related to conclusion and execution of contracts and the rules of appeal.

RIGHTS AND OBLIGATIONS OF PARTIES INVOLVED IN PROCUREMENT

According to the Decree, a procuring organization shall be only the organization that has the right to conduct state secret procurement, and a procuring entity - a person or a group of persons with access to the state secrecy of a relevant category.

A procuring organization shall be entitled to select a supplier in accordance with the procedure, conclude a contract, exercise control and oversight over the execution of the contract terms, terminate the contract, disqualify the bidder from the procurement procedure, suspend a procurement procedure at any time prior to awarding a contract in the cases stipulated in the procedure.

A procuring organization shall follow the rules of the state secret procurement,⁵ the Law of Georgia "On State Secrets" and the legal acts issued based on thereof, reimburse a supplier for the value of goods or service as stipulated in the contract and inform the bidder of the decision about such issue.

A supplier is a person or an international organization that provides a procurement object to the procuring organization on the basis of the state secret procurement contract.

According to the Agency system, a person, who wishes to take part in an electronic procedure, shall obtain a permit to perform the activities related to state secrecy (Form N4). In addition, in direct procurement and Request for Bids(RFB), negotiations shall be held with the bidder who has access to the state secrecy of a relevant category. In case of such access, the supplier shall be entitled to take part in state procurement and conclude a contract with a procuring organization, receive compensation in lieu of the execution of the contract or appeal the actions or decisions of the procuring organization.

A supplier shall follow the rules set forth by the Law of Georgia on State Secrets and the legal acts issued on the basis thereof and fulfill the obligations undertaken under the contract.

AVOIDING CONFLICTS OF INTEREST

Conflicts of interest may occur during selection of suppliers, monitoring and supervision of the execution of contracts, or reviewing disputes arising during procurements. A person may have a

⁵The list of state procurement objects related to the state secrets defined in the Law of Georgia on State Secrets and the rule for conducting procurement of such objects.

conflict of interests if there is a special relationship between a procuring entity and a bidder / supplier, which is regulated by the Tax Code of Georgia.⁶

However, if the supplier / bidder is also represented by a procuring organization, the conflicts of interest may occur if:

- the persons are the founders (participants) of one enterprise, provided that their combined share is at least 20%;
- one person has a direct or indirect interest in another person's enterprise, provided that such participation is at least 20%;
- the persons are relatives;
- the persons are members of a partnership.

In case of presence or absence of conflicts of interest, such situation shall be recorded in writing. In the former case, a procuring organization shall challenge and discontinue the participation in the state procurement, and in the latter case, write an acknowledgement letter on the absence of a conflict of interest.

⁶ Article 19. Related parties:

1. Parties shall be regarded as related if the existence of a special relationship between them may affect the conditions or economic results of their activities or the activity of the persons that they represent.

2. Special relationships shall be the relationships, where:

a) persons are the founders (participants) of one enterprise, provided their combined share is at least 20%;

b) one person has a direct or indirect interest in another person's enterprise, provided such participation is at least 20%;

c) a person controls the enterprise;

d) a natural person is subordinated to another natural person;

e) one person directly or indirectly controls another person;

f) the persons are controlled, directly or indirectly, by a third person;

g) the persons jointly control, directly or indirectly, a third person;

h) the persons are relatives;

i) the persons are members of a partnership.

3. For the purposes of the tax legislation of Georgia, a natural person's relatives shall be:

a) the first line of relatives: spouse, parent, child, sister, brother;

b) the second line of relatives: spouse, parent, child, sister, brother of each relative in the first line, except for the natural person who already belongs to the first line;

c) persons who are related to one other as parents and children as a result of long-term guardianship.

4. In determining kinship, step sisters (brothers) shall be treated as equal to full sisters (brothers) and adoptees shall be treated as equal to biological children. At the same time, guardianship relations shall be regarded as equal to a family unity (where persons are related to one another as parents and children) which, in turn, shall be deemed equal to kinship relationship. Termination of family unity between these persons shall not be taken into account if a parent-and-child relationship between them is maintained under paragraph 3(c) of this article.

5. For the purposes of this article, control shall mean: a supervisory board membership, directorship and the right to appoint persons to such offices; holding 20% of voting share or interest.

6. For the purposes of this article, a natural person shall be an indirect holder of the interest if his/her relative holds this interest.

STATE SECRET PROCUREMENT OBJECTS

The Chapter 2 of the State Secret Procurement Rule provides for the list of objects that may belong to the state secret procurement objects, namely services, goods and construction works. This refers to construction and repair works of the strategic and defense purpose facility-buildings, as well as goods and services related to equipment and storage of ammunition, weapons, special and material-technical facilities for military / defence purposes, information related to material reserves, construction and renovation works of repositories, scientific research services that serve important state interests, also other goods, services and works that contain the information defined as state secrets under the Government's Decree.⁷

ELECTRONIC PROCUREMENT PROCEDURE

The Chapter 3 of the Rule determines and regulates the means of procurement and the rules of their implementation.

The major means of procurement is the **electronic procurement procedure**, which is applicable to all cases unless direct procurement or RFB is applied.

According to the Rule, an application for an electronic procurement procedure (if any, also documentations) may include the following:

- Information which can provide general data to interested persons about the procurement object;
- Accurate information about the procedure for expressing interest and submission of a bid/proposal by an interested person;
- An accurate list of information and documents to be uploaded in the system by a bidder;
- Additional information, if required.

After the announcement of the procedures for the electronic procurement, an interested person, according to the terms provided for in the notice on the electronic procurement procedures (if any, also documentations), shall apply to a procuring organization with the request to obtain full information and documents related to the procurement. Only those who have access to the state secrets of a relevant category shall be eligible to request such documents.

The order of bidders in the electronic procurement procedure and the RFB (Request For Bids) shall be determined by the lowest value bid/proposal, or if a procuring entity uses the quality and price criteria, by the highest total score. The winner shall become a bidder with the lowest price bid/proposal, whose proposal is in full compliance with the predefined requirements, and if the procuring organization uses the quality and price criteria - a bidder with the highest total score, whose bid/proposal is fully compatible with the specific requirements.

It is noteworthy that the law does not envisage the cases where and when low price or quality and price criteria are jointly applied, or whether they are applicable for any type of procurement and whether or not a procuring organization has the right to choose a criterion.

⁷ Decree # 507 of the Government of Georgia issued on 24 September 2015.

In addition, the procedure for calculating the highest total score or whether a procuring organization can use the quality and price criteria is vague and insufficiently defined.

According to the Procedure, *"If a procuring organization uses the quality and price criteria, it shall evaluate bidders and their proposals at the first stage in terms of formal compliance with the requirements and subsequently from the qualitative perspective and assign an appropriate score within the relevant criteria in order to calculate the total score."* The provision does not define at what stage the price criterion shall be assessed, also, does not specify what weight a specific criterion may have or whether or not it is determined by a procuring entity in a particular case. There is also no indication of the obligation to inform a bidder in advance of the evaluation procedures, which would help a potential supplier to better develop its own proposal instead of just relying on the lower price.

The total term for the selection-evaluation and winner nomination shall not exceed 3 months. However, the procurement Rule does not envisage the obligation for publishing the information about the status change, accordingly, for the public it still remains unknown which company becomes the winner, whether a bidder is disqualified or the procurement is terminated or not. Also, there is not provided the term for conclusion of contracts.

MODULE „ ELECTRONIC PROCUREMENT PROCEDURE”

A application about the electronic procurement procedures (if any, also documentations) shall be published in the Module "Electronic Procurement Procedure" in the Unified Electronic System of State Procurement⁸.

Since July 11, 2016,⁹ only the applications of 5 agencies have been posted in the system:¹⁰

Ministry of Defence of Georgia (34 applications):

- 4 – Tender announced;
- 27 -Submission of bids completed;
- 2 – Tender not held;
- 1 - Tender terminated.

Ministry of Corrections and Probation of Georgia (84 applications):

- 67 - Submission of bids completed;
- 17 - Tender not held.

State Security Service of Georgia (1 application):

- 1 - Submission of bids completed;

LEPL SMSTC "DELTA" (3 applications):

- 2 - Tender not held;
- 1 – Submission of bids completed;

LEPL MIA State Material Reserves Department (1 application)

- 1 - Submission of bids completed.

⁸<http://procurement.gov.ge/>

⁹ February 17, 2017

¹⁰ Data calculated according to the registration dates;

None of the tender applications in the system have gone far than the completion stage of submission of tender bids/proposals (except where procurements have been cancelled or terminated). Although **more than 6 months have passed**, in some cases the selection-evaluation status has not been awarded yet, and therefore, neither winning bidders nor contract award has been announced. However, according to the Rule, the total timeframe for selection-evaluation and selection of the winning bidder shall not exceed 3 months. As mentioned above, the rule on state procurement does not envisage the obligation of publishing the information on the change of status.

In the module "Electronic Procurement Procedure," total of 123 applications on secret procurement have been published¹¹, and in 98 cases, submission of bids is completed. The estimated value of the procurements has exceeded GEL 122 000,000.¹²

DIRECT PROCUREMENT AND REQUEST FOR BIDS (RFB)

Articles 8 and 9 of the Rule provide for the cases of RFB and direct procurement which are not subject to electronic procurement procedures.

The **Request For Bids(RFB)** shall be conducted if there is no ground for direct procurement and for the purpose of protecting the information related to the procurement it is not advisable to use the electronic procurement procedures.

During the RFB, a procuring organization shall send at least 2 bidders and only those who have access to the state secrets of a relevant category a written invitation to participate in the Request For Bids. The invitation shall include:

- The complete information and detailed order related to the procurement object;
- The list of information / documents to be submitted by a bidder, the terms and conditions of the submission of such data;
- The time and place of opening and reviewing the proposal/bid;
- Other important information provided by a procuring organization.

Direct procurement shall be conducted by a procuring organization based on the negotiations with a specific supplier. This can be carried out unless the procurement value exceeds 20 000 GEL, or if:

- Only one resident supplier may have the access to the state secrets of the relevant category regarding the particular procurement object;
- Procurement of goods or services is conducted directly by non-resident manufacturer or its non-resident official representative / dealer;
- To prevent the deterioration of the quality of objects procured from the supplier and / or for ensuring its further operations, it is necessary to procure from the same supplier, unless the estimated value of the object of the procurement exceeds the value of the object originally procured;
- There is an urgent necessity or a situation, which poses a real threat to operations of the procuring organization and which cannot be pre-determined and / or the occurrence of which is not caused by the conduct of a procuring entity or which may cause significant

¹¹From 11 July, 2016 to 17 February 2017 ;

¹² The estimated total value does not include the trade with a price list;

damage to the State and / or the public interest of Georgia or the property of the procuring organization;

- Direct procurement is caused by important state and / or public interests.

The GYLA approached several procuring organizations¹³ regarding the procurements conducted pursuant to the above rules and requested the information on the number of procurements conducted on the basis of the RFB and direct procurement and the amount of money paid in the mentioned procurements since July 2016.

According to the responses of the agencies:

- Procurements have not been conducted in 4 agencies;¹⁴
- 3 agencies have not issued the information due to its state secrecy;¹⁵
- 1 agency refused to respond;¹⁶

The procurement has been conducted by 6 agencies;

1. Ministry of Corrections and Probation of Georgia

One purchase has been made on the basis of RFB (Request for Bids), the cost of which amounted to 195 501 GEL, and 29 purchases through direct procurement with the total value of 7 998 022.69 GEL.

2. State Security and Crisis Management Council

Has concluded 4 contracts with the total cost of 79 680 GEL, three of them based on RFB and one through the direct procurement.

3. Administration of the Government of Georgia

1 contract is signed from 1 January to 31 December 2017, where monthly fee is GEL 450. The Administration has not specified the basis for the contract award (RFB or direct procurement).

4. Special State Protection Service of Georgia

39 secret procurements have been conducted under the direct procurement, the total amount of which amounted to 2,421,058 GEL.

5. LEPL State Maintenance Agency of Georgia

13 purchases have been conducted, for which 760,780 GEL was paid in total. The agency has not specified the basis for the procurement (RFB or direct purchase).

6. Ministry of Defense of Georgia

¹³State Security and Crisis Management Council; Administration of the Government of Georgia; Administration of the President of Georgia; Ministry of Foreign Affairs of Georgia; Special State Protection Service; LEPL State Maintenance Agency of Georgia; National Security Council of Georgia; Ministry of Internal Affairs of Georgia; LEPL Delta; Ministry of Economy and Sustainable Development of Georgia; Ministry of Energy of Georgia; Ministry of Defense of Georgia; Ministry of Justice of Georgia; Ministry of Corrections and Probation of Georgia;

¹⁴Administration of the President of Georgia; National Security Council of Georgia; Ministry of Economy and Sustainable Development of Georgia; Ministry of Energy of Georgia;

¹⁵Ministry of Foreign Affairs of Georgia; Ministry of Internal Affairs of Georgia; LEPL DELTA

¹⁶Ministry of Justice of Georgia;

On the basis of the RFB, 25 contracts have been signed and the total amount paid amounted to 1,278,937 GEL. 22 contracts have been awarded on the basis of direct procurement, the total amount paid was 4,585,468 GEL.

Although the Procedure for State Secret Procurements has been approved, the standard of issuing information has not improved yet and so far double standards are manifested when issuing the information about secret procurements. In particular, a part of the procuring organizations issues the information which another part considers as confidential. In addition, the Rule fails to specify what information may be considered public during the RFB or direct procurements. At the same time, the Rule does not obligate and therefore, neither agencies nor procuring organizations ever provide general information on purchases, submit procurement reports, and analyze how many purchases have been performed by avoiding the electronic tender procedures and what amounts of money have been paid.

Summary

The list of the state procurement objects related to state secrets defined by the Law of Georgia on "State Secrets" and the rule for conducting state procurement, in some points, are quite problematic. Their improvement is important for achieving the goals set out in the same rule, namely:

- The issue related to timeframes is problematic in the rule. The only provision that sets the time limit for the procurement procedures prior to an award of a contract is the selection-evaluation of a winning bidder, which, as mentioned above, is supposedly neglected.
- There are no records of timeframes for awarding a contract after the winning bidder is selected (it may be a specific term or a "reasonable" term, in general).
- The procedure for conducting state procurement does not provide for the obligation of publishing the information about the status change, and consequently, for the public it still remains unknown which company was selected as the winner, whether the bidder was disqualified or whether the procurement was terminated or not.
- There is no provision regulating in what cases procurement may be terminated, or end with negative result or receive the status - "Procurement not held".
- Moreover, there are some terms which are specified in the Rule though not defined if they convey the same meaning as in the Law of Georgia On State Procurement.
- The law does not envisage the cases where and when low price principle or quality and price criteria are used, whether they are used for all types of procurement or a procuring organization has the right to choose a criterion.
- The rule for calculating the highest total score is vague and incomplete, it is not clear whether a procuring entity refers to the quality or price criteria.
- It is not specified at which stage the price criterion is evaluated. The law also fails to indicate a specific weight assigned to a specific criterion or whether a particular procuring organization determines such weight in a particular case. Also, there is no indication of the obligation of informing a bidder in advance of the evaluation procedures, which can help a potential supplier to better develop its own proposal and not just rely on a lower price.
- Since there is no provision stipulating what public information can be when conducting secret state procurement, the established double standards still persevere and a part of the procuring organizations still considers the information about secret procurement as confidential.

- The Rule does not contain a provision on secret procurement reports.
- From July 2016 to January 11, 2017, 6 administrative agencies¹⁷ conducted 134 procurements on the basis of RFB and direct procurement, the total value of which was over GEL 17 million.¹⁸
- From July 11, 2016 to February 16, 2017, 5 administrative agencies¹⁹ submitted applications to the module of the Electronic Procurement Procedure. In total, 123 bids were submitted and for 98 of them the procurement is completed. The estimated value of the procurement exceeded GEL 122 million.²⁰

¹⁷ State Security and Crisis Management Council; Administration of the Government of Georgia; Special State Protection Service; LEPL State Maintenance Agency of Georgia; Ministry of Defense of Georgia;

¹⁸17,324,846.69 GEL;

¹⁹Ministry of Defense of Georgia; Ministry of Corrections and Probation of Georgia; National Security Council of Georgia; Ministry of Internal Affairs of Georgia; LEPL SMSTC “DELTA”; LEPL MIA State Material Reserves Department.

²⁰The estimated total value does not include the trade with a price list;