

IMPROVING TRANSPARENCY IN GOVERNMENT PROCUREMENT PROCEDURES IN IRAQ

Discussion Paper

Prepared for supporting discussions and exchange of views in
Workshop 2 Session 1 on Enhancing Transparency in Public Procurement

Introduction: Objectives of this Discussion Paper

The Discussion Paper was prepared to serve as a basis for discussions in the Workshop 2 Session 1 on Enhancing Transparency in Public Procurement (the “Workshop”) organised in the framework of the International Compact with Iraq on 9 July 2008 in Paris.

The Discussion Paper summarises:

- Background and objectives of OECD activities to support transparency in public procurement in Iraq;
- Strengths of the government procurement regulations in Iraq in light of international standards and good practice;
- Elements of the current procurement regulations and procedures that would require further discussion and clarification at the Workshop for better comprehension;
- The proposed structure and approach of the final benchmark report on public procurement regulations in Iraq.

Accordingly, the main objectives of the Workshop 2 Session 1 on Enhancing Transparency in Public Procurement are to:

- Verify whether the paper correctly interprets the provisions of the Procurement Regulations;
- Review the main findings and policy recommendation based on the analysis of survey and provisions of regulations in light of international standards and good practices;
- Review how local practice of government procurement is consistent with the Procurement Regulations;
- Verify that the proposed structure and approach of the report reflects the expectations of the Iraqi Government;
- Clarify the Iraqi Government’s interest for practical tools, training material and other hands-on instruments to support transparency and resistance to corruption in government procurement procedures.

Participants of the *Workshop* are kindly invited to express their views on the above points and actively intervene during the *Workshop* discussions. Also, written proposals are asked to be submitted to the OECD Secretariat during and/or after the *Workshop* addressed to Aniko.Hrubi@oecd.org.

Part I. Background

1.1. Request from the Iraqi Government

One of the main outcomes of the Workshop on Enhancing Transparency in Public Procurement Procedures held in January 2008 in Jordan was that representatives from

various agencies and institutions of the Government of Iraq (GOI) requested the OECD to examine the public procurement regulations and procedures of their government and provide policy recommendations for improvement. This request was reiterated by high-level Iraqi delegates during the Preparatory Meeting with the GOI on the Paris Declaration on Aid Effectiveness held in May 2008 in Paris. Following this outcome, the preparation of the Benchmark Report on public procurement regulations in Iraq (the “Benchmark Report”) was identified as being one of the main priorities in the MENA-OECD Investment and Anti-Corruption Policy Reforms in the Republic of Iraq project.

Government procurement procedures in Iraq are based on the 2007 *Implementing Regulations for Governmental Contracts* (“Procurement Regulations”), the 2007 *Iraq Quick Start Contracting Guide* for supporting its implementation, and the 2008 *Instructions for government contracts’ execution*. The analysis of the Benchmark Report focuses on the above mentioned Procurement Regulations, Instructions and Contracting Guide. Iraqi officials indicated in the June 2008 meeting in Paris that a new law on government procurement was prepared but not yet approved.

The Procurement Regulations have been reviewed in light of international instruments and good practices, including:

- The *Model Law of the United Nations Commission on International Trade Law* (UNCITRAL);
- The *Agreement on Government Procurement of the World Trade Organisation* (WTO);
- Main policy instruments drawn up by the OECD on the basis of good international practices, in particular the *Principles for Enhancing Integrity in Public Procurement*.

1.2. Methodology and information gathering process

Various **sources** have been used for the analysis for the benchmark report. Information gathering started by reviewing materials received from Iraqi Ministries – in particular from the Ministry of Planning and Development Co-operation (MoPDC), – as well as from the Council of Ministers and from international organisations working in Iraq. The documents received include both legal documents, such as laws, regulations and guide and background documents related to public procurement practice in Iraq, such as report on Procurement Workshop for Iraqi Ministries. The report on Procurement Workshop for Iraqi Ministries is part of internal training material that served as a basis for training procurement officials in late 2007 by the Procurement Assistance Center (within the MoPDC). The document highlighted elements of the current procurement regulations that Iraqi public officials in charge of procurement found unclear or difficult to comply with.

After discussions with various stakeholders from the GOI, the OECD also developed a **survey questionnaire** entitled “Survey on current public procurement legislation in Iraq” to support data collection from all stakeholders in the procurement process. The distribution of the questionnaire had the high-level support of the Deputy of the Secretary General of the General Secretariat for the Council of Ministers and the Deputy Prime Minister’s Office.

The questionnaire was translated into Arabic and tailored to each targeted respondents’ group, namely for 1) senior experts in the procurement units of key spending Iraqi Ministries – such as the Ministry of Trade, Industry and Minerals, Electricity, Oil and Health; 2) Members of Parliament; 3) members of the Joint Anti-Corruption Council and 4) private sector representatives. The responses from the questionnaire provided unique insight of the actors directly involved in public procurement process in Iraq (Please find in Annex a model of the survey questionnaire distributed to Iraqi Ministries).

Last, but not least, **bilateral discussions** with high-level Iraqi delegates largely contributed to the information gathering process. There were many opportunities for these discussions to take place, in particular during meetings organised in the framework of the International Compact with Iraq and interviews with representatives of the GOI conducted by regional consultants working in Baghdad.

1.4. General Questions for discussion for the *Workshop 2 Session 1 on Enhancing Transparency in Public Procurement*

- **What do you consider as main challenges of the implementation of the 2007 Procurement Regulations? What elements of the Procurement Regulations are the most difficult to comply with?**
- **What are the internal and external control mechanisms in place and how do they function to verify compliance with the Procurement Regulations? How do different control institutions co-ordinate their work?**
- **Do you consider public procurement as particularly vulnerable to fraud and corruption in Iraq? If yes, in what stage of the process? Please describe why.**
- **What measures would you consider putting in place in order to improve the public procurement regulations and their enforcement?**

Part II. Summary of the Preliminary findings of the Benchmark Report

1. THE PRINCIPLE OF TRANSPARENCY THROUGHOUT THE PROCUREMENT PROCESS

A fundamental strength of the Iraqi Procurement Regulations is that their provisions provide numerous guarantees of transparency throughout the procurement process, including requirements for:

- Carrying out a comprehensive study of a project before the launch of a procurement procedure;
- Meeting stringent conditions regarding the reception and filing of contractors' bids;
- Setting up a bid opening committee made up of senior civil servants;
- Establishing the bid opening committee's functions in a clearly defined manner;
- Setting up a bid evaluation committee with clearly defined composition and responsibilities;
- Clearly defining the bid evaluation committee's tasks;
- Laying down strict conditions for accepting bids;
- Making all negotiations prohibited on prices with any potential contractors;
- Forbidding amendments, except when extending the period of time for completing the contract. This time period extension is subject to very strict conditions;
- Stipulating heavy penalties for overshooting deadlines;
- Laying down precise conditions for archiving files and listing the documents to be archived.

On the other hand, provisions of the Procurement Regulations may further support transparency in government procurement procedures, in particular:

- By supporting the institutionalisation of procurement plans that give candidates advance information about procurement opportunities coming up over a predetermined period. The lack of these procurement plans can partly be justified by the current situation of the country.
- By making publication of tenders more consistent. Contracts are not announced in the same way for all candidates. Advertising methods vary from Ministry to Ministry, for example some Ministries use the internet for publishing tenders, while others use announcement boards and newspapers.
- By supporting competitive processes. The transparency of the process is restricted by the fact that it is easy to use direct procurement procedures such as direct invitations or single source methods. Also, these non-competitive procedures do not seem to require additional measures to be taken to ensure their effectiveness and integrity.
- By providing sufficient time for submitting bids. Procurement advertising periods may be arbitrary as the Regulations give vague instructions and criteria on how to fix them (Article (5)). Tight advertising periods do not always allow enough time to obtain the required guarantees from banks such as performance bonds (this is clearly underpinned by several replies to the questionnaire). Also, time may not be sufficient enough to prepare all documentation required to attach to the submitted bid (such as catalogues or technical details for complex procurement) nor to send samples and have them received in a timely manner.
- By providing information on bid evaluation criteria in a consistent manner:
 - Bid evaluation criteria are not always known in advance nor published in the tender. This hampers contractors' preparation in submitting their bids and, if evaluation criteria are not properly defined, this may give room for subjectivity for the bid evaluation.
 - The indicative price calculated by the purchasing entity can eliminate submitted bids with prices that are 25% lower or higher without giving the possibility to the contractor to explain its' submitted price (e.g. lower price is based on new technical solutions). Moreover, according to the survey, price seems to be the principal and decisive evaluation criteria, although the indicative price is not communicated in the tender advertisement.
 - The criteria for eliminating "ineffective contractor according to his/her work experience" are not known and thus give place of subjectivity (Article (11)/Seventh)
- By providing specific mechanisms for monitoring and sanctioning failures in the execution of contract:
 - No mention is made of monitoring sites or deliveries, whereas most international regulations require the project manager himself to do so, or to delegate the task to another manager.
 - What sanctions are applied and how, who decides on their application (for example if what is delivered does not match the initial order).

A number of specific points need to be clarified in the *Workshop*:

- **How can the indicative price calculated and set by the authorities result in automatic exclusion of certain competitors?**
- **How and by whom is this indicative price calculated?**
- **What are the reasons why the bid evaluation criteria are not published in the invitations to tender?**

2. PRECAUTIONARY MEASURES TO ENHANCE INTEGRITY IN NON-COMPETITIVE TENDER METHODS

The Iraqi Procurement Regulations provide five different tendering methods for public procurement including open and competitive tenders and non-competitive ones. The Regulations include provisions for enhancing integrity in non-competitive tendering methods as they:

- Give the choice between three different procedures to be used,
- Forbid negotiated procedures.

Supporting transparency and corruption prevention in government procurement procedures also requires in particular:

- Supporting the selection of most adequate non-competitive method (e.g. by providing criteria for selection). Neither the Procurement Regulations nor the Instructions or the Guide give specific indication which of the non-competitive methods are to be used in specific situations and the criteria for determining the best of them when open and competitive tendering is not obligatory (e.g. no reference can be found for specific thresholds, special conditions such as the absence of candidates for an invitation to tender, etc.).
- Simplifying procedures to avoid red-tape when possible. The number of candidates who have to be invited for restricted tenders to submit a bid (at least 6) seems very high compared to other countries' requirements.
- Providing directions when using discretionary power in "non-competitive" procedures:
 - The so-called "direct invitation" procedure can apply to all contracts, after getting proper approval. However, the Procurement Regulations give no details on who has to agree to recourse to this procedure, neither on how the three contractors are selected (Ex: does every Ministry have a list of successful past contractors for various categories of products to be used as a basis for selection of the three contractors?)
 - The Regulations do not indicate under what circumstances the single source method can be used.
 - No specific information explains in the Regulations in what circumstances the "purchasing committee" procedure can be used.
 - The Regulations provide no details on the control mechanisms to verify that exceptions from open tendering are justified.

The Procurement Regulations exclude the use of negotiated procedures without further explanations. Although, the recourse to negotiated procedures may provide effective public procurement in many countries, this exclusion can be justified by the current Iraqi context. Further considerations to put in place negotiated procedures will require very precise and often exceptional conditions for their use.

Participants of the *Workshop* are invited to clarify the following points:

- **In which specific conditions are the three non-competitive procedures used – direct invitation, single source method and purchasing committees?**
- **Could you illustrate their use through concrete examples?**
- **Are these non-competitive methods only used in exceptional cases? Please specify under what conditions/circumstances.**

3. USING PUBLIC FUNDS FOR THE PURPOSES AND IN THE MANNER INTENDED

The Procurement Regulations stipulate and describe in detail how a procurement transaction should be properly prepared; this is clearly one of the strongest parts of the Regulations. They provide that:

- *Procurement shall be based on public funds that are at this time available,*
- *The total amount of the contract shall be deposited in an Iraqi bank in the form of an irrevocable letter of credit,*
- *High-level civil servants shall be personally involved throughout the whole process, and especially when the contractors' bids are opened and examined.*

However, the Regulations do not precise the use of control mechanisms on procurement, in particular the recourse to independent committees to verify the appropriateness and good management of the procurement process from the definition of needs until the execution of contract through the bidding and bid evaluation phase. It is possible that the Regulations on procurement do not say so (it being the case in the majority of domestic and international regulations on procurement), but it would be useful to clarify the role of the Board of Supreme Audit, the Inspector General or other government body and their experience in reviewing and controlling procurement procedures.

4. ENSURING PROFESSIONALISM IN PROCUREMENT

According to international standards, ensuring that the overall procurement process is managed by qualified public officials is a prerequisite for good and effective procurement. This professionalism can be guaranteed by providing and updating a common body of knowledge, skills and ethical standards to the procurement personnel.

Although the Procurement Regulations do not talk explicitly about the professionalisation of public officials – which is generally not the object of a law on government procurement –, it stipulates that officials responsible for procurement have to *abide by professional principles, such as the non-disclosure of information and absence of private interests.*

5. BUILDING RESISTANCE TO CORRUPTION IN PROCUREMENT

A number of important points are covered by the Procurement Regulations, including:

- The ban on the disclosure of information to persons not involved in procurement,
- The need to fill in a form declaring any private interest,
- Compliance with provisions to prevent corruption, in particular requiring
 - The need to seek authorisations throughout the process;
 - The existence of numerous controls;
 - The rotation of officials, particularly in the bid evaluation committees.

Despite this undeniable progress, there is no reference in the Procurement Regulations to improving risk awareness (risk mapping, for example) in the design and implementation of procurement process. To provide information on risk mapping, a specific Workshop session will deal with mapping out the risk of corruption in the overall procurement cycle. The session will also provide possible solutions to manage these risks, and thus provide participants with a concrete tool and a very practical example to raise awareness of corruption risks.

The following important point needs to be clarified:

- **Procurement Regulations excludes the use of new technologies for submitting bids, although certain officials have indicated that some ministries would be using the electronic portals for public procurement.**

6. MECHANISMS FOR DETECTING AND FIGHTING CORRUPTION

It is important to mention that the purpose of the Law on procurement is generally not to list the measures designed to detect and fight corruption and bribery. These integrity measures – such as codes of conduct, control mechanisms, etc. – need to be the subject of additional specific laws or regulations as is the case in other countries. It would, however, be useful if there was an explicit reference to these regulatory provisions in the implementing regulations and guides of *Procurement Regulations*.

It is worth mentioning *a positive and very important factor in the Procurement Regulations; that is the requirement of archiving the main components of the tender documents, which can help to track down past procurements and gives basis to detect misconduct or mismanagement by procurement control mechanisms.*

7. CLEAR RESPONSIBILITIES AND EFFECTIVE CONTROL MECHANISMS IN PROCUREMENT

Another strength of the Procurement Regulations is that provisions very clearly specify:

- The role of the bid opening committee,
- The role of the bid evaluation committee,
- The role of the Minister in the process,
- The content of the reports,
- The content of the archived files.

Although, provisions discuss a number of stages of the procedure, these provisions do not provide detailed information. The following questions remained unanswered in this regard:

- What are the “specialised offices” that “confirm the availability of allocated amounts for implementation of the contract (Art (3) point B)?
- Who is the person responsible for approving the technical feasibility studies relating to the project?
- Who decides on the selection of tendering methods?
- How the Minister’s representatives are appointed?
- Are there external audits in place for procurement? If yes, how frequently? What are the respective roles of the Board of Supreme Audit and the Inspectors General in this regard?

8. REGULATIONS CONCERNING CONTRACTORS’ COMPLAINTS

The most significant strength of the recourse system provided by the Procurement Regulations is its rapidity with which the final decision is taken. However, the survey responses indicated that contractors are not sufficiently aware of the recourse and complaint system.

The Regulations remain unclear on the following points:

- What are the respective roles of the Administrative Tribunal and the Ministerial committees with regards to protests and complaints of contractors? In what order (if there is one) should cases be referred to the Administrative Tribunal and the Ministerial Committee?

- Can bidders seek for further information about the project during the consultation period before submitting their bid?
- Is there a “pre-contract” injunction procedure for suspending the award of the contract?
- What are the checks and balances used to counterbalance the discretionary power of the Minister, who decides on the tender selection and is also a jury regarding the contract in case of protest?

Part III: Proposed structure of the final Benchmark Report

This part presents the proposed structure of the benchmark report on government procurement procedures in Iraq:

Chapter 1) Reviewing the Procurement Regulations in light of *international rules and good practices*

The analysis of the first part puts the provisions on transparency and integrity of the current Iraqi procurement regulations in an international context (e.g. WTO GPA, UNCITRAL Model Law, OECD Principles). The first part of the benchmark report follows the structure of the previous part in line with the OECD Principles for Enhancing Integrity in Public Procurement. The OECD Principles are an internationally tested practical instrument that draws from experiences that have proved effective for enhancing transparency, accountability and integrity in public procurement in countries all around the globe. It reflects various legal and administrative systems from developed *and* developing countries.

Chapter 2) Critical review of the Procurement Regulations, *analysed article by article*

On the basis of international legal instruments and standards (such as the WTO Agreement on Government Procurement; the UNCITRAL Model Law, UNCAC, etc.), the second part of the benchmark report takes a critical review of the provisions of the current procurement legislation, and provides an article-by-article analysis.

Chapter 3) Policy *recommendations*

The third part of the benchmark report provides policy recommendations for improvement of the procurement legislation. These policy recommendations are based on the analysis provided in chapters 1 and 2, and will be discussed with Iraqi delegates during the scheduled stakeholder meeting.

Chapter 4) Proposal for *implementation*

The fourth part of the benchmark report provides with a concrete proposal on supporting the implementation of recommendations of the benchmark report in daily practice.

Annex:

SURVEY ON CURRENT PUBLIC PROCUREMENT LEGISLATION IN IRAQ
TO BE COMPLETED BY MINISTRIES AND REGIONAL AUTHORITIES

Dear Expert,

The OECD (Organisation for Economic Co-operation and Development) is contacting you in your capacity as an expert and would be pleased if you could assist in sharing your views and expertise in the area of public procurement regulations in Iraq.

The request is motivated by the fact that the OECD wishes to support the Government of Iraq in its undertaking to enhance economic and social development. The OECD is a unique forum where the governments of 30 countries come together to address the economic, social and governance challenges of globalisation. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies. (For further information on the OECD please consult our webpage at <http://www.oecd.org/>)

In order to improve transparency in public procurement provisions, the OECD proposes to analyse the Iraqi public procurement regulation in place in light of international good practice. As part of the OECD work-method, it is important to have a better understanding of the current situation and perspectives. To be able to have an informed opinion, we would be pleased if you could participate in this questionnaire and answer the questions below. Additional pages are provided for your answers.

Please address your replies and return the entire completed questionnaire via email to:

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Baghdad: +964 (0) 7904 397 488
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Email: aniko.hrubi@oecd.org

Thank you in advance for your very much appreciated contributions.

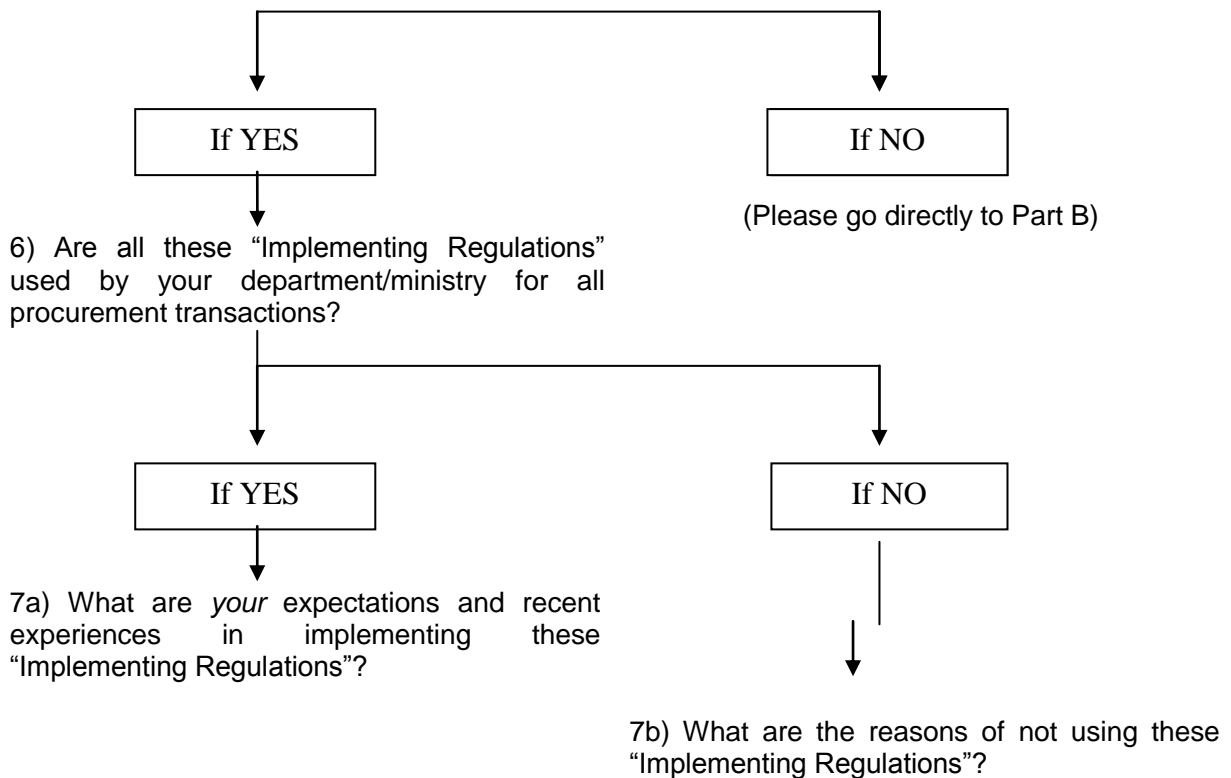
PART A) GENERAL QUESTIONS

General Context

- 1) Please describe the responsibility that your department plays in the overall procurement process for your ministry?
- 2) Please describe *your* role in the overall procurement process for your ministry?

Legal sources of public procurement

- 3) What are the current and past legislations / instructions / guides that your department follows in procurement processes for your ministry?
- 4) What other regulations / instructions / guides used by your ministry are you aware of in the procurement process? Do those regulations address all the needs of your ministry for guidance in the overall procurement process?
- 5) Are you aware of procurement law N° (1) 2007, entitled “Implementing Regulations for Governmental Contracts (Procurement Law)”?



PART B)
QUESTIONS RELATED TO THE PROCUREMENT LEGISLATIONS / INSTRUCTIONS / GUIDES
APPLIED IN YOUR ORGANISATION

Scope of the application

- 8) Are the procurement legislations / instructions / guides that you use applied:
- to state-owned enterprises? If not, why?
 - to international-funded contracts? If not, why?

Tender Methods

- 9) What type of tender contracts does your department/ministry use? E.g. single source, direct invitation, open tender, etc.
- 10) What is the proportion of direct invitation and single source tenders that your department uses compared to all tender contracts offered by your ministry?
- 11) Under what conditions and circumstances are exceptions from open and competitive tendering allowed?

Advertising periods and methods

- 12) What are the lengths of the advertising periods in use? Are they different depending on the value and/or the nature (supplies/services/public works) of the contract?
- 13) What methods for advertisement does your department/ministry use in the procurement process? News papers (which ones), radio, television, websites, etc.

Evaluation criteria

- 14) Do you solely use the lowest price criteria for the selection of the best tender candidate? If not, what other evaluation criteria help guide the decisions of the officials awarding procurement contracts? How, by whom and when are these tender evaluation criteria defined? Are they indicated in the tender notice?

Indicative price

- 15) Does your department/ministry develop a cost estimate for each tender before it is published? If yes, how is the cost estimate calculated? Which department in your ministry prepares the cost estimate? How much flexibility does your department/ministry have to deviate from the cost estimate?

Capacity of companies

- 16) When examining the offers submitted, do you start with the evaluation of the "capacity" of the company or with its submitted price? Does it happen that certain candidates are eliminated from the procurement process because of lack of "capacity" or previous poor experiences? How do you obtain this specific information?
- 17) For the purpose of assessing the technical capability of domestic tender candidates, does your department/ministry always rely on the company-classification system designed by the chambers of commerce and/or by the Ministry of Planning? Does your department/ministry think the chambers of commerce/Ministry of Planning's company classification systems are fair and accurate representations of domestic tender candidates? Are you aware of other company-classification systems used by the government? If so, please specify which institutions/ministry elaborated it, and how it is used.

Results of the tenders

18) Do you publish the results of the tenders? What is the information published (name of the winner, price, the reason other candidates were disqualified or failed, etc.)? Where these information are published (e.g. in newspapers (which ones), radio, television, websites, etc.)?

Complaint system

19) What are the mechanisms in place for challenging decisions related to the procurement procedure? How does the system operate? Do you have any statistics about complaint cases submitted /settled?

Capacity and professionalism

20) How does your department ensure that the overall procurement process is managed by qualified individuals especially for the definition of the needs and for the opening and evaluation committees?

Challenges of implementation

21) What do you consider as main challenges of the implementation of the applied procurement legislations / instructions / guides put forth in the Implementing Regulations for Governmental Contracts (Procurement Law) No (1) of 2007?

Integrity measures

22) What rules and measures are in place to promote integrity and prevent corruption in public procurement? In particular, do you have

- code of conducts?
- rules for managing conflict-of-interest?
- assets / income declaration for procurement officials?
- procedures to report misconduct in the workplace?
- other measures? If yes, please specify.