



# Public procurement in the post-war reconstruction of Ukraine – main challenges

8 August 2023

## Key messages

- The current procurement system of Ukraine, based on the 2015 Public Procurement Law, provides a sound foundation for managing the public procurement process and is well aligned with international standards. The legal and institutional foundations of the current system should be preserved and strengthened.
- All contracts for reconstruction projects in Ukraine (both current and after the war) should be awarded in accordance with internationally recognised standards of public procurement. The public procurement system should enable clear and fast, but also transparent, fair and competitive award of procurement contracts and efficient management and oversight of concluded contracts.
- A unified legal framework for awarding all contracts for the reconstruction of Ukraine, regardless of the source of financing, would streamline the tendering process. It is recommendable that the framework, fully aligned with international standards, be based on the Ukrainian public procurement legislation. The multiplication of procedural rules and requirements would lead to an increase of the administrative burden and the time required of procurement officers as well as economic operators.
- The Ukrainian public procurement legislation would benefit from a revision in order to simplify requirements and allow for a clear and fast contract award process, without compromising its integrity and transparency and the protection of bidders' rights.
- The existing tools for promoting transparency (the electronic procurement system ProZorro) could be made available for all public contracts for the reconstruction process, regardless of the source of financing. It will also be necessary to support the integration of ProZorro with the future Electronic Reconstruction Management System (ERMS - or DREAM), which will enhance the transparency and accountability of the whole reconstruction process.

- The procurement procedures should be implemented by Ukrainian institutions, with extensive, continuous, international support both for the central procurement institutions managing the system as a whole and for the contracting authorities implementing contract award procedures at central, regional and local levels.
- Risks of corruption across the procurement cycle pose a significant threat to the integrity of reconstruction and need to be identified, assessed and managed effectively, including by strengthening internal control and audit, external audit, and the procurement review (remedies) system, managing conflict of interest, providing whistleblowing channels and protection, making use of data analysis, preventing undue influence in decision-making and facilitating social accountability.

## Background and key issues

Russia's war of aggression is causing immense destruction of Ukrainian infrastructure: destroyed or heavily damaged residential buildings and houses, hospitals, schools, as well as airports, bridges, factories and other infrastructure. According to an estimate prepared jointly by the Government of Ukraine, the World Bank Group, the European Commission, and the United Nations in March 2023, the cost of reconstruction and recovery in Ukraine will exceed EUR 383 billion, which is 2.6 times the 2022 GDP of Ukraine<sup>1</sup>.

### *Reconstruction process – basic principles*

It will take time and money to rebuild the country. Judging from the solidarity shown from all over the world there is no doubt that financial resources will be provided generously in various forms. In June 2023, the European Commission announced the establishment of a new instrument, the Ukraine Facility, to provide predictable financial support to Ukraine over the 2024-2027 period. The Facility will provide up to EUR 50 billion for State and recovery needs in the short term as well as for reconstruction and modernisation in the medium term. Support continues to come from the EU and other international donors and organisations. Assistance will also be provided directly on a bilateral basis by countries, aid organisations or private donors.

The speed of the reconstruction of infrastructure will not only depend on the level of available funds but also on sound and efficient tools and mechanisms being used for their allocation and spending.

In the Lugano Declaration of July 2022, Ukraine, supporting countries and international organisations agreed on the basic principles that will govern the recovery process:

- **Partnership.** The recovery process is led and driven by Ukraine and conducted in partnership with its international partners. The recovery effort has to be based on a sound and ongoing needs assessment process. Priorities are aligned and there is joint planning for results, accountability for financial flows, and effective co-ordination.
- **Reform focus.** The recovery process has to contribute to accelerating, broadening and achieving Ukraine's reform efforts and resilience in line with Ukraine's European path.
- **Transparency, accountability and rule of law.** The recovery process has to be transparent and accountable to the people of Ukraine. The rule of law must be systematically strengthened and corruption eradicated. All funding for recovery needs to be fair and transparent.

<sup>1</sup> World Bank (2023) *Ukraine Rapid Damage and Needs Assessment: February 2022 - February 2023* (English), World Bank Group, Washington, D.C. <http://documents.worldbank.org/curated/en/099184503212328877/P1801740d1177f03c0ab180057556615497>

- **Democratic participation.** The recovery process has to be a whole-of-society effort, rooted in democratic participation by the population, including those displaced or returning from abroad, local self-governance and effective decentralisation.
- **Multi-stakeholder engagement.** The recovery process has to facilitate collaboration between national and international actors, including from the private sector, civil society, academia and local government.
- **Gender equality and inclusion.** The recovery process has to be inclusive and ensure gender equality and respect for human rights, including economic, social and cultural rights. Recovery needs to benefit all, and no part of society should be left behind. Disparities need to be reduced.
- **Sustainability.** The recovery process has to rebuild Ukraine in a sustainable manner aligned with the 2030 Agenda for sustainable development and the Paris Agreement, integrating social, economic and environmental dimensions including green transition.

Several of the above principles will have direct impact on the public procurement rules and procedures that will apply to the design, award and execution of recovery projects.

On 23 June 2022, Ukraine was granted EU candidate country status and the journey to EU membership began. As part of the accession process, Ukraine will be required to fully harmonise its national legislation with the EU *acquis*. It is recommendable that the reform of the public procurement system starts as soon as possible, as it would be highly beneficial for the recovery process if the principles of the EU public procurement system (equal treatment, non-discrimination, transparency, proportionality and competition) fully applied to the award of public contracts in the framework of the recovery process.

### ***Public procurement system in Ukraine – current situation***

The 2015 Ukrainian Public Procurement Law (PPL) reflects the key elements of the EU *acquis*. However, significant amendments will be required to fully align it with the EU Directives. The issues requiring further alignment include: the scope (exclusions), procurement procedures and techniques, selection of economic operators and contract award. In its implementation, the PPL strongly prioritises contract award based on the lowest price only (99.99 % of contracts awarded in 2022, whereas the EU average is 55%). The application of the local content requirement (added to the PPL in 2021) is not in line with the principle of equal treatment and discriminates against EU companies, even if it is only applied to contracts below the EU thresholds.

After the outbreak of the Russian war of aggression against Ukraine in February 2022, the procurement legislation was completely revised several times. Initially, the application of the PPL was partially suspended. As of October 2022, the procurement system under martial law is regulated by Decree No. 1178, which provides for simplified and faster, but still somehow competitive and transparent, procurement procedures. Decree No. 1178 has been generally well received due to the flexibilities it provides. However, it is not a long-term solution, since it further deviates from the international standards of transparency and competition. Concerns remain about the rules being unclear, open to different interpretations, and being modified too often.

The institutional framework for public procurement in Ukraine is in place. The Public Procurement and Competition Policy Department of the Ministry of Economy (MoE) is responsible for regulating and implementing public procurement policy, preparing draft legislation, managing the e-procurement system, collecting and disseminating information and developing manuals, guidelines and other tools, providing recommendations and advice and facilitating international co-operation. The MoE is recognised by the procurement community as a responsive and co-operative institution. The State Audit Service monitors procurement procedures but underutilises automated risk indicators.

The Antimonopoly Committee of Ukraine (AMCU) is responsible for reviewing complaints in public procurement. In 2021 it received 14 828 complaints. Provisions on the procurement review process by the AMCU are largely in line with international standards. The AMCU respects the statutory time limits for deciding on complaints (14 working days). The AMCU's decisions refer to applicable law and principles and generally demonstrate a clear rationale. However, staff issues and the large number of appeals are serious challenges. The review process is fully digitalised, but the method of publication of decisions does not support user-friendly browsing and searching.

The *ProZorro* e-procurement system is widely recognised for its transparency and user-friendliness. When martial law was introduced, the *ProZorro* system was quickly adjusted to develop and implement simplified functionalities, to align with the simplified procedures.

## What are the impacts?

Several factors might affect the quality of procurement operations during the implementation of the reconstruction process.

### **Corruption**

Corruption has been a serious and wide-spread problem in the Ukrainian administration. Corruption experience and corruption perception in Ukraine has decreased during the war but remains high: according to the surveys conducted by OECD/SIGMA, in 2022 8.9 % of citizens and 15.4 % of businesspeople have experienced corruption (in 2018: 14.1 % and 20.1 % respectively).

Corruption is the most serious threat to the integrity of the public procurement process, undermining the basic principles of the process, leading to artificially high prices and low quality of performance, lowering competition, discouraging business participation and damaging public trust.

The significant scale of funds involved in the future reconstruction of infrastructure in Ukraine will mean additional and increased risks of fraud and corruption throughout the procurement cycle.

Several measures to tackle integrity threats in all phases of the procurement process (pre-tendering, tendering, post-award) will have to be implemented, continuously monitored and improved. These include:

- Implementation of efficient integrity and anti-corruption measures building on corruption risk assessments (at organisational, sectoral and territorial levels) and aiming at strengthening internal control and audit, managing conflict of interest, following-up on asset declarations, providing whistleblowing channels and protection, using data analysis as well as preventing undue influence in decision-making.
- Transparency at all stages of the procurement cycle (including with respect to the decision phase or contract performance, for example).
- A rapid and efficient independent review mechanism available to dissatisfied economic operators.
- Professional, independent external audit, focused on performance audit. Effective enforcement of laws and regulations through disciplinary and administrative proceedings as well as independent criminal investigations and the sanctioning of corruption by the judiciary and anti-corruption agencies.
- Participation of civil society in the monitoring process (with full access to procurement files) to promote social accountability.

### ***Long and cumbersome tendering procedures***

Overregulation, inefficiency of institutions or a formalistic approach by procurement officers in contracting authorities (often also by managers and internal and external auditors) would lead to time-consuming and costly procurement procedures that might go on for months or even years before contracts are effectively awarded and executed<sup>2</sup>. This would be a disastrous result that would overthrow the very objective of the public procurement system, invalidate the economic savings and scare off potential bidders. Time will be crucial in the reconstruction process, even more than in regular procurement practice.

The procurement legislation (including secondary legislation) should be reviewed in order to identify room for simplification and acceleration without sacrificing safeguards for transparency and integrity, competition or the legal protection of the rights of economic operators. A balance will have to be found between the need for rigid protection of transparency and equal treatment and the need for competition and flexibility, to allow procurement officers to focus and make decisions quickly.

A monitoring mechanism should be able to continuously identify bottlenecks in the institutional framework at the central and regional level. All central public procurement institutions (including, first of all, the procurement review system) should be strengthened (expanded to match the new, expected level of their workflow) and all necessary resources (material and human) should be made available to them. Technical assistance projects should focus on accelerated capacity building for their (new) staff.

International donors should assist in implementing an extensive professionalisation programme to provide massive training for procurement officers in contracting authorities at all levels of public administration across the country.

### ***Preferential (national) treatment***

There will be pressure both from domestic business and from some donor countries to allow for preferential treatment of domestic (Ukrainian) companies or companies from donor countries (preferential treatment linked to the source of financing).

Any form of preferential treatment distorts the market, reduces competition and leads to inflated prices. It reduces the pressure on bidders to be competitive by offering better products (services) and lower prices. Preferential treatment might even lead to the bypassing of the competitive procurement rules and the direct awarding of contracts.

Ukraine, as an EU candidate country, will have to respect the basic principles of the EU Treaty underlying the EU public procurement system: equal treatment and prohibition of discrimination based on nationality.

However, some forms of support for the local economy are possible under the EU public procurement legislation (for example social clauses to promote local employment) and can be considered.

### ***Insufficient capacity of implementing institutions***

The number, scale and complexity of procurement procedures related to the construction process, to be awarded over relatively short period, will be overwhelming. This task will be a challenge for the procurement community in Ukraine.

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<sup>2</sup> In a survey conducted by OECD/SIGMA among economic operators in Ukraine, three main factors have been indicated as obstacles to participate in public tenders: "contract award seemed to be criteria biased and tailor-made for certain participants (18,5 % respondents), "the procedure too bureaucratic or burdensome" (17%) and "unclear selection or evaluation criteria" (8,1%).

The contracting authorities and economic operators will need various forms of support by the international community and the Ukrainian central public procurement institutions to boost the professional capacity of procurement practitioners.

The support activities could include:

- Development and delivery of large-scale, continuous, practical training on public procurement (including on-line training) for both the public and private sectors.
- Establishment of central and regional advisory support centres (perhaps in co-operation with business associations and civil society organisations), with the main task of providing direct assistance to the public sector to organise tenders and to the private sector to facilitate their participation in tendering.
- Development of training materials, practical guidelines, manuals.
- Maintaining a public database of standard tender documents (standard technical specifications for most common types of works, services and goods), developed in close co-operation with representatives of economic operators, to streamline and standardise the tender design phase by contracting authorities.
- More direct support to the Ukrainian institutions engaged in the reconstruction process (at the central, regional and local levels), including providing direct budget support, training and secondment of procurement specialists able to work in the Ukrainian institutions.

## What is the outlook?

**There is agreement in the donor community that all contracts for reconstruction projects (both current and after the war) should be awarded in accordance with internationally recognised standards of public procurement.**

Several conditions will have to be met in order to achieve successful implementation of the reconstruction process and generate additional benefits for the Ukrainian state, economy and society.

**The public procurement system should enable clear and fast, but also transparent, fair and competitive award of procurement contracts and efficient management and oversight of concluded contracts.**

The current procurement system of Ukraine, based on the 2015 Public Procurement Law (PPL), provides a **sound foundation for managing the public procurement process and is already well aligned with international standards**. The recovery process would benefit from preserving and strengthening the legal and institutional foundations of the current system.

**Therefore, in principle, it is recommendable that all contract award procedures for recovery and reconstruction in Ukraine be governed by the Ukrainian PPL.**

Despite the advantages of the current legal framework, some provisions might need adjustments in order to **simplify and accelerate** the procurement procedures, for instance by reducing some formal requirements, or accelerating the review procedures. This should be done without compromising the overall fairness and transparency and the protection of bidders' rights. Access of foreign economic operators could be simplified by allowing documents to be submitted in English. However, the possibility of conducting the procurement process in English should be carefully considered to take into account the capacity of contracting authorities and of review and audit institutions. It could possibly be allowed in the case of projects of high value.



The usual practice of **international organisations** is that contracts funded or co-funded by them are subject to the procedures set by those organisations. There may also be pressure on the side of foreign donors to procure goods from the donor countries instead of applying fully transparent and competitive procedure. The multiplication of procedural rules and requirements may lead to an increase of the administrative burden and the time required of procurement officers as well as economic operators. Applying a unified legal framework for awarding all contracts for the reconstruction of Ukraine, regardless of their source of financing, would significantly simplify and streamline the procurement process.

It would be beneficial for the transparency of the whole process and for reducing the opportunities for fraud and corruption, if **all contracts, including those awarded outside of the scope of the Ukrainian PPL, were made publicly available via the ProZorro system** (both at the contract award phase and contract execution, in accordance with the Open Contracting Data Standard).

The clear need to speed up the procurement process **should not weaken the legal protection of the legitimate interests of economic operators** in public procurement. Aggrieved bidders should be allowed to challenge all decisions of procuring entities adopted in infringement of procurement rules and provisions. However, the capacity of the review institutions will need strengthening.

It is obvious that domestic economic operators suffer the full force of the disruption caused by the war and they may not be able to provide, at least initially, the full array of goods and services needed for the reconstruction process. Shortages of equipment, financial and material resources and workforce are inevitable. Therefore, the **procurement system should be able to attract reliable foreign suppliers** to fulfil the needs of procuring entities, supported when possible by national suppliers in the role of subcontractors. Interest of foreign companies in applying for bidding opportunities in Ukraine, as in any economy, is closely correlated with the fairness and transparency of the procurement system as well as access to an impartial and independent review of the legality of the decisions of procuring entities.

Public procurement for the reconstruction of infrastructure should also be used as an **instrument to rebuild, improve and strengthen the Ukrainian economy and society**. The procurement process should promote environmentally friendly design and focus on the highest quality of performance. Social, environmental and innovative solutions could be promoted at various stages of the procurement process: in the description of the object of procurement, through criteria for selection of bidders and tenders or in particular conditions of performance of contracts.

Mainstreaming responsible business conduct standards in procurement as a useful tool that development actors can rely on could help create a level playing field and support public actors engaging the private sector to ensure that the partners they work with or invest in are acting responsibly according to international standards<sup>3</sup>.

Public procurement in the process of recovery should support the (re)building of the economy and **strengthen domestic businesses, in line with the non-discrimination principle and without introducing barriers for foreign companies**. In order to encourage participation of local companies wherever possible, partial advance payments should be applied and formal requirements should be strictly proportionate and not excessively demanding. The PPL and standard (model) procurement documents should be reviewed in order to reduce any obstacles to efficient procurement. Tender and performance guarantees and documentary evidence requirements should only be applied in strictly limited circumstances and entirely removed in emergency situations. For obvious, practical reasons, documentary evidence proving fulfilment of qualification and selection criteria should be, in principle, replaced by self-declarations from economic operators, and formal certificates, if any, required only from the best ranked bidders before concluding the contract.

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<sup>3</sup> OECD (2023), "Responsible business conduct implications of Russia's invasion of Ukraine", OECD Policy Responses on the Impacts of the War in Ukraine, OECD Publishing, Paris, <https://doi.org/10.1787/f222a4d1-en>.

To minimise the risk of fraud and corruption while avoiding bureaucratic burden and allowing fast and efficient procurement, Ukraine should implement **risk-based and efficient prevention and control measures** together with **increased transparency and ex post audits** of decision-making, the award processes and the execution of contracts. The system of monitoring based on a central electronic portal (*ProZorro*) for contract award and execution could be extended to cover not only contracts that are awarded on the basis of the PPL but also those exempted from it, including contracts fully or partly funded by international donors. Violations of procurement rules need to be effectively **detected** (e.g. through reports from whistleblowers, use of data analysis or audits), **investigated** and **sanctioned** in a timely, objective and fair manner by applying disciplinary, administrative and/or criminal penalties. Finally, the participation of **civil society** in monitoring the process and outcome of procurement would be beneficial to allow for additional social accountability.

Significant gains could be achieved by **centralising the procurement mechanisms (also at regional level)**. Aggregated demand for identical and similar goods or services could lead, in accordance with economy of scale, to reduced costs on the side of public purchasers (implementing agencies). Higher value contracts are also likely to attract more interest from domestic and in particular foreign companies. In order to avoid negative impact of clustered contracts on competition, such large procurements could be covered by multi-party framework agreements and divided into lots in order to enable wider participation of SMEs. Ukraine already has a number of centralised purchasing bodies dealing with the purchase of medicines as well as other goods and services used by the public administration. They could be provided with further support as they have an enormous role to play. The provisions of the PPL could be also modified in order to increase possibilities for using occasional joint procurement by various procuring entities.

The central public procurement institutions in Ukraine are mature enough to govern the whole complex procurement process. However, extensive international **support for contracting authorities** (material support and support for building professional capacity) will be required, especially at local and regional levels, where skills and professional procurement knowledge are not always adequate.

## What are the key considerations for policy makers?

**A sound public procurement system** will be key for successful reconstruction of Ukrainian public infrastructure. In this context, it would be recommendable to consider the following prerequisites:

- A unified legal framework aligned with international standards that covers the totality of public procurement including both public sector and utilities, as well as public contracts and concessions and public-private partnerships. The legal framework should provide for transparent, competitive, fast and efficient contract award and management procedures and for legal protection of economic operators.
- Full compliance of the Ukrainian public procurement system with the internationally recognised public procurement principles, policies, legislation and practice (especially vital in the context of EU membership negotiations).
- Reduction of administrative burden and simplification of rules to allow for clear and fast procurement processes.
- Incentives to attract foreign capital and companies, not only by applying the non-discriminatory criteria, but also by removing bureaucratic and practical barriers for their participation.
- Instruments to promote sustainable procurement and strengthen local economy, without violating the non-discrimination principle.



- Increased transparency and monitoring coupled with a balanced approach to centralisation of procurement operations to minimise fraud and corruption.
- Support for central procurement institutions (including the review and control system) with a focus on strengthening the professional and technical capacity of these institutions.
- Support for building capacity of contracting authorities and economic operators, especially small and medium enterprises, to encourage them to participate in the procurement market.
- Strong independent audit and monitoring of procurement operations (both contract award procedures and contract execution) – both by state audit (control) institutions and civil society organisations.

## Further reading

World Bank (2023) *Ukraine Rapid Damage and Needs Assessment: February 2022 - February 2023* (English), World Bank Group, Washington, D.C. <http://documents.worldbank.org/curated/en/099184503212328877/P1801740d1177f03c0ab180057556615497>.

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OECD (2017) Recommendation of the Council on Public Integrity [OECD-Recommendation-Public-Integrity.pdf](#)

OECD (2015) Recommendation of the Council on Public Procurement [OECD-Recommendation-on-Public-Procurement.pdf](#)

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