

Country Profile

Tunisia

I. Public Procurement Legislation Review Summary

a. Legislative framework

Public procurement in Tunisia is governed by Decree 2002-3158 of 17 December 2002 regulating public procurement, and its subsequent amendments decree 2011-623 of 23 May 2011 (The PPL). Since 2008 the PPL has been subject to 6 amendments. The most recent amendment, Decree number 2012-515 of 2 June 2012, introduced new public procurement thresholds and the requirement to publish tenders on the website of the National Monitoring Office for Public Procurement www.marchespublics.gov.tn. Although not enacted under a single text and located in different sources, Tunisian PPL is based on the principles of fair competition and non-discrimination. However, the PPL does allow for domestic preferences which introduces an element of discrimination into the public procurement process and hinders the achievement of fair competition. Although the legislative review identified several regulatory gaps, Tunisian PPL aims to regulate all three phases of the public procurement process: pre-tendering, tendering, and post-tendering.

Chart 1: Tunisia - Quality of public procurement legal framework



Note: The chart presents the scores for the quality of the public procurement legal framework for each Core Principles benchmark indicator. The scores have been calculated on the basis of a legislation questionnaire, based on the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local legal advisers. Total scores are presented as a percentage with 100 per cent representing the optimal score for each Core Principles benchmark indicator.

Source: 2012 SEMED Public Procurement Assessment

On average Tunisian PPL scored medium compliance (64 per cent) regarding the quality of its public procurement legal framework compared with other EBRD countries of operation. **Chart 1** presents the scores for the quality of public procurement legal framework for each Core Principles indicator. In the review, Tunisian PPL scored high compliance for the competition indicator (85 per cent), medium compliance for the integrity (75 per cent), transparency (70 per cent), economy (70 per cent), efficiency (77.5 per cent), uniformity (72.5 per cent), stability (72.5 per cent), flexibility (70 per cent) indicators, low compliance for the accountability (57.5 per cent) indicator as well as very low compliance for the enforceability (47.5 per cent) indicator. The resultant regulatory gaps suggest that the PPL is rigid, cannot accommodate the changing market, and does not implement sufficient instruments in promoting accountability across all three phases of the process. Regarding the proportionality indicators Tunisian PPL does not recognise that the size of the contract matters and low value contracts shall be purchased in simple procedures, adequate to their value and complexity. ^{Article 12 of the Decree 2011-623 of May 23, 2011 providing specific provisions relating to the regulation of public procurements.}

b. Regulatory institutions

The legislative review highlighted that there is no independent dedicated remedies body to handle complaints related to public procurement. However, the Tunisian public procurement institutional framework is complex with several institutions responsible for the harmonization of rules and the monitoring of public procurement compliance. These include:

- **Office of the Prime Ministry**
The Office of the Prime Ministry (OPM) is responsible for the coordination of national procurement planning and administers all other public procurement regulatory institutions. The OPM does not interfere with the functioning of other regulatory institutions by issuing instructions since each regulatory institution administers its own decision making process.
- **High Committee of Public Procurement** ("La Commission Supérieure des Marchés Publics")
The High Committee of Public Procurement (HCPP) is a unit within the OPM. The HCPP consists of representatives of various Ministries and is involved in all three phases of the public procurement process. The HCPP is the highest regulatory institution and does not report to any other regulatory institution. The HCPP comprised of 8 committees, with each committee specializing in a specific field. For example: buildings, civil engineering, and other related studies etc...

- **National Monitoring Office for Public Procurement** (“L’Observatoire Nationale des Marchés Publics”)

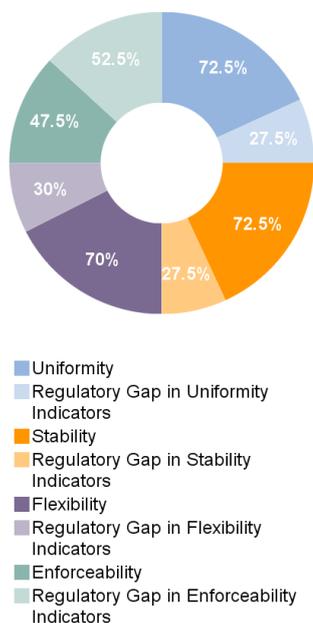
The National Monitoring Office for Public Procurement (NMOPP) is an agency within the HCPP. The NMOPP administers a data base which collects and analyses public procurement data, suggests appropriate measures and amendments to improve the PPL, and reviews and evaluates public procurement developments.
- **Follow-up and Investigations Committee** (“Le Comité de Suivi et d’Enquete”)

The Follow-up and Investigations Committee (FUIC) is an ad hoc entity established to address matters pertaining to public procurement. The FUIC is a unit within the OPM.
- **Committee for Amicable Settlement of Disputes** “Comité Consultatif de Règlement Amiable des Litiges”

The Committee for Amicable Settlement and Disputes (CASD) is an arbitration committee established within the OPM whose mission is to secure amicable settlements of disputes relating to public procurement.

Chart 2 presents the results for quality of the public procurement legislation and institutional framework benchmarked against the EBRD Core Principles for institutional and enforcement measures. The PPL scored medium compliance for the uniformity (72 per cent), stability (72.5 per cent), and flexibility (70 per cent) indicators, and low compliance for the enforceability (47.5 per cent) indicator. The regulatory gap for the flexibility indicator is a result of the bureaucratic structure of the system, which is inflexible and cannot accommodate the changing market.

Chart 2: Tunisia - Quality of public procurement institutional and enforcement framework



Note: The chart presents the scores for the quality of the public procurement institutional and enforcement framework. The scores have been calculated on the basis of a legislation questionnaire based on the EBRD Core Principles benchmark for an Efficient Public Procurement Framework and answered by local legal advisers. Total scores are presented as a percentage with 100 per cent (one quarter of the pie chart) representing the optimal score for each of the four institutional and enforcement measures. A regulatory gap, the difference between the assessment results and the benchmark, is marked in light blue, light orange, light purple and light green respectively.

Source: 2012 SEMED Public Procurement Assessment

c. Scope of regulation

Although the review identified regulatory gaps, Tunisian PPL aims to regulate all three phases of the public procurement process. Decree 2002-3158 applies to public procurements carried out for the state (“L’Etat”), municipalities (“Collectivités locales”), public institutions (“Etablissement Publics”), non administrative public institutions (“Les Etablissements Publics a Caractere Non Administratifs”), and publicly owned companies (“Les Entreprises Publiques”). In addition, the PPL contains some specific procurement rules Law number 75-35 of 14 May 1975 related to local public collectivities’ budget, law number 75-33 of 14 May, 1975 related to municipalities; and the organic law number 89-11 of 4 February, 1989 related to regional councils.

Still, some public sector entities are exempt totally or partially from the application of the PPL Sector opened to private companies such as telecommunication, air transport, and media, with procurement for these entities governed by private law.

Pre-tendering: The PPL provides for some regulation of the pre-tendering phase of the procurement process. The PPL requires contracting entities to define their needs, prepare a procurement plan, fix a budget, and choose the appropriate procurement method before launching the procurement. In addition, the PPL states that the technical and financial award criteria should be published with the full terms of reference. The PPL scored 37 per cent (low compliance) concerning the speed of the procedure suggesting that the pre-tendering phase is frequently slow, bureaucratic and inflexible.

Tendering: Tunisian PPL prescribes procedures for the tendering phase. Tenders should be submitted within the deadline stipulated in the terms of reference. The PPL sets out procedures in which a technical evaluation of the bid is separated from the financial evaluation. Participants are bound by their bid for a period of 60 days, unless the terms of reference provide another duration - this duration cannot exceed 120 days. Tenders are evaluated by tender evaluation committees (‘la commission de dépouillement des offres’) and awarded based on the tender evaluation criteria stipulated in the tender documents. Tunisian PPL determines a clear test as to when the contracting entity should seek a tender security, which may amount to 0.5 to 1.5

per cent of the tender price. However, current regulation does not authorize the use of electronic submission of bids or other electronic communication in public tenders. The PPL scored 75 per cent (medium compliance) concerning the speed of the procedure.

Post-tendering: Tunisian PPL aims to regulate procedures for the post-tendering phase. The PPL requires that any change to a contract shall be subject to an amendment to be agreed between the parties. The PPL provides that the contracting entity shall apply financial penalties in the case that the contract is not performed to schedule. The PPL scored 100 per cent (very high compliance) concerning the speed of the procedure.

d. Eligibility rules

Article 14 of the Decree n°2002-3158 of 17 December 2002 lists several public procurement eligibility rules including: compliance with tax regulations and social security rules; not being under bankruptcy or any other insolvency proceeding; not being a prior agent of the contracting entity; and, not having offered any gift or made any promise in order to manipulate the results of the proceedings. Moreover, the bidder must be able to comply with the terms of reference of the public procurement.

Tunisian PPL allows contracting entities to establish additional qualification criteria. These criteria can differ from one contract to another and for specific contracts including: enhanced financial capacity; technical experience; environmental requirements; compliance with national and international standards; and, references. In addition, bidders may be required to submit relevant documents, including certificates and licenses, proving compliance with published requirements.

e. Procurement methods

Decree 2002-3158 of 17 December 2002 lists the procurement methods available to contracting entities. These include:

- Open call for tender - 'appel d'offres'
- Open call for tender with pre-qualification - 'Appel d'offres précédé par une pre selection'
- Negotiated procurements - 'Marchés négociés'
- Large consultation - 'Consultation élargie'

Open call for tender is the default procurement method, and can be used for national (open only to Tunisian entities) or international (open to Tunisian and international entities) tenders. The choice between a national or international tender rests with the contracting entity taking into consideration the specificity of the procurement. *Open call for tender with pre-selection, negotiated procurements or large consultation* are only used in certain cases and under specific conditions as defined by the PPL Decree 2002-3158 of December 17, 2002 regulating the public procurements lists the procurement procedures and the conditions of application for each procedure: Open call for tenders (Chapter 2, Article 30 and 31 of the Decree); Open call for tender with pre-selection (Chapter 3, article 32 to 37 of the Decree); Large consultation

procedure (Chapter 4, article 38 and 39 of the Decree); Negotiated Procurement as defined by Tunisian PPL (Chapter 5, Article 40 of the Decree 2002-3158)

Large consultation is used in specific cases listed in the Decree 2002-3158. *Large consultation* procedure follows the same procedure as the *open call for tender* except that the tender is not published. *Large consultation* can be used in 4 limited cases: for procurements with public safety and national defence necessities, for procurements that did not receive any offer or only non acceptable offers, for small value procurements as stated in Decree 2002-3158, for procurements related to forestry, water and ground conversation works.

In the PPL Direct Contracting is a procurement method identified as Negotiated Procurements. The contracting entity may use this procedure without following the established tender procedures. The PPL states that this procedure may be used when the procurement can only be granted to a specific provider (exclusive provider), or for specific projects and without following the established tender procedures. Furthermore *direct contracting* between public sector entities is allowed. However, although there is no specific procurement procedure to follow the PPL rules still apply.

f. Procurement process regulation

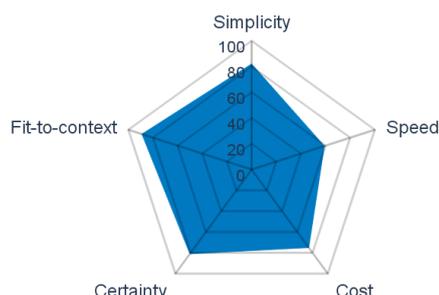
Tunisian PPL does not prescribe minimum deadlines for any of the three phases of the public procurement process. However, the PPL provides that the duration of validity of the submitted tender will be 60 days, and that the terms of reference may provide a longer period up to a maximum of 120 days. The PPL regulates the procurement process with the procedures for each procurement method clearly defined.

Tunisian PPL does not contain specific conditions related to the cost of participation in the procurement process. However, the tender documents are not free of charge as the PPL provides that a cost should be attached to the tender documents. Although the cost of the documents is low, for most contractors this will not constitute a barrier to participation. The review highlighted that there are issues, in particular for complex tenders, concerning the speed of the procedure. The PPL prescribes several provisions setting fundamental principles relating to impartiality, predictability, and corruption, and provides procurement procedures to meet different business needs containing specific provisions for simple and complex contracts. For example, the award criteria for simple contracts is the lowest priced bid, and for complex contracts the most economically advantageous tender.

Once the procurement is granted and the contract signed, the competent Public Procurement Committee (PPC) monitors the performance of the contract. Any change in the performance of the contract shall be submitted to the PPC. For long-term projects - greater than one budget year - it is compulsory that a financial programme is established to ensure that financing is available when required. The PPL requires appropriate budget authorization prior to publication of any contract notice, allowing the contracting entity to amend or extend the contract if required.

Chart 3 presents the assessment results for efficiency of regulation of the public procurement process for key LEC indicators. The PPL scored high compliance for the simplicity (82 per cent), certainty (81 per cent) and fit-to-context (89 per cent) indicators, medium compliance for the cost (75 per cent) indicator, and low compliance for the speed (59 per cent) indicator. The regulatory gap in the speed indicator reflects that the PPL does not prescribe minimum deadlines for the three phases of the public procurement process.

Chart 3: Tunisia - Efficiency of regulation of the public procurement process (average scores for key LEC indicators)



Notes: The chart presents the average scores for the key Legal Efficiency Concept benchmark indicators for efficiency of regulation of the public procurement process. The scores have been calculated on the basis of a legislation questionnaire based on the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local legal advisers. Total scores are presented as a percentage with 100 per cent representing the optimal score for each Legal Efficiency Concept benchmark indicator.

Source: 2012 SEMED Public Procurement Assessment

g. National review and remedies mechanisms for complaints related to public procurement

Tunisian PPL provides an administrative review and remedies mechanism for each stage of the public procurement process, which is monitored by an administrative structure established within the OPM. Members of the review and remedies bodies are appointed by the Prime Minister.

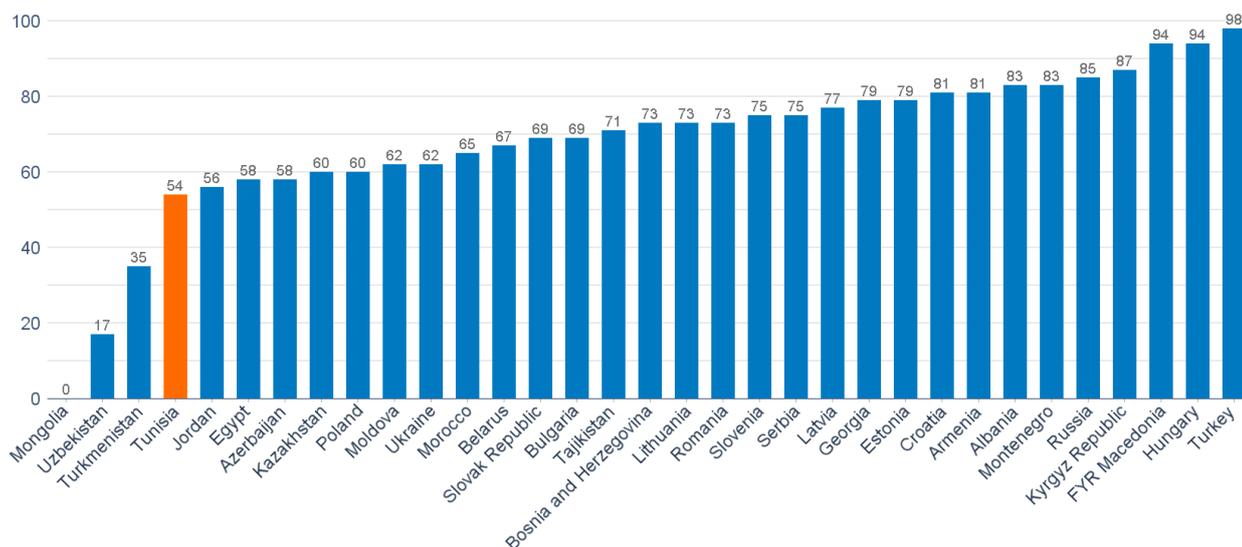
Pre-tendering: During this internal phase, which involves the contracting entity and the competent PPC, the PPL provides a review mechanism concerning approval of the tender documents prior to publication.

Tendering: Complaints related to breaches of the fundamental principles of the procurement such as transparency, equal treatment between participants and fair competition are reviewed by the FUIC. The opinion of the FUIC is not binding on the contracting entity. However, there is a specific legal process for the applicability of the opinion made by the FUIC. The PPL provides that the decision of the FUIC is notified to the president of the contracting entity concerned and the competent public procurement committee. The president of the contracting entity and the competent public procurement committee have authority by law to make the decision of the FUIC mandatory and applicable to the contracting entity. A right to complain is available to any stakeholders, with no specific conditions concerning the filing of the complaint required. Although the PPL does require that the complaint be submitted within 10 days prior to the expiration of the period of validity of the tender. Moreover, the PPL does not provide any conditions related to the fees of the review and remedies mechanism. Therefore, there is no cost associated with the right to complain. The stakeholders if requested by the FUIC shall submit documents related to the subject of the review. In addition, the FUIC may request the suspension of the public procurement procedure. The PPL grants stakeholders the right to challenge the results of the FUIC within 3 days following announcement. During this period, candidates may make claims on the results of the process to the FUIC, which suspends the appointment of a contractor. The FUIC will issue a decision within 10 days from the submission of the explanation of the contracting entity.

Post-tendering: The PPL provides the opportunity for a contractor to resolve any dispute before the CASD, with no specific conditions concerning the filing of the complaint required by law. The CASD shall issue its opinion within 3 months following the filing of the complaint. The decision of the CASD is not binding and cannot be used by parties if a judicial action is brought before a court. As the PPL does not provide any condition related to the fees, the complaints mechanism is free of cost to contractors. However, in cases where an expert witness is required, then the cost will be shared equally between the parties. The PPL does not treat the right to recover losses related to the loss of rights or damage the tenderer suffers from the cancellation of the procurement by the contracting entity.

Chart 4 presents the data for the quality of Tunisian public procurement review and remedies legislation compared to other countries in the EBRD region. Tunisia scored 54 per cent (low compliance) for the quality of its review and remedies legislation. This places Tunisia in third last place compared to other countries in the EBRD region 19 percentage points ahead of Turkmenistan, 2 percentage points below Jordan and a full 44 percentage points below Turkey the top placed country.

Chart 4: Tunisia - Quality of public procurement review and remedies legislation as compared to countries in the EBRD region



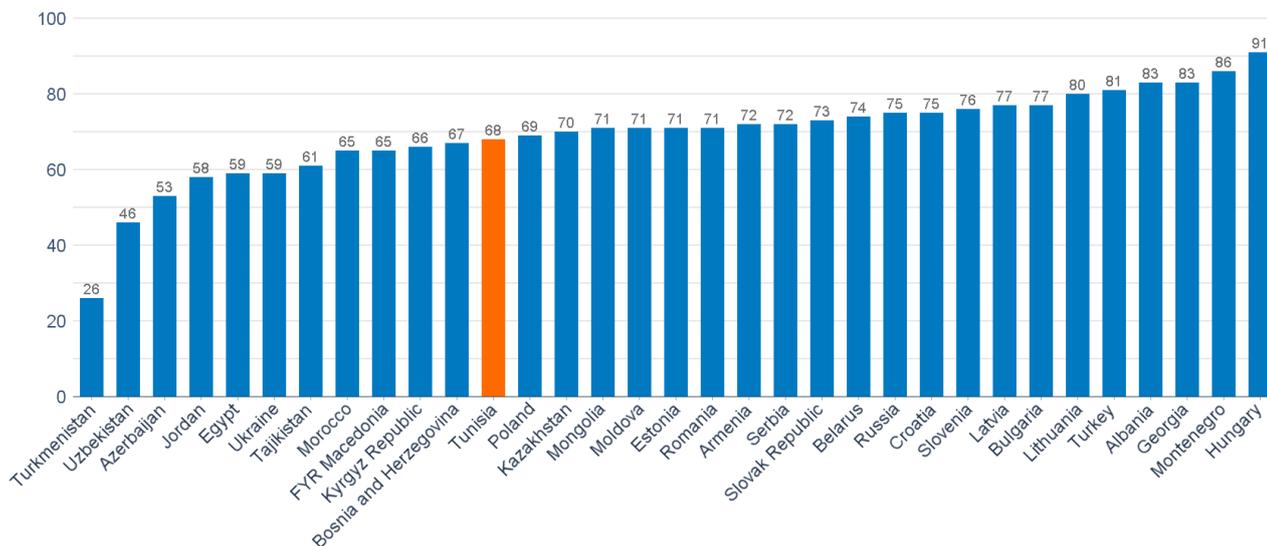
Note: The chart presents the scores for the quality of public procurement review and remedies legislation as compared to countries in the EBRD region. The laws have been benchmarked against key requirements of the EBRD Core Principles for enforceability of public procurement laws. The scores have been calculated on the basis of a checklist on remedies procedures and answered by local legal advisors. Total scores are presented as a percentage with 100 per cent representing the highest performance in the Legal Efficiency Concept benchmark indicators.

Source: 2012 SEMED Public Procurement Assessment

Assessment overview

Chart 5 presents the assessment results for the quality of the national legal framework (law on the books) as compared to countries in the EBRD region. Tunisia scored 68 per cent medium compliance for the quality of its national legal framework. This places Tunisia approximately one third distance from the lowest placed country 1 percentage point ahead of Bosnia and Herzegovina, 1 percentage point below Poland, and a full 23 percentage points below Hungary the top placed country.

Chart 5: Tunisia - Quality of national legal framework as compared to countries in the EBRD region



Note: The chart presents the scores for the quality of the national legal framework (law on the books) as compared to countries in the EBRD region. The scores have been calculated on the basis of a legislation questionnaire, based on the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local legal advisors. Total scores are presented as a percentage with 100 per cent representing the highest performance in the Legal Efficiency Concept benchmark indicators.

Source: 2012 SEMED Public Procurement Assessment

In addition, the assessment highlighted several strengths, weaknesses, opportunities and regulatory risks regarding the legislative framework. These include:

Strengths

The review highlighted several strengths. For example, Tunisian PPL is founded on the general principle of equal treatment between bidders by promoting fairness, reliability and free competition. In addition, the PPL covers the three phases of the procurement process and requires contracting entities to conduct the procurement process transparently. The complaints mechanism is free, making the procedure accessible to all stakeholders.

Moreover, the PPL requires the procurement process to be conducted by procurement committees composed of members highly qualified in their own field of expertise. Furthermore, to increase economy and efficiency accredited training programs are undertaken with contracting entities

Weaknesses

The review unearthed numerous weaknesses. For example, the PPL system is centralized and is not flexible enough to accommodate the market. The legal framework is not enacted under a single text and located in various sources. Frequent changes to the PPL framework have disrupted procurement capacity building. In addition, and negatively impacting the economy of the process, the PPL does not allow for an accurate estimation of the duration of any of the procurement phases. Moreover, as several institutions harmonize rules and monitor the compliance of contracting entities, combined with no independent national review and remedies mechanism, this has resulted in the achievement of weak levels of enforceability. Furthermore, both the economy and transparency of the process is impacted as the PPL does not authorize the use of electronic communication with regard to the submission of bids.

Opportunities

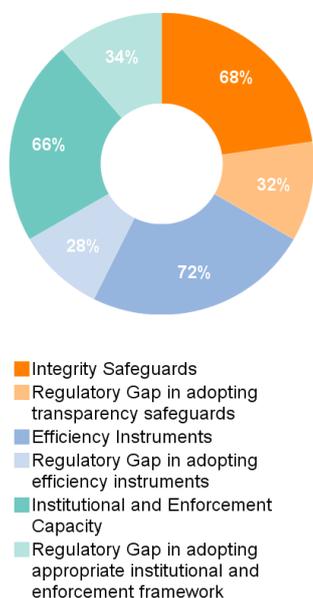
The review highlighted several opportunities for reform. For example, information technology and specifically the internet should be used to promote transparency and integrity. In addition, the PPL should be updated to follow international standards in public procurement. Moreover, to enhance enforceability dedicated organisations should be established to undertake an independent review and remedies mechanism.

Regulatory risks

Throughout the review several regulatory risks were identified. For example, as the legal framework is too centralised and lacks flexibility it cannot accommodate the changing market. In addition, the integrity of the process is at risk if the initial period fixed for the selection of the contractor is not respected by the contracting entity.

Chart 6 presents the results of the assessment for the public procurement policies on the books in three fundamental evaluation categories. The PPL scored medium compliance for the integrity safeguards (68 per cent), efficiency instruments (72 per cent), and institutional and enforcement capacity (66 per cent). Regarding the resultant regulatory gaps the integrity safeguards gap is because communication between the contracting entities and tenders is rigid since electronic communication is not permitted. The institutional and enforcement gap is explained by the fact that the PPL is under developed and does not follow standards in public procurement. Finally, regarding the efficiency instruments there is no independent body to review and monitor the compliance of contracting entities.

Chart 6: Tunisia - Public procurement policies on the books (transparency safeguards, efficiency instruments, and institutional and enforcement measures)



Note: The chart presents the results of the assessment of public procurement policies on the books in three fundamental evaluation categories (transparency safeguards, efficiency instruments, and institutional and enforcement measures). The scores have been calculated on the basis of a legislation questionnaire, based on the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local legal advisers. Total scores are presented as a percentage with 100 per cent (one third of the pie chart) representing the optimal score for each evaluation category. A regulatory gap, the difference between the assessment results and the benchmark, is marked in light orange, light blue and light green respectively.

Source: 2012 SEMED Public Procurement Assessment

II. Practice Review Summary

a. Legal framework in practice

It was discovered during the undertaking of the local procurement practice survey that practitioners believe that the PPL is clear, comprehensive, and promotes fair competition. In practice, Tunisian PPL is supplemented by contracting entities internal procurement rules, with internal roles in the procurement process clearly allocated. Contracting entities update their internal procurement rules whenever the PPL is amended. These internal rules are enacted in compliance with the law and are interpretative.

The survey revealed that the majority of contracting entities provide training to their public procurement officers regarding their roles, rights, obligations in the public procurement processes. The NOPP assists contracting entities by delivering training programs, undertaking consultations, and establishing standard documents, computer applications, and assistance on various issues to facilitate and simplify duties and tasks required for the completion of the public procurement process. Although strictly observed by public procurement staff the rules concerning ethics are not published under a single text but are diluted across different documents.

On average Tunisia scored 65 per cent (medium compliance) for the general quality of local public procurement practice. **Chart 7** presents the scores for the quality of local procurement practice for the Core Principles benchmark indicators. The PPL in practice scored very high compliance for the uniformity (91 per cent) indicator, high compliance for the transparency (77 per cent), competition (82 per cent), efficiency (88 per cent), proportionality (79 per cent), and flexibility (76 per cent) indicators, medium compliance for the accountability (60 per cent) and stability (67 per cent) indicators, and low compliance for the integrity (55 per cent) and enforceability (53 per cent) indicators. The low compliance scores were achieved because communication between the contracting entities and tenderers is rigid as the PPL does not authorize the use of electronic communication.

Chart 7: Tunisia - Quality of local procurement practice



Note: The chart presents the scores for the quality of local procurement practice for each Core Principles indicator. The scores have been calculated on the basis of a practice questionnaire, based on the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local contracting entities. Total scores are presented as a percentage with 100 per cent representing the optimal score for each Core Principles benchmark indicator.

Source: 2012 SEMED Public Procurement Assessment

b. Institutional framework in practice

The members of the Regulatory Institutions representing various Ministries are appointed by order of the PM. The committees are ad hoc institutions with their members appointed on a part-time basis, performing the duties of their appointed function in parallel with their ministerial work.

- **Higher Committee of Public Procurement**

The HCPP is involved in all stages of the public procurement process: pre-tendering - approving the procurements terms of reference; tendering - approving the choice of the winning bid; post-tendering - during execution of any amendment, litigation or settlement.

- **National Monitoring Office for Public Procurement**

The NMOPP collects and analyses public procurement data, suggests appropriate measures and amendments to improve the PPL, reviews the profitability of public procurements, and assists contracting entities develop and improve through specific training programs.

- **Follow-up and Investigations Committee**

The FUIIC is responsible for the monitoring of compliance with the principles regulating the granting of public procurement. The monitoring ensures equality between bidders, transparency of proceedings, and the use of a competitive process. The Committee ^{The committee is composed of:} a representative of the PM; a member of the Accounting Court; a representative of the general audit of public services authority; and, a representative of the general audit finance authority.

Members are appointed by Decree of the PM

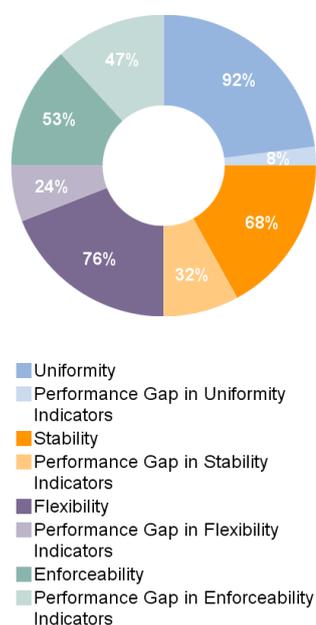
reports to the PM, informs the President of concerns regarding contracting entities and the PCC of any requests related to the granting of the procurement.

- **Committee for Amicable Settlement of Disputes**

The CASD is in tasked with finding amicable solutions to disputes on procurement. Members of the CASD are appointed by order of the PM following a proposal by the President of the Administrative Court and the President of the Federation of the profession concerned ^{The CAS is} composed of an advisor of the administrative court, a representative of the HCPP, a representative of the profession to which belongs the market. The CAS hears parties and may request them to provide reports and documentation if required. In cases where an expert witness is required, the cost will be shared equally between the parties.

Chart 8 presents the data for the public procurement institutional and enforcement framework in practice. The data illustrates how the institutional framework is perceived by local contracting entities and practitioners. A very high compliance score for the uniformity (92 per cent) indicator and a high compliance score for the flexibility (76 per cent) indicator suggest that in practice public procurement is in compliance with the PPL. In addition, the survey revealed performance gaps in the stability (32 per cent) and enforceability (47 per cent) indicators.

Chart 8: Tunisia - Public procurement institutional and enforcement framework in practice



Note: The chart presents the scores for the public procurement institutional and enforcement framework in practice. The scores have been calculated on the basis of a practice questionnaire, based on the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local contracting entities. Total scores are presented as a percentage with 100 per cent (one quarter of the pie chart) representing the optimal score for each of the four institutional and enforcement measures. A performance gap, the difference between the results of the survey of local practice and the benchmark, is marked in light blue, light orange, light purple and light green respectively.

Source: 2012 SEMED Public Procurement Assessment

c. Scope of regulation

The survey of local practice confirmed that the contracting entities follow in practice the published PPL procedures, which cover all three phases of the public procurement process. The use of the *Negotiated procurements* by contracting entities is strictly limited to the conditions set by law ^{Chapter 5, Article 40 of the Decree 2002-3158 of December 17, 2002 regulating the public procurements}.

Pre-tendering: The survey highlighted that each contracting entity prepares an annual procurement plan which includes: the project definition, procurement method, completion schedules and cost estimates. In practice, contracting entities have procedures in place for planning the procurement of recurrent contracts. The tender documents provide all the information necessary to submit a tender. The survey highlighted that efficiency of the pre-tendering process in practice scored (91 per cent) very high compliance.

Tendering: The survey revealed that in practice there is no standard form of contract notice available. However, the law is considered clear which sets the mandatory terms and conditions of the notice. Concerning language, the survey results demonstrate a clear preference for the use of the French language although English may be used when required depending of the circumstances ^{English is allowed for technical documents etc...}. The survey highlighted that the efficiency of the process in practice during the tendering phase scored (87 per cent) high compliance rate.

Post-tendering: This phase of the procedure has been reported to be simple, clear and easy to follow, with contracting entities adhering to contract monitoring requirements stipulated by the PPL. Contracts are generally completed on schedule and within the original contract price suggesting effective contract management. In addition, the survey highlighted that any modification to the contract is approved by both the contracting entity and the contractor. The survey revealed that the efficiency of the post-tendering process in practice scored (98 per cent) very high compliance.

d. Eligibility rules

General eligibility rules provided by law and fixed in the tender documents are adhered to by contracting entities. Grounds for exclusion include: making false declarations; deficiencies in the performance of a prior contract; professional misconduct; act or omission that adversely reflects commercial integrity; or, failure to pay taxes or other public duties. In practice, the bidder who fails to comply is excluded from the process. Moreover, the monitoring authority which is in charge of regulating the selection process verifies compliance with the eligibility rules. If the eligibility rules are not observed the procurement process may be cancelled.

Concerning the negotiated procurements contracting entities have a list of prequalified contractors. In addition, contracting entities hold a list of blacklisted suppliers who have not performed a previous procurement to satisfaction, or are in dispute with the contracting entity.

e. Procurement procedures as applied by contracting entities

Although contracting entities use all the procurement procedures as provided by the PPL, the survey highlighted that *open call for tender* is the default procedure used by contracting entities. However, the choice of the procurement procedure is not discretionary and is governed by the condition of application set by law ^{Decree 2002-3158 of December 17, 2002 regulating the public procurements}, with selection of the procedure depending on the specificity of the procurement. The non-use of the *open call for tender* is justified if the procurement cannot be opened to competition. For example, regarding issues of national security or defense, or where an exclusive contractor is required. However, the programme must be submitted to the relevant competent PPC for approval. In addition, *large consultation* is used only in specific cases as presented in Part I, section e. *Negotiation procurements* are used when procurement can be granted only to an exclusive provider or for specific projects

f. Efficiency of the procurement process regulatory framework in practice

Notwithstanding the validity of the bid, Tunisian PPL does not prescribe specific deadlines for the completion of the procurement process. The survey revealed that the time taken to sign a general public contract for works with a value greater than EUR 250,000 is 4 to 6 months. However, the process regarding complex projects is endemic with delays negatively impacting the time it takes to sign a contract. The survey revealed that both contracting entities and tenderers consider that although not costly the procurement process is time consuming.

Contracting entities comply with the PPL and conduct the public procurement process impartially, predictably and with integrity. Contracting entities have procurement reports to simplify, standardize, and enhance efficiency of the process, with public procurement plans prepared in detail. In addition, contracting entities have in place procedures for planning the procurement of recurrent contracts through inventory control, forecasting of future purchase needs etc...

Contract administration is mandatory for public contracts, and it is undertaken in a fair and equitable manner. Contracting entities hold records on their contract administration, and establish appropriate procedures to monitor the delivery of goods and services to verify quantity, quality and timeliness. Contract administration regimes are established on the basis of tender documents. During the tendering phase negotiation between the contacting entity and the bidder is not permitted, with reservations expressed by the bidder rejected. Moreover, during the post-tendering phase any modifications or waiver of the terms and conditions of a signed contract must be submitted to the competent PPC for approval.

Chart 9A - 9D presents the results for the efficiency of the public procurement process for all three phases of the public procurement procedure. The charts highlight several anomalies with regard to the Legal Efficiency Concept indicators. For example, in the pre-tendering phase the simplicity indicator scored very high compliance, while the fit-to-context and certainty indicators scored high compliance, the cost indicator scored medium compliance, and the speed indicator scored very low compliance. In the tendering phase the cost indicator scored very high compliance, while the certainty and fit-to-context scored medium compliance, the speed indicator scored medium compliance, and the simplicity indicator scored very low compliance. In the post-tendering phase the certainty and fit-to-context indicators scored very high compliance, while the simplicity, speed and cost indicators scored high compliance.

Chart 9A: Tunisia - Efficiency of public procurement process in practice

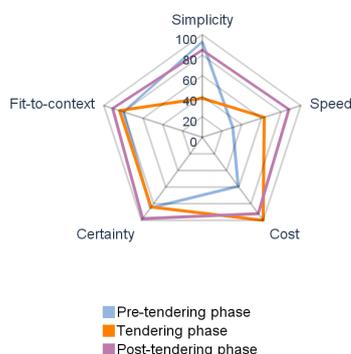


Chart 9B: Tunisia - Public procurement process in practice (efficiency of the pre-tendering phase)

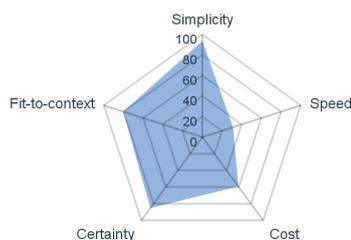
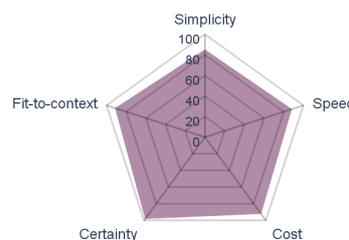


Chart 9C: Tunisia - Public procurement process in practice (efficiency of the tendering phase)



Chart 9D: Tunisia - Public procurement process in practice (efficiency of the post-tendering phase)



Note: The charts present the average scores for the five Legal Efficiency Concept benchmark indicators for efficiency of the public procurement process in practice in the pre-tendering, tendering, and post-tendering stage of the public procurement process. **Chart 9B** presents the assessment scores for efficiency of local procurement practice in the pre-tendering stage of the public procurement process. **Chart 9C** presents the assessment scores for efficiency of the local procurement practice in the tendering stage of the public procurement process. **Chart 9D** presents the assessment scores for efficiency of the local procurement practice in the post-tendering stage of the public procurement process. The scores have been calculated on the basis of a practice questionnaire based on the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local contracting entities. Total scores are presented as a percentage with 100 per cent representing the optimal score for each Legal Efficiency Concept benchmark indicator.

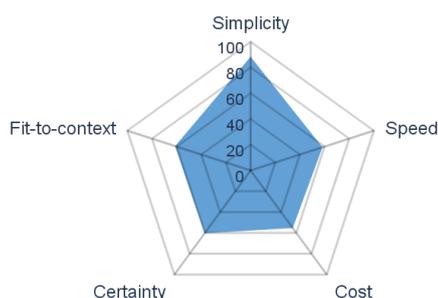
Source: 2012 SEMED Public Procurement Assessment.

g. Efficiency of the national review and remedies system in practice

The Tunisian national reviews and remedies mechanism is considered to be well structured and makes endeavours to cover the three phases of the public procurement process. Compliance with the PPL is monitored by dedicated public procurement regulatory authorities which include the FUIC and the ACAS. The survey highlighted that the review and remedies procedure in practice has no barriers to participation as it is easy to follow and free of cost. However, the review and remedies processes are not undertaken in a timely manner, as the mechanism is bureaucratic due to the number of internal administrative steps. This is evidenced as deadlines are not controlled due to the excessive number of cases, and the non-availability of the part-time committee members. Moreover, although the survey highlighted that the review and remedies authorities are perceived to be predictable to the extent that the solutions fixed by the PPL are clearly listed, the authorities are perceived to be honest.

Chart 10 presents the results for efficiency of public procurement review and remedies in practice. The PPL in practice scored high compliance for the simplicity (88 per cent) indicator, medium compliance for the certainty (60 per cent), and fit-to-context (61 per cent) indicators, and low compliance for the speed (58 per cent), and cost (55 per cent) indicators. The scores suggest that review mechanism as set by law is easy to follow, predictable and not corrupt. However, both the speed and cost indicators scored low compliance which is explained by the fact that the public procurement process is considered slow, and as a consequence there are unnecessary participation costs for private contractors.

Chart 10: Tunisia - Efficiency of public procurement review and remedies in practice



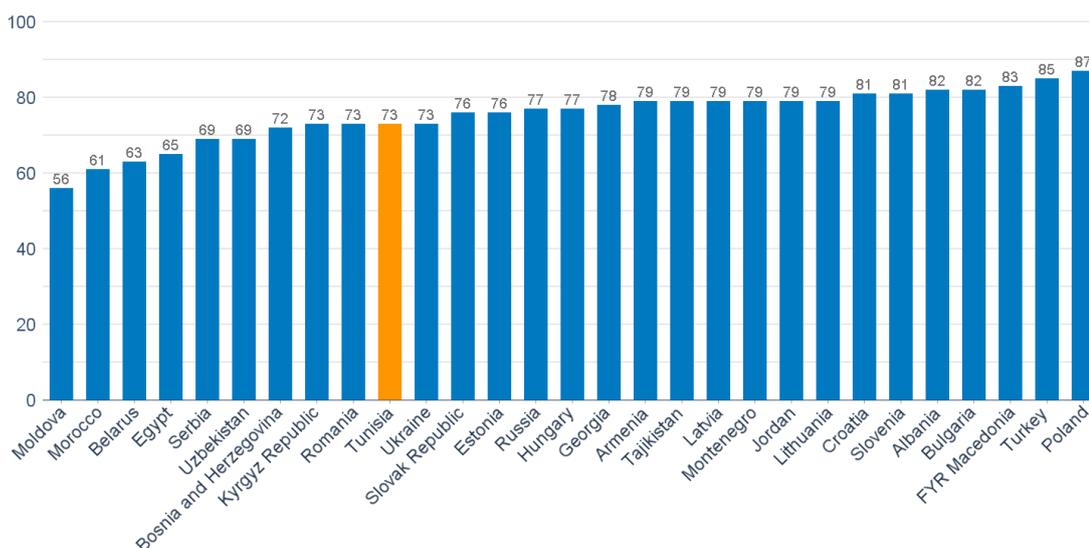
Note: The chart presents the average scores for the five Legal Efficiency Concept benchmark indicators for efficiency of the public procurement review and remedies procedures in practice. The scores have been calculated on the basis of a checklist on remedies procedures and case studies answered by local legal advisors. Total scores are presented as a percentage with 100 per cent representing the highest performance in the Legal Efficiency Concept indicators, equivalent to full compliance with the Legal Efficiency Concept benchmark.

Source: 2012 SEMED Public Procurement Assessment

Assessment overview

Chart 11 presents the assessment results for the quality of local procurement practice as compared to countries in the EBRD region. Tunisia scored 73 per cent level with 3 countries including Romania and Ukraine, 1 percentage points ahead of Bosnia and Herzegovina, 3 percentage points behind Slovak Republic and Estonia and a full 14 percentage points behind Poland the top ranked country.

Chart 11: Tunisia - Quality of local procurement practice as compared to countries in the EBRD region



Note: The chart presents the scores for the quality of local procurement practice as compared to countries in the EBRD region. The scores have been calculated on the basis of a practice questionnaire, based on the EBRD Core Principles benchmark for an Efficient Public Procurement Framework and answered by local contracting entities. Total scores are presented as a percentage with 100 per cent representing the optimal score.

Source: 2012 SEMED Public Procurement Assessment

In addition, the survey highlighted several strengths, weaknesses, opportunities and regulatory risks regarding the PPL in practice. These include:

Strengths

The survey highlighted several strengths. For example, the PPL is closely followed and the public procurement process in practice has been reported to be simple, clear and easy to follow, with the internal roles in the process clearly allocated promoting accountability, integrity and economy. In addition, levels of accountability enjoyed are also enhanced as the general eligibility rules provided by law and fixed in the tender documents are respected, with contracting entities consulting with regulatory institutions regarding interpretation of the PPL, and during procurement execution any amendment, litigation or settlement is submitted to the PPC. Moreover, economy and efficiency is improved as contracting organisations undertake capacity building and improvement programmes. Furthermore, contracting entities have regulated internal procurement, monitoring and auditing arrangements.

Weaknesses

The survey revealed several weaknesses. For example, the procurement process, specifically regarding complex projects, is lengthy and inefficient. Efficiency and economy are also compromised as the PPL does not provide a directive to minimize the cost of participation in the process or the duration of the procedure to decide a complaints case. In addition, both the economy and transparency of the process is impacted as electronic communication is underdeveloped. Moreover, accountability is impacted as there are no standard contract documentation and pay levels of procurement officers are not comparable with private sector employees. Furthermore, integrity is compromised as the rules concerning public procurement ethics are not published under a single text.

Opportunities

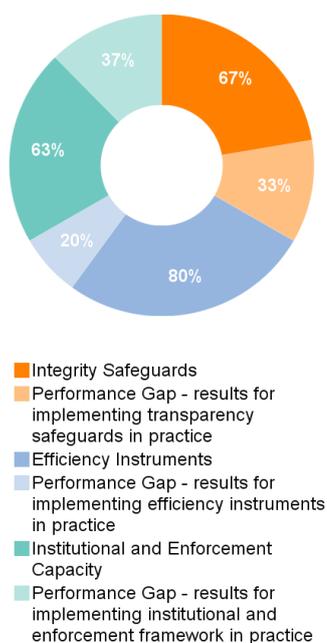
The survey highlighted several opportunities for reform. For example, to promote transparency and integrity all public procurement should be conducted electronically, with electronic communication between contracting entities and tenderers encouraged. In addition, to secure greater levels of efficiency and the reduction of costs specific deadlines for the completion of the procurement process should be prescribed. Moreover, to promote accountability standard contract documentation should be available. Furthermore, to ensure integrity is achieved the rules concerning public procurement ethics should be published under a single text.

Regulatory risks

The survey identified several regulatory risks. For example, the existing complaints mechanism is not robust. In addition, any communication undertaken electronically does not constitute legal proof in a dispute. Moreover, the PPL does not prescribe specific deadlines for the completion of the procurement process.

Chart 12 presents the data for public procurement policies in practice. The PPL in practice scored high compliance for efficiency instruments (80 per cent), and medium compliance for institutional and enforcement capacity (63 per cent) and integrity safeguards (67 per cent).

Chart 12: Tunisia - Public procurement policies in practice (transparency safeguards, efficiency instruments, and institutional and enforcement measures)



Notes: The chart presents the scores of the survey of public procurement policies in practice in three fundamental evaluation categories (transparency safeguards, efficiency instruments, and institutional and enforcement measures). The scores have been calculated on the basis of a practice questionnaire, based on the EBRD Core Principles for an Efficient Public Procurement Framework and answered by local contracting entities. Total scores are presented as a percentage with 100 per cent (one third of the pie chart) representing the optimal score for each evaluation category. A performance gap, the difference between the results of the survey of local practice and the benchmark, is marked in light orange, light blue and light green respectively.

Source: 2012 SEMED Public Procurement Assessment

III. Conclusions and recommendations

Overview

Public procurement in Tunisia is governed by both primary and secondary legislation. Although not enacted under a single text and located in different sources, Tunisian PPL is clear, coordinated, comprehensive, structured and based on the principles of fair competition and non-discrimination. However, the PPL does allow for domestic preferences, which introduces an element of discrimination into the public procurement process and hinders the achievement of fairer competition. Although the legislative review identified several regulatory gaps, Tunisian PPL aims to regulate all three phases of the public procurement process.

In practice, the PPL is supplemented by internal procurement rules of the contracting entities with internal roles in the procurement process clearly allocated. Contracting entities update their internal procurement rules whenever the PPL is amended. These internal rules are enacted in compliance with the law and are purely interpretative. Assisted by the NOPP, contracting entities provide training to their public procurement officers regarding their roles, rights, obligations in the public procurement processes. Although strictly observed by procurement staff the rules concerning ethics are not published under a single text but are diluted in different PPL texts. On average Tunisia scored high compliance for the quality of local public procurement practice.

Conclusions

Unsatisfactory transparency safeguards: The assessment highlighted the performance of several 'on the books' indicators with regard to transparency safeguards. For example, although the integrity indicator managed to secure high compliance, albeit just, the transparency indicator only managed medium compliance with the accountability indicator hovering just above low compliance. This indicates that although the PPL is making endeavours to promote integrity across all stages of the procurement function, there are issues with regard to promoting accountability. This implies issues with regard to the establishment of a clear chain of responsibility between management, budget and procurement officials as the PPL does not implement sufficient accountability instruments across all three stages of the public procurement process. Moreover, the scores highlight concerns concerning the balancing of the public and business dimensions of the process and achieving adequate levels of transparency in delivering government policy and value for money. This outcome is compounded as communication between the contracting entities and tenderers is rigid since electronic communication is currently not authorized by law. Moreover, there are issues with regard to public procurement being acceptable to all stakeholders as it is not seen to be fully public, transparent and objective. This level of underperformance highlights that the existing transparency safeguards are not aligned. Until the safeguards are fully aligned transparency of the process will be at risk and little or no improvement regarding integrity and transparency as a whole can be achieved. This will result in partial delivery of government policy, poor achievement of value for money, and ineffectual anti-corruption safeguards throughout all phases of the public procurement process. Overall, both 'on the books' and in practice the transparency safeguards were assessed as inadequate with the assessment highlighting several regulatory and performance gaps requiring treatment in the short-run.

Insufficient efficiency instruments: In the assessment the score for the efficiency instruments hovered between medium and high compliance. The review of the legislative framework highlighted issues with regard to insufficient economy and proportionality instruments. This indicates problems with accomplishing the public procurement in a reasonable time frame. Moreover, the low score for proportionality highlights that the formality and extent of the public procurement procedure does not take into consideration the scope and size of the contract. However, the higher score achieved for the survey of local practice suggests that contracting entities have developed internal procedures to align the value and scope of the contract with the choice of contract type and tendering procedure. The survey of local practice highlights issues with regard to competition and economy. The use of direct contracting has introduced an element of discrimination into the public procurement process and hinders the achievement of fair competition in practice. The issues with regard to economy of the process centre on the costs of transaction regarding participation in the public procurement process. In terms of transparency, efficiency and proportionality contracting entities were found to apply in practice higher standards than required by law, with the survey of local practice scoring higher marks than in the legislative review. This indicates that contracting entities are making endeavours to ensure the procurement is public, transparent and objective, that contracting entities are ever mindful of cost with the lowest priced tender most frequently selected, and that endeavours are being made to ensure that the procedure chosen is reflective of the scope and value of the contract. This is evidenced by the implementation gap in the economy indicator which highlights that economy of the process is more advanced in practice than 'on the books'. However, both 'on the books' and in practice the results of the assessment highlight that all the efficiency instruments require treatment to ensure that they reach the standards required by international procurement standards. In sum both 'on the books' and in practice the efficiency instruments were assessed as deficient with the assessment highlighting several regulatory and performance gaps which require immediate attention.

Regulatory and performance gaps: The assessment revealed several inconsistencies and opportunities for improvement between the legislative framework and local procurement practice. The review of the quality of Tunisian local procurement legal framework as compared to other countries in the SEMED region highlight with the exception of uniformity and efficiency where a high and very high compliance was achieved respectively, local procurement practice scored low to medium compliance with the benchmark. The survey of the quality of the local procurement practice highlighted that on average a medium compliance rate for essential transparency safeguards, efficiency instruments and overall public procurement institutional and enforcement capacity was achieved. This suggests that currently public procurement in Tunisia lacks accountability, integrity and objectivity. In addition, there are issues with regard to the promotion of fair competition, the ability to undertake the procurement in a reasonable time frame, and anxiety regarding the formality of the public procurement procedure and enforcement of public procurement law. The assessment results suggest that the Tunisian PPL does not provide a firm footing for supporting modern public procurement practice. In addition, the assessment discovered numerous inconsistencies between the legal framework and local public procurement practice. These inconsistencies include the implementation of inadequate integrity safeguards, weak efficiency instruments and poor institutional and enforcement measures. The performance gaps identified regarding the adoption of inadequate integrity safeguards is explained because there are insufficient measures to limit the scope for undue influence, and conflict of interest management is not in place for all stages of the procurement process. The legislative gap in the efficiency instruments is because with regard to proportionality there is no requirement to align the scope and value of the contract with the choice of contract type and tendering procedure. As no independent remedies mechanism is provided a low score in both the 'law on the books' and the law in practice has been identified regarding enforceability, indicating that legal protection for suppliers and contractors is poor, with the implementation of existing standards not uniform. These inconsistencies, and their resultant implementation gaps, have resulted in the identification of unacceptable levels of risk regarding the procurement, contracting and execution of publically administered projects. Consequently, several opportunities for improvement between the legislative framework and local procurement practice are necessary. For example, the legislative framework requires updating to comply with regulatory standards recommended by international best practice. More specifically, it is essential that the PPL is compliant with the WTO GPA standards as it currently allows for domestic preferences and does not make adequate endeavours to promote fair competition. In addition, there is a need to create a dedicated

national regulatory agency and implement an independent review and remedies mechanism. Moreover, there is a need to increase the use of ICT and specifically the internet to better manage public procurement activities.

Chart 13 presents the regulatory and performance gaps identified in the assessment of public procurement laws and practice.

Chart 13: Tunisia - Regulatory and performance gaps identified in the assessment of public procurement laws and practice



Note: The chart presents the scores for the regulatory gaps identified in the review of public procurement legislation, and the performance gaps identified in the survey of local procurement practice for each Core Principles benchmark indicator. The regulatory gap is marked in light blue, while the performance gap is marked in dark blue. The implementation gap (the percentage difference between the higher scoring regulatory gap and the lower scoring performance gap) highlights issues regarding the implementation of public procurement legislation in practice. The wider the percentage performance gap the greater the issues regarding the implementation of public procurement legislation.

Source: 2012 SEMED Public Procurement Assessment

Main policy recommendations

The analysis of the data collected in the assessment draws out several policy recommendations.

- **Review and update the existing public procurement laws.** The development and implementation of modern public procurement policies compliant with the 2012 WTO GPA standards will impact positively the levels of transparency, economy and efficiency achieved regarding the implementation of public procurement procedures. New policies and procedures should be developed to ensure a level of operational ability commensurate with that required to satisfy WTO GPA standards and to incorporate provisions which take into consideration the value and whole-life cost of a procurement, the methods of evaluating complex tenders, timescales for completion of all aspects of the process, and compensation in the event of a cancellation. This will result in greater accountability and integrity regarding the planning and execution of government contracts and will increase the perception of fair trade by local businesses and enterprises with contracting entities.
- **Review the current use of information and communication technology.** There is an urgent need to review the current use of information and communication technologies and the internet regarding the support, development and management of the public procurement process. It is incumbent on the government to fully utilize eProcurement supported by modern information and communication technology tools to more effectively manage the pre-tendering, tendering and post-tendering phases of the public procurement process. The adoption of eProcurement and modern information and communication technology tools will encourage participants in the public procurement process to publish contract documentation online, and submit queries, proposals, and undertake contract monitoring and administration electronically. This in turn will contribute to the modernisation and simplification of existing public procurement procedures, and reduce transaction costs for both contracting entities and local businesses and enterprises.
- **Dedicated public procurement policies should be used to facilitate economic development.** The introduction of simplified procedures for small value contracts will encourage the participation of local SMEs in public tenders. This will contribute to economic development at a sub-regional, regional and national level.
- **Instruments should be implemented across the procurement process to promote accountability.** The current public procurement legal framework should be reviewed with a view of promoting and increasing the current levels of accountability achieved across all stages of the procurement process, balancing public and business dimensions. Robust accountability instruments will develop a clear chain of responsibility between management, budget and procurement officials. This in turn will contribute to increased levels of simplicity and certainty achieved.
- **Promote the continuous personal development of procurement staff.** Develop an online 'body of knowledge' to assist procurement staff in their continuous personal development obligations leading to purchasing and supply awards recognised at both national and international levels. The development of a 'body of knowledge' and the subsequent enhanced skills levels of procurement staff will contribute to increased levels of accountability, integrity, efficiency and economy of the public procurement process.
- **New legal instruments promoting sustainability should be developed and implemented.** The government should utilise public tenders to implement its environmental and social policy objectives.