

EUROPEANIZATION OF GEORGIA: RECEPTION OF EUROPEAN PUBLIC LAW IN GEORGIA

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Abstract

European integration is a supranational form of cooperation based and developed on the foundation of broad consensus of the states. Europeanization of law with European interpretation is a demonstrative process of convergence of national and supranational legal systems in the space of European integration, which is not only a nebulous political act, but a more binding and legal definition.¹

The Association Agreement (AA) signed between the European Union and Georgia on June 27, 2014, expresses absolute respect for the sovereignty, and territorial integrity of the internationally recognized borders of the Georgia. European association is a foreign and domestic policy priority declared by the Georgian people. The instrument for the implementation of this policy is the association agreement and legal approximation.

The opportunity of complex transformation within the framework of the Association Agreement is a great advantage for present and future generations. From the historical perspective, the full and successful implementation of the legal reforms determined by the association agenda is a normative prerequisite for the European Union which provides a unique opportunity for Europeanization of the country.²

The association agreement envisages the gradual convergence of the national legislation of Georgia with the legal acts of the European Union and international legal regulations. One of the areas of legal approximation is public procurement, which falls under the exclusive jurisdiction of the European Union. The Europeanization of state procurement, as the declared political will of the Georgian state, requires the transposition of European legal experience into national law.

In accordance with the association agreement³, the public procurement law of Georgia should be adapted to the public procurement law of the European Union (gradual approximation). In order to ensure the fulfillment of the obligations defined by the agreement and the convergence of the state procurement legislation with the EU directives, Georgia adopted the Law of Georgia "On Public Procurement" adjusted to the European public procurement law.⁴ With the implementation of the Law of Georgia "On Public Procurement", the currently valid regulation of the Law of Georgia "On State Procurement" is declared invalid and the European public law is adopted into the national law.⁵

Keywords: Association Agreement, Public Procurement, Disputes Centre, Sanctioning of Contractor.

Introduction

The European Union is the only supranational organization. Its formation and development in various fields was carried out at the expense of reducing and receding the sovereignty of its member states.⁶

¹ Kalichava, K., Europeanization of Georgian Administrative Law in Terms of European Integration - Past Experience and Future Perspectives, *Journal of Law*, No. 2, 2017, p. 296.

² Gegeshidze, A., *Georgia's European Perspective: How to Approach the Future*, Opening of Georgia's European Perspective, Levan Mikeladze Foundation, Tbilisi, 2018, p. 12.

³ Article 146, "Association Agreement between Georgia, on the One Hand, and the European Union and the European Atomic Energy Union and Their Member States, on the Other Hand", 2014.

⁴The main tender definitions of the Law of Georgia "On Public Procurement" will come into effect on January 1, 2025.

⁵,The Law of Georgia "On State Procurement" is declared invalid from January 1, 2025 - the date of entry into force of the Law of Georgia "On Public Procurement".

⁶ Pirtskhalashvili, A., Mirianashvili G., *Human Rights Protection Policy in European Union Law*, Tbilisi, 2018, p. 19.

The association agreement arises the obligation of Georgia to harmonize the national legislation with the European Union through its reception in the national law. The definition of the Constitution of Georgia,⁷ the constitutional bodies within their authority to take all measures to ensure the full integration of Georgia in the European Union and the North Atlantic Treaty Organization (NATO), confirms that European integration and joining the European Union is the highest value and legitimate interest of the Georgian people and the state itself.⁸

The reform of the state procurement law is related to the unification of the national procurement norms with the EU procurement law, which is required by the international association agreement of Georgia as a candidate country for EU membership. With the implementation of the Law of Georgia "On Public Procurement", the Georgian public legal order finally separates from the post-Soviet law and harmonizes with the precedent public procurement law of the European Union. Taking into account the directives of the Association Agreement, a number of issues of procurement law are being changed institutionally and legally - a new tender type institution (DRC) and tender definitions are being introduced.

The innovative law of Georgia "On Public Procurement" aims at implementing the regulations established by the European directives stipulated by the association agreement into the national legislation. Based on the international agreement, the large-scale reformation affected the tender content norms of the state procurement law. Taking into account the relevant regulations of the association agreement⁹, the following procedures are changed:

- Stages related to state (public) procurement
- Eight main procedures of the procurement process were defined
- Rule of evaluation of the evidence submitted by the economic operator (bidder) at the tender selection-evaluation stage
- Rule of evaluation of the economic operator at the tender selection-evaluation stage
- Grounds for disqualification of the economic operator at the tender selection-evaluation stage
- Registration of the economic operator in the official register of the white list
- The procedure for registering an economic operator in the official register of the black list
- Grounds for early removal from the register of the bidder registered in the blacklist register (the so-called self-cleaning mechanism)
- In case of violation of the tender form of the affidavit, the evaluation test of the dishonest action of the economic operator (bidder)
- In cases of urgent need, procurement will be carried out without prior publication through negotiation procedures (analogous to the simplified procurement procedure)
- Purchase of services up to 100,000 GEL will be carried out without the participation of the procurement committee (analogous to the tender commission)
- The Law of Georgia "On Public Procurement" creates a transparent bidding, competitive environment for the participation of bona fide and potential entities in the public procurement process.

⁷ Article 78, Constitution of Georgia, August 24, 1995.

⁸ Kardava, E., The Place of the Association Agreement as an International Treaty of Georgia in National Law, Georgian-German Journal of Comparative Law, No. 2, 2021, p. 25.

⁹ Article 141-149, "Association Agreement between Georgia, on the one hand, and the European Union and the European Atomic Energy Union and their member states, on the other hand", 2014.

1. Dispute Resolution Centre (DRC) as a Collegial Administrative Body with Quasi-Judicial Status

The association agreement¹⁰ belongs to the rank of international agreements of Georgia, which is equally binding for both contracting parties - the European Union and Georgia. This is a European type of transaction between two equal state entities. The association agreement - as a treaty of international status, is hierarchically and politically higher than the national law, but lower than the supreme law of the state - the constitution. In case of legal conflict between association agreement and national law, the norm of national law should be changed, and in case of legal conflict with the constitution - association agreement should be amended.

According to the norms of the tender content of the association agreement, each party must ensure the creation of an institutional environment necessary for the proper functioning of the public procurement system. The Georgia undertakes to establish a collegial appeal body, the task of which will be to review the decisions made by the purchaser state bodies or purchaser organizations in the selection of the winner for the conclusion of the contract. According to the procurement law tender norms of the association agreement¹¹, the Collegiate Appellate Body considers that such tender body can be as follows:

- Public institution - state institution
- Public institution - state institution, separated from the purchasing organization
- Public institution - state institution, separated from economic operators
- The decision of the tender commission of the procuring organization is appealed by the economic operator to the Public Procurement Disputes Resolution Centre (DRC)
- Decisions made by the independent body (DRC) can be appealed through the courts

In public procurement, the Tender Disputes Resolution Centre (DRC), as a collegial administrative body, discusses tender disputes arising from the procurement tender process against the Tender Commission¹². The Dispute Resolution Board is not a personified (mediator, arbitrator) appellate institution for the wide-spread protection of tender dispute resolution rights. According to the Law of Georgia "On Public Procurement", the Council is a sovereign body,¹³ however, the Disputes Centre is not considered the only non-alternative way for general courts to relieve themselves from administrative cases.

The Dispute Resolution Centre (DRC), as a collegial administrative body, although it does not administer justice and as a judicial institution does not presuppose the development of law, however, when considering disputes arising from procurement law, it interprets the tender norms and performs a quasi-judicial function. Members of the Disputes Centre also perform the function of a quasi-court (judge) during the consideration of tender disputes, and therefore, at this time, they are not just observers of the dispute review process, but represent independent decision-making and important procedural actors. The institution of the dispute board defined by the procurement law, exercising quasi-judicial authority, gives the bidder a procedural opportunity to review the decision of the tender commission on its disqualification from the tender through an appeal.

When discussing disputes arising from public procurement law, it is important to exercise the right to a fair trial by the contracting parties of the procurement process (the right to procedural fairness) in order to avoid a tender conflict. According to the Convention on the Protection of Human Rights and Fundamental Freedoms,¹⁴ every person has the right to a fair and public hearing by an independent and impartial court established by law within a reasonable period of time when determining his/her civil rights and duties, or the validity of a criminal charge against him/her (the right to a fair hearing).

¹⁰ "Association Agreement between Georgia on the one hand and the European Union and the European Atomic Energy Union and their member states on the other", 2014.

¹¹ "Association Agreement between Georgia on the one hand and the European Union and the European Atomic Energy Union and their member states on the other", 2014.

¹² An institution with the status of a collegial administrative body.

¹³ Article 83, Law of Georgia "On Public Procurement". February 9, 2023.

¹⁴Article 6, "European Convention for the Protection of Fundamental Human Rights and Freedoms", 1950.

The right to a fair trial is an absolute right in national tendering proceedings and is consistent with EU public procurement law. The right to a fair trial in public procurement (in the tender process) would be simulated if judicial control of the decisions of the Disputes Centre would be impossible in the national legal space.

2. Suspensive Effect of a Complaint Filed with the Dispute Resolution Centre (DRC)

Based on the association agreement, the law on public procurement, which will be implemented from 2025, offers bidders three alternatives to appeal: the tender commission of the procuring organization, the public procurement Dispute Resolution Centre and the court.

- The decision on the disqualification of the economic operator (bidder) from the tender is made collegially by the tender commission of the procuring organization.
- The decision of the tender commission of the purchasing organization is an individual administrative-legal act¹⁵
- The decision of the tender commission of the procuring organization on the disqualification of the economic operator (bidder) from the tender is appealed once to the public procurement Dispute Resolution Centre and then to the court
- The decision of the Public Procurement Dispute Resolution Centre is an individual administrative-legal act
- Decision for dishonest action¹⁶ to register a disqualified bidder on the black list is issued by the Chairman of the State (Public) Procurement Agency of the State Procurement Agency of the State of Ukraine as a decree, which is appealed directly to the court.
- The decree of the chairman of the LEPL State (public) Procurement Agency is an individual administrative-legal act.

The role of the Dispute Resolution Centre in the tender dispute between the conflicting parties is very important. According to the Law of Georgia "On Public Procurement", the decision of the procuring organization can be appealed to the Public Procurement Dispute Resolution Centre no later than ten days after the notification of the decision. The dispute centre determines the admissibility of a qualified and active bidder's claim within two working days after the registration of the claim, and issues a decision within ten working days from the notification of the claim's admissibility:

- Full satisfaction of the complaint
- Partial satisfaction of the complaint
- Refusal to satisfy the complaint

The decision of the Public Procurement Disputes Resolution Centre (DRC) is subject to appeal in the Tbilisi City Court under the administrative law from the moment the relevant decision is published on the official website of the Disputes Centre.¹⁷

As soon as the Dispute Resolution Centre (DRC) recognizes the bidder's tender complaint as admissible, a "suspension effect" applies in electronic tender procedures, the same as the bidder's fixed protest (tender appeal). That is, once the Dispute Centre recognizes the complaint as admissible, the procurement procedures are considered suspended until the council makes a new decision.

"Suspension effect" is a legal guarantee of rights protection for the tenderer participating in the tender, since the protection of his/her tender interest and the restitution of the violated rights must be done before the procuring organization starts the process of pre-contractual negotiations with the other tenderer.

Qualifying tender stages of the "suspension effect" in the procurement tender process are:

- The procuring institution electronically announces the state procurement (electronic tender) for the purpose of procuring services.

¹⁵ Decision of the State Procurement Dispute Resolution Centre in case DET230012244_02, September 15, 2003, p. 7.

¹⁶ Dishonest act committed by the bidder in order to obtain the right to enter into the contract.

¹⁷ www.drc.gov.ge.

- Electronic tender is a public legal institution and information about the tender is also public
- Tender qualification requirements of bidders and submitted documentation (evidence) are determined by the tender.
- The bidder participating in the tender process uploads the documents (evidence) confirming the qualification requirements in the electronic procurement module.
- The purchasing institution (tender commission) at the tender selection-evaluation stage assesses the compliance of the bidder's qualification data with the tender requirements
- In case of non-compliance of the bidder's qualification data with the tender requirements, the tender commission takes a sanctionable decision (disqualification) of the bidder participating in the tender process.
- The tender commission starts the process of pre-contractual negotiations with the bidder with the next lowest price.
- The disqualified bidder appeals the sanctioned type (disqualification) decision made by the tender commission.
- The Procurement Disputes Resolution Centre will review the admissibility of a complaint by a disqualified bidder.
- As soon as the Dispute Resolution Centre recognizes the bidder's complaint as admissible, the electronic procurement tender procedures are stopped (suspension effect)
- The tender commission makes the decision to suspend the procurement tender procedures (tender)
- During the suspension of tender procedures (tender), the entities¹⁸ participating in the tender process are restricted from tender activation
- During the suspension of the tender process, the procuring organization is authorized to make the purchase only in case of urgent necessity.¹⁹
- In case the claim of the bidder disqualified from the tender is recognized as admissible, the Disputes Centre will review the case on its merits
- The claimant has the right to file a complaint before the Dispute Centre makes a decision.
- In case of appeal by the bidder, the appeal will not be considered
- In the event of the annulment of the decision of the Tender Commission by the Disputes Centre, the tender procedures must be renewed

In public procurement law, the suspensive postulate has a dampening effect on the decisions of the tender commission. The tender's purpose of the suspensive effect is to protect the economic operator (bidder) from the unfair tender intervention of the tender commission until the final decision is made, which de facto means returning to the situation that existed before the disputed administrative-legal act was issued.

The legal definitions of international and public procurement law norms and the tender mandate obviously enable the Dispute Centre to exercise the function of the supervisory institution delegated to it, but only with the reservation that it should not invade the exclusive competences of the court and should not try to implement parallel public law and justice, which is a worthy and legitimate interest to protect the constitutional order.

The suspension-tender process of the national law does not conflict with the normative reservations of the European, precedent procurements on preventive and repressive tender actions and is unified in the relevant norms of the national law.

3. Dispute Resolution Centre (DRC) Investigative Power

From the moment the claim of the bidder is recognized as admissible, the activity of the Disputes Centre moves to a completely new stage of the bidding process, and the Board operates for a quick and fair resolution of the dispute. A sanctioned bidder or an entity wishing to participate in the

¹⁸ Procuring organization, bidders with active and passive status participating in the tender.

¹⁹ Article 3, paragraph 1, subparagraph "R", Law of Georgia "On Public Procurement". February 9, 2023.

procurement process, who believes that the tender commission's decision is clearly unfair and/or the tender condition is discriminatory, has the right to submit a complaint (Locus Standi) through the unified electronic procurement system²⁰ appeals the decision of the procuring organization. In case of discrimination of the tender condition, the tender condition (record) is appealed, the legal interest of which is the cancellation of the inappropriate record of the legislation, and in the case of disqualification of the bidder from the tender, the decision of the tender commission is appealed, in which the legal basis of the request (tender norm) is the cancellation of the inappropriate decision of the tender commission.²¹ In the case of a tender dispute related to the record of a discriminatory tender condition, the bidder must submit evidence to the Disputes Centre that proves the discriminatory nature of the tender condition, after which the tender commission bears the burden of proving that the tender condition is non-discriminatory.²²

After receiving the complaint, the tender commission of the procuring organization (respondent) is obliged to submit a tender response to the Council (DRC) regarding the subject of the dispute²³ as a procedural means of tender defense and all kinds of relevant written evidence that justifies the sanctionable decision taken by him/her against the bidder. Failure to submit a pleading is not a basis for issuing a decision in absentia as established by the Civil Procedure Law in tender proceedings.²⁴ Nor is the non-appearance of the counterparty²⁵ a legal prerequisite for leaving the complaint unconsidered by the Dispute Centre. The Dispute Centre has the right to make a decision to leave the complaint unconsidered in case of a complaint by the bidder²⁶. In all other types of tender disputes, the Council shall consider and decide the tender dispute on its merits.²⁷ Complaints submitted by a claimant or other interested person to the Disputes Centre shall be considered on the basis of an oral hearing, which is an essential part of the right to a fair trial. In the process of a tender dispute, the parties' procedural authority is exercised in accordance with the principles of disposition and competition, that is, the party involved in the tender process of the dispute concentrates on presenting to the Dispute Centre the evidence on which its tender acceptance is based. The evidence presented by the contractors of the tender process in the tender, disputed process does not have the form of pre-established evidence for the Dispute Resolution Centre. A member of the Dispute Resolution Centre (DRC) assesses the evidence submitted by the participants in the process based on his or her own conviction, based on a thorough, complete and objective investigation of the tender dispute.

Absolute discretion and inquisition is the measure of self-initiative of the Dispute Resolution Centre (DRC) in tender proceedings.²⁸ However, the Disputes Centre is bound by the tender request of the bidder - it is not authorized to go beyond the scope of the tender complaint and is limited in its right to assist the sanctioned bidder in transforming the tender request.²⁹

4. Dispute Resolution Centre (DRC) as an Institution with the Status of an Administrative Body

Complete submission of the necessary tender documentation to the administrative body (tender commission) is the realization of the procedural right of the interested person, which according to the General Administrative Code of Georgia belongs to the right of the person, the evaluation and conclusions of the administrative body depend on the quality of its use, however, improper realization

²⁰ www.tenders.procurement.gov.ge.

²¹ Decision of the State Procurement Dispute Revsolution Centre on case DET210000665_02(NAT), March 22, 2021.

²² Decision of the State Procurement Dispute Revsolution Centre on case DIS160019380_01, July 28, 2016.

²³ Decision of the State Procurement Dispute Resolution Centre on case DET230012244_02, June 8, 2017.

²⁴ Article 229, Civil Procedure Code of Georgia, November 14, 1997.

²⁵ A person participating in the tender process, a purchasing organization, a bidder.

²⁶ Article 17, Resolution No. 826 of the Government of Georgia dated December 31, 2020, "On Approval of the Regulations of the Council for Review of Disputes Related to State Procurements".

²⁷ Article 14, Resolution No. 826 of the Government of Georgia dated December 31, 2020, "Approving the Regulations of the Council for Review of Disputes Related to State Procurements".

²⁸ Article 4, Administrative Procedure Code of Georgia, July 23, 1999.

²⁹ Article 28(1), Administrative Procedure Code of Georgia, July 23, 1999.

of this right in the state procurement procedure leads to the sanctioning of the bidder - disqualification.

The procedural right of the economic operator (bidder) to submit the requested tender documentation in good faith as evidence in accordance with the tender conditions is transformed in state procurement as a procedural obligation of the economic operator (bidder). Evaluating the evidence submitted by the bidder in the tender process and determining their relevance to the tender requirements is the legal competence of the tender commission. The decision of the tender commission of the procuring organization on the disqualification of the economic operator (bidder) is subject to the legal control of the Public Procurement Disputes Resolution Centre (DRC) as an institution supervising the legality and impartiality of public procurement.

The Public Procurement Dispute Resolution Centre (DRC) is an administrative body defined by the General Administrative Code of Georgia,³⁰ the decisions of which related to the tender process (decisions made on the complete, partial or refusal to satisfy the complaint) fully meet the qualifying tender conditions of the individual administrative-legal act³¹

- One of the subjects of the tender, dispute relationship is the Dispute Resolution Centre (DRC) - an administrative body³²
- Tender, disputed legal relationship is derived from public law legislation
- The action of the Dispute Resolution Centre (DRC) is aimed at regulating a specific tender relationship
- The personal tender intervention of the Dispute Resolution Centre (DRC) establishes, modifies, terminates and confirms the tender legal position of the economic operator.

The decision (individual administrative-legal act) made by the Dispute Centre within the scope of discretionary authority consists of introductory, descriptive, motivational and resolution parts and contains written justification. As soon as the decision is made, it is uploaded to the unified electronic procurement system, it is public and it is considered delivered to the interested person.

4.1. Sanctioning of unscrupulous contractors in public procurement law

According to the Law of Georgia "On Public Procurement", in order to obtain the right to enter into a contract, the secret negotiation between the entities participating in the procurement, bypassing the procurement procedure, is a dishonest act and it is the basis for the disqualification of the economic operator from the tender. The tender conflict between the contracting parties of the procurement process arises when the economic operator violates the terms of Article 58 of the "Public Procurement" Law of Georgia³³ in order to gain material advantage or advantage and creates a risk of substantial violation of the legal interest of the procuring organization. The tender commission evaluates the tender documentation submitted by the bidder through the electronic module, upon determining the dishonest action of the bidder, makes a decision on the disqualification of the subject from the procurement procedure based on the standard of reasonable assumption at the procurement selection-evaluation stage.³⁴ Dishonest action in procurement procedures is also the basis for registering a bidder in the official register of the black list³⁵, and at the same time it is a punishable action established by a special norm of criminal law.³⁶

³⁰ Article 2, paragraph 1, subparagraph "a", General Administrative Code of Georgia, June 25, 1999.

³¹ Article 2, paragraph 1, subsection "d", General Administrative Code of Georgia, June 25, 1999.

³² Decision of the State Procurement Disputes Review Board on the case DET230012244_02, September 15, 2003, p. 7.

³³ Article 58, Law of Georgia "On Public Procurement". February 9, 2023.

³⁴ Decision of the Tender Commission on electronic tender No. 4 NAT230027193, January 31, 2024.

³⁵ Decree of the Chairman of the State Procurement Agency of the State Procurement Agency No. 609 on electronic tender NAT230027193, February 22, 2024.

³⁶ Article 195(1), Criminal Code of Georgia, July 22, 1999.

Conclusion

As soon as the Dispute Resolution Centre (DRC) recognizes the bidder's tender complaint as admissible, a "suspension effect" applies in electronic tender procedures - the same bidder's fixed protest (tender appeal). In public procurement law, the suspensive postulate has a dampening effect on the decisions of the tender commission. The tender purpose of the suspension effect is to protect the economic operator (bidder) from the unfair tender intervention of the tender commission until the final decision is made.

The legal definitions of international and public procurement law norms and the tender mandate obviously enable the Dispute Centre to exercise the function of the supervisory institution delegated to it, but only with the reservation that it should not invade the exclusive competences of the court and should not try to implement parallel public law and justice, which is a worthy and legitimate interest to protect the constitutional order.

The measure of self-initiative of the Dispute Resolution Centre (DRC) in tender proceedings is absolute discretion and inquisition. However, the Disputes Centre is bound by the tender request of the bidder - it is not authorized to go beyond the scope of the tender complaint and is limited in its right to assist the sanctioned bidder in transforming the tender request.

According to the Law of Georgia "On Public Procurement", in order to obtain the right to enter into a contract, secret negotiations between the entities participating in the procurement, bypassing the procurement procedure, is a dishonest act and it is an unconditional basis for disqualification from the tender. The tender commission evaluates the tender documentation submitted by the bidder through the electronic module, upon determining the dishonest action of the bidder, makes a decision on the disqualification of the subject from the procurement procedure based on the standard of reasonable assumption at the procurement selection-evaluation stage. Dishonest action in procurement procedures is also the basis for registering a bidder in the official register of the black list, and at the same time it is a punishable action established by a special norm of criminal law.

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