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## International Procurement

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This Article reviews international law developments in the field of international procurement in 2015.

### I. Canada's New Procurement Integrity Regime

The main change to Canada's procurement regime in 2015 was the Canadian Government's introduction of a new government-wide Integrity Regime for procurement (the "Integrity Regime"), on July 3, 2015.<sup>1</sup> The Integrity Regime is composed of an Ineligibility and Suspension Policy and associated integrity provisions to be incorporated into federal solicitations, contracts, and leases. The Integrity Regime softens some of the obligations in the prior federal Integrity Framework, which Public Works and Government Services Canada ("PWGSC") introduced in 2012 and amended in 2014, while adding new requirements.<sup>2</sup> The primary features of this new legislation are addressed below.

#### A. THE INTEGRITY REGIME'S INELIGIBILITY AND SUSPENSION POLICY

*Ineligibility.* With respect to criminal provisions prohibiting frauds against the government under the Criminal Code of Canada<sup>3</sup> (the "CCC") or the Financial

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\* Martin G. Masse and Erin Brown of Norton Rose Fulbright Canada LLP authored Section I on "Canada's New Procurement Integrity Regime." Steven D. Tibbets, Senior Counsel with the company CA Technologies, authored Section II, entitled "The United States' New Rule on Reporting Supply Chain Risk Complicates Compliance for Defense Manufacturers." Helene Gogadze and Samuel W. Jack of Fried, Frank, Harris, Shriver & Jacobson LLP authored Section III, entitled "Application of the State Procurement System of Georgia's Competition and Dispute Resolution Mechanisms." Mr. Jack also served as the editor of the International Procurement Committee's Year in Review for 2015. The views of the authors are not attributable to their law firms or companies. The Article covers developments during 2015.

1. See *Backgrounder* on the new government-wide integrity regime, Government of Canada, August 18, 2015, available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/synopsis-backgrounder-eng.html> [hereinafter *Backgrounder*].

2. *Id.*; see also Government of Canada's Integrity Regime, Government of Canada, September 28, 2015, available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html> [hereinafter *Integrity Regime*].

3. R.S.C., 1985, c. C-46, §§ 121, 124, 380, 418.

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Administration Act<sup>4</sup> (the “FAA”), suppliers who have ever been convicted of, or who have pleaded guilty to, such offences (the “Fraud Offences”) will be ineligible to bid on government contracts for an indefinite period of time with little access to recourse.<sup>5</sup>

The Government of Canada has maintained a list of other offences that relate to the integrity of bidders. These include, *inter alia*, money laundering, extortion, and bribery offences under the CCC,<sup>6</sup> the Competition Act,<sup>7</sup> the Income Tax Act,<sup>8</sup> the Excise Tax Act,<sup>9</sup> the Corruption of Foreign Public Officials Act,<sup>10</sup> and the Controlled Drugs and Substances Act.<sup>11</sup> Suppliers that have been convicted of, or have pleaded guilty to one or more of these offences in the past 3 years<sup>12</sup> will be ineligible to bid on government contracts for a period of 10 years.

*Affiliates and Subcontractors.* From the supplier’s perspective, the most positive change introduced in the Integrity Regime is that suppliers will no longer be automatically ineligible as a result of the actions of affiliates, unless the supplier had “a degree of control over the convicted affiliate”<sup>13</sup> in relation to the acts or omissions that led to the affiliate’s conviction. Specifically, the Ineligibility and Suspension Policy specifies that a bidder must have directed, influenced, authorized, assented to, acquiesced in, or participated in the commission or omission of the acts or offences that would render the affiliate ineligible under the Policy. While this is an improvement, given the wording of the Policy, this remains a fact-specific assessment over which the Minister of Public Works and Procurement (the “Minister”) has significant discretion.<sup>14</sup>

Further, suppliers who contract with subcontractors that were convicted or have pleaded guilty to any of the covered offences, and for which no pardon or equivalent has been received, will become ineligible to bid on government contracts for a period of five years unless the supplier obtained the advance approval of PWGSC.<sup>15</sup> However, the Integrity Regime creates a public list of ineligible and/or suspended entities that prime contractors can use to verify the eligibility of their subcontractors.<sup>16</sup>

*Suspension.* Under the new Integrity Regime, the Minister has the power to suspend a supplier for up to eighteen months and to extend that suspension as necessary while a judicial process is underway. The Minister’s considerable discretion in this regard can be

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4. *Id.*, c. F-11., §§ 80(1)(d), 80(2), 154.01.

5. A Public Interest Exception and/or an administrative agreement cannot be invoked or applied to these situations; however, a record suspension may be obtained. *Id.*

6. R.S.C., 1985, c. C-46, §§ 119, 120, 346, 366 to 368, 382, 382.1, 397, 422, 426, 462.31, 467.11 to 467.13.

7. *Id.*, c. C-34, §§ 45, 46, 47, 49, 52, 53.

8. *Id.*, c. 1 (5th Supp.), § 239.

9. *Id.*, c. E-15, § 327.

10. S.C. 1998, c. 34, §§ 3, 4, 5.

11. S.C. 1996, c. 19, §§ 5, 6, 7.

12. Under the former Integrity Framework, the period was 10 years.

13. Frequently Asked Questions, Government of Canada, July 3, 2015, available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/faq-eng.html> [hereinafter FAQs]; see also Integrity Regime, *supra* note 2.

14. See Integrity Regime, *supra* note 2; see also For Better or Worse, *infra* note 17.

15. See Ineligibility and Suspension Policy, Government of Canada, August 18, 2015 at Part D, § IV, ¶ 7, available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html> [hereinafter Ineligibility and Suspension Policy].

16. See FAQs, *supra* note 1. The Ineligibility List can be found at: <http://www.tpsgc-pwgsc.gc.ca/ci-if/four-inel-eng.html>.

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triggered if a supplier has admitted guilt in relation to a listed offence (or similar foreign offence) or if the supplier is charged with such an offence. This trigger, of course, raises serious concerns with respect to the presumption of innocence.<sup>17</sup> If the suspension power extends to entities seeking immunity in relation to criminal offences under the Competition Act, the number of entities that come forward could be significantly reduced, thus lessening the efficiency of the immunity regime in tackling anti-competitive cartels.<sup>18</sup>

**B. RECOURSES**

*Reduction of Ten-Year Ban.* The ten year ban imposed on suppliers as a result of a conviction in relation to a listed offence can be reduced to five years if the supplier has (1) cooperated with authorities, or (2) taken steps to address the causes of the misconduct in question.<sup>19</sup> This added flexibility brings Canada in line with the United States's regulations with respect to the imposition of suspension and debarment.<sup>20</sup>

*Administrative Agreements.* Administrative agreements provide suppliers with the possibility to obtain relief from the consequences of non-compliance. Under the Integrity Regime, administrative agreements may be used (1) in lieu of suspending a supplier; (2) where a supplier's ineligibility period is reduced; (3) where a Public Interest Exception, or PIE (see below), is invoked; or (4) when the government decides to continue an existing contract with a supplier that has become non-compliant.<sup>21</sup> However, administrative agreements cannot be used to gain relief from ineligibility in relation to frauds against the government under the CCC or FAA.<sup>22</sup>

*Public Interest Exception.* The Public Interest Exception ("PIE"), which is continued from the Integrity Framework, allows the government, on public interest grounds, to do business with suppliers who were convicted or absolutely or conditionally discharged of the specified offences. The PIE can be applied in situations in which no other supplier is capable of performing the contract, or when there is an emergency, a national security threat, or a health and safety concern, or when it is necessary to avoid economic harm. When the PIE is applied, an administrative agreement between the supplier and PWGSC is required.<sup>23</sup>

**C. DUE PROCESS FEATURES OF THE INTEGRITY REGIME**

The Integrity Regime contains several procedural components that offer basic due process rights to suppliers subject to the law. First, suppliers will be notified if they become ineligible or are suspended.<sup>24</sup> Second, suppliers are incentivized to disclose wrongdoing proactively and can at any time seek an advanced determination; if they are

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17. See Martin Masse, *et al.*, *For Better or Worse? Canada Updates Procurement Integrity Regime*, McMillan LLP, Aug. 2015, available at <http://www.mcmillan.ca/For-Better-or-Worse-Canada-Updates-Procurement-Integrity-Regime> [hereinafter *For Better or Worse*].

18. *Id.*

19. See Integrity Regime, *supra* note 2.

20. See *For Better or Worse*, *supra* note 17; see also 48 C.F.R. § 9.4, *et seq.*

21. See Integrity Regime, *supra* note 2.

22. See FAQs, *supra* note 13.

23. See Integrity Regime, *supra* note 2.

24. *Id.*

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determined to be ineligible then their ineligibility period would begin immediately.<sup>25</sup> Third, ineligible or suspended suppliers may apply to the Minister for a review of determinations that the supplier “directed, influenced, authorized, assented to, acquiesced in or participated in the commission or omission” of the acts which made its affiliate ineligible.<sup>26</sup>

D. CONCLUSION

Under the new policy, some aspects of the former Integrity Framework have been relaxed. Notably, the impact of convictions by affiliates has been tempered. However, these changes are balanced by the Minister’s new suspension power and the fact that certain offences now carry indefinite disbarment no matter how long ago the offence took place.

**II. The United States’ New Rule on Reporting Supply Chain Risk Complicates Compliance for Defense Manufacturers**

On October 30, 2015, the United States Department of Defense (“DoD”) finalized a new regulation (the “Final Rule”) requiring its purchasing organizations to account for supply chain risk in specific ways when procuring information technology items.<sup>27</sup> As discussed in further detail below, the rule is intended to address the risk that an adversary of the United States may sabotage or otherwise disrupt the functioning of the information technology items related to certain national security functions.

*Lead-up to the Final Rule.* The Final Rule has been in the works for several years. The National Defense Authorization Acts for Fiscal Years 2011 and 2013 imposed broad requirements relating to information about supply chain risks.<sup>28</sup> To implement those statutes, DoD issued an Interim Rule in 2013 that amended the Defense Federal Acquisition Regulation Supplement (“DFARS”) and empowered DoD contracting organizations to exclude offerors or downgrade evaluations of proposals that present unacceptable supply chain risks.<sup>29</sup> The Final Rule adopts most of the Interim Rule, but there are several important differences that are addressed below.

*Overview of the Final Rule.* DoD agencies are required to consider supply chain risk when evaluating proposals and, as under the Interim Rule, are permitted to exclude contractors from procurements related to National Security Systems (“NSS”) due to supply chain concerns. The Final Rule requires contractors providing DoD with information technology to support NSSs to mitigate supply chain risk related to the services or supplies. More specifically, the Final Rule embodies two main changes: (1)

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25. *Id.*

26. Ineligibility and Suspension Policy, *supra* note 15 at Pt. E, § V, ¶ 13.

27. See 80 Fed. Reg. 67244-52 (Oct. 30, 2015). The Final Rule modifies DFARS Subpart 239.73 (48 C.F.R. § 239.73 *et seq.*).

28. National Defense Authorization Act (“NDAA”) for Fiscal Year 2011, Pub. L. No. 111-383 § 806, as amended by the NDAA for Fiscal Year 2013, Pub. L. No. 112-239, entitled *Requirements for Information Relating to Supply Chain Risk*. A number of commentators in the field have noted that contractors that support the Intelligence Community – *i.e.*, U.S. Government agencies like the Central Intelligence Agency and the National Security Agency – have been subject to a Directive that is similar to the Final Rule since 2013.

29. 78 Fed. Reg. 69268-73 (Nov. 18, 2013).

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supply chain risk must be used as a factor in evaluating proposals for contracts covered by the rule, and (2) DoD may exclude sources that present supply chain risk from consideration for the award of a covered contract.

*Definitions.* The definitions of several terms are key to understanding the Final Rule's impact on DoD's information technology vendor. A "covered system" means the same thing as an NSS, defined as any information system that involves: (1) intelligence activities; (2) cryptologic activities related to national security; (3) command and control of military forces; (4) equipment that is an integral part of a weapon or weapons system; (5) direct fulfillment of military or intelligence missions; or (6) storing or processing information that has been classified for national defense or foreign policy reasons.<sup>30</sup> NSSs do not include, however, systems used for routine administrative and business applications, including payroll, finance, logistics, and personnel management applications. The new requirements apply to procurements of items that are covered systems, components of covered systems, or support-covered systems. "Supply chain risk" means "the risk that an adversary may sabotage, maliciously introduce unwanted function, or otherwise subvert the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of [an NSS] so as to surveil, deny, disrupt, or otherwise degrade the function, use, or operation of such system."<sup>31</sup>

*Substantive Aspects of the Final Rule.* The Final Rule applies to all covered procurements, regardless of value and whether the items being procured are commercial or commercial off-the-shelf items. The Final Rule requires a DFARS clause—252.239-7017, "Notice of Supply Chain Risk"—to be included in covered solicitations and another DFARS clause—252.239-7018, "Supply Chain Risk"—to be included in both covered solicitations and covered contracts. The new DFARS contract clauses are not required to be flowed down to subcontractors.

These clauses generally provide that purchasing organizations must account for supply chain risk in their procurement of items related to NSSs, but do not prescribe particular sub-factors or methodologies for assessing supply chain risk. It remains to be seen exactly how DoD contracting officers will assess supply chain risk in information technology procurements and what information they will rely on to downgrade or exclude risky offerors. However, firms supplying information technology to the DoD primarily through competitive procurements would be well-served to consider how well their supply chains compare to those of their competitors. In light of the Final Rule, firms are well advised to also consider whether they, and their competitors, source hardware from, and develop software in, locations where security is difficult to guarantee and the risk of counterfeits and malware is significant.

To summarize, companies that supply information technology to the DoD should expect increased, procurement-by-procurement scrutiny of their supply chains. While it remains to be seen just how active DoD procurement offices will be in downgrading or attempting to exclude offerors and exactly what methodology they will use to assess supply chain risk, suppliers should consider whether their supply chain risk is a strength or a weakness as compared to competitors and strategize accordingly.

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30. 48 C.F.R. § 239.7302.

31. 78 Fed. Reg. 69273 (Nov. 18, 2013).

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**III. Georgia's National Procurement System: The Competition Mandate and Dispute Resolution Mechanism in Practice**

In October 2010, Georgia implemented major reforms to its public procurement system, which amounted to a complete overhaul of the country's formerly inefficient, bureaucratic, and "high-risk" procurement system. As a result, the new system has been recognized as one of the most successful and transparent procurement systems in the region, and is cited as a model for transitional countries seeking to adopt international standards of procurement. This section revisits Georgia's procurement system five years after its introduction and addresses certain aspects of its effectiveness in practice.

**A. COMPETITION REQUIREMENTS**

Central to Georgia's reforms was the adoption of an electronic procurement system, which fully replaced the previous paper-based tender system.<sup>32</sup> In its first five years of operation, Georgia's e-procurement system has been credited with simplifying participation in public procurement,<sup>33</sup> thereby increasing transparency and competition,<sup>34</sup> and instilling confidence by decreasing corruption risk.<sup>35</sup> The State Procurement Agency ("SPA") of Georgia manages the e-procurement system and central purchasing initiatives for the Government of Georgia.

Article 10 of Georgia's 2010 Law on State Procurement (the "Law") requires the use of "electronic tender" methods for all procurements of uniform items exceeding 200,000 Georgian Lari ("GEL") (approximately \$83,500 USD).<sup>36</sup> Procuring entities may also elect to use the electronic tender procedures for procurements below this threshold.<sup>37</sup> Electronic tenders are conducted by tender committees of at least three members that are formed by the procuring entity.<sup>38</sup> When conducting an electronic tender, the tender committee is required to publicly post the solicitation materials to Georgia's official e-

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32. The English version of the Georgian electronic Government Procurement ("Ge-GP") system is available at <http://tenders.procurement.gov.ge/login.php?lang=EN>.

33. See State Procurement Agency, *Georgian Successful Reforms in Public Procurement: Path Towards the Risk-Based and IT Based Approach*, presentation to the World Bank 11th Public Procurement Knowledge Forum (June 9-12, 2015), available at [http://www.worldbank.org/content/dam/Worldbank/document/eca/georgia/11-procurement/Georgia\\_ENG.pdf](http://www.worldbank.org/content/dam/Worldbank/document/eca/georgia/11-procurement/Georgia_ENG.pdf) (noting an increase of registered bidders between 2011 (7,365 registered bidders) and May 2015).

34. See Giorgi Gaprindashvili, *Public Procurement Development Stages in Georgia*, 9 Int'l J. of Soc., Behavioral, Educ., Econ., Bus. and Indus. Eng'g 962, 964 (2015), available at <http://www.universaluniversity.org/publication/10000958>. The average number of bidders per individual procurement has increased each year between 2010-2011 (1.71 bidders per tender) and 2014 (over 2.14 bidders per tender).

35. See The World Bank, *Georgia: An E-Procurement Success* (Feb. 18, 2015), available at <http://www.worldbank.org/en/news/feature/2015/02/18/georgia-an-e-procurement-success>. The World Bank uses Georgia's e-procurement system for the procurement of civil works with an estimated contract price below \$10 million and for goods with an estimated contract price of less than \$1 million.

36. See Law, Art. 3(1)(p). An unofficial English translation of the 2010 version of the Law is available at [http://procurement.gov.ge/files/\\_data/eng/normative/legislative\\_acts/Law\\_on\\_State\\_Procurement\\_\(Unofficial\\_Translation\).pdf](http://procurement.gov.ge/files/_data/eng/normative/legislative_acts/Law_on_State_Procurement_(Unofficial_Translation).pdf). Unless otherwise noted, all quotations in this Article are from the English translation.

37. See Law, Art. 10<sup>(2)</sup>.

38. See Law, Art. 11(1<sup>4</sup>).

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procurement website.<sup>39</sup> The Law requires that specific information be included in solicitations for procurements conducted through the electronic tender process,<sup>40</sup> as well as the establishment of “qualification details” that are “conductive to the promotion of healthy competition.”<sup>41</sup> Contracts are awarded to the bidder that meets the qualification requirements and proposes the lowest price, often through a reverse auction process.<sup>42</sup>

Although Georgia’s e-procurement system—and, in particular, the electronic tender process—is widely heralded, a large segment of Georgian state procurements remain exempt from its requirements. Procuring agencies are not required to use electronic tender procedures when the supply of goods or services is an “exclusive right” of only one company and there is no “reasonable alternative” to provide the item.<sup>43</sup> Noncompetitive “simplified procurement” methods may also be used in cases of “urgent necessity”<sup>44</sup> or for micro-purchases of less than GEL 5,000 (approximately \$2,000 USD).<sup>45</sup> In addition, the Law does not apply to procurements subject to Georgia’s “state secret” law, which are identified and governed by procedures established by the National Security Council and approved by the President of Georgia.<sup>46</sup> Historically, many Georgian military procurements have been classified for national security purposes.<sup>47</sup> Several other types of procurements are explicitly exempted from the Law as well, including procurements of “electricity, guaranteed power supply, natural gas and water supply.”<sup>48</sup>

While many long-established procurement systems include similar exemptions from standard competition requirements,<sup>49</sup> international organizations have reported that, in practice, as much as 45% of Georgia’s total procurement spending is made through simplified procedures, and therefore, without the benefit of competition.<sup>50</sup> Although the vast majority of such purchases fell under the GEL 5,000 micro-purchase threshold, 74%

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39. See Law, Art. 12<sup>1</sup> (1)-(2). The tender website is <http://procurement.gov.ge>. Tender announcements for goods or services estimated to exceed GEL 2 million (approx. \$835,000 USD) must also be provided in the English language.

40. See Law, Art. 12<sup>1</sup> (5).

41. Law, Art. 13. Note, however, that not all requirements apply to procurements of less than GEL 200,000, which are referred to as “simplified electronic tenders.” See Law, Art. 3(1)(q).

42. See Law, Art. 3(1)(s); cf. 48 C.F.R. § 14.000, *et seq.* (United States’ “sealed bidding” procurement standard).

43. Law, Art. 10<sup>1</sup>(3)(a).

44. Law, Art. 10<sup>1</sup>(3)(b).

45. See Law, Art. 3(r<sup>1</sup>).

46. See Law, Art. 1(2)-(3).

47. See Transparency International – Georgia, *Reform of Georgia’s Defence Sector*, Jan. 2007, available at <http://www.transparency.ge/sites/default/files/Reform%20of%20Georgia%27s%20Defence%20Sector.pdf>; see also TI-Georgia Report, *infra* note 50 at 17 (noting that information concerning noncompetitive procurements conducted by the Ministry of Defense and its agencies is not made available through the on-line system).

48. Law, Art. 1(3<sup>1</sup>)(c).

49. See, e.g., 10 U.S.C. § 2304(c); 41 U.S.C. § 253(c). Note, however, that U.S. law requires the execution of a “justification and approval” for the use of noncompetitive procurement procedures.

50. See, e.g., PMC Research Center, *Research Report: Analysis of the State Procurement System of Georgia*, June 2014, at 16-18, available at [http://csogeorgia.org/uploads/publications/121/PMCG\\_analysis\\_of\\_the\\_state\\_procurement\\_system\\_of\\_Georgia-eng.pdf](http://csogeorgia.org/uploads/publications/121/PMCG_analysis_of_the_state_procurement_system_of_Georgia-eng.pdf) [hereinafter “PMC Research Report”] (“In the period of 2011-2013, approximately 4.6 billion GEL were spent on direct purchase, this is 45% of the total purchases.”); see also Transparency International-Georgia, *Public Procurement in 2013-2014: How Taxpayers’ Money Got Spent*, July 2015, available at [http://www.transparency.ge/sites/default/files/post\\_attachments/public\\_procurement\\_in\\_2013-2014\\_how\\_taxpayers\\_money\\_got\\_spent.pdf](http://www.transparency.ge/sites/default/files/post_attachments/public_procurement_in_2013-2014_how_taxpayers_money_got_spent.pdf) [hereinafter “TI-Georgia Report”]

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of the total costs were incurred for direct purchases of large-budget items.<sup>51</sup> Construction services firms appear to be the largest recipient of contract spending awarded through simplified procurement.<sup>52</sup> State-owned companies have also been the beneficiaries of simplified procurements.<sup>53</sup> Further, it has been recently reported that, contrary to the stated intent of the Law, Georgia's prime minister has encouraged local governments to utilize simplified procurement.<sup>54</sup>

While Georgia's e-procurement system is a marked improvement over the previous system, until Georgia minimizes the use of such exceptions it will not reap the full benefit of competition.

**B. PROCUREMENT DISPUTES**

A transparent, trusted, and efficient dispute resolution mechanism is also an important component of an effective public procurement system. Georgia has made significant strides in this area as well, including the adoption of newly updated rules governing procurement disputes. The new rules represent an improvement over the previous rules by providing additional clarification and guidance on a number of matters that were not previously covered. The continued increase in the number of procurement challenges (i.e., bid protests) lodged this year is also a sign of a healthy procurement system that is continuing to gain the public's confidence.

Below we analyze the main aspects of Georgia's procurement dispute resolution mechanism, and decisions in selected procurement disputes, and provide an analysis of the procurement challenges filed in 2015.

*1. Functioning of the Dispute Resolution Board and the 2015 Revisions*

Article 23(41) of the Law called for the creation of a board in order to resolve procurement-related disputes, and it is composed of representatives of the public and civil society sectors. Accordingly, the Dispute Resolution Board (the "Board") was formed pursuant to Order No. 12 of the Chairman of the State Procurement Agency on the Rules of Activity of the Procurement Related Disputes Resolution Board, dated November 30, 2010. These rules set forth the legal framework governing the activities and the procedures of the Board with respect to procurement-related challenges.

On February 27, 2015, the Chairman published a new Order No. 1 regarding the Rules of Activity of the Dispute Resolution Board, which took effect on March 16, 2015, and replaced the 2010 Rules (the "New Rules").<sup>55</sup> The New Rules apply to challenges related

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("According to the State Procurement Agency's 2014 report, GEL 915.7 million in contracts were awarded using simplified procurements, which is 32% of total procurements.")

51. See PMC Research Report, *supra* note 50 at 16.

52. See *id.*; TI-Georgia Report, *supra* note 50 at 15-16 (noting that approximately GEL 275 million (approx. \$115 million USD) was spent through simplified procurement on construction of the Gardabani combined cycle gas power plant).

53. See TI-Georgia Report, *supra* note 50.

54. See Transparency International – Georgia, *Prime Minister Encourages Simplified Procurement, Fosters Malpractice*, Mar. 16, 2015, available at <http://www.transparency.ge/en/node/5108>.

55. See SPA Chairman's Order No. 1 of February 27, 2015 (as amended), available in Georgian on SPA website available at <http://www.procurement.gov.ge/ELibrary/LegalActs.aspx>.

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to tender contests, as well as the simplified electronic tenders and electronic tender procedures discussed in the previous section.<sup>56</sup> The New Rules state that the goal of the Board is to resolve procurement disputes efficiently and fairly, in observance of principles of equality.<sup>57</sup>

*Composition of the Board.* The Board is composed of six members—three of whom are State Procurement Agency (“SPA”) employees and three of whom are representatives of the non-profit sector (civil society).<sup>58</sup> Board members serve one-year terms, which may be renewed for an additional year.<sup>59</sup> The Board is a quasi-judicial body that is independent and not subordinate to any agency or official. As a general matter, the Board’s activities and the review process are not strictly regulated or monitored for adherence to the pre-established rules. However, the Board’s decisions may be appealed to the administrative court.<sup>60</sup>

*Filing Requirements.* Any actual or potential bidder may submit a challenge regarding a tender committee’s or procuring entity’s decision or action on the basis that the applicable law or regulations were breached or the complainant’s rights were violated.<sup>61</sup> Procurement challenges must be submitted to the Board electronically via the e-procurement system’s website.<sup>62</sup> The action/decision of a purchasing entity or a tender commission must be challenged within 15 days after the relevant action/decision is uploaded onto the system, which is managed by the State Procurement Agency.<sup>63</sup> However, if the tender process has moved to the stage of an “ongoing preparation of the agreement,” the challenge can be brought any time before the finalization of the procurement agreement.<sup>64</sup>

*Admissibility of Challenges.* Challenges submitted after the relevant time limits will be inadmissible.<sup>65</sup> In addition, a challenge will be considered inadmissible if it contests an action or decision that cannot be the subject of the challenge under the Law, does not concern an action or decision of the tender committee or procuring entity, or is missing required information or the format is otherwise defective.<sup>66</sup> Decisions concerning

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56. See New Rules, Art. 1(2).

57. See New Rules, Art. 1(3). The Board’s activities are at all times governed by the Constitution of Georgia, the Procurement Law, the New Rules and other applicable rules and normative acts. See New Rules, Art. 1(4).

58. See New Rules, Art. 3(1). The Chairman of the SPA selects the two employees of the SPA to sit on the Board and also chairs the Board. Representatives of non-profit organizations select the civil society members. There are no specific qualifications or experience requirements that the members must meet.

59. See New Rules, Art. 3(2), 4.

60. See New Rules, Art. 11.

61. See New Rules, Art. 2(1). For example, in challenge number DIS150020577 (admitted on Sept. 8, 2015), the complainant challenged the tender commission’s decision to disqualify the firm from a Georgian Defense Ministry procurement prior to award of the contract.

62. See New Rules, Art. 1(6).

63. See New Rules, Art. 2(2).

64. See New Rules, Art. 2(3).

65. The decision on admissibility has to be made promptly - within one working day after the submission of the challenge. See New Rules, Art. 6(2)(a). Thus, challenge number DIS150029823 (filed on November 25, 2015), which related to an electronic tender announced by the Mayor of Tbilisi, was dismissed the following day because the Mayor had already executed the procurement agreement with a bidder when the challenge was filed.

66. See New Rules, Arts. 2, 6(3). Thus, challenge number DIS150017252 (dated July 30, 2015), related to a tender by the National Bank of Georgia, was rejected as inadmissible on July 31, 2015 based on the

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admissibility are communicated to the applicant through the e-procurement system within one business day.<sup>67</sup> If the challenge is inadmissible due to noncompliance with technical requirements or the format prescribed under the Rules, the Secretariat will provide additional time during which the complainant can resubmit the challenge.<sup>68</sup>

*Automatic Stay of Performance.* The law includes an automatic stay provision whereby if the Secretariat determines that a challenge is admissible, it will immediately take appropriate measures to freeze the relevant procurement while the procurement dispute is ongoing.<sup>69</sup> The challenged procurement will be frozen for 15 working days after the challenge is admitted. The Board must resolve the challenge during this time period.<sup>70</sup>

*Board Hearings.* Except for special circumstances designated by the Law, the Board's hearings are open to the public.<sup>71</sup> The parties may represent themselves or present their positions with the assistance of a duly authorized representative (i.e., counsel).<sup>72</sup> Depending on the circumstances of the case, the Board may invite a specialist, expert, or interpreter to the hearing, either on its own initiative or upon a party's request.<sup>73</sup> The New Rules also contemplate the possibility of attending the hearing before the Board via videoconference.<sup>74</sup> The members of the Board may question the parties at any time during the hearing, and the parties may also question each other with the permission of the Board.<sup>75</sup>

*The Board's Decision-Making Authority.* The Board may resolve the challenge by (1) fully sustaining the challenge; (2) partially sustaining the challenge; or (3) rejecting/dismissing the challenge.<sup>76</sup> The decision is made by the majority of votes of the present members, and the Chairman holds the deciding vote in the event of a tie.<sup>77</sup> The New Rules provide that each member of the Board must make his or her decision in accordance with the objective and full consideration of all the relevant circumstances.<sup>78</sup> Board decisions are promptly uploaded to the e-procurement system website, together with related documents.<sup>79</sup>

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determination that the challenge did not relate to the action or decision of the tender committee or procuring entity. In that case, the complainant company described its challenge in three sentences, including the statement: "Why are you killing Georgia and destroying its system and institutes," and using a common saying meaning "we are doomed, there is no saving us."

67. See New Rules, Art. 6(2)(a). In addition, the decision can be directly communicated to the complainant.

68. See New Rules, Art. 6(2)(b).

69. See New Rules, Art. 6(2)(c).

70. See New Rules, Art. 7(4). The time limit has been recently extended to 15 days (from the previously-prescribed 10 days), but certain official legal acts still refer to the previous 10-day time period.

71. See New Rules, Art. 7(3). Documentation related to disputes is also freely available and easily accessible on the electronic system.

72. See New Rules, Art. 7(8).

73. See New Rules, Art. 7(5)-(6). The New Rules specify that if the expert/interpreter is requested on the Board's initiative, the parties share the cost of the specialist's services. Otherwise, the cost is borne by the party requesting the attendance of the specialist. *Id.*

74. See New Rules, Arts. 7(10), 9(7).

75. See New Rules, Art. 7(15).

76. See New Rules, Art. 9(1).

77. See New Rules, Art. 9(5). A Board member who disagrees with the Board's decision may write a dissenting opinion, which will be appended to the Board's decision. *Id.*

78. See New Rules, Art. 9(4).

79. See New Rules, Art. 9(8).

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If the Board sustains the challenge, it may: (1) identify the procuring entity's wrongful decision or action and request that the procurement procedure be conducted in accordance with applicable laws and regulations; (2) request that the wrongful decision or action be revisited or cancelled; or (3) otherwise comment on the responsibility of the participants in the procurement procedure.<sup>80</sup> Selected decisions in which the Board has recently exercised these authorities are discussed below.<sup>81</sup>

- In challenge DIS150020577 (admitted on September 8, 2015), which related to a tender by the Georgian Ministry of Defense for procurement of certain construction materials, the complainant submitted that the procuring entity's decision to disqualify one of the bidders (not the complainant itself) was wrongful for a number of reasons, including for failure to allow the bidder to attend the procuring entity's testing of its product samples. The complainant also challenged the test results, arguing that the agency's explanation for why the samples were inadequate did not comport with the procuring entity's stated requirements. The Board sustained the challenge and requested that the procuring entity cancel its disqualification decision. The Board also ordered the procuring entity to document in detail its decision concerning the results of the product testing.

- In challenge DIS150014813 (admitted on July 23, 2015), which related to a tender announced by the Ministry of Defense for procurement of automobile motors and other parts, the complainant challenged the contract awardee's ability to meet the solicitation requirements. Although the challenger submitted the lowest-priced bid, it was disqualified for failure to submit documentation meeting the procuring entity's requirements. The complainant argued before the Board that the successful bidder's documentation also failed to satisfy the requirements. The Board agreed and stressed that the tender commission had failed to discuss this matter in its decision to select the successful bidder. The Board ordered that the tender commission's decision to accept the successful bidder's documentation be cancelled and reconsidered in light of the Board's decision.

- In challenge DIS150017632 (admitted on November 9, 2015), which related to a tender announced by the Tbilisi National Medical University for procurement of various medical instruments, the complainant challenged its disqualification for failure to meet certain technical specifications. The complainant argued, among other things, that it should not have been summarily disqualified for failing to meet three or four out of a total of 500 technical requirements. The Board rejected the challenge, and noted that the tender committee has the right to disqualify a bidder based on any noncompliance with the tender documentation. The Board also stressed that the complainant was aware of the disparity at the time it submitted its proposal.

The Board's decisions must be enforced promptly. Importantly, the New Rules introduce the Board's monitoring duties during the enforcement stage. Specifically, under the New Rules, the Board's Secretariat is authorized to request from a procuring entity any documentation or information regarding the fulfillment of the Board's

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80. See New Rules, Art. 9(2).

81. All procurement challenges are available in Georgian on the Dispute Resolution section of the SPA website *available at* <https://tenders.procurement.gov.ge/dispute/>.

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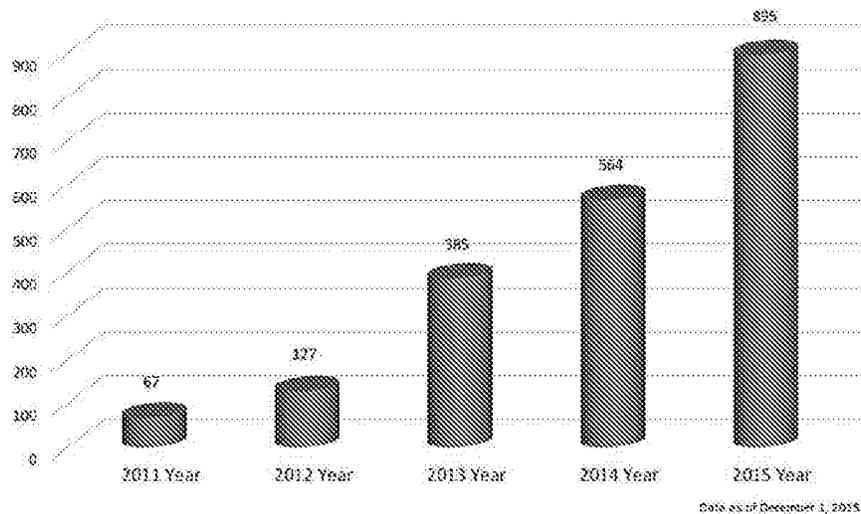
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decision.<sup>82</sup> Any interested person may submit to the Secretariat information about a procuring entity's failure to implement the Board's decision.

2. *Statistics on 2015 Procurement Challenges*

The annual number of procurement challenges submitted to the Board has increased significantly each year since the Board's establishment in 2011. As shown in Figure 1 below, only 67 challenges were filed in 2011.<sup>83</sup> That number increased to 127 in 2012, and further increased to 385 in 2013 and 564 in 2014. This year, by December 1, 2015, 895 challenges had been submitted. Accordingly, the number of procurement challenges submitted to the Board in 2015 to date has increased by about 58.6 percent when compared to 2014.

**Figure 1: Number of Georgian Procurement Challenges by Year**

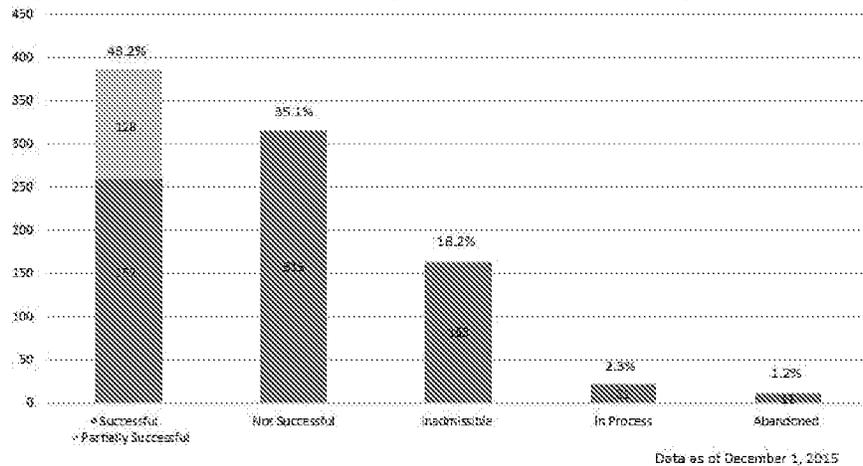


As shown in Figure 2 below, out of the 895 challenges brought before the Board in 2015, 257 (28.8 percent) were successful; 128 (14.4 percent) were partially successful; 315 (35.1 percent) were not successful; 163 (18.2 percent) were determined to be inadmissible; 11 (1.2 percent) were abandoned; and 21 (2.3 percent) are still in process. Thus, successful and partially successful tenders amount to 385 or 43.2 percent of total challenges.

82. See New Rules, Art. 6(8).

83. All statistics in this section are drawn from the Dispute Resolution section of the SPA website available at <https://tenders.procurement.gov.ge/dispute/>.

**Figure 2: Outcomes of 2015 Georgian Procurement Challenges**



Most of the challenges (731) concerned the procuring entity’s decision or action and sought the cancellation of the decision or action. Mostly, these challenges targeted the procuring entity’s disqualification of bidders. The rest (164) challenged the tender documentation itself.

**C. CONCLUSION**

As discussed above, Georgia has established a healthy state procurement system that encourages competition and includes a well-functioning dispute resolution mechanism. Although a large percentage of procurements continue to be conducted through “simplified” or noncompetitive means, Georgia has established the legal and technical infrastructure to allow for a transparent and efficient procurement process. The continued increase in the number of challenges lodged this year is also a sign of a healthy procurement system that is continuing to gain the public’s confidence.

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