ALBANIAN INSTITUTE of SCIENCE

Author:	Albanian Institute of Sciences Organization (AIS)
Subject:	Comments/Recommendations in the framework of the Public Consultation Process regarding the Draft Law on Amendments to Law 162/2020 on Public Procurement [1].
To:	Council of Ministers, Public Consultation, contact person Ms. Merita BUNDO, Coordinator for the Right to Information
Date:	20 July 2023

Dear Ms. Merita Bundo,

Through this letter, the organization Albanian Institute of Sciences, promoter of Open Data Albania, engaged in monitoring and identifying developments related to Public Procurement, would like to share with you some comments and recommendations regarding the draft law that is currently in the Public Consultation Process, presented by the Albanian Government in June-July 2023, entitled "On several additions and amendments to law no. 162, dated 23.12.2020 on Public Procurement.

The comments and opinions we are presenting to you are related solely to three new concepts of the Draft Law.

In the explanatory report accompanying the Draft Law, it is stated that the Purpose of the Draft Law and its Objectives are:

1) Improve the Regulatory Framework for Public Procurement in Albania, aiming for further alignment of the Law with the EU Directives,
2) Address and resolve issues that have arisen during the implementation of this law in practice since March 2021, by the contracting authorities and economic operators, with the aim of facilitating the procurement process for all the parties involved.

A review of the draft law shows that the essence and true purpose of the proposed changes are entirely different from what is stated in its Explanatory Report. Thus, the actual purpose consists of introducing three elements in the Public Procurement Law, namely:

[1] https://konsultimipublik.gov.al/Konsultime/Detaje/642

a) The procurement process is taken out of the public domain, i.e., involving private-non-public entities that will play the role of Contracting Authorities in the public procurement process;
b) A new EPS (Electronic Procurement System) is introduced. Such system presented in the draft includes two innovations: firstly, it is harmonized with, and integrated into other electronic systems, and secondly, this new EPS is accessible to users against payment. The country has been already applying for years an Electronic Procurement System that provides good and cost-free access for users who participate in tenders and user who monitor the processes.
c) Introduction of Artificial Intelligence as a mechanism that will serve to develop the PES for standardizing technical specifications, as well as to develop a dynamic electronic procurement and auction system using advanced Artificial Intelligence and automated processes, etc.

From the detailed examination of the changes proposed by the Legislator, it is evident that these legislative proposals foresee several changes, which, in terms of the functioning of the procurement process, can be considered crucial. In this context, several issues, problems, and concerns closely related to the implementation and practical application, as well as the consequences expected to result from these proposed fundamental changes, need to be addressed. Here is a brief description of our findings:

A. The concept of a Public Service Provider

In the Draft Law on Several Additions and Amendments to Law No. 162, dated 23.12.2020, on Public Procurement, the concept of 'Service Provider' is proposed for the first time. This subject/actor will play the role of the Contracting Authority against payment for those Institutions which, for one or several reasons, cannot carry out the procurement process themselves. According to the draft law, the 'Service Provider' can be a public or private entity, and it can even be a foreign entity.

Regarding this proposal, some ambiguities and a fundamental problem are identified.

Firstly, the Law does not provide a clear reference and definition of how and who will be able to exercise this function. Specifically, it is not specified whether a status, license, or legal title as 'Service Provider' shall be applied (in fact, the accurate term would be 'provider of procurement, concession, and auction services') and if yes, how it is going to be issued;
Secondly, it is not explicitly and clearly specified under which circumstances a Contracting Authority will contract a 'Service Provider.' The legislator may propose to regulate this through sublegal acts, but from the perspective of legislative technique, we believe that the law can and should set the specific principle for when a 'Service Provider' will be contracted."

Thirdly, the legislator has determined that the 'Service Provider' will be selected through competitive procedures only for procedures that exceed the monetary ceiling. This provision is unfair, discriminatory, and abusive. There should be a competition for the selection of 'providers of procurement/concession/auction services.'.
Fourthly, the proposal allows the 'Service Provider' to be a Foreign Entity. This provision is in complete contradiction, firstly, with the Law on Public Procurement, where the definition of the Contracting Authority is provided, and secondly, besides the issue of non-recognition of the specific Albanian legal framework by foreign entities, it may raise concerns about national sovereignty and security.".

B. A harmonized and paid Electronic Procurement System (EPS)

The Draft Law proposes the establishment of an EPS (Electronic Procurement System) as a public procurement system harmonized with other systems. This system will be accessed through payment, both by the Economic Operators and the Contracting Authorities that will use it. There is an existing electronic procurement system, and it is worth noting that this system operates without payment, it is accessible to everyone, and functions quite well. Certainly, an EPS harmonized with other systems would make things easier for Operators and the Authority, but introducing a paid EPS is a step backward in the field of procurement. The application of payments will create additional costs for all the EPS users (Operators, Authorities, journalists, monitors, NGOs, watchdogs, etc.).

The explanatory report of the draft law does not include any cost estimation as to the development of this EPS, and its cost of operation and annual maintenance.
Paid access to the EPS limits transparency in the field of procurements.

C. The introduction of Artificial Intelligence in Procurement Process is an immature concept in the absence of laws regulating its application in practice

The Draft Law proposes for the first time the concept of Artificial Intelligence. Specifically, the use of Artificial Intelligence is proposed as a mechanism that will serve for the development of the Electronic Procurement System for standardizing technical specifications, as well as for the development of the dynamic procurement and auction electronic system using advanced Artificial Intelligence technology and automated processes. Additionally, based on the explanatory report of the draft law, it appears that the application and use of Artificial Intelligence is proposed by the National Agency of Information Society (AKSHI) and the Public Procurement Commission (KPP).

Firstly, it is worth noting that neither in the existing Public Procurement Law, nor in the organic Law of AKSHI, and not even in the proposed draft law, do we have an accurate or general definition of the term/concept "Artificial Intelligence.".

Secondly, the proposers have not provided any reference to EU Directives that the draft law intends to align with through this mechanism.
Thirdly, not only Economic Operators who will compete in public procurement and therefore will be affected by the "judgments"/"evaluations"/"determinations" of the "Artificial Intelligence," but even the Contracting Authorities themselves, to whom this mechanism will serve, have no idea or minimal knowledge of it.
Fourthly, there is no mechanism foreseen for controlling or auditing the "Artificial Intelligence."

In **conclusion**, it is, in our opinion, too early, and we are completely uncertain about the application of this mechanism in **public procurement**.

Recommendations
As mentioned above, the proposed draft law is premature, lacks clear references to the parts of the draft that transpose EU Directives, introduces concepts that are not regulated in our (national) legislation, and similarly, it is not based on proven models.

The draft contains regulations that may reduce broad access to the process of monitoring and participating in Public Procurements, which poses a risk of regression.

The draft law itself introduces some partial and non-comprehensive provisions.

The explanatory report lacks sufficient information about the models it is based on and does not cite any evaluation documents analysing the need for intervention.

AIS, the promoter of Open Data Albania, requests to the Council of Ministers to withdraw the draft from the Consultation and Advancement process as it is premature and has deficiencies in its compatibility with national legislation. Additionally, it requests (to the Council of Ministers) to:

1. Initiate a technical evaluation of the current state of the current Electronic Public Procurement System, which will serve as a basis for future legislative initiatives. Consider the possibility of integrating the current system instead of creating an entirely new and expensive EPS creating forms of public-private partnerships or transferring public services to the private sector.
2. In any future initiative, carefully consider how to guarantee the principle of transparency and participation in the Public Procurement Process, while assessing the risk of limiting such transparency and participation by introducing payments for services.
3. Clearly and responsibly present any transfer of duties, functions, and competencies from the Public Sector or Authority to the Private Sector.
4. Ensure that legislative initiatives refer specifically and carefully to all provisions or reference to EU Directives applicable.

Please consider these thoughts and comments and share them with the working group and institutions involved in this Draft Law.

Respectfully,

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