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Uniunea Europeană

**Project "Cutting edge improvements in the public
procurement system in Moldova through
inclusiveness, creativity and
law-abiding practices"**



Acest proiect este implementat de
IDIS „Viitorul”

TRANSPARENCY AND DATA OPENING IN PUBLIC PROCUREMENT



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Topics addressed:

- 1. Data opening in public procurement – legal framework**
- 2. Ensuring transparency at all stages of the public procurement process**
- 3. Data sources on public procurement**



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DATA OPENING IN PUBLIC PROCUREMENT – LEGAL FRAMEWORK

Relations in public procurement are regulated based on the following principles (article 6):

- a) efficient use of public money and minimizing the risks for contracting authorities;
- b) transparency of public procurement;**
- c) ensuring competition and combating unfair competition in public procurement;
- d) protecting the environment and promoting sustainable development through public procurement;
- e) maintaining public order, good morals and public safety, protecting health, protecting the lives of people, flora and fauna;
- f) liberalization and expansion of international trade;
- g) free movement of goods, freedom of establishment and freedom of provision of services;
- h) equal treatment, impartiality, non-discrimination regarding all bidders and economic operators;
- i) proportionality;
- j) mutual recognition;
- k) assumption of responsibility in public procurement procedures.



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DATA OPENING IN PUBLIC PROCUREMENT – LEGAL FRAMEWORK

transparency – provision in order to **inform** in an open and explicit manner by the public authorities covered by this law of all information about their activity and **consultation** of citizens, associations created according to legislation, other stakeholders of the process of drafting and adopting decisions (article 2).

(Law No. 239 of November 13, 2008 on transparency in decision-making process)



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**The Organization for Economic Cooperation and Development
addresses the presence of several hierarchical levels within the concept of
transparency**

- 
- **Informing**
 - **Consulting**
 - **Active participation in decision-making
process**



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- The contracting authority must include **representatives of the civil society** in the working group if a written application to this effect was submitted two days before the deadline for submission of bids but they can not constitute more than one third of the total composition of the group.
- The representatives of the civil society included in the working group have an **advisory capacity** or the right to separate opinion, which is set out in the deliberative act of the respective group.
- Inclusion of representatives of the civil society in the working group shall be carried out for each procurement procedure separately.

(Article 13 p. (2), (3) of Law No. 131 of July 3, 2015 on Public Procurement)



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- **The report on the public procurement procedure** is a public document. People's access to this information may be limited according to provisions of **Law no. 171-XIII of July 6, 1994 on Commercial Secret** or **Law no. 245-XVI of November 27, 2008 on State Secret** only to the extent that such information includes, in particular, technical or commercial secrets or include confidential aspects of the bids (article 73 p.(2)).
- The Working Group will provide information on the conduct of public procurement procedures in accordance with public procurement legislation, if it does not contain technical or commercial secrets and confidential aspects of the bids according to provisions of **Law no. 171-XIII of July 6, 1994 on Commercial Secret** or **Law no. 245-XVI of November 27, 2008 on State Secret** (article 33).

(Law No. 131 of July 3, 2015 on Public Procurement, Government Decision No. 667 of May 27, 2016 on approval of the Regulation on the activity of the procurement working group)



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CONFIDENTIALITY

Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and confidential aspects of tenders.

Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

(Article 21 of Directive 2014/24 of the European Parliament and Council of February 26, 2014 on public procurement and repealing Directive 2004/18/EC)



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State Secret

- **Article 4 p. (1) (h)** public procurement contracts declared as secret according to legislation, if their execution requires special safety measures established by law.
(Law No. 131 of July 3, 2015 on Public Procurement)

Commercial Secret

- **Article 1 p. (1)** Commercial secret means information that is not state secret, which relates to the production, technology, administration, financial activity and other activity of the economic agent the disclosure (transmission, leakage) of which may harm its interests. (Law No. 171 of July 6, 1994 on Commercial Secret)



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(4) As object of the commercial secret cannot be:

- a) documents on establishment, as well as documents authorizing to practice business activities and certain types of economic activity to be licensed;
- b) information in the form of statistical reports, as well as reports on economic and financial activities and other data necessary for the verification of calculations correctness and tax payments and other mandatory payments;
- c) documents pertaining to tax payments and other payments to the national public budget;
- d) documents proving solvability;
- e) information pertaining to personnel number and structure, payroll, working conditions, as well as information pertaining to job vacancies;
- f) information pertaining to environment pollution, infringement of antimonopoly legislation, violation of labor protection rules, marketing of goods dangerous for the consumers' health, as well as other infringements of legislation and the size of the caused prejudice.

(5) The following cannot be regarded as object of the commercial secret of the state and municipal enterprises before privatization and during the process of privatization :

- a) the amount of property and funds of the enterprise;
- b) investment of funds in profitable assets (securities) of other enterprises, in obligations and loans, in joint ventures' equities;
- c) loan obligations, commercial and other obligations of the enterprise, which proceed from legislation, and from the concluded contracts;
- d) contracts with non-state enterprises.

(Law No. 171 of July 6, 1994 on Commercial Secret)



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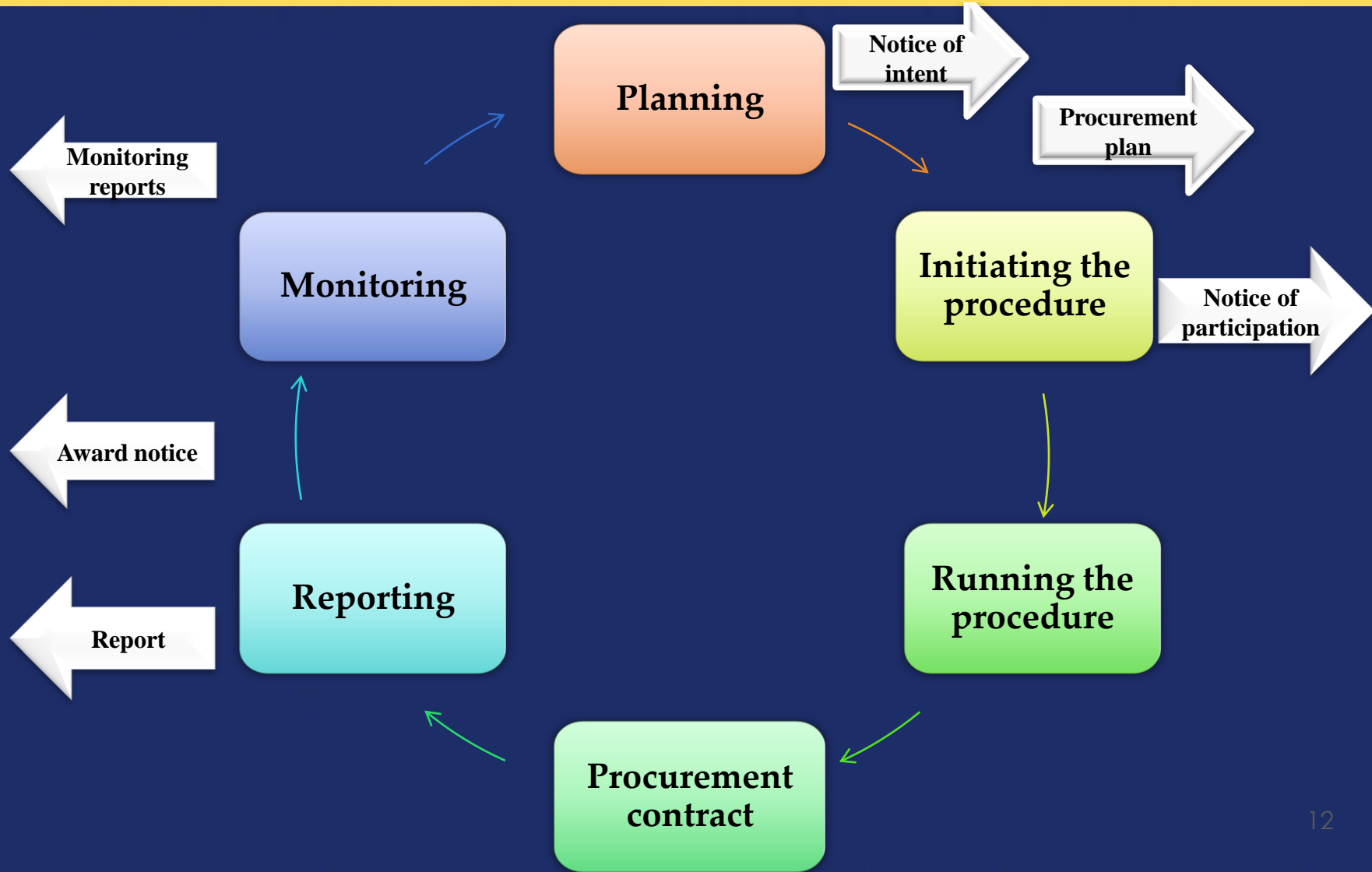
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ENSURING TRANSPARENCY AT ALL STAGES OF THE PUBLIC PROCUREMENT PROCESS





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PLANNING

- **Notice of intent** - an announcement to be published in the Public Procurement Bulletin within 30 days from the approval of the contracting authority's budget covering all public procurement contracts expected to be awarded by the end of the budget year, whose estimated value for goods and services is equal or exceeds the value of MDL 400,000, and the estimated value for works is equal to or exceeds the value of MDL 1500,000 (item 2).
- **Procurement plan** – a set of needs for goods, works or services for the entire budget year to be covered by concluding one or several public procurement contracts, depending on the manner of their planning. The Plan is amended or supplemented if there are changes in the budget and new financial resources are identified (item 2).

After the notice of intent was published in the Public Procurement Bulletin and official webpage of the Public Procurement Agency, the contracting authority (item 17, 18):

- 1) within **15 days** shall approve the procurement plan;
- 2) within **15 days** of its approval/**5 days** after its amendment **must** publish on its website the **provisional/annual procurement plan**.

(Government Decision No.1419 of 28.12.2016 on approval of the Regulation on the way of planning of the public procurement contracts)



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PROCEDURE INITIATION

Invitation to / Notice of participation

- **Invitation to participation** for price quotation request without publication in P.P.B. is transmitted simultaneously to as large as possible number of economic operators (item 12, item 67).
- **Notice of participation** is published in P.P.B. and on the Public Procurement Agency webpage. To ensure maximum transparency the contracting authority has the right to publish the notice of participation in other national or international media, but only after publication of this notice in the Public Procurement Bulletin and on the website of the Public Procurement Agency (article 28).
Approved standard forms are used.

Terms:

Price quotation request:

Goods – at least 7 days;

Works/Services – at least 12 days.

Public tendering:

at least - 20 days

Note! The term for public tendering may be reduced to 15 days if all award documentation is published on the contracting authority's website and the economic operators have direct and unrestricted access as from the date of publication of the notice of participation in PPB. Information on the webpage will be published in the notice of participation.

(Law No. 131 of July 3, 2015 on public procurement, Government Decision No. 666 of May 27, 2016 on approval of the Regulation on the acquisition of goods and services by request of price offers, Government Decision No. 669 of May 27, 2016 on approval of the Regulation on public procurement of works)



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CONDUCT OF THE PROCEDURE I

Opening of bids (item 27 - 31)

- The bids are opened at the time specified in the award documentation as the deadline for the submission of the bids or at the time specified as the deadline for the extended term, regardless of the number of bidders, in the place and in accordance with the procedures established in the award documentation. The name and contact details of each bidder whose bid is open, the qualification documents and the cost of the bid will be communicated to those present at the opening, as well as to those who have been absent or not represented at the opening, at their request.
- The working group meeting is deliberative if it has a majority of its members, and the decision of the working group is adopted by open voting with a simple majority of votes.
- **Everyone is authorized to attend the opening of bids.**
- Bids shall be signed by all members of the working group mandatorily, including by the representatives of the civil society and invited consultants.
- The bids opening session is finalized by drawing up a bids opening minutes.
- The minutes shall be also signed by all members of the working group and shall be forwarded to the representatives of the economic operators to be countersigned upon their request.
- If a member of the working group disagrees with the decision taken at the meeting, he/she is obliged to express his/her opinion separately in the minutes, indicating the clear reasons for disagreement with the decision taken.



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CONDUCT OF THE PROCEDURE II

Evaluation of the bids (item 32)

The working group shall examine the bids on a confidential basis and shall not disclose information regarding the examination, evaluation and comparison of bids to bidders or persons not officially involved in these procedures or in determining the winning bid.

(Government Decision No. 667 of May 27, 2016 on approval of the Regulation on the activity of the procurement working group)



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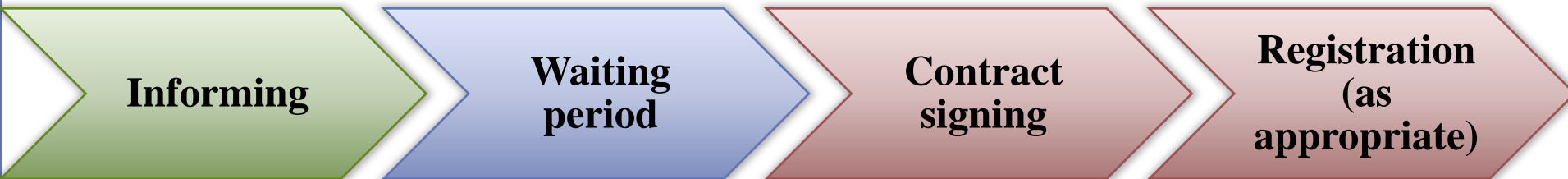
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PROCUREMENT CONTRACT





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REPORTING I

Report on the public procurement procedure (article 73)

- The report on the public procurement procedure, as well as the report on canceling the public procurement procedure are drawn up by the contracting authority and are submitted to the Public Procurement Agency within **5 days** from the date of the contract conclusion or from the date of issuance of the decision to cancel the public procurement procedure.
- The report on the public procurement procedure is a **public document**. People's access to this information may be limited according to the provisions of Law no. 171-XIII of July 6, 1994 on Commercial Secret or Law no. 245-XVI of November 27, 2008 on State Secret only to the extent that such information includes, in particular, technical or commercial secrets or contain confidential aspects of the bids. (*Article 73 para.(2) as worded in LP229 of 23.09.16, MO379-386/04.11.16 art.777; in force since 01.01.17*)
- The Public Procurement Agency processes the information from the reports submitted by e-mail or via SIA "RSAP" and places the data on the awarded contracts on the webpage.



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REPORTING II

Award notice (article 29)

- The Public Procurement Agency is obliged to publish in the Public Procurement Bulletin and on its website an award notice no later than 30 days after the contracting authority issues the information regarding:
 - a) completion of the public procurement procedure – open tender, restricted tender, competitive dialogue, negotiation with/without prior publication of a notice of participation, price quotation request – by awarding a public procurement contract or by concluding a framework agreement;
 - b) completion of a contest of solutions by establishing the winning competitor;
 - c) award of a public procurement contract through a dynamic procurement system.

(Law No. 131 of July 3, 2015 on Public Procurement)



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MONITORING I

- The working group monitors the compliant execution of the public procurement contracts (item 20, sub-item 10).
- The working group will ensure monitoring of the execution of the public procurement contracts compiling in this regard quarterly/half-yearly and yearly reports. **These reports**, which will compulsorily include information on the stage of execution of contractual obligations, causes of non-execution, complaints submitted and penalties applied, notes on the quality of the contract execution etc., will be placed on the **contracting authority's website**, and in case of its absence on the official website of the central authority to which it is subordinated or of the local public authority of the second level (item 34).



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MONITORING II

- **The Public Procurement Agency carries out the ex-post control** (LP229 of 23.09.16, MO379-386/04.11.16 article 777).
- **Methodology on ex-post control** (Decree no. 17 of 30.03.2017 on approval of Methodology on ex-post control published in Monitorul Oficial No. 109-108 (6032-6041) of 07.04.2017):
 - Random selection/risk indicators/complaints;
 - Examination of the procurement documentation;
 - Report on control;
 - Contraventions according to article 327¹ of the Contravention Code, where applicable.



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Contraventions applied in public procurement (article 327¹):

- (1) **Violation of reporting deadlines** with regard to the Public Procurement Agency is subject to a fine from 2 to 4 conventional units applied to a natural person, a fine from 6 to 12 conventional units applied to a managerial employee.
- (2) **Inclusion of false data in the reports and official explanations** on complaints submitted to the Public Procurement Agency is subject to a fine from 3 to 6 conventional units applied to a natural person, a fine from 12 to 24 conventional units applied to a managerial employee.
- (3) **Lack of public procurement planning or procurement planning that violates the provision of legal/standard acts, failure to publish the invitation to tender and the notice of intent, splitting up public procurement** through conclusion of separate contracts with the view to apply another procurement procedure than the one that could have been used in compliance with the legal/standard acts are subject to a fine from 15 to 60 conventional units applied to a managerial employee.
- (4) **Restricting in any manner the access for economic operators** to the award procedure for public procurement contracts is subject to a fine from 15 to 60 conventional units applied to a managerial employee.
- (5) **Failure to sign statements of confidentiality and impartiality by the members of the working group, failure to draw up minutes of opening and evaluation of the bids within the public procurement procedures, failure to send to bidders within the established deadlines information** on the outcome of the procurement procedure or other information stipulated by the legal/standard acts is subject to a fine from 15 to 90 conventional units applied to a managerial employee.
- (6) **Violation of the rules of drafting and maintenance of the public procurement documentation** is subject to a fine from 15 to 60 conventional units applied to a managerial employee.
- (7) Refusal to submit to the Public Procurement Agency **information on the public procurement procedure requested by the Agency** in order to fulfill its duties and responsibilities, or failure to submit them within the period by the legislation or, where appropriate, within the required timeframe is subject to a fine from 15 to 60 conventional units applied to a managerial employee.
- (8) **Failure to execute the decisions of the Public Procurement Agency** issued with regard to the public procurement procedures is subject to a fine from 15 to 60 conventional units applied to a managerial employee.



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Any person who considers him/herself prejudiced in any of his/her legal rights by a public authority by means of an administrative act or by failure to address a petition within the legal time limits may apply to the competent administrative court for the purpose of annulment of the act, recognition of the own right and compensation for the damage caused to him/her.

(article 1 p.(2) of Law on Administrative Litigation no. 793 of February 10, 2000)

- **Violation of legislation on access to information and on petitioning** (article 71 of Contravention Code of the Republic of Moldova no. 218 of October 24, 2008)

(1) Deliberate violation of legal provisions on **access to information** or those on petitioning is subject to a fine from 9 to 15 conventional units applied to a natural person, a fine from 18 to 30 conventional units applied to a managerial employee.

(2) Presenting, upon request, an answer containing clearly erroneous data is subject to a fine from 27 to 33 conventional units applied to a managerial employee.



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Claim handling instrument in public procurement

The right to file complaints (article 76, 79)

- Any person who is or was interested in obtaining a public procurement contract and who considers that under the public procurement procedures an act of the contracting authority has prejudiced one of his legal rights following which damage has been or might be caused to him has the right to challenge this act according to the procedure set forth by this law.
- **Complaint handling meetings are open** and the National Agency for Settlement of Claims will ensure that information on the date and place of the meetings is published on the webpage 3 working days before the date the meetings will take place.
- The ANSC (National Agency for Settlement of Claims) decisions are published on:
www.ansc.md