

## Compliance of the primary legislation of the Kingdom of Morocco with the mandatory requirements of the World Trade Organization Agreement on Government Procurement

### Introduction

The following summary is based on a comparison between the primary public procurement legislation of Morocco<sup>1</sup> - the Decree No. 2-12-349 - with the mandatory requirements of the World Trade Organization Agreement on Government Procurement (WTO GPA). The process of reviewing the above-mentioned public procurement law (PPL or the Decree) resulted in a report obtained through a comparison of the PPL against the “WTO Government Procurement Agreement Compliance Questionnaire”, a checklist with more than 150 questions, developed by EBRD experts as part of the work of the EBRD GPA TC Facility. The object of this preliminary analysis is to identify potential regulatory gaps which could eventually be addressed during accession negotiations. Notwithstanding, the present exercise does not constitute a binding review as only GPA Parties are in the position of asserting compliance with the text of the Agreement.

The key findings of the review, in terms of possible discrepancies with the GPA, are as follows:

#### 1. Scope and coverage of the PPL

- **Entities Covered (Article II (4) GPA)**

Besides covering all levels of local government the conditions and forms under which the contracts of works, supplies and services shall be awarded for the State and the public institutions,<sup>2</sup> the Decree also specifies the conditions and forms under which the contracts of works, supplies and services to be awarded for the account of the (prefectures, provinces and municipalities) (Article 2).

In addition to the above, the procurement contracts of works and supplies awarded by the National Defence Department shall be subject to the provisions of the Decree, however, the National Defence Administration shall not be obliged to the exceptions stipulated in Article 171.

- **Contracts Covered (Article II (2) GPA)**

The current procurement framework has institutionalized the design and execution of the contracts by defining the design of a project and the execution of the works, or the design, supply and execution of a complete installation as a single contract with a service supplier. In addition, the Decree includes articles defining the regime for the supply of architectural services, which is mandatory to employ for the design, granting of a building permit and overseeing the construction of buildings situated in certain zones.<sup>3</sup>

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<sup>1</sup> The main public procurement legislation of the Kingdom of Morocco is the Decree No. 349-12-2, issued on 8th of Jumada I, 1434 AH (20 March 2013), in force since 1 December 2014.

<sup>33</sup>World Trade Organization, Trade Policy Review – Kingdom of Morocco. 15 June 2016.

With regards to Public Private Partnerships (PPPs), it is worth mentioning that though the Decree No. 2-12-349 does not mention them as such, in Morocco, the PPP model stems from Act No. 86-12 on PPPs, promulgated by Decree No. 1-14-192 of 24 December 2014 (PPP Decree), and it is supplemented by Decree No. 2-15-45 published in June 2015. Under Moroccan Law No. 86-12, and law No. 46.18 provides for the change and completion of Law No. 86.12 regarding public-private partnership contracts, which was approved in 14th of January 2020.

A PPP contract applies to the State, its public institutions and public companies, excluding local authorities. Pursuant to the provisions of Law No 69-00 relating to State Financial Control of the Public Companies and other Entities; the public companies who may enter into a PPP contract are (i) state companies whose share capital is wholly owned by public entities; (ii) public subsidiaries whose share capital is held more than half by public bodies and (iii) mixed company whose share capital is owned up to 50% by public entities. Furthermore, there are specific sectoral laws on concessions, which include: (i) Law No. 4-89 relating to motorways (dated 6 August 1992); (ii) Law No. 15-02 relating to ports and creating the Ports National Agency (Agence Nationale des Ports) and the Ports Operating Company (Société d'Exploitation des Ports) (dated 23 November 2005); (iii) Law No. 52-02 relating to the organisation and the operation of the national railway network (dated 7 January 2005); and (iv) Law No. 25-79 creating the Airports National Office (Office National des Aéroports) as amended by Law No 14-89 and Law No. 1-93-140.

- **Excluded Contracts (Art. II (2) and III (1)-(2) GPA)**

The PPL contemplates in Article 3 a list of contracts excluded from its scope of application. These are the following:

- Agreements or contracts concluded in accordance with forms and rules of ordinary law as provided in Annex 1 of the Decree;<sup>3</sup>
- Contracts of management delegated for the public utilities and installations;
- Transfers of funds between the State facilities or between the State and the entities, prefectures, provinces and groups;
- Works carried out between the State facilities subject to the legislative and regulatory provisions in force;
- Contracts for financial transactions on the international financial market and related services;
- Contracts awarded in connection with agreements or conventions concluded by Morocco with international organizations or foreign governments where these expressly specify the application of special requirements and methods for awarding contracts.

Some of the above-mentioned exceptions, such as contracts for financial transactions or procurement under particular conditions of international organizations are also exempted from the GPA. However, if Morocco wishes to exclude procurement conducted by, for instance,

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<sup>3</sup> The list of services which may be the subject of contracts or agreements under ordinary law is attached as Annex 1 to Decree No. 2-12-349. The list may be amended or supplemented by means of an order from the Minister responsible for finance following a proposal by the Minister concerned and after hearing the opinion of the Procurement Commission.

public utilities companies, this would be subject to negotiations with other Parties of the GPA, in case GPA accession is desired. The PPL also stipulates that the regime of awarding contracts under agreements or treaties signed by Morocco with international bodies or foreign countries prevail over the PPL if these agreements and treaties are stipulated explicitly to apply special conditions and forms for the conclusion of contracts.

In addition to the cases provided for in Article 3, according to Article 131 on exceptions, the following shall remain outside the scope of application of this Decree:

- Agreements made by the entities, prefectures, provinces and municipalities with the local or national public bodies or international commissions concerning assistance to the contracting entity;
- Works carried out on behalf of the entities, prefectures, provinces and municipalities by legal person subjected to the public law, the local development companies or non-governmental organizations recognized as public benefit, within framework of special agreements, which their form and conditions shall be determined by a decision of the Minister.
- The list of works that may be the subject of contracts or agreements subject to ordinary law concluded by the entities, prefectures, provinces and municipalities provided for in Annex (5) of this Decree shall be changed or supplemented by a decision of the Minister of Interior.

On defence procurement, Article 171 on “*National Defence Administration Contracts*” provides that the procurement contracts of works and supplies awarded by the National Defence Department shall be subject to the provisions of this Decree. However, the National Defence Administration may apply exceptions to the standard procedural requirements.

## 2. Transitional Measures and Non-discrimination (Art. IV (2), (4), (6) GPA)

Developing countries acceding to the GPA may benefit - for a certain period of time - from transitional measures, in the form of price preferences, offsets or higher thresholds. Notwithstanding, these flexibilities are not automatically granted and must be consented by all GPA Parties during accession negotiations. Following a determined period of time, not exceeding three years, new Parties must eliminate such measures from their procurement framework vis-à-vis GPA covered procurement. From this preliminary assessment, it seems that currently the Decree incorporates some measures discriminating between foreign and domestic bidders, as detailed below.

On price preferences, the Decree includes provisions that grant a preference to national suppliers, in detriment of the non-discrimination principle embedded in the text of the GPA. For example, Article 155, on preference for national enterprise provides that:

When foreign contractors submit bids for these contracts, preference can be given to the bids submitted by national contractors. Under these conditions, the amounts of financial offers submitted by foreign contractors shall be added to a percentage not exceeding fifteen per cent (15%) ... the consultation regulation relating of the procedures of concluding these contracts, shall determine the percentage that should be applied to compare the offers during their evaluation ... when consortia comprising national and foreign contractors submit bids for such contracts, the percentage referred

to above shall be applied only to the share of the foreign contractor in the amount of the offer submitted by the consortium...

On set-asides, Article 156 and Article 158, could arguably be understood as establishing set-asides for SMEs. In particular these provisions stipulate as follows:

- *Article 156, on procedures for the benefit of the SME provides that:* “the contracting entity shall allocate twenty percent of the projected amount to the contracts intends to offeror each fiscal year to the small and medium national enterprises”.
- *Article 158, on subcontracting provides that:* “the contracting entity may provide in the Special Prescriptions Clauses (SPC) for a clause whereby the contractor, if the contractor decides to subcontract part of the contract, shall be obliged to assign it to business owners residing in Morocco, especially to the small and medium enterprises.

Moreover, though the Decree does not incorporate express provisions allowing procuring entities to impose offsets, there are certain articles that could create a degree of inconsistency with the GPA. As a case in point, Article 1, on general provisions provides that:

...the conclusion of public procurement contract shall take into account the respect for the environment and sustainable development goals. A system of rules and practices in procurement for sustainable and social development may include elements such as reducing the negative impact and promoting potential positive impacts on the environment procurement costs, expanding opportunities for small and medium-sized businesses, including for business-engaged women, institutions and businesses, organizations with disabilities, assistance social responsibility, health and social well-being, as well as the involvement of civil society in the Morocco.

As such, this Article could be construed as a provision providing grounds for procuring entities to impose offsets for sustainable and social development.

In addition, Article 141 on the revitalisation of local employment stipulates that:

the procurement contracts of works and services, other than those related to the studies, conducted by the entities, prefectures, provinces and groups may include an item requiring the holder of the contract to recourse to the employment of local labour at the level of the beneficiary group of the work the subject of the contract, within ten percent of the requirement of the required number of works to implement the contract.

Overall, although under the GPA, transitional measures are available for least developed and developing countries seeking to accede to the Agreement, nevertheless, considering the scope of the above-mentioned measures, these could certainly pose some concerns in case Morocco seeks accession to the GPA.

### **3. Valuation of Contracts and Aggregation Rules (Art. II (6)-(8) GPA)**

Article (5/2) of the PPL stipulates that:

Prior to any call for competition or negotiation, the contracting entity shall prepare an estimation of the cost of the works to be achieved based on the definition and content

of the works the subject matter of the contract and the prices applicable in the market, taking into account all considerations and constraints related in particular to the terms and duration of implementation... The estimation shall be prepared on the basis of the various prices shown, as appropriate, in the prices schedule or the detailed estimated statements, Prices Schedules - Detailed Estimated Statement or Schedules of Total Prices. The total amount of the estimation refers to the amount of the estimation with the calculation of fees... The estimation shall be included in a written document signed by the contracting entity. If the contract is apportioned, the contracting entity shall prepare an estimation for each portion.

The PPL in Article (162) allows contracting entities to aggregate their needs in a Procurement Bloc, and the conclusion of contracts by procurement blocs shall be subject to the rules prescribed in the PPL.

### 3. Public Notices

Regarding the publication of summary notices (see Art. VII (3) of the GPA), however, the PPL stipulates in Article (14) that:

At the beginning of each fiscal year and before the complete the first three months thereto at the latest, the contracting entity shall publish the provisional program, for the Contracts intended to be concluded on the concerned fiscal year, at least in a nationally distributed newspaper and in the public procurement portal. The contracting entity may also publish such program in every other way of publishing, especially in an electronic formula.

In addition, the provision calls for bids to be published twice in at least two national newspapers and on the government procurement website, one of which must be in Arabic and the other in a foreign language.<sup>4</sup> Considering the latter, if the publication is in one of the WTO languages, this could fulfil the purpose of the summary notice, as intended by the text of the GPA.

### 5. Multi-use List

There are no provisions regarding multi-use list in the PPL as stipulated (see Art. IX (7) GPA).

### 6. Timelines (Article. XI GPA)

The Decree sets out a shorter time-period in comparison to the one required by the Agreement for the submission of tenders. In particular, the following articles show some inconsistencies with the related mandatory GPA requirement:

- Article 20.2, on “*Publication of the call for tenders*”: “The deadline set for the advertisement of the tenders opening to be published in the two newspapers and in the procurement portal is at least twenty-one (21) days prior to the date set for the opening of envelopes. This term shall be valid starting from the day following the date of advertisement publication in the public procurement portal and the date of publication in the second newspaper published.”

<sup>4</sup> See WTO’s Trade Policy Review, above note **Error! Bookmark not defined.**

- Article 65, on “*publication of the competition*” provides that: “The advertisement of the competition shall be published in accordance with the same conditions stipulated in paragraphs (1) and (2) of the item (2) of Article (20) above. However, this advertisement shall be published at least fifteen (15) days prior to the date specified for the acceptance session”.
- Article 85.3, on “*The Negotiation Procedure by Prior Advertisement and Competitive Bidding*” provides that: “The minimum period between the date of publication of the advertisement in the Gazette and the Public Procurement Portal and the deadline of receipt of the nominations shall be at least ten (10) days.”
- Article 93. 2, on “*Publication of Architectural Consultation*” provides that: “Such advertisement shall be published in the newspapers and in the public procurement portal by twenty-one (21) days at least before the date set for the session of the envelopes opening. This period is effective from the day following the date of publication of the advertisement in the public procurement portal and the date of publication in the second newspaper issued”.

Notwithstanding, and referring to Article XI.4 of the GPA, if what it is stipulated in Article 14 of the PPL is considered as a notice of planned procurement, the procuring entity may, according to the GPA text, reduce the time period for tendering to not less than 10 days.

## 7. Registration Systems (Article. IX GPA)

The Decree does not provide special provisions for the maintenance of a supplier registration system (Common Register). However, Article 25 (d) contains a reference to the Common Register, and in paragraph (f) of the same provision, suppliers are allowed to provide an equivalent of the certificate of registration in the Common Register.

## 8. Treatment of Tenders and Awarding of Contracts (Article XV GPA)

The Decree stipulates in Article (1) the principles that the public procurement contracts shall be subjected to. It also mentions that for the awarding of public contracts, the most economically advantage tender must be selected. The Decree has redefined the ‘most economically advantageous’ bid as that acceptable as regards to the technical and operational quality and offering the lowest price taking into account the economic assessment of the cost of use and/or maintenance. Article (40) on “Evaluation of Tenderers” in the PPL stipulates the evaluation and the awarding principles including the criterion where (the lowest) price is the sole consideration.

There are no provisions in the Decree ensuring “that a procuring entity does not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity”. A related provision, Article (31) deals in general with “Placing of Envelopes of Bidders” and stipulates that the offer must be sent by the registered post accompanied by a notification of reception to the office referred to above; and to be delivered directly to the head of the tendering committee at the beginning of the session and before opening of the envelopes. The deadline for receiving the envelopes shall end in the date and time defined for the session of envelopes opening to open the envelopes referred to in the advertisement of requesting offers. Placed or delivered envelopes after the defined day and time shall not be accepted.

## 9. Electronic Communication

The Decree allows certain stages of procurement to be conducted electronically, e.g. Article 49, 85,93,94, 129 on "*Electronic publication*", Article 147 on "*Advertisement of Revers Electronic Auction*", Article 148 on "*Submission and Withdrawal of the Competitors Envelopes Electronically*"; Article 149 on "*Opening of Competitors Envelopes and Evaluation of Bids Electronically*"; Article 150 on "*Electronic Database of Contractors, Suppliers and Service Providers*", Article 151 on "*Procedure of Reverse Electronic Auction*". Notwithstanding, the Decree does not mention authentication and encryption requirements, or other requirements related to the e-communication and e-procurement as stated in Art. XI (5), X (7) GPA.

Though the GPA stipulates that a procuring entity may reduce the time-period for tendering if the notice of intended procurement is published by electronic means, however, the Decree does not include a provision on the reduction of such time-period, or a shorter deadline for bid submission when all tender documentation is made available by electronic means.

## 10. Domestic Review Procedures (Article XVIII GPA)

Morocco has a clear and well-established procurement review mechanism:

First, the Decree provides ex-post audits by internal inspectors to ensure compliance with the procurement documents set forth in Article 165 of the Decree. Pursuant to Article 165, controls and audits shall be the subject of a report, as the case may be, addressed to the concerned Minister or the director of the concerned public institution. The concerned minister or the director of the concerned public institution shall publish a summary of the control and audit reports mentioned in the public procurement portal.

Second, competitors have the right to submit complaints and appeals at any time during the procurement proceedings and interim measures (suspension of the call for competition for a maximum of 10 days) or corrective actions (order the correction of the defect) are provided as a result of the review procedure. In particular, Article 169 specifies the course of action for challenging contract award decision. The supplier can notify or seek redress from the contracting authority (within five (5) days from the date of receiving the contracting entity's response). If not satisfied with the response of the contracting authority, the claimant may file the appeal to the Minister concerned with the procurement contract, or the board of the directors of the public institution of the procurement contracts (level 1 authority).

Thirdly, challengers may also address a detailed complaint directly to the Procurement Contract Committee without recourse to the contracting authority (within a maximum period of seven (7) days after the presentation of the result of the said call for competition or within seven (7) days from the date of reception of the response of the concerned Minister or the head of the Board of Directors of the relevant public institution, or in case of a non-response, following the thirty (30) days prescribed in Article 169, where there are any procedural non-compliance with the Decree, or any clause or condition in the procurement documents that contains discrimination or not disproportionate to the subject of the contract, or any dispute as to the reasons for the exclusion of the challenger's offer by the procurement committee/the competition committee.

Furthermore, the Procurement Contract Committee is the level 2 authority that the competitor may seek to review the decision of the level 1 authority when the competitor is not satisfied with the response given to it in accordance with Article 169 or in the absence of the minister concerned or the head of the board of directors of the concerned public institution (Article 170). The decision of this Committee is binding.

An issue of inconsistency with the text of the GPA on domestic review procedures relates to the deadline for filing a complaint, namely, the five days (Article 169) or seven days (Article 170) deadline set by the Decree to submit complaints. The text of the Agreement establishes that such period shall be a sufficient period and not less than 10 days.

The judiciary system is also part of Morocco's national review and remedies mechanisms for complaints related to public procurement. As public procurement contracts are administrative contracts in nature, tenderers may file a complaint before the Administrative Court against the public entity, in case of an infringement of the public procurement rules.<sup>5</sup> The appeals Judge of the Public Procurement Review Board may also intervene and may decide to suspend the procedure if he feels that such a suspension would be in the interest of plaintiffs.<sup>6</sup>

Moreover, there is not a single independent regulatory institution with general regulatory powers to develop procurement policy and monitor compliance of contracting entities. Notwithstanding, Morocco has created several institutions to harmonise rules and monitor public procurement compliance. These include:

- **Public Bids Commission (Commission des Marchés):**

The Public Bids Commission (PBC) is regulated by Decree No. 2-78-840 dated 30 December 1975. The Prime Minister appoints the PBC Chairman. The remaining ten members are representatives from relevant Ministries. The core function of the PBC is to monitor enforcement and suggest amendments to the PPL. In addition, the PBC is responsible for giving opinions on awards, execution and settlement of public contracts, and claims related to public bids and contracts.

- **National Audit Body (Cour des Comptes):**

The National Audit Body (NAB) is the central authority responsible for reviewing the accounts of each public entity. It reports to the King. The "NAB" monitors public procurement law compliance as part of its general audit.

- **Ministry of Interior:**

The Ministry of the Interior (MoI) is responsible for reviewing and monitoring the public procurement process of municipalities as stipulated in Articles 142, 145 of the Public Procurement Legislation of Morocco, the Decree No. 2-12-349.

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<sup>5</sup> See, Article 8 of Morocco's Decree No. 41-90 (Administrative Procedure Law) and Dahir No. 1-91-225 (22 rabia I 1414) of 10 September 1993: Administrative Courts are competent to judge in first instance litigations relating to administrative contracts.

<sup>6</sup> Articles 7 and 24 of Law No. 41-90 establishing the administrative tribunals. Available at <https://bit.ly/311FS0S>.