SEMED: searching for the best reform concept
SEMED: searching for the best reform concept

Joao de Almeida
Jean-Claude Mabushi

The EBRD assessment of the public procurement sector in Egypt, Jordan, Morocco and Tunisia (SEMED), completed in 2012 confirmed that several policy areas need substantial improvement and that governments in the SEMED countries are actively working to reform their national public procurement systems. Since these countries are keen to create a modern and comprehensive legal framework for public procurement and to get good value for money in public spending, different reform scenarios are under discussion. This article aims to highlight ‘problem areas’ in local procurement practice identified in the EBRD research and consider using the 2011 UNCITRAL Model Law on Public Procurement to find suitable regulatory solutions for SEMED countries.

Public procurement reform challenges in the SEMED region

In accordance with its mandate, the European Bank for Reconstruction and Development fosters the transition to market economies in its countries of operations. At the EBRD Office of the General Counsel, the Legal Transition Program (LTP) aims to contribute to the improvement of the investment climate in the Bank’s countries of operations by helping create an investor-friendly, transparent and predictable business environment.

In order to encourage reforms of public procurement regulation, in 2010 the LTP, in collaboration with the Bank’s Procurement Department, conducted its first sector assessment in the then 29 countries of operations. Based on the results of the assessment, the LTP has developed a series of public procurement reform initiatives in the Commonwealth of Independent States (CIS) countries to assist them to upgrade their public procurement regulation. The majority of policy dialogue in the CIS countries has been linked under the EBRD’s UNCITRAL Initiative on Enhancing Public Procurement Regulation in the CIS and Mongolia.

In the wake of the Arab spring, the EBRD’s mandate was extended to include four countries in the southern and eastern Mediterranean (SEMED) region – Egypt, Jordan, Morocco and Tunisia. From 2011-12 the LTP conducted an evaluation of commercial laws in the SEMED countries, with an assessment of the public procurement sector (the Assessment) forming part of this initiative. The Assessment reviewed public procurement “laws on the books” as well as the local procurement practice, and revealed that the public procurement legal framework in SEMED countries is generally in medium compliance with international standards. The quality of local procurement practice was also recorded as below the average compared to the other transition countries in the EBRD region. A review of the Assessment results, conducted with SEMED governments in 2013, verified the accuracy of the Assessment findings and enabled a discussion about reform recommendations. The most relevant reform issues in the SEMED region relate to transparency safeguards, fair competition instruments for local and international bidders and review, and remedies mechanisms to protect private sector suppliers and contractors.

This article aims to discuss how the 2011 UNCITRAL Model Law may assist in driving and strengthening reform of public procurement in SEMED countries.
Opportunities for using the Model Law as a reform tool in SEMED countries

As an international standard covering the principles, rules and procedures that are essential for a sound public procurement system, the 2011 UNCITRAL Model Law offers a set of valuable legislative instruments to align national regulation of public procurement sector with current international best practice.

The results of the Assessment revealed specific reform needs in the SEMED region, which should be targeted by government reform projects (a summary of research findings is presented, country by country, in Figure 1 below).

The key findings from the Assessment were recently discussed with SEMED governments in order to facilitate well-designed and results-driven national reform programmes. Inevitably, in the context of regulatory gaps revealed by the Assessment, different policy standards and objectives were discussed, including reasons for international procurement standards as well as specific UNCITRAL Model Law recommendations. In this context, the objectives of the UNCITRAL Model Law are highly relevant for the SEMED countries, since enactment of national legislation based on the 2011 Model Law could facilitate significant improvements in national legal frameworks, regardless of their specific legal traditions or their current political objectives.

The question remains as to whether SEMED governments will find regulatory standards that were recommended by the 2011 UNCITRAL Model Law useful for their reform work. To answer this key question, we interviewed SEMED national regulatory authorities. The opinions of Jordanian, Moroccan and Tunisian officials, on the prospects of utilising the UNCITRAL Model Law in designing their public procurement reform projects are presented below.

In addition to specific reform needs, the Assessment identified some common problems across the SEMED region which, if neglected, have the potential to hinder any reform efforts. In the following four sections of this article we have attempted to address issues that were identified by the Assessment and that recurred in the discussions with SEMED governments. Next, we have tried to identify whether the 2011 UNCITRAL Model Law could offer guidance about how to set priorities in the public procurement reform agenda in order to better address these common problems.

Need for better legislation: more modern, uniform and comprehensive

The results of the SEMED public procurement sector assessment suggest that the public procurement legal framework in SEMED countries is fragmented, and not always as comprehensive as it could be. For this reason, both contracting authorities and economic operators might find the rules difficult to understand and apply.

In order to address these concerns, the broad scope of the Model Law might help national legislators to design far more comprehensive legislation that should regulate every phase of the procurement process (pre-tendering, tendering and post-tendering phases), embrace the public sector as a whole, and cover all types of public contracts. Exemptions from the application of the public procurement law are treated as the exception, and are therefore as limited as possible.

Need for better governance: weak regulatory agencies and monitoring units will not make good public contracts

A weak institutional framework – which is sometimes combined with a limited scope of the public procurement law (which may have the effect of creating uncertainty about which rules to apply to local government entities, state-owned companies, utilities, concessions and public-private partnerships) – might mean that important areas of public contracts are excluded from the beneficial results that are expected to be produced by the reforms.

Significant efforts will have to be made by national legislators and policy-makers to strengthen the public procurement institutional framework and promote an effective segregation of functions, based on the concept of independence and independent bodies.
Jordan

The EBRD SEMED Assessment identified substantial regulatory gaps in public procurement laws in Jordan. The UNCITRAL Model Law standards may be beneficial in breaching the gaps and creating modern, comprehensive legal framework.

"I find the UNCITRAL Model Law very useful in the context of the reform in Jordan and I would like to highlight the following main positive aspects:

First, the Model Law provides a very clear structure upon which the national legislator can build their own system in such a way that the main features characterising modern public procurement systems are not neglected. The draft legislation that is currently pending approval in Jordan is largely inspired by the Model Law.

Second, the set of procedures envisaged by our draft legislation has been largely taken from the Model Law toolbox, with the exception of competitive dialogue, which we do not envisage adopting given the transparency-related risks.

Third, the Model Law is among the main important sources of information used to draft national regulations regarding the framework procedures and agreements.

Lastly, the challenge proceedings that we are now in the stage of redesigning will certainly take into account the guiding principles and the main features promoted by the Model Law.

These are, among others, good reasons to consider the Model Law such an important and useful reform tool, which needs to be promoted before key policy-makers and legislators at the national level."

Moh’d Khaled Al-Hazaimeh
Director-General
Government Tenders Directorate
Ministry of Public Works and Housing
Jordan
Other reform efforts, and even some interim positive results (for example, those generally linked to the creation of challenge proceedings, the implementation of some of the electronic procurement [eProcurement] tools, and the generalisation of the publication of contract notices through the internet) could be jeopardised by a weak institutional framework that does not provide for a clear separation of functions and responsibilities, which is a mandatory feature of every modern and transparent public procurement system.

Proportionality and flexibility are important values for modern procurement methods: combining old bureaucracy and eProcurement tools can hamper reform

In principle, the current legal frameworks in all SEMED countries could be improved in order to allow for different solutions, as well as different procurement methods and procedures, to be adopted according to the nature, scope and value of the public contracts concerned. In addition to the bureaucracy inherited from the previous regimes, some more rigid approaches are still being justified by public procurement authorities as a way of preventing corruption. A better alignment between procedural complexity and the value of the public contract is needed if these countries are to enhance the cost-effectiveness of their public procurement systems.

The Assessment revealed that SEMED governments are enthusiastic about eProcurement tools, although there is still significant room for building a clear understanding about how to implement eProcurement in order to benefit both the public and private sectors.

It has been proven by several governments that adopting eProcurement will not only enhance transparency and cost-effectiveness, but that it will also contribute to hastening progress in other critical areas of reform. Experience of successful reformers shows that comprehensive regulatory reforms incorporating eProcurement tools have significant potential to generate benefits related to transparency, and to the cost-efficiency of public contracts. Further, eProcurement “changeover” programmes, if well-managed and efficiently implemented, are able to produce quick economic results that are easy to showcase, and that can be useful in supporting further reform efforts.

Taking the Model Law as a starting point for designing regulatory frameworks for eProcurement-oriented policies should follow a balanced approach, and should allow for adaptation to country-specific circumstances. In order to ensure a sustainable changeover towards eProcurement solutions, a clear understanding about the required specific legal instruments dealing with eProcurement is needed.

eProcurement tools are neutral in terms of policy decisions, and the Model Law provides the necessary guidelines in respect of how to incorporate new tools without compromising basic standards of transparency and accountability. Particular attention should be paid to the distribution of legal content between the primary law – which is designed with the main aim of setting the principles and main rules – and the secondary legislation, aimed at regulating the eProcurement systems in detail.

Rights of the private sector to complaint against public official decisions: review and remedies for public procurement

Challenge proceedings should also attract particular attention, as the current situation in SEMED countries has substantial room for improvement, since there is no clear understanding about the public procurement review and remedies mechanisms, nor how to implement them.

The Model Law provides clear guidance on these key matters, striking a balance between public and private interests, and putting forward the main principles to be adopted, and the requirements to be fulfilled.
Morocco

As presented in the chart below, the EBRD SEMED Assessment mapped substantial progress in development of the public procurement laws in Morocco in 2013. Further work on implementing the eProcurement procedures, if based on the UNCITRAL Model Law recommendations, should enable creating modern and efficient public procurement system.

“Morocco was a member of the working group on public procurement in charge of updating the 1994 Model Law, and considers it a reference point for the reform of public procurement legislative frameworks. Indeed, the 2011 Model Law provides countries with best practices and new procurement methods. This is particularly the case for our country since the regulation of electronic reverse auctions in the new Moroccan public procurement law, adopted in 2013, has been developed based on the Model Law provisions.”

Abdelmjid Boutaqbout
Head of Legislative Drafting Department for Regulatory and Legislative Work
General Treasury of the Kingdom of Morocco

In some cases the proposed way forward requires broad agreement and a common understanding among the key public stakeholders, such as the national government, the parliament and policy-makers. This is an area where we can expect countries to face some difficulties in their progress, especially in those cases where the institutions trying to reach a common understanding have a very different level of expertise regarding the public procurement law, and different levels of experience with its practical application.

Also, in this perspective, since the Model Law provides a neutral approach, it can be used by national policy-makers as a solid and convincing argument in favour of the envisaged reforms.
Tunisia

Tunisia is intensively reforming national public procurement system. Still, the EBRD SEMED Assessment revealed (see chart below) that more efforts should be dedicated to increasing efficiency and accountability of procurement procedures. Within this specific area policy recommendations of the UNCITRAL Model Law can be easily applied and provide a basis for developing new legislation addressing these reform needs.

“...The Model Law represents an excellent reference in the field of public procurement, among others, such as various donor guidelines and the European Union (EU) directives on public procurement. The public procurement reform engaged in within Tunisia aims at harmonising our national legislation with international standards and adopting the best practices.”

Khaled El Arbi
Programme Manager
Office of the Head of the Government
Government Presidency
Tunisia

Designing reform based on the UNCITRAL Model Law in the SEMED countries

As a consequence of its ability to accommodate different political decisions and legal environments, we believe that the Model Law has significant potential to be used as a template for modernising national legislation in the SEMED region, where political objectives differ but where all governments have identified a common need for procurement to deliver better “value for money”.

The dialogue thus far undertaken between the EBRD and national public procurement authorities of the SEMED countries has confirmed these countries’ interest in taking advantage of the Model Law as a guiding reform tool. The same dialogue has demonstrated the need to build a clear understanding about how to incorporate the Model Law principles and provisions into the national legislations of the SEMED countries. Additional efforts in respect of capacity building are seen as critical success factors within the framework of an effective enactment of the Model Law.
At a practical level, we believe that the critical issues for implementing reforms using the Model Law should be identified and addressed in the national reform agenda. Following a priority-based approach, the scope and objectives of the reform project should be tailored to local circumstances.

However, the Assessment results suggest that the national reform agenda should consider the following issues in all SEMED countries: (i) unifying the public procurement law and making it more comprehensive; (ii) strengthening governance-related aspects of the institutional framework; and (iii) enabling independent review and remedies procedures, providing a fundamental guarantee of a fair system of public contracts.

1 (i) maximising economy and efficiency in procurement; (ii) fostering and encouraging participating in procurement proceedings by suppliers and contractors, regardless of nationality, thereby promoting international trade; (iii) promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured; (iv) providing for the fair and equitable treatment of all suppliers and contractors; (v) promoting integrity, fairness and public confidence in the procurement process; and (vi) achieving transparency in the procedures relating to procurement.
Acknowledgements

General Counsel of the EBRD
Emmanuel Maurice

Co-Editors-in-Chief
Gerard Sanders
Michel Nussbaumer

Focus Editor
Eliza Niewiadomska

Production Editors
Tabitha Sutcliffe
Bryan Whitford

Editorial and Support
Dermot Doorly
Stuart Roberts