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Policy Brief

Corrective Action and Positive Discrimination in Government Tendering

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Corrective Action and Positive Discrimination in Government Tendering

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This study examines the regulatory environment for public procurement operations in the West Bank, identifying the most prominent legal and procedural obstacles that limit the ability of micro, and small enterprises to participate in public (governmental) procurement. The paper outlines the most prominent legal and procedural reforms that will raise the efficiency of public procurement procedures - and formulate required interventions - in order to grant smaller enterprises some preferential treatment in government procurement, while noting that public procurement accounts for 12.3% of GDP, distributed amongst the procurement of supplies, works, as well as consulting and non-consulting services. By the end of 2019, the total government public procurement expenditures arrears to the private sector amounted to USD 2.5 billion. ⁽¹⁾

1. The share of small businesses in public procurement

Micro and small enterprises (according to the latest definition adopted by the Ministry of National Economy) constituted 98.75% and 98.5% of the total number of establishments operating in the West Bank, according to the censuses held in 2012 and 2017 respectively. According to a recent study by the World Bank, the share of these enterprises for the years 2017-2019 (which employ less than 20 staff, with an annual turnover of not more than USD 500,000) did not exceed 8% of the total number of bids, and 6% of the value of bids according to the Ministry of National Economy's former definitions.⁽²⁾ According to the Ministry's new definitions, these percentages increased to 17.9% (number of bids) and 15.3% (value of bids) for the same period.

The difference between the World Bank's estimates and the Ministry's estimates is wide, despite the fact that the two estimates are based on the same criteria concerning the number of workers and sales volumes. This calls for a review by the Ministry of Finance and the Higher Council for Public Procurement Policies of the methodology and data sources underpinning these estimates, in order to create a comprehensive database with more accurate estimates of the various characteristics of establishments involved in public procurement.

2. Reasons for the low participation of small enterprises in public procurement

The study identifies the reasons for the low participation of micro, very small, and small enterprises in public procurement in the West Bank.

2.1 Internal factors

- Little confidence in procedures for announcing and awarding bids. Through following the public procurement procedures and the field study conducted with the bidders, it became clear the state of general distrust in the public procurement procedure stems from enterprises questioning the integrity of the bid description and receiving procedures. This is mostly centered on the possible collusion between the control and receipt committee with the head of the procurement committee in favor of one of the tenderers through accepting lower specifications (upon receiving the items/service) than the specifications advertised in the bid.
- Difficulties faced by small contractors in obtaining classification status at the Contractors' Union.

(1) https://www.aman-palestine.org/cached_uploads/download/migrated-files/uploads/files/PublicDept.pdf

(2) For medium-sized enterprises and smaller enterprises, according to the former definition adopted by the ministry, and for small enterprises and even smaller enterprises (micro), according to the newly adopted ministry definition, i.e. enterprises employing less than 20 workers, with a sales cycle that does not exceed USD 500,000

- Accumulation of tax arrears at various small establishments, disqualifying them from participation in bidding.
- Costs of bank and performance guarantees, as well as stringent requirements for the registration of suppliers and contractors, documentary requirements and procedures, and qualification requirements.
- Long repayment periods and complex dispute-resolution procedures.

2.2 Legal and regulatory external factors

- The public procurement law or system does not include any explicit articles that allow for the possibility of dividing large bids to enhance small enterprises' ability to participate in them.
- Delays by purchasing entities (governmental units) in paying the value of public procurement contracts, given the weak financial capabilities of the government and the accumulation of arrears in private sector contracts. While larger companies can better accommodate problems related to arrears, smaller enterprises have much more limited cash-flow margins.
- The tendency of governmental agencies and municipalities (buyers) to avoid risks in public procurement. Resultantly, governmental and municipal procurement entities may set stringent financial or technical requirements that exclude newer (and financially weaker) small enterprises.
- A lack of knowledge by micro, very small, and small enterprises surveyed in this study of the existence of a unified electronic portal for public procurement. Additionally, the portal has weak capabilities in reaching out to facilities and establishments involved in public procurement. It also lacks accurate databases on firms' qualifications, areas of expertise, and classifications. The absence of such information during portal registration further exacerbates these deficiencies.
- Delays at the Council of Ministers level in deciding on the mandatory use of the unified electronic portal by responsible entities.
- Procurement units at some entities do not adopt the methodology of rotating personnel involved in the management of bidding processes.
- When inviting price quotations, a committee is formed to evaluate and study the offers submitted by bidders. The law does not specify the time limits for the work of such committees. In many cases, this leads to long periods of time elapsing before a final decision is made and then communicated to the winning bidder by the procurement committee.

3.Policies and measures to enhance the participation of small enterprises in public procurement within the Palestinian context

3.1 Indirect interventions (reform and enhance the quality of public procurement systems and processes)

- The commitment of central government and procuring centers to earmark contracts for small enterprises, with a down payment of the contract value upon delivery (half the amount, for example), while scheduling the rest of the amount in installments. Note that the government's total commitments do not exceed, at the highest estimate, USD 115 million (2% of the 2021 budget).
- Complete the inclusion of all government centers and local authorities in the unified electronic portal of the Higher Council for Public Procurement Policies, with the need to adhere to the announcement of invitations to submit bids, pre-qualification requests, or expressions of interest through the portal.
- Implement the plan of the Higher Council for Public Procurement Policies that seeks to target all establishments (including small ones) by directing them to register their company in the unified portal's databases, using the portal's electronic form. There is a need to develop an electronic form and systematic outreach and advocacy for the registration of establishments on the portal, such that classification fields that are necessary for future data analysis become mandatory (e.g., the field of expertise, number of employees, sales volume, company capital, etc.).



- Introduce establishments to the Dispute Review Unit (affiliated with the Higher Council for Public Procurement Policies).
- Provide training for administrative, procedural, and technical workers at small enterprises in the areas of bidding, public procurement procedures, and financial/technical requirements. This should be facilitated by the Higher Council for Public Procurement Policies, the Ministry of Finance, the Ministry of Public Works and Housing, and unions/federations.
- Make use of bid guarantee declarations instead of bond guarantees, while requesting performance guarantees only whenever necessary.
- Procuring entities should take into account that qualification criteria and documentation requirements are commensurate with the size and conditions of the procurement process, and not exaggerate them in a way that limits the participation of small and medium enterprises.
- Dissatisfaction with the provisions of the procurement law and system, which allows procurement authorities to split bids without any indication of priorities, or to boost the capabilities of small enterprises to participate in bidding processes (especially large-scale bids for central government).
- Amend the public procurement system by stipulating that procurement committees at concerned ministries are required to justify their failure to take the recommendations of the evaluation committee into account.

3.2 Direct interventions and positive discrimination policies

Affirmative action policies require direct intervention by the High Council for Public Procurement Policies, the Ministry of Finance, and other responsible institutions. This can be done through direct interventions from the Council of Ministers by amending the public procurement regulatory framework. More specifically, this can be done through:

- Target small enterprises in strategic sectors/activities (based on the national strategy) with the highest labor density and/or the largest national component. Apply price discrimination policies in contracts at a rate equal to the percentage granted in government tenders for national products (15%), if the products of those establishments are not of national origin.
- Require large enterprises pursuing large-scale bids (over a certain amount) to commit to 30% sub-contracting with small enterprises. This requires conducting a detailed sectoral study of subcontracting processes.
- Allocate half of the direct purchases (for amounts below USD 3,000 for supplies or USD 5,000 for works), and at least half of the solicitations for purchases under USD 20,000 (for supplies, works, and non-consulting services) for competition between small enterprises that meet qualification requirements.
- Create a dedicated webpage on the unified electronic portal for public procurement to display the products and services of small enterprises to different purchasing entities and procuring centers, for promotion and networking.
- Follow-up on the Cabinet's decision regarding the granting of "preferential treatment" to cooperative societies in public procurement contracts, by:
 - Defining the term "preferential treatment" at the Ministry of Finance and the Higher Council for Public Procurement Policies.
 - Determining the necessary procedures to realize this preferential treatment, and follow-up on the extent of compliance.
- Identify the sectors that are most suitable for integrating women managed? targeted? projects into public procurement through direct procurement mechanisms, and by subcontracting on large bids and solicitations. This can commence with the food industry, handicrafts, and agricultural production, with a focus on the products of women's cooperatives.
- Earmark 20% of public procurement operations for the benefit of small enterprises, while

allocating half of that percentage (10% of public procurement operations) to foster competition between youth or women's establishments and associations, or those employing people with disabilities. Exclude other establishments from entering this competition. This requires periodic follow-up on the effectiveness of adopted policies, in order to realize the specified percentage.

- Enhance transparency in bidding and award procedures. This can be done by activating a monitoring and control process in the design stages of public procurement (pre-procurement) instead of only monitoring the processes after the completion of the procurement operation through a collaborative effort from the Ministry of Finance (General Administration of Civil Financial Control) as well as Financial and Administrative Oversight Bureau.
- Requiring the presence of an employee from the Financial and Administrative Oversight Bureau to attend the sessions of procurement committees (control and receipts processes), and to seek the assistance of experts that it deems appropriate in order to enhance the confidence of targeted groups in the fairness of procedures.

