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Committee on Government Procurement

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ACCESSION OF ALBANIA TO THE AGREEMENT ON GOVERNMENT PROCUREMENT

COMMUNICATION FROM ALBANIA

*Albania's Responses to Questions from Canada ([GPA/ACC/ALB/12](#))
on Albania's Replies to the Checklist of Issues ([GPA/ACC/ALB/2](#))*

The following communication, dated 27 February 2024, is being circulated at the request of the delegation of Albania.

1 LEGAL FRAMEWORK

1. N/A – No clarification questions at this time.

2 SCOPE AND COVERAGE

2. In response to Question 2.7, the table "Number of procedures concluded with a winner for 2021 and 2022" lists (as well as in the table below) "Restricted related to the Reconstruction" and "Restricted above the upper monetary threshold related to the Reconstruction".

a. **Could Albania please elaborate on these procedures or point to information in the Checklist that describes these procedures?**

After the earthquake of 26 November 2019, and the need to adjust its consequences and rebuild the affected areas, pursuant to Normative Act no. 9, dated 16 December 2019 "On coping with the consequences of the natural disaster", the responsible Contracting Authorities, have conducted procurement procedures for the selection of winners of the framework agreement for the reconstruction process in the public procurement system. The procurement procedure used through the Framework Agreement is "Restricted related to the reconstruction" and "Restricted above the upper monetary threshold related to reconstruction". These procedures are opened for competition for everyone that is interested in specific procedures that are only related to the reconstruction process because of the earthquake, but due to the specific content, have shorter waiting periods for bids compared to others. The contract notices for procurement procedures within the reconstruction process have been published in the Electronic Procurement System.

The reconstruction process has continued throughout the years 2020 to 2022 and currently this process is nearing completion.

Based on the data retrieved from the Electronic Procurement System, for 2023 there are only seven notices related to the procedure "Restricted related to reconstruction", which comprises 0.17% of the total number of published procedures on 2023 and, expressed in value, is ALL 214,432,678¹

¹ Exchange rate of Bank of Albania on 2 February 2024 is: EUR 1 -ALL 103.98
(https://www.bankofalbania.org/Markets/Official_exchange_rate/)

(Approx. EUR 2,062,249.25) comprising only 0.16% of the total limit fund and are mostly supervision services.

3. In response to the same Question 2.7, in the table "The Value of procedures in 2021 and 2022 in Albanian Lek", there seems to be a corresponding decrease from 2021 to 2022 for "Open Procedures" and increase from 2021 to 2022 for "Open above the upper monetary threshold" for services and goods.

a. Could Albania please elaborate on the figures that appear in this table?

The adoption of the new law on public procurement, Law 162/2020 "On Public Procurement" which entered into force on 31 March 2021, is followed with the adoption of the secondary legislation, by which significant changes regarding the monetary thresholds are made.

The monetary thresholds were changed and as a result, the high monetary threshold has been lowered considerably, thus a lot of procedures which in previous years were considered as procedures under the high monetary threshold, during the second half of 2021 and onwards, were classified as procedures above the high monetary threshold. This has led to an increase in the use of the "Open procedure above the upper monetary threshold". It must be emphasised that, in these procedures, the bidding period is longer and the standard tender documents are published in Albanian and English.

3 NON-DISCRIMINATION

4. In reference to the response to Question 3.4, could Albania please elaborate on how it defines "persons in need"?

The definitions related to the concept of persons with disabilities or persons in need are found in the legal provisions in the field of social protection, among others, in Law No. 121/2016 "On social care services in the Republic of Albania". This definition refers to people from vulnerable groups other than disabled people.

4 AVOIDANCE OF CONFLICTS OF INTEREST AND PREVENTION OF CORRUPT PRACTICES

5. In response to Question 4.1., Albania indicates that officials engaged in the procurement process and any interested party who has information on corruption is obliged to inform the competent bodies.

a. Could Albania please elaborate on the process for informing the competent bodies?

Pursuant to the Law no. 60, dated 2.6.2016 "On whistleblowing and whistle-blower protection", as amended, article 5, any person, who becomes aware of alleged corruption actions or practices in the course of his/her work or activity in the organisation, shall be entitled to whistleblowing this fact to the competent unit within the organisation or to HIDAACI (High Inspectorate of Declaration and Audit of Assets and Conflict of Interest), as applicable.

Articles 10 and 11 of the Law mentioned, foresees the channels for Whistleblowing. The law foresees that a competent unit shall be designated within any public authority having over 80 persons employed and within any private entity having over 100 persons employed, which shall register, conduct administrative investigation and examine any whistleblowing pursuant to this law. Also HIDAACII shall directly investigate the whistleblowing on the alleged corruption actions or practices in organizations which do not have a competent unit for this purpose.

From 2017 the Ministry of Justice held the portfolio of the National Coordinator Against Corruption. In December 2023 the State Minister for Public Administration and Anti Corruption was established. The National Coordinator is responsible for designing and implementing the strategic framework against corruption, as well as conducting administrative investigation of corruption related denunciations from the general public or businesses. The capacities of the National Coordinator were further enhanced through the decision of 20 October 2021 "On the establishment, organization and functioning of the network of anti-corruption coordinators and the structure responsible for

anti-corruption at the National Anti-Corruption Coordinator", in which, the Council of Ministers has laid the foundations to create the first General Directorate of Anti-Corruption, as a unique national structure for coordination of the fight against corruption, in the direction of three strategic approaches: Prevention - Awareness - Punishment. This Directorate focuses on all functions previously performed by the National Anti-Corruption Coordinator, as well as by all agencies under the Prime Minister that have focused on anti-corruption. This already empowered directorate will have increased human resources and dedicated to best fulfil all the functions of the National Anti-Corruption Coordinator.

The mission of this body is to carry out the verification (administrative investigation) of denunciations/complaints about abusive, corrupt or arbitrary practices for the implementation of legality, including procurement procedures, as well as the development of projects and programs in the field of anti-corruption, planning, coordination and determining the necessary instruments for the implementation of anti-corruption policies. The controlling activity of this structure focuses on identifying and penalizing corrupt cases.

Public procurement is a high-risk area for corruption, so the General Anticorruption Directorate (GPA) has prioritized administrative investigations of public procurement procedures for institutions that are part of the monitoring network, but not only. Specifically, the GDA has proceeded on a case by case with a final investigation report for the institution proposing and taking the relevant administrative measures, and/or has also filed a criminal complaint directed or referred to the competent prosecution body in administrative investigations carried out primarily or based on complaints and denunciations received from various sources.

According to law no. 95/2016 "On the organization and functioning of institutions to fight corruption and organized crime" a special Structure Against Corruption and Organised Crime (SPAK) is established, which prosecutes and represents the prosecution on behalf of the state in cases of criminal offenses against corruption and organized crime. SPAK is the responsible structure for the prosecution and investigation of criminal offenses of corruption, organized crime and criminal cases including article 258 of Penal Code on cases of breaching the equality of participants in public bids.

b. Furthermore, could Albania please elaborate on how officials reporting corruption are protected? Does Albania have any protections for whistleblowers that would apply in this context?

Reporting of corruption and conflict of interest's cases within the public institutions is governed under the whistleblower law, concretely Law No. 60/2016 "On whistleblowing and whistleblower protection".

The Law no.60 dated 2.6.2016 "On whistleblowing and whistle-blower protection"., as amended", in the articles 17 – 20, foresees "The right of the whistleblowers, Protection from retaliation, Investigation procedure for protection requests, Compensation in the event of retaliation".

The rights and interests of whistleblowers shall be protected in a reliable, effective, and adequate way. Whistleblowers shall enjoy the right to confidentiality during the whistleblowing process, which includes also the possibility of anonymous whistleblowing of an alleged corruption action or practice; preservation of confidentiality of the information source of the whistleblower; protection from retaliation.

The law provides that a whistleblower, who reports an alleged corruption, shall be protected from any acts of retaliation action against them by the organisation, including, dismissal from office; suspension from work or from one or more duties; transfer within or outside the organisation; demotion; reduction of salary and/or financial remuneration; loss of status and privileges; denied promotion; removal of the right to participate in trainings; negative work performance appraisals; other work-related forms of retaliation.

If the whistleblower wishes to be placed in another structure of the organisation in order to protect themselves from hostile reactions in their close work environment, the organisation shall take reasonable and adequate measures to facilitate such movement. Otherwise, HIDAACI, upon a request of the whistleblower, shall address the competent body in accordance with the effective legislation to order the public authority or shall order the private entity to take all measures in

accordance with this Article. If the competent body or the private entity fails to take the measures requested by HIDAACI, any persons concerned shall have the right to address the court.

A whistleblower, who claims to be subjected to an act of retaliation, shall file a protection request with the competent unit. The competent unit shall take immediate measures and shall, in any case, issue a reasoned interim act no later than ten days from the filing of the request on repairing the illegal consequences resulting from the retaliation act. Should this timeline not be observed, the request shall be filed with HIDAACI, which shall take a decision thereon no later than ten days from the receipt of the request.

HIDAACI shall investigate the retaliation claims to determine whether there are reasonable grounds to believe that a retaliation act has occurred, is occurring, or is expected to occur.

HIDAACI shall, no later than five days from receiving a request for protection from retaliation, inform the whistleblower in writing on the registration of the claim and the name of the person at HIDAACI in charge of the case.

The organisation, upon a request of HIDAACI, must prove that the measures taken to the detriment of the whistleblower are based on various grounds and are not directly or indirectly related to the whistleblowing.

HIDAACI shall inform the whistleblower in writing no later than ten days from receiving the request on the status of the administrative investigation, the protection request, and any procedural action taken. Regardless of the notification timelines set out in this Article, HIDAACI shall have to respond in writing to every request for information submitted at any time by the whistleblower regarding his/her request.

The procedure of administrative investigation on protection requests shall be completed as soon as possible and, in any case, no later than 60 days from the date the request is registered.

In case the administrative investigation concludes that the whistleblower suffered a retaliation act from the public authority, HIDAACI shall address the competent body under the effective legislation to order the public authority to take all measures to repair the violation committed. If the investigation concludes that the whistleblower suffered a retaliation act from a private entity, HIDAACI shall order the private entity to take all measures to repair the violation committed. If the competent body or the private entity fails to take the measures requested by HIDAACI, in accordance with this paragraph, any persons concerned or HIDAACI shall have the right to address the court.

HIDAACI and competent units shall, in line with the HIDAACI instructions, approve internal rules of procedure on the examination of whistleblowers' requests for protection from retaliation.

Also, whistleblowers shall have the right to address the court to demand compensation for damages suffered from any retaliation act as defined in this law, and as provided for in the Civil Code

APP in cooperation with HIDAACI, pursuant to the provisions of Law 162/2020, has approved Instruction No. 1, dated 21 January 2022 "On the declaration of Conflict of Interest by Officials/Employees in the procurement process and the implementation of the contract", which clarifies the procedure followed by officials engaged in public procurement procedures, in potential cases of conflict of interest.

5 ELEMENTS SPECIFIC TO PROCUREMENT PROCEDURES

6. In response to Question 5.1 on page 19, the paragraph starting with "Chapter XII", ends with the following sentence:

"Contracting authorities or entities shall reserve the right to participate in public procurement procedures to certain organizations for the award of public contracts for special services, in particular for health, social and cultural services."

- a. **Could Albania please clarify what is meant by this sentence?**

The law 162/2020 provides for a special chapter, Public Contracts for social services and other specific services.

Based on this provision of the law, a specific decision of Council of Ministers is approved, Decision No. 768, dated 15 December 2021 "On specifying the types of social services and other specific services, the types of special services, for which the right of organizations to participate in public procurement procedures can be reserved, as well as the detailed rules for their procurement".

DCM 768/2021 provides for the types of social services and other specific services, (their list) for which can be reserved the right of Non-Profit Organizations to participate and provides that in any case the contracting authorities or entities shall comply with the principles of transparency, equal treatment of economic operators and the promotion of competition, to ensure compliance with the obligations laid down in environmental, social, and labor law, and in the provisions of international agreements and conventions ratified in accordance with the Constitution.

DCM determines that contracting authorities/entities reserve the right to participate in these procedures to certain organizations related to public contracts, especially social, health and cultural. The NGO must simultaneously meet several conditions, among which,

- its purpose is to fulfil a public service mission related to the provision of services referred to as above;
- the benefits generated are reinvested to meet the objectives of the organization, in accordance with the legislation into force.
- the governing or ownership structures of the organization are based on the principles of employee ownership and participation or require the active participation of employees, users or interested parties; and
- during the last three years, the organization is not awarded a contract for the services defined in this Article by the contracting authority or entity that procures the contract.

In any case, the duration of the contract concluded shall not be more than three years.

6 INFORMATION

7. N/A – No clarification questions at this time.

7 DOMESTIC REVIEW PROCEDURES

8. In reference to the response to Question 7.1, if a complaint is deemed not submitted, could Albania please advise whether the payment of the complaint fee is subsequently refunded?

Based on article 120 of Law No. 162/2020 "On Public Procurement", the complaining economic operator is obliged to pay the fee to the Public Procurement Commission.

The rules and appeal fees are defined in the decision of the Council of Ministers no. 236, dated 20 April 2023 "On determining the rules and payment fee for appeals in a procurement procedure at the Public Procurement Commission".

The complaint submitted to the contracting authority or entity, as well as the Public Procurement Commission, according to the provisions of law no. 162/2020, "On public procurement", from any economic operator, who has or has had an interest in a procurement procedure and when it is damaged or is at risk of being damaged by the actions or inactions of the contracting authority or entity, must include the bank document, which validate the payment of the relevant fee for the complaint.

For the review of the complaint, the economic operator is obliged to pay the fee to the Public Procurement Commission, according to the following definitions:

- a) When the complaint is submitted for tender documents, 0.4% of the value of the procurement procedure;
- b) When the appeal is submitted for the evaluation decision, the final classification or the candidate selection decision after the pre-qualification phase, 0.5% of the value of the procurement procedure;
- c) When the complaint is submitted for the invalidity of the contract, 0.5% of the value of the signed contract.

The prepayment of the fee by the complaining economic operator or the interested economic operator is a necessary condition for the acceptance and review of the complaint. In cases of non-payment, the contracting authority or entity and the Public Procurement Commission have the right to reject the complaint submitted by the complaining economic operator or the interested economic operator.

In any case, the payment of the fee is refunded to the complaining economic operator or the interested economic operator, who has appealed the decision of the authority or the contracting entity, if their complaint has been fully or partially accepted by the Public Procurement Commission, within five days from the date of the decision taken by the PPC.

In case the complaint is not accepted, the appeal fee is 100% transferred to the state budget.

In the case when the submission of the complaint to the Public Procurement Commission and the contracting authority has not been completed, but the economic operator has paid the complaint fee, this fee will be refunded to the economic operator who made the payment, in accordance with Chapter VII "Prosperity without cause", on the Civil Code of the Republic of Albania.

9. In reference to the response in Question 7.2 g., could Albania please advise if there are any exceptions to the requirement that a complaining economic operator must pay the fee for a complaint in a procurement procedure?

In interpretation to the Law on Public Procurement, we can identify two cases where they can be considered as an exception to the payment of the appeal fee, which serve as an instrument of establishing the rights of economic operators, who have an interest in a procedure procurement. Specifically:

- a. The law provides for the right to appeal for small value procedures (under ALL 1 million), without paying any appeal fee.

For low-value procurement procedures, economic operators have the right to complain only to the contracting authority or entity within two days from the announcement of the winner's notice in the electronic procurement system.

Upon receipt of the submitted complaint, the contracting authority or entity suspends the continuation of the procurement procedure until the complaint is fully examined. Within two days of receiving the complaint, the authority or contracting entity issues a decision on its acceptance or rejection.

In relation to the decision given by the contracting authority or entity, economic operators have the right to appeal to the relevant court responsible for examining administrative disputes.

- b. Also, the law provides a special instrument for the protection of the rights of interested economic operators that may be affected by the decision of review bodies (authority and PPC) in case of complaints from economic operators. Article 113 of the law provides that in cases of appeals against the decisions of the authority or the contracting entity for the selection of candidates after the pre-qualification stage or for the process of evaluation of offers, the economic operators who have participated in the procurement procedure and may be affected by the appeal presented, have the right to present their arguments regarding the latter, simultaneously, to the contracting authority or entity and the Public

Procurement Commission, without any fee. This is an instrument of establishing the rights of economic operators, who have an interest in a procedure procurement.

The public procurement law does not provide any difference in fee between domestic or foreign economic operators.

8 OTHER MATTERS

10. N/A – No clarification questions at this time.
