A SUPPLEMENTARY REPORT ON SME SET-ASIDE PROGRAMS

Final Report

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A SUPPLEMENTARY REPORT ON SME SET-ASIDE PROGRAMS
FINAL REPORT

SUSTAINABLE ACHIEVEMENT OF BUSINESS EXPANSION AND QUALITY (SABEQ)

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BEARINGPOINT, INC.

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EXECUTIVE SUMMARY

This report is supplementary to an earlier report on the Legal Aspects of Jordan's Accession to the Government Procurement Agreement, prepared by IBLAW in October, 2007.

The purpose of this report is to comment on a SME set-aside program that may be worked out according to the proposals of a SABEQ-commissioned report of 10/19/2007 on "SME Set-Aside Program" (SME Report).

However, in order to place the approach to SME set-aside program in the context of the treatment of SMEs in Jordan entity offer and Draft Government Procurement Regulation (Draft GPR), this supplementary report examines the preferential treatment of SMEs under the said draft regulation in general. Then, the report concludes with a general observation regarding the approach to a SME set-aside program as proposed in the SME Report.
I. INTRODUCTION

I.1 Background
In its endeavor to accede to the Government Procurement Agreement (GPA), the Government of Jordan seeks to work out a SMEs set-aside program that achieves its development needs while being acceptable to GPA parties. Toward this end, an international expert has been engaged so as to put forward a suggested SMEs set-aside program.

SABEQ provided IBLAW with a Report dated 10/19/2007 on "SME Set-Aside Program" (SME Report). The SME Report recommends that the Government of Jordan should commission a study aiming at putting forward sound economic and social justifications for a set-aside program based on particular circumstances of Jordan. At this stage, the SME Report does not attempt to put forward specific parameters of determining the status of a Jordanian SME. Nor does it offer a specific program. Instead, the SME Report lays down a road map towards producing a convincing, defensible set-aside program that is likely to be accepted by the GPA parties.

I.2 IBLAW Assignment

The task of IBLAW, according to the scope of work and terms of reference, is to examine the legal aspects of a set-aside program to ensure that it is accurately reflected in the draft regulation as well as in the Jordan entity offer. Given the approach adopted in the SME Report, IBLAW will analyse the treatment of SMEs in the Draft Government Procurement Regulation (Draft GPR) against the GPA parties' response to Jordan's initial entity offer and the relevant general observations contained in the SME Report. As such, it covers the definition and determination of the status of SME, any offsets, price preference, and set-aside aspects relation to SME. It is essential to examine the preferential treatment of SMEs in general because GPA parties will take such a treatment into account when considering the grounds of the need for a set-aside program in particular.

Besides, IBLAW will comment on the requirements and procedures under the GPA if a set-aside program would not be finally prepared (as per the recommendation contained in the SME Report), but will be instead worked out and proposed to GPA parties after Jordan having acceded to GPA.

As IBLAW has already submitted a report on Jordan's accession to the GPA, the present Report should be treated as supplementary thereto.
I.3 The Organization of this Supplementary Report

This supplementary report starts with the provisions of the Draft GPR relating to the definition of SMEs, and the procedures of verifying the status of an enterprise as a SME. Then, the report examines the aspects of the preferential treatment of SMEs under the Draft GPR and their impact on the accession to the GPA. Also, the administration of the policy involving SMEs is explained in a separate section. Finally, the report examines the proposed approach to a set-aside program as recommended in the SME Report.
II. THE DEFINITION AND DETERMINATION OF THE STATUS OF SMES

II.1 The Definition of SMEs

The Draft GPR defines small and medium size enterprises as follows:

"Any institution which is owned and run by an independent person and its confederates, and which does not have a controlling position in its field of business in relation to government contract as it pertains to type of product in the local market as to prices and produced quantities. Such institution shall have (1-50) personnel."

(sections 2 Draft GPR)

The following observations can be made with respect to the above quoted definition:

a) The parameters used in this definition are: (i) ownership (an independent person); (ii) volume of business in that the enterprise is not dominant in relation to government procurement whether in terms of the type of product, price or quantities; and (iii) the number of personnel does not exceed 50. The definition does not include the parameters of the size of capital.

b) The definition does not differentiate between small and medium size enterprises, although the draft regulation refers to both types of enterprise. A unified treatment applies.

c) The definition does not differentiate between different sectors or industries.

Further, the following comments can be made on the basis of the SME Report:

a) The parameter of the number of personnel, which according to the definition does not exceed 50 persons, is expected by the SME Report to be very restrictive of competition and to take a large portion of government procurement in Jordan away from the ambit of the GPA. This is because many Jordanian enterprises would - as the SME Report presumes - fall within the said parameter.

b) One of the main principles of GPA is transparency, including the publication and clarification of relevant legislation. An entity offer should explain the existing national legislation and how it is implemented. However, the definition provided in the Draft GPR may be regarded as vague as it does not clarify the criteria of determining whether an enterprise has 'a controlling position'. Further, the High Commission of Procurement to be established under the regulation will have the power to issue instructions to implement the regulation, and further clarification of the definition may be contained in such instructions that may be issued and amended from time to time by the said commission.
II.2 The Determination of the Status of SMEs

The Draft GPR adopts a self-certification system of determining the status of SMEs. That is, an enterprise participating in a procurement is required to submit to the procuring entity a statement asserting that it is a SME and requests to be treated as such. Subsequently, this status may be challenged by any interested participant or supplier or verified by the procuring entity on its own motion. Thus, section 264 of the Draft GPR provides that:

a) The bidder and in order to confirm its eligibility to award as a small or medium-size enterprises, shall confirm in writing, to the procuring entity that it is a small or medium-size enterprises at that time.

b) The competent procurement entity may, at any time, verify the bidder's representation that it is a small or medium-size enterprises and in the method it deems appropriate.

c) The competent procuring entity shall accept the bidders offer or proposal that it is a small or medium-size enterprises unless:
   1. any other bidder or any concerned party has objected that the bidder is not a small or medium-size enterprise.
   2. the procuring entity finds, due to convincing reasons, that the bidder is not a small or medium-size enterprise.

There is no particular concern about the self-certification system since it is a recognised method that is adopted by other GPA parties, including the US, as explained in the SME Report. Yet, the method for verifying the status of a SME by the procuring entity may be vague as it is subject to the procuring entity's choice and judgment. What matters most, however, is the procedure whereby the status of SME can be challenged.

It should be realized that the Draft GPR provides a special challenging procedure to question the status of an enterprise as a SME, which involves a modification of the challenging procedure followed by a participant or a supplier to object to a measure or decision taken by a procuring entity. Section 264 of the Draft GPR prescribes that

3. Objections / challenges or reasons mentioned in paragraph (c) of this section [set out above] shall be referred to the commission within a period not exceeding five (5) business days from the date of objection or knowing reasons. The commission shall promptly provide the small 'governmental' [we believe that the reference to 'governmental' is misplaced] enterprise whose representation is being challenged, with a copy of the challenge / objection or the reason for not considering it a small enterprise.

4. The bidder who allegedly represents itself as a small-size enterprise shall respond to such challenges or reasons within three (3) business days from submission thereof, and to submit evidence supporting its position. The commission shall, within ten (10) business days from receiving the response to the challenge, issue its decision
regarding the challenge, and shall inform the competent procuring entity, the challenging party as well as the challenged bidder, of its decision by registered mail, and the return of delivery receipt shall be requested.

The time periods involved in the above procedure are shorter than the minimum periods set in the GPA (Article XVIII). The objection to be raised by a bidder or a concerned party should be subject to the time limits fixed in the Draft GPR, which are generally shorter than those set in the GPA. Then, the Commission will deal with the objection, affording the alleged SME to defend its position within 3 days. This period is also inconsistent with the standards of the GPA. Although an alleged SME is a national bidder and foreign interested parties would not be harmed by such a short period, the GPA applies equally to all bidders.

Finally, it should be mentioned that a decision of the high Procurement Commission can be challenged before the High Court of Justice (the Jordanian administrative court) in accordance with the law establishing the said court.

III. THE PREFERENTIAL TREATMENT OF SMES UNDER THE DRAFT GPR

A SME set-aside program is not articulated in detail in the Draft GPR. While there is a reference to establishing such a program, its details and conditions are left for subsequent instructions to be issued by a High Procurement Commission. The Draft GPR, however, contains a number of measures aimed at strengthening the position of SMEs in relation to government procurement. Further, the regulation broadly empowers the forthcoming High Procurement Commission to establish measures for the purpose of enhancing the participation of SMEs in government procurement.

This section examines (1) those specific measures explicitly provided for in the regulation, highlighting how they should be reflected in Jordan entity offer, (2) the broad power of the High Procurement Commission with respect to according SMEs a favorable treatment, and (3) SME-set aside program.

III.1 Specific Measures Explicitly Provided for in the Draft GPR

a) Apportioning of Procurements

While subsection 24.a of the Draft GPR recognizes that 'a procurement requisitions shall not be divided with the intention of avoiding monetary thresholds set forth in this Regulation', section 24 continues to provide that 'b. Procurement requisitions may be apportioned if apportioning is intended to allow for Small and Medium Enterprises’ participation whereby special Tenders may be awarded via separate Procurement Contracts, provided that the
apportioning is done with the approval of the Competent Minister. If the Procurement is done through the central committees, the Minister and the Competent Minister must approve the apportioning.

c.1- The Procuring Entity may apportion the Procurement through one or more lots. The Bidders may submit their offers to one or more lots. The Procuring Entity may award each lot to the Bidder with the best offer for the same lot, whereby a Procurement Contract is signed by the Competent Procuring Entity therewith.

2- Nothing in Subparagraph (1) of this Paragraph prevents the awarding of more than one lot to the same Bidder.

d. Any apportionment of Procurement requisition, and the grounds therefore, shall be noted in the Register of the Procurement Proceedings.'

This power is further endorsed by subsection 263.h which states that the high Procurement Commission shall identify measures to facilitate SMEs participation in government procurement, including 'apportioning procurement transactions into relatively small portions, when practicable, so as to allow small and medium-size enterprises to submit their offers for quantities less than the total quantity.

Subsections 24.b and c, and 263.h, can be read as being contrary to article II.6.a of the GPA revised text which states that 'In estimating the value of a procurement for the purpose of ascertaining whether it is a covered procurement, a procuring entity shall: (a) neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Agreement.'

Thus, apportioning a procurement may (depending on the resulting value of apportionment) exclude an otherwise covered procurement. While this is practically the same result of a set-aside program, apportioning is distinguished from a set-aside program on the basis that the former does not necessarily bring a procurement or part thereof below the GPA thresholds and does not, therefore, result in excluding the application of GPA, whereas a set-aside program excludes the application of GPA even though a procurement exceeds the applicable thresholds.

However, although subsection 24.d lays down a requirement of transparency (acknowledging an apportionment and disclosing its grounds), the draft regulation is not entirely clear as to the criteria, sectors, values or percentages of procurements that may be divided. Since Jordan entity offer will include a set-aside program (or at least require recognition of the need for such a program at a later stage after accession), the power to divide a procurement may be difficult to explain as a separate measure. It may be envisaged that section 24.b would apply to procurements not covered in the first place and to a procurement excluded under a set-aside program. If this is the intended use of apportionment, it should be
explained in the entity offer or in a separate clarification of the Draft GPR. GPA parties would probably request a clarification of subsections 24.b and c.

b) **Facilitating the Procedures of the Procurements**

Section 263 of the Draft GPR includes a number of measures aiming at facilitating the procedures of procurement so as to encourage and increase the participation of SMEs. Many of these measures, which are listed below, raise one major concern in relation to the application of GPA; that is the equality and non-discrimination between foreign and national suppliers. Section 263 as far as relevant states that:

"The Commission shall identify methods necessary to facilitate participation of small and medium-size enterprises in the government procurements, including the following,

a) Simplification of procurement procedures and rules as well as transparency thereof .

b) Drafting the technical requirements in away which shall lead to the possibility of broadening competition and participation by small and medium-size enterprises.

c) Prompt payment of due payments including progress payments and undisputed variation orders .

d) Facilitate access to financing government receivables.

e) Facilitate guarantees (bonds) required from small and medium-size enterprises .

f) Facilitate access to the technical data related to procurements and allowed by government to be disclosed / published for pre-procurement purposes.

... 

k) Allow the maximum time possible to submit offers. ...' 

There would be no problem if the above mentioned measures are intended to apply to all participants and interested suppliers. The GPA revised version requires equality and non-discrimination between suppliers including, but not limited to, the provision of tender documents and time periods (articles X.7, XI). Further, article IV.1. stipulates that:

'With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accord to:

(a) Domestic goods, services, and suppliers; and

(b) Goods, services, and suppliers of any other Party.'
It follows, that if the power under section 263 of the Draft GPR is intended to accord to Jordanian SMEs more favourable treatment than that accorded to other national or foreign suppliers, the measures listed above would be inconsistent with the GPA. However, if the Government of Jordan wants to be able to derogate from certain aspects of equality of suppliers for the purpose of supporting SMEs in relation to covered procurement, then the application of article IV.1.a should be delayed by virtue of a negotiated and agreed delayed application (an implementation period) pursuant to article V.4 of the GPA revised version. In the case of a negotiated and agreed implementation period, the Government of Jordan will be required to provide additional information and clarifications in its entity offer as regards the delayed obligation (article V.5 of the GPA).

c) Encourage sub-Contracting Opportunities with Small and Medium-Size Enterprises

Subsection 263.g of the Draft GPR provides that the High Procurement Commission may take measures to encourage sub-contracting with SMEs. This amounts to a requirement of domestic content imposed on suppliers, and constitutes an offset that is prohibited - as a general rule - under the GPA. If such a measure is to be implemented in respect of covered procurements, then this method should be listed in the entity offer among the offsets and measures open to developing countries.

III.2 The Broad Power of the High Procurement Commission to Favor SMEs

The Draft GPR sets out a general policy of supporting SMEs, without providing an exclusive list of measures and methods to be applied in implementing this policy. Rather, the regulation empowers the High Commission to identify these measures and methods, which can take place by virtue of subsequent instructions issued by the Commission.

Thus, section 262 of the Draft GPR states that:

a) Upon approval of the general policy of the government procurements, it shall be taken into consideration, to ensure appropriate opportunities for the small medium size enterprises to participate in the procurement transactions as main or sub-contractors, suppliers, consultants or service providers.

b) The commission shall establish programmes necessary to encourage small and medium-size enterprises to participate in the procurement transactions.

c) The secretary general shall be responsible for the application of the small and medium-size enterprises promotion programmes mentioned in para (b) of this section, each in its field of specialization. The secretary general shall ensure that
procurement staff in his institution are acquainted with the programmes and requirements of small and medium-size promotion programmes, and shall take all measures necessary to increase participation of such enterprises in the governmental procurements.’

The measures mentioned in section 263 are not exclusive. Further, no clear criteria are provided in the regulation, and the implementation of the policy in favor of SMEs depends by and large on future instructions and directives issued by the Commission.

However, the SME Report suggests that a body implementing laws relating to government procurement should be 'responsible for implementing certain functions in relation to the program: (a) adopting a detailed set of guidelines to ensure that the law or regulation is properly put into operation by the other government agencies...' This suggested responsibility is executive in nature, whereas the Draft GPR envisage a more substantial legislative power to be exercised by the High Procurement Commission. Therefore, it should be clarified to GPA parties that any instructions issued by the Commission would not be applied by the courts in case of contradiction between them and the provisions of the GPA.

III.3 A Set-Aside Program

Subsection 263.i provides a legal basis for a set-aside program than can be subsequently detailed and clarified by instructions issued by the High Procurement Commission. Thus, the said subsection states that the Commission may take measures to 'encourage limiting participation in the procurement transactions carried out in certain area, in the small and medium-size enterprises existing in the said area, when practicable.'

As with the definition of SMEs, the above mentioned provision does not clarify the conditions and criteria for limiting a procurement to the participation of SMEs. Nor does it indicate whether a set-aside program will aim at reserving categories of government Procurements or a certain percentage of such contracts or total procurement Spending, for SMEs. There is no indication as to whether it should be a total or partial set-aside, where only a portion of the quantities sought in the procurement are reserved exclusively for SMEs. (It is not clear whether the apportionment of procurement under the Draft regulation means partial setting aside or results in a total set aside.)

The above-mentioned provision may reflect the approach suggested in the SME Report, according to which the details of a set-aside program should be worked out and negotiated with GPA parties after acceding to the GPA. IBLAW’s comments on this approach are set out below (section V).
As the SME Report points out, 'SME set-aside programs are typically implemented through legislation and regulations that are harmoniously added into a domestic legal system.' Therefore, the legislative framework for such program should be clarified to the GPA parties, especially in terms of the constitutional basis of the legislative power delegated to the High Procurement Commission.

IV. THE ADMINISTRATION OF SME POLICY AND RULES

The SME Report suggests that:

"The GOJ should create institutional capacity and commitment for the program. Institutional capacity is necessary to implement, monitor, audit, and enforce the laws, regulations, guidance, and program effectiveness. It may be difficult to achieve an effective SME set-aside program if the institutions that are required to implement the program are absent, weak, or uncommitted."

And

"The GOJ should designate an appropriate institutional structure as “owning” the SME set-aside program. That institution should have the appropriate expertise - legal, economic, accounting, statistic and other disciplines - and structure for the public management of the program. It should be responsible for implementing certain functions in relation to the program: (a) adopting a detailed set of guidelines to ensure that the law or regulation is properly put into operation by the other government agencies; (b) conducting training of managers in government and industry; (c) measuring results of the program; and (d) recommending changes to the program as necessary. Additionally, a single entity may be responsible for all procurement or, at the least, for ensuring that all relevant government procuring agencies understand and comply with the applicable laws, regulations, and guidelines."

The Draft GPR provides that a High Procurement Commission shall be established. Under section 6 thereof, the Commission shall have financial and administrative autonomy. Section 7 includes the mandate and functions of the Commission. These include, inter alia, the following:

1. Setting the general policy for Procurement and setting the means to execute such policy, in coordination with the relevant bodies.
2. Monitoring the performance of the Government Institutions and persons performing Procurement Proceedings, including the entities excluded pursuant to section (4) of this Regulation to ensure the compliance with the provisions of the enacted legislation.
3. Preparing drafts of regulation relating to Procurement processes, including the amendment of Procurement thresholds for Procurement Committees, and submitting such amendments to the Council of Ministers in order to take the necessary legal procedures thereon.
4. Unifying the general and specific conditions for the contracting contract and Technical Services agreements, the terms of reference and bidding proceedings, and developing such conditions and proceedings according to the provisions of this Regulation and the enacted laws, regulations and instructions.

5. Developing human resources and uplifting the professional capacity of persons working in Procurement, including preparing training courses and programs.

6. Reviewing grievances submitted by Bidders according to the provisions of this Regulation.

7. Issuing the instructions necessary to implement the provisions of this Regulation, including the instructions pertaining to qualifying the required arbitrators, setting a list of their qualifications and certifying such.

8. Following up on the implementation of international agreements pertaining to government Procurement.

The above-mentioned functions and powers ensure that the desired administration of SMEs programs can be in accordance with the requirements referred to in the SME Report. Obviously, section 7 provides for legislative, supervisory, and capacity building tasks of the Commission.

As far as SMEs are concerned, the Commission will undertake additional tasks and assume certain powers as follows:

1. The secretary general [ of the Commission] shall be responsible for the application of the small and medium-size enterprises promotion programmes mentioned in para (b) of this section, each in its field of specialization. The secretary general shall ensure that procurement staff in his institution are acquainted with the programmes and requirements of small and medium-size promotion programmes, and shall take all measures necessary to increase participation of such enterprises in the governmental procurements (section 262.c.)

2. The Commission shall accurately measure the participation extent by small and medium-size enterprises in the procurements, while collecting data and information (section 263.k.).

It should be mentioned that the studies pertaining to measuring the participation of SMEs in government procurement are not directly required to be published under the GPA revised text, since transparency as to tenders and contract awards apply to covered contracts. However, the disclosure of such studies may be requested by a GPA Party or a supplier in the course of a complaint or under the general entitlement to seek clarifications and relevant information that affect the implementation of the GPA (e.g., under article XX.2. GPA revised text).
V. COMMENTS ON THE PROPOSED APPROACH TO A SET-ASIDE PROGRAM

At SABEQ’s recommendation, the SME Report puts forward a proposal as to how the Government of Jordan may simultaneously accede to the GPA while reserving its rights to develop and implement a well-balanced SME set-aside program. Thus, the approach proposed by the SME Report rests on initiating the steps necessary to establish the basic parameters for an SME set-aside program for government tenders while simultaneously acceding to the GPA. This requires the Government of Jordan to make realistic, appropriate requests in its Final Offer for accession to the GPA.

The gist of the proposal is stated thus:

"Jordan has commenced development of a set-aside program for small and medium-sized (or minority owned) enterprises that will be consistent with the GPA. This program will seek to achieve set-aside levels, in terms of a certain percentage of such contracts or total procurement spending, of approximately the same levels as the United States achieves under the its SME set-aside program. Jordan will consult with the WTO Parties regarding the scope of the program and will implement such program provided that no Party objects."

As already noted, section 263 of the Draft GPR contains the legal basis for developing a SME set-aside program, without providing any guidance or criteria to determine the scope and nature of such a program. While this is in line with the SME Report, the following observation should be made:

Article V.9 and 10 of the GPA revised text leaves it open as to the requirements and procedures (including voting) according to which article V is implemented with respect to implementation periods, offsets, and SME programs. Therefore, if a SME-set aside program is left till after acceding to the GPA, the Government of Jordan may want to consider seeking specific commitments from GPA parties. Such commitments may include extending the implementation periods and the measures relating to phasing-in and phasing-out schemes, or reducing certain threshold, while a SME set-aside program is being finalized.

An alternative (which depends on expert opinion) may also be to provide at the time of accession a basic, limited SME set-aside program that constitutes an acceptable minimum shall come into effect while a wider and final program is being negotiated.

Such commitments will obviate the impact of any undesirable measures and procedures that may be introduced by the GPA Committee under article XX.9 and 10.
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