



SIGMA

Support for Improvement in Governance and Management

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BOSNIA AND HERZEGOVINA
PUBLIC PROCUREMENT SYSTEM
ASSESSMENT MAY 2009

1. Summary

1.1 Main Developments since last year

The only change in the legislative framework for public procurement in Bosnia and Herzegovina since Sigma's May 2008 assessment was an amendment to the Public Procurement Law (PPL), which entered into force on 19 February 2009. This amendment increased the ceiling for application of the competitive request for quotations from 30,000 BAM (ca. 15,000 EUR) to 50,000 BAM (ca. 25,000 EUR) for public supplies or services contracts and from 60,000 to 80,000 BAM (ca. 40,000 EUR) for public works. In addition, the maximum limit for application of the direct agreement procedure was raised from 3,000 BAM (ca. 1500 EUR) to 6,000 BAM (ca. 3,000 EUR). Amendments proposed by the government in 2007 were rejected in January 2008 by parliament. A new draft based on the existing law and the rejected amendments was submitted to parliament in January 2009. Some members of parliament proposed changes aimed at the establishment of separate institutions located in the entities (Republika Srpska and Federation of BiH) instead of single institutions established at the BiH State level¹.

A case before the Constitutional Court, filed by Serb parliamentarians in May 2007, claimed that the state-level parliament had no authority over public procurement and that procurement issues should be regulated solely by the entities. The Court concluded, on 4 October 2008, that the PPL had been enacted with the purposes of enforcing the supervision functions of parliament and of meeting the international obligations of Bosnia and Herzegovina (harmonisation with the *acquis communautaire*) and therefore that the law was consistent with the Constitution.

In March 2009 the Government of the Republika Srpska (RS) approved a new law on Public / Private Partnerships - PPPs (currently under discussion by the RS Assembly). This draft law does not comply with EU standards. It will not only contradict EU procurement law but could also be a deterrent for foreign investors and could damage the ambition of the Republika Srpska to create a lawful, solid and economically viable basis for the development of PPPs.

Two twinning-light projects were in operation in 2008, with the objective of strengthening the capacity of the Public Procurement Agency (PPA) and the Procurement Review Body (PRB). Both projects, which were of significant help to these institutions, have now concluded, respectively in March 2009 and July 2008.

1.2 Main Characteristics (strengths and weaknesses)

The Public Procurement Law (PPL), which was adopted in 2004, in general complies with the requirements of the *acquis* (with the exception of domestic preferences), although several discrepancies and deviations remain (resulting mainly from the fact that the PPL had been drafted on the basis of the EC Public Procurement Directives in force prior to 2004).

Bosnia and Herzegovina (BiH) is the only country in the region which has not implemented, even partially, the provisions of EC Directives 2004/18 and 2004/17 and which maintains discrimination against foreign companies in terms of access to the public procurement market. Moreover, the duration of the transition period during which such discrimination applies has recently been extended by four years, up to January 2015. From a formal point of view, such an extension seems in line with BiH commitments to the EU (article 74.5 of the Stabilisation and Association Agreement – SAA – signed between Bosnia and Herzegovina and the EU stipulates that national treatment is to be ensured for EU companies not later than five years after entry into force of the SAA). The extension of the transition period could be perceived, however, as an introduction of new discriminatory measures, which are not allowed under the SAA process. On the other hand, a Partnership Agreement between Bosnia and Herzegovina and the European Union, signed in February 2008, stipulates that BiH should

¹ On 23 July 2009 the House of Peoples rejected this draft Law. Two months earlier (27 May) the draft law had been adopted by the other chamber of the BiH Parliament (House of representatives). The decision of the House of peoples means the definite termination of the legislative process.

ensure that the legal framework for public procurement is compatible with the *acquis* and implemented properly. Amending the PPL is a high priority task for BiH.

One of the weaker elements of the public procurement system has been the functioning of the review and remedies system. The situation should improve, however, with the appointment of two new members of the PRB at the end of March 2009. Once the decision of parliament concerning these appointments is legally proclaimed, PRB will be at its full capacity, with all six members envisaged by the law. Any attempts to reform the public procurement system are hindered, however, by disagreements between the PPA and the PRB, which concern some details related to the conduct of the review procedures, in particular the legal effects (final character) of the decisions taken by the PRB. For proper functioning of the system, both institutions should co-operate so as to achieve coherent views on the interpretation of the most relevant provisions of the PPL.

The situation concerning concessions and PPPs is worrisome. The Sigma peer review of concessions in 2008 revealed that both the legal framework and practice concerning the award of works and services concessions and PPPs did not comply with the fundamental principles and the derived Community law (transparency, equal treatment and non-discrimination). Thus, the provisions concerning the award of services and works concessions and PPPs need to be urgently amended.

1.3 Recommendations for Reform

1.3.1 Short-term Priorities

- If the new PPL is adopted, the BiH State Government should adopt practical implementation tools in order to enable the smooth application of the new provisions.
- The contract notices should be published entirely in electronic form on the website of the PPA; the current system, even after reduction in the price of notices in the *Official Gazette*, is very costly for contracting authorities.
- The application of domestic preferences should be reconsidered, taking into account the fact that CEFTA requires the opening of the public procurement market to companies from the CEFTA region.
- The rules in the utilities sectors should be brought into line with Directive 2004/17/EC.
- The current regulations concerning concessions and PPPs should be replaced by new legislation in order to take due account of principles stemming from the *acquis*, namely transparency, non-discrimination and equal treatment, and effective legal protection.
- The work of the previous years in building the capacity of the PPA and of the PRB should be continued but both the PPA and the PRB still need further resources to carry out their functions efficiently. The constraints on the PPA's resource requirements are likely to increase as a result of the need to revise the PPL.
- The process of establishment of the PRB should be concluded and all missing internal rules should be adopted; PRB staffing should be strengthened (there is an urgent need to employ on a permanent legal basis highly qualified legal experts); the PRB should also contribute to the development of the public procurement system, particularly by making its decisions public.

1.3.2 Medium-term Priorities

- The procurement function at operational level should be further strengthened and professionalised by developing training and new ways of organising procurement processes within contracting authorities. Suppliers' understanding of, and confidence in, the law could also be enhanced by training and briefings. The PPA should play a key role in the process.
- Consideration should be given by the PPA to the development of the instruments and methods set out in the new EC Directives (e.g. framework agreements, e-procurement) and to the provision of support for their practical implementation.

- Actions to gradually implement e-procurement should be undertaken.
- Better harmonisation of procurement procedures with budgetary procedures should be sought.

If the attempt to adopt a new PPL fails again, the European Commission would be entitled to examine the reason for such a failure with the authorities of Bosnia and Herzegovina and to identify with them the areas where and the conditions under which BiH could benefit from EU assistance in the future.

2. Assessment of the Public Procurement/Concessions System

2.1 Legislative Framework

2.1.1 Public Procurement

The basic legal act regulating the award of public contracts in Bosnia and Herzegovina is the Law on Public Procurement of Bosnia and Herzegovina (PPL) published in the *Official Gazette of BiH* on 2 November 2004. The PPL mainly:

- provides a uniform public procurement regulation for the whole country;
- establishes a fully decentralised public procurement system, which grants the responsibility for public procurement to contracting authorities;
- requires transparency through the mandatory publication of procurement opportunities and procedures;
- is modelled on, but not fully compliant with, (pre-2004) EC procurement legislation;
- is aimed at promoting cost-effective public procurement and the economical use of public funds;
- safeguards the legitimate interests of tenderers by introducing review mechanisms and procedures;
- ensures implementation of public procurement legislation by setting up two institutions, the Public Procurement Agency (PPA) and the Procurement Review Body (PRB).

This legislative framework is completed by a number of secondary legislative acts issued on the basis of the PPL, implementing regulations, instructions, and standard forms, such as the following:

- Decision on Implementation of Public Procurement Law for BiH (“Implementing Regulations”) – published in the *Official Gazette of BiH* no. 3/05 on 24 January 2005;
- List of categories of contracting entities obliged to apply the Public Procurement Law for BiH – published in the *Official Gazette of BiH* no. 3/05 on 24 January 2005;
- Standard forms of procurement notices (contract notices, contract award notices and cancellation notices) along with instructions on their application – published in the *Official Gazette of BiH* no. 17/05;
- Template for the minutes of tender opening meeting along with instructions on its application – published in the *Official Gazette of BiH* no. 17/05, then amended in 2008;
- Decision on the obligatory application of domestic preferences, published in the *Official Gazette of BiH* no. 105/06, amended in 2009;
- Rulebook on monitoring of public procurement procedures (*Official Gazette of BiH* no. 48/08).

The PPL applies to any public procurement contracts awarded by any public authorities of BiH State, BiH Federation (FBiH), Republika Srpska (RS) and District of Brcko. Fully fledged procurement procedures apply, since the amendment adopted in 2009, as from an amount of 50,000 BAM (ca. 25,000 EUR) in the case of supplies and services and 80,000 BAM (ca. 40,000 EUR) for public works. Below those thresholds, contracting authorities may have recourse to simplified procedures: competitive request for quotations and direct agreement. The former – competitive request for quotations – does not require the contracting authority to make a public call for competition, but for a successful procedure at least three valid tenders are needed. The latter – direct agreement – means negotiations of the terms of the contract with just one economic operator, chosen by the contracting authority.

Although the direct agreement threshold is still too low, the increase does reduce the amount of red tape for small expenditures. On the other hand, the increase in the upper limit for the request for quotations increases the risk of corruption, a concern shared by auditors and economic operators.

The PPL is mainly modelled on the previous generation of EC Directives on public services, supplies and works contracts awarded by public authorities, with only a few elements taken from the Directive concerning utilities. It does not incorporate the new procedures and tools provided in EC Directives 2004/18 and 2004/17.

The PPL still includes provisions for domestic preference (article 37 of the PPL and implementing regulations). Originally, the transition period during which contracting authorities were obliged to apply a price preference was to expire on 31 December 2010. Article 74.5 of the Stabilisation and Association Agreement (SAA) signed between Bosnia and Herzegovina and the EU provides for the national treatment to be ensured for EU companies not later than five years after entry into force of the SAA (which has not yet entered into force at the time of the assessment). Taking advantage of this opportunity to protect domestic companies, the Government of Bosnia and Herzegovina adopted on 26 February 2009 a Decision concerning the extension of the application of domestic preferences **until the end of 2014**. However, other international commitments undertaken by BiH require an earlier partial opening of the public procurement market in BiH (articles 34 and 35 of CEFTA 2006 set a deadline for ensuring equal treatment in public procurement for parties to the Agreement as of 1 May 2010). The Decision mentioned above, however, takes due account of commitments stemming from CEFTA. Consequently, the companies coming from CEFTA countries will have non-discriminatory access to public procurement contracts in BiH long before EU economic operators.

The PPL specifies the open procedure as the basic award procedure. Unlike the EC Directives, the restricted procedure is allowed only if special circumstances defined in the PPL are met. Exceptionally, the PPL also allows for the application of the negotiated procedure with and without publication of notice, but only in explicitly listed circumstances (which are modelled on EU law, albeit with minor deviations). The PPL does not provide for application of competitive dialogue, dynamic purchasing systems, electronic auction, social and environmental provisions, new more flexible rules on the description of the public procurement subject as well as other new tools introduced by EC Directives 2004/18 and 2004/17.

The coverage of the PPL includes all public undertakings, regardless of the sector of the economy they deal with. On the other hand, the PPL does not cover any private utilities that carry out their activities within the “utility” areas of EC Directive 2004/17 on the basis of special or exclusive rights granted by a public authority. Since such bodies do not yet exist, this does not create any practical difficulties at present, but in this respect the PPL is not harmonised with the *acquis*. It is of even greater concern that the PPL does not include the exemptions specifically laid down by EC Directive 2004/17, which are intended to allow greater flexibility for bodies operating in a commercial and operational environment. Examples of this are the very restrictive provisions on framework contracts and the inability to rely on standing lists of qualified suppliers (qualification systems) as well as some special exemptions, such as for purchases of energy or products purchased in order to produce energy. This over-regulation can have significant effects on the efficiency of operations of such bodies in BiH.

The current legislative framework is seen as being overly complicated by all actors in the procurement system. The key problems identified relate to the bureaucratic nature of the law’s provisions, particularly in relation to smaller contracts, as well as some unnecessarily detailed requirements relating to the qualification of suppliers, in comparison to the value or complexity of the subject matter of public procurement. The main problem lies, however, in the practical application by some contracting authorities. For example, contracting authorities set requirements at levels which effectively exclude domestic companies, even in consortia, from the competition. The situation is aggravated by other intervening legal provisions that are not directly related to public procurement, such as those concerning the minimum number of highly qualified staff in construction companies, and that are – in the opinion of suppliers – extremely difficult to satisfy.

The basic structure of the current PPL is sound but its practical implementation must be improved. There has been no progress with regard to aligning BiH rules with the *acquis*. The objective of alignment has been stressed in *Council Decision of 18th February 2008 on the principles, priorities*

and conditions contained in the *European Partnership with Bosnia and Herzegovina*. The European Partnership requires BiH in general “to make substantial progress on creating a single economic space in Bosnia and Herzegovina supporting the free movement of goods, capital, services and persons”. In the field of public procurement in particular, BiH is to “ensure that the legal framework for public procurement is compatible with the *acquis* and that public procurement procedures are implemented properly”. Bosnia and Herzegovina is now the only country in the region that has not yet implemented provisions of the new EC Directives in the area of public procurement. As was underlined in Sigma’s assessment in May 2008, simplified procedures, in particular for low-value procurement, would considerably increase the efficiency of operations. The recently adopted amendment of the PPL did not simplify the rules, but allowed for wider exemption of public contracts from the competitive and transparent rules by raising the minimum thresholds above which the application of basic procedures was obligatory. Contracting authorities are now allowed to use, to a larger extent, the request for quotations or direct agreement procedures. These procedures are not, however, fully transparent and competitive. In both cases, the contracting authority sends invitations to participate in the procedure to suppliers selected at its own discretion. Sigma’s view, expressed also by auditors and many contracting authorities, is that simplification of the procedure could be obtained, for example, by shortening the time periods for submission of tenders or requests for participation, or by diminishing the requirements that must be met by potential suppliers in terms of, for example, tender security or documents or certificates to be delivered by economic operators.

2.1.2 Concessions

Details concerning provisions and practice in the area of concessions were part of the focus of a Sigma concessions peer review carried out in 2008, the results of which are still being discussed with BiH authorities. Without going into detail, it is fair to say that the existing legal framework concerning concessions is characterised by its fragmentation. Also, the coverage of legislation dealing with concessions is wider than in the EU (it includes exploration and exploitation of mineral resources). The PPL does not apply to the award of concession contracts. Unlike the PPL, the award of concessions by competent authorities is regulated by concessions laws and accompanying laws and decrees in force simultaneously at state, entity and cantonal levels. Altogether, 14 laws regulate the award of concessions at state, entity and cantonal levels. The (main) laws regulating the granting of concessions in Bosnia and Herzegovina are the following: Law on Concessions of Bosnia and Herzegovina (*Official Gazette of BiH*, no. 32/02); Law on Concessions of the Federation of Bosnia and Herzegovina (*Official Gazette of FBiH*, no. 40/02); Law on Concessions of Republika Srpska (*Official Gazette of RS*, no. 25/02); and cantonal laws on concessions.

The laws at state and entity levels have similar structures: they regulate, inter alia, the modalities and conditions concerning the granting of concessions, including the competencies and institutional structure of the Concessions Commission, tender procedures, content of the concession contract, and the concessionaire’s rights and obligations. All of the above-mentioned laws diverge substantially from EU requirements, in particular with regard to fundamental principles of the EC Treaty. For instance, they allow for the conclusion of a concession based on either a public invitation or an unsolicited proposal by a bidder without a public invitation. Both types of procedure – although to a differing extent – are not in conformity with EU requirements. Although the public invitation procedure basically is comparable to the procedure with prior notice, as set out in the EC Procurement Directives, it is not published internationally. An international invitation has to be sent only in cases where this is explicitly required by the Concessions Commission. The vast majority of concessions and PPP contracts has been awarded by following the procedure of “unsolicited proposals”, without applying an open, transparent and competitive process. The lack of open and competitive processes means that there is a missed opportunity to invite additional potential candidates and to expand the basis for competition. This in turn is likely to lead to a lack of real price competition, as tenderers are under little pressure to deliver better value for money, in terms of both concession fees and quality of delivery. The end results are that the income from concession fees is likely to be lower and that the end-users may not necessarily get the best value for money.

A further concern is that the law allows for the feasibility study to be prepared by the bidders rather than by the conceding party, whereas the preparation of the feasibility study, including the environmental impact assessment, is a key task of the contracting authority.

On the other hand, the concessions legislation does not provide for sufficient legal protection of rights of economic operators, since there is no independent review of the concessions award procedure.

During the assessment the mission team was informed of a new draft law on PPP for Republika Srpska. Previous consultation on the draft with the European Commission did not take place. This draft does not fully comply with the principles of equal treatment, non-discrimination or transparency derived from EU primary law. The draft concerns two types of contractual PPPs – concessions and “private finance initiative (PFI)” contracts substantially financed from public funds. As such, the PFI contracts may be public procurement contracts and should therefore be awarded in accordance with the PPL instead of with procedures defined in the new PPP law. The draft PPP law provides for only one procedure to be applied for PPP, which is the negotiated procedure, the details of which are to be defined in secondary legislation. Again, it is not clear whether this procedure applies only to concessions or to PFI contracts as well. In both cases, however, subject to the content of the secondary legislation, this draft law seems to be a step backwards compared with the current situation with regard to concessions. Thus, the provisions concerning PPP, as well as services and works concessions, should be urgently amended (uniformly for the whole country) in order to introduce competitive and transparent procedures and practices, taking due account of the *acquis* and good international practice.

For further successful development of the concessions system in BiH, it is also indispensable that the Concessions Commissions at all levels co-operate closely. Only such co-operation can ensure a uniform and coherent practice of awarding and managing concessions and PPP projects in the whole country. So far these institutions have proved to be unable to work together. Even if at working level friendly relations exist, no form of co-operation could be formalised. Technical assistance for the development of PPP legislation would be premature at this moment, as the beneficiaries would not be ready to guarantee the successful implementation of the project (in terms of a coherent system for the whole country). However, limited assistance in order to facilitate co-operation between the Concessions Commissions could be considered.

Summary

Public Procurement:

The Public Procurement Law (PPL) basically complies with EU requirements but should be amended in order to ensure a higher level of compliance with EC Directives 2004/18 and 2004/17.

Concessions:

The adoption of legislation concerning concessions and public / private partnerships (PPPs) that would be compliant with the basic principles of the *acquis*, EC procurement Directives and good international standards is urgently needed.

2.2 Central Public Procurement Organisation

2.2.1 Public Procurement

The 2004 PPL establishes two institutions at state level to be responsible for implementation of the public procurement system – the Public Procurement Agency (PPA) and the Procurement Review Body (PRB). The PPA was established as an independent administrative organisation with legal personality and directly responsible to the government. It has two branch offices in Banja Luka (RS) and Mostar (FBiH), but these offices are not authorised to make decisions without the approval of the PPA central office. The PPA’s function is to ensure proper application of the PPL, in particular by proposing amendments to the PPL and its implementing regulations, raising awareness among contracting authorities and suppliers of the public procurement legislation and its objectives, procedures and methods, publishing procurement manuals, guidelines, standard forms and models,

providing technical assistance and advice to both contracting authorities and suppliers, establishing systems for monitoring the compliance of contracting entities with the PPL, collecting, analysing and publishing information on public procurement procedures, developing an information system to supplement the *Official Gazette*, initiating and supporting the development of electronic procurement, publishing training information and maintaining a register of accredited trainers in public procurement.

The PPA has a director and a board, comprised of seven members. There are 19 staff (11 in Sarajevo and 4 in each of the branch offices). The number of staff should be increased to 31 over the next four years. Taking account of the current difficult budgetary situation, it will be a real challenge for the PPA to attain this capacity. A twinning-light project with Germany, which started in June 2008 and was concluded in March 2009, provided some relief to the capacity problems experienced by the PPA. Together with twinning, the PPA organised various training activities (seminars) in a number of cities of BiH and elaborated a new manual on procurement procedures. For instance, it adopted a training methodology and programme of training that incorporates a more practical, case study-based training approach as well as a rulebook of monitoring activities. One of the monitoring functions performed by the PPA is checking compliance with legal requirements of notices published in the *Official Gazette* and requesting contracting authorities to correct any irregularities. For pedagogical purposes, the PPA keeps on its website a list of the most common mistakes. The implementation of e-procurement has not yet started, although the basic steps have been taken (preparation of a basis for elaborating an Action Plan on electronic procurement). The PPA has been very active with regard to its role to disseminate information – in 2008 the PPA issued more than 850 written opinions on the application of the PPL provisions; it also organised 250 meetings with representatives of contracting authorities. The PPA maintains a help line to answer questions from contracting authorities or economic operators.

2.2.2 Concessions

The BiH administrative set-up for regulating and managing concessions appears to be extremely complex. Relatively large institutions (Concessions Commissions) are replicated at each level of government – state, regional (entities), and local (cantons). The administrative cost of the system is high. The competences of the various institutions are not clearly defined and tend to overlap. The levels of activity differ widely. The RS Concessions Commission has been very active. On the other hand, the BiH Commission and the FBiH Commission have been virtually inactive, since almost no actual concessions have been awarded at those levels (state, Federation). This problem, however, stems at least partially from the constitutional set-up of Bosnia and Herzegovina (distribution of competences between the state level, entities and cantons) and cannot be easily resolved without implementing a more general political solution (such as an agreement that concessions and PPP projects are to be implemented at state level).

Summary

The Public Procurement Agency (PPA) is now well established and is very active; it was the subject of positive feedback from all actors interviewed. However, it is still understaffed to fully meet its obligations. This is even more true in the case of the Procurement Review Body (PRB), which because of problems with the adoption of rules concerning its internal organisation, described in detail in Sigma's 2008 assessment report, is still unable to employ competent staff on a permanent basis. There is a serious risk that the progress achieved so far will be reversed. The role and position of branch offices of the PPA is currently under debate. Representatives of the Republika Srpska in particular would prefer separate institutions – both the PPA and the PRB at the entity level instead of one single institution at state level. The vast majority of stakeholders interviewed considered that it would be extremely difficult in the future to ensure consistency in the adoption of any of the new provisions and to uniformly interpret rules in public procurement should the central institutional framework be replaced by separate bodies with territorially limited competences. Sigma shares this view.

2.3 Procurement Operations and Practices

The largest part of public expenditure, and consequently of public procurement, is managed by the two entities of Bosnia and Herzegovina (FBiH – 56.98 %; RS – 35.13%) – there is little expenditure at the state level or in the District of Brcko. The aggregate value of contracts awarded in 2008 was more than 1.73 billion BAM (ca. 880 million EUR). The share of the total value of contracts awarded by state institutions was slightly more than 6%, and by Brko 1.87%. The value of public contracts was estimated in 2007 (no statistics available yet for 2008) to amount to 6.44 % of the GDP of Bosnia and Herzegovina. Above the basic thresholds referred to above, the open procedure is most commonly used (91.87 % in terms of the value of awarded contracts), whereas other procedures are significantly less frequent: restricted procedure – 3.58% and negotiated procedure – 4.34%. It should be noted that above the basic thresholds non-competitive and non-transparent procedures were relatively rarely used (less than 5% of concluded contracts).

Discussions with contracting authorities and suppliers indicated a good understanding of the requirements of the law and its practical effects on procurement operations. All of the actors reported problems in understanding some provisions of the PPL, which they found insufficiently clear. However, contracting authorities considered that they had adapted to the new requirements. Although more written guidance would be helpful, most thought that the guidance received from the PPA was generally helpful. Although contracting authorities identified some problems with the details of the law, the vast majority thought that the current law was better than the previous one. They were also of the opinion that the draft of the law would bring further improvement. Contracting authorities would like to see more involvement of the PPA in direct assistance, although they agreed that without significant strengthening of the PPA's human resources this would be impossible.

Discussions with contracting authorities revealed that there is room for more frequent use of centralised or co-ordinated procurement which, thanks to the increased purchasing power of public purchasers, should bring significant savings. Suppliers are particularly concerned with the excessive costs of tender documentation and the difficulty in meeting the requirements of bureaucratic procedures, particularly for low-value contracts. Recent training organised by the PPA and certified trainers proved to be successful and useful. However, out of about 70 certified trainers, only 15 are active. More detailed interpretative documents on some aspects of the PPL – e.g. application of article 23 dealing with conditions to be met by suppliers and documents requested in order to prove those conditions and provisions on abnormally low tenders – would be helpful. Auditors also welcomed the reduced bureaucracy and greater clarity of interpretation of some aspects of the law, and drew attention to some worrying breaches of the law in relation to some very large contracts (including the new government building and the medical centre in Banja Luka).

With regard to the building of a single economic space in the area of public procurement, companies from an entity that is different from that of the contracting authority are formally not discriminated against. Their chances of obtaining contracts are nevertheless reduced because other provisions (such as tax or social insurance provisions) are not harmonised.

Particular issues that arose with regard to current practices:

Costs of tender documentation: Both suppliers and auditors considered that the prices requested by contracting authorities for tender documentation providing instructions for suppliers were excessive. Normally, these prices should be set at a level that covers the cost of their reproduction and delivery. There were, however, cases where tender documentation cost 200, 300 or even 1000 – 2000 BAM (in the case of construction works concerning the bypass road around Sarajevo). Sigma was shown a tender dossier consisting of one sheet of paper with a long list of office items for which the contracting authority requested 50 BAM (25 EUR). Suppliers in general shared the view that the quality of tender documents was satisfactory, although they thought that technical specifications should be more precise.

Costs and limits of publication of contract notices: All actors considered that the cost of publication of contract notices in the *Official Gazette* was excessive. At the time of this assessment the price had been reduced, but it was still 290 BAM (ca. 150 EUR) per page. Previous assessment reports had

drawn attention to this anomalous approach to publication. According to contracting authorities there is still room for a further reduction of the price. Contracting authorities and suppliers also shared the view that (costly) publication in the *Official Gazette* should be replaced by free-of-charge advertisements in exclusively electronic form on the website maintained by the PPA. Of even more concern were the relatively long periods of publication and rigid terms of delivery of notices to the *Official Gazette*. The *Official Gazette* is published once a week. The notice has to be delivered not later than Monday noon to be published on Tuesday of the following week. If the contracting authority misses this deadline, it must wait another week for its publication. Thus very often the publication process itself significantly prolongs the contract award procedure. The current system of publication in paper form in the *Official Gazette* is too expensive from the point of view of contracting authorities. A good solution, which is also a practice in other countries in the region, would be a publication of notices on the website of the PPA. Since the PPA is part of the public administration, posting notices on its website should be entirely free of charge for contracting authorities or at least the fees should be limited. It was argued that such a solution should not be introduced yet since not all BiH public institutions are ready for completely electronic means of submission of notices. It seems, however, that this solution could be introduced by using a step-by-step approach, starting with the possibility of also using, in a transition period, other means of communication (post, fax) and only switching to an entirely electronic system of publication at the end of that period. All other countries in the region have gone in this direction, and there is no logical reason why BiH should be an exception.

Over-regulation: The PPL makes no or very little distinction between the rules to be applied by classical sector bodies (public institutions) and utilities. The law is particularly strict for entities in the utilities sector, where the commercial environment is quite different from that of government bodies. As pointed out above, such authorities would be able to take advantage in the EU of the much more flexible rules of EC Directive 2004/17.

Implications of BiH budget laws: Auditors and contracting authorities drew attention to the inflexibility of the budget legislation. Delays in adopting central budgets (at state and entity levels) and delays in the procurement process, together with the budget law's limitations on contracts exceeding one year's duration, often made it impractical to award contracts. In practice, the budgets of institutions are often adopted only at the end of the first quarter of the current year and it is not possible to initiate public procurement procedures on the basis of the preliminary budget. This means that only from the beginning of April of a given year may the first procedure be prepared and then launched.

Excessive documentation requirements: All actors agreed that the documentation required proving supplier capacity appeared excessive, and this was exacerbated by the legal interpretation in BiH of provisions concerning the request for certain documents, where the word "may" in the EU regime is interpreted as "must" in BiH. This situation results in inefficiency, particularly where lower-value contracts are concerned.

Limitations on the use of framework agreements: Many of the excessive costs associated with smaller contracts could be reduced by the greater use of framework agreements. The PPL does make (very limited) provision for framework agreements, but only with one supplier and only for a limited range of "off-the-shelf" supplies. If the law were to allow for multi-supplier framework agreements, with provision for second-level "mini-competitions" when the need arises, the capacity problems and delays experienced by contracting authorities could be considerably reduced. It is nevertheless recognised that there is currently little understanding of the benefits of framework agreements and some uncertainty as to whether they could be awarded for more than one year. The introduction in the PPL of more extensive provisions for framework agreements would need support from the PPA through interpretative documents, training, etc.

Summary

The considerable efforts to improve training, information and the publication of secondary legislation and model tender and contract documentation have improved the capacity of actors in

the system. There is nevertheless still scope for maintaining and increasing this support. There is a need to focus on training activities. The competitive side of the public procurement market is satisfactory, but resources would be used more efficiently by streamlining the approach to low-value contracts. Implementation of provisions equivalent to article 51 of EC Directive 2004/18, which permits economic operators to supplement or clarify pre-qualification certificates and documents, would ease the problem of documentation required from suppliers. Public procurement procedures should be made less costly for contracting authorities by abolishing payment for publication of contract notices. Another possibility to be considered is a reduction in the number of required documents, making some items voluntary and others mandatory, at the discretion of the procuring entity. In the case of utilities in particular, the introduction of qualification systems is likely to be beneficial. The whole public administration could benefit from greater use of co-ordinated, joint procurement procedures.

2.4 Review, Control and Integrity

2.4.1 Review Procedures

In accordance with PPL rules, any person who considers that his/her rights have been infringed by a decision taken by a contracting entity may submit an objection to this entity within five days of the date on which the decision was notified. If the contract has not yet been awarded, such an objection excludes any further actions by the contracting entity, which has to consider the objection within five days of the date of its receipt.

A complaint may be lodged with the Procurement Review Body (PRB) against the decision taken by the contracting entity or in the event that the contracting entity fails to make a decision within the five-day time-period. Upon receipt of a copy of the complaint, the contracting entity has to suspend the procedure for a five-day period, unless otherwise decided by the PRB, which can annul in whole or in part any decision of the contracting entity, order the termination of the procedure, or award damages to the complainant.

If the complaint was submitted to the PRB after the contract had been awarded, the PRB can award damages to the complainant. The decisions of the PRB may be appealed to the courts of BiH within 45 days. There are, however, contradictory opinions of the PPA and the PRB as to the legal consequences of the PRB's decision in the case it was appealed to the court. A request was submitted to parliament for official clarification of the meaning of the relevant provisions. Until the issue is clarified, contracting authorities are confronted with different interpretations by the relevant institutions.

Neither the provisions of the PPL nor the new draft PPL submitted to parliament in January 2009 fully transpose the new EC Remedies Directive 2007/66. It should be stressed, however, that they do provide for a mandatory standstill period between notification of the decision of the contracting authority of the award of the contract to all concerned economic operators and the conclusion of the contract. Time periods for submission of a request for review are shorter than required by the *acquis*, in the case of both the existing law and the draft law. Suppliers and auditors consider these time-limits to be too short. Opinions were also expressed that draft provisions on the dissemination of information on completed procedures by contracting authorities significantly limit the application of rules on public access to information.

Summary

The issue of the final character of decisions adopted by the PRB should be clarified once and for all so that contracting authorities know whether they can sign the contract once the appeal has been dismissed by the PRB; rulings of the PRB should be publicly available (published on the Internet); efforts should continue to harmonise review rules with new requirements stemming from EU law (EC Directive 2007/66) and the case law of the European Court of Justice.

2.4.2 Procurement Review Body

The Procurement Review Body (PRB), located in Sarajevo, is an independent administrative organisation with a legal personality. The PRB is responsible for ensuring the enforcement of PPL rules and for acting as a second instance in the review procedure. According to article 49 (5) of the PPL, the PRB should consist of six members, three of whom are chosen from among selected experts in administrative law and/or administrative procedure. Their status should be equal to that of an independent judge, and their PRB membership is incompatible with any direct or indirect, permanent or periodical duty, with the exception of academic activities. The other three members are to be experts in the area of works, public purchases, transportation or strategic business management, and they are selected through open competition, as provided for in the implementing regulations to the PPL. Members of the PRB are proposed by the government and thereafter appointed by parliament at state level.

The establishment of the PRB was severely delayed. In fact, the PRB did not become operational until mid-September 2006. At the time of the assessment mission, the PRB had only four members; two positions have been vacant since 2006. However, in March 2009 parliament appointed the two remaining members of the PRB. They could start their work effectively only after the official publication of the relevant decision. The number of supporting staff amounts to 14 persons. In general, the PRB has experienced great difficulties in recruiting its employees. As the adoption of a rulebook on internal organisation is still pending (due to disagreement between the PRB and the Ministry of Justice), all support staff members have been employed exclusively on a temporary contractual basis (they do not enjoy the full rights of civil servants).

In 2008 the PRB received assistance from the Slovenian National Procurement Review Commission under a twinning-light EU-funded project (250,000 EUR). The activities of the project focused on the following areas: development of legal framework, reinforcement of the capacity of the PRB, training for the staff of the PRB, day-to-day assistance in handling cases and preparation of a remedies handbook. The PRB, assisted by the twinning partner, also prepared a draft of new provisions concerning legal protection.

In 2008, the PRB received in total 1145 complaints. The PRB adopted 1078 rulings concerning appeals submitted in the course of 2008, of which less than 40 % concerned cases where the PRB found the appeals to be justified. In 377 cases the appeals were rejected for formal reasons, 235 appeals were dismissed as ungrounded and in 57 cases the appeals procedure was cancelled. The PRB also resolved a number of backlog complaints submitted in the period between 1 April and 19 September 2006, when the PRB was formally established but not yet operational due to the lack of a quorum. Altogether, the PRB resolved 1515 cases in 2008. The PRB also imposed five financial penalties on contracting authorities for breaching PPL provisions (in the range of 1000 - 2000 BAM (ca. 500 - 1000 EUR). There are no more backlog cases and all due appeals were reviewed in either 2007 or 2008. To date the rulings of the PRB are not publicly available, for example by publication on the PRB website. Sigma strongly believes that all rulings of the PRB should be published on the Internet (for example, on the joint PPA – PRB website).

Any attempts to reform the public procurement system are compounded, however, by disagreements between the two leading BiH institutions responsible for public procurement: the PPA and the PRB. For proper functioning of the system of public procurement, it is essential that both institutions cooperate and try to achieve coherent views on the interpretation of the most relevant provisions on public procurement.

Summary

Formally, the review and remedies system set up in the PPL is acceptable, but in practice the remedies system represents the weakest part of the public procurement system and requires urgent attention by the government. The PPL does not implement the provisions of the new EC Remedies Directive (2007/66), which is logical since the existing PPL was adopted well before the new rules were adopted by the EU. It should be noted, however, that the new draft PPL that was submitted to

parliament does not attempt to harmonise the review rules in BiH with the new acquis. The organisation of the PRB, in particular in terms of support staff, needs to be enhanced considerably. The legal situation of the PRB should be stabilised.

2.4.3 External Audit

External audit activities are carried out by three supreme audit institutions (SAIs), which are competent respectively for BiH State, BiH Federation (FBiH) and Republika Srpska (RS). The SAIs have set up a Co-ordination Board in order to ensure the consistency of audit standards and audit quality and to determine audit responsibilities in the case of joint activities. In general, no specialist audits of procurement procedures have been carried out, but auditors have worked closely with the PPA on procurement issues and found a number of PPL violations during normal financial audits. Statistics provided by the auditors indicate that 80 – 90 % of recommendations included in financial audit reports concern public procurement procedures. The most important violations were against article 1 of the PPL (transparency, non-discrimination, efficiency, etc.).

Auditors were also concerned by the application of provisions of the PPL dealing with the exemption of contracts related to the purchase or rental of land or existing buildings. In some cases the violation seems to have resulted from a lack of practical understanding of the new law, together with the perceived inflexibility of the law whenever authorities needed to carry out procurement quickly for a large number of small-value contracts. Auditors also drew attention to the impact of delays in the adoption of annual budgets. In some cases, in particular for larger-value contracts, some political involvement cannot be excluded. Auditors also highlighted the excessive costs of publication of notices in the *Official Gazette*, as well as the high prices of tender documentation, referred to above. In their opinion, certain infringements of the PPL, such as lack of publication of contract notice, could have been caused by the high costs of publication.

Summary

Through their audit of procurement procedures, the Supreme Audit Offices at state and entity levels play a key role in the review of procurement processes and contribute to the improvement of procurement practices and integrity. Horizontal audits of procurement processes, which have not been conducted so far, could be a development in this regard.

2.4.4 Integrity of Procurement Operations

While the PPL includes no specific requirements related to the fight against corruption in public procurement, much of the strict regulation referred to elsewhere in this report has the effect of making the corrupt use of procurement procedures more visible. Auditors referred to a number of cases where they had identified breaches in procedures, and it has been their practice to refer any suspicion of criminality to the relevant authorities. In the case of the Federation, adverse audit reports were made public, thereby ensuring transparency. The cases where public money was not properly used were probably not limited to the three cases identified. That being said, it must be noted that the authorities of Bosnia and Herzegovina are aware that public procurement is a high-risk area in terms of the potential for corruption. In this respect, an anti-corruption body has been created within the Ministry of Security, but its involvement in procurement operations is unclear. This topic will be subject to further investigations by Sigma in the course of 2009 in accordance with the assignment concerning the elaboration of a report on integrity in public procurement in BiH.

Summary

Public procurement is acknowledged as a high-risk area in terms of the potential for corruption. Further investigation of the integrity in public procurement and concessions is necessary.

3. Reform Dynamics

Although the public procurement system of Bosnia and Herzegovina was developing in the right direction four to five years ago when the first Public Procurement Law, based on the previous generation of EC Procurement Directives, was adopted, there are obvious signs of weakness. No serious reform of the public procurement system has been successfully implemented since 2005, and it is not certain whether the latest, rather modest attempt to improve the legal framework will be successful. The main reasons for that tentative assessment stem from the political deadlock in BiH and the lack of genuine political will to change the situation.

Some parts of the legislation have gradually appeared to be unnecessarily cumbersome, especially when compared to their equivalents in other countries of the Western Balkans region. It is to be deplored that the BiH legislator has focused on implementing new higher thresholds for application of non-transparent and non-competitive procedures instead of implementing serious reforms by adopting public procurement and concessions legislation that is to a greater or lesser extent harmonised with the new *acquis*, open for application of e-procurement tools and other modern procedures (competitive dialogue, electronic auctions), etc. The upshot is that Bosnia and Herzegovina is lagging behind in the area of public procurement. It does not concern just the legal framework but also the application of various implementing tools (strengthening of human resources dedicated to public purchases, training and publications, introduction of e-procurement, etc.).

There is an urgent need to adopt new legislation to allow better alignment between the EC Directives and the BiH legal system in the area of public procurement and, even more, concerning concessions as well as to correct the weaknesses identified in the review systems, both in the public procurement system where it is in place and in concessions, where no legal protection is provided. In addition, there is still a need to strengthen the capacity of both leading institutions – the PPA and the PRB.

The twinning-light projects that have been just completed with both the PPA and the PRB were helpful, but further support is likely to be needed. Such assistance, however, can be efficient only if there is a clear political will to pursue public procurement reform.

Sigma does not recommend any further major assistance on the part of the EU unless there are real commitments and progress on the BiH side with regard to the adoption and implementation of public procurement and concessions/PPP reform. If the draft Public Procurement Law currently under discussion is adopted, such assistance could focus in the short term on assisting the PPA and the PRB in the proper implementation of the law: adoption of required implementing tools (by-laws, internal rules, manuals and guidelines, etc.). In the medium term, assistance could be useful in electronic procurement (preparation of a national strategy, action plan, development of necessary software, etc.). If the attempt to adopt a new law fails again, the European Commission would be entitled to examine with the BiH authorities the reason for such a failure and to identify with them the areas where and the conditions under which BiH could benefit from EU assistance in the future.