



SIGMA

Support for Improvement in Governance and Management

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**FORMER YUGOSLAV REPUBLIC
OF MACEDONIA
PUBLIC PROCUREMENT SYSTEM
ASSESSMENT MAY 2009**

1. Summary

1.1 Main Developments since last year

There continue to be further positive developments in the practical implementation of the new Public Procurement Law (PPL) in the former Yugoslav Republic of Macedonia¹, which came into effect at the start of 2008. In October 2008 the PPL was amended by the *Law on Amendments and Modifications to the Law on Public Procurement*, which has introduced some substantive changes. It establishes the Public Procurement Bureau (PPB) as a separate legal body with effect from September 2009, and introduces an obligation to use electronic auctions for awarding 30% of public contracts as from 2010, increasing to 100% by 2012. Several revised and new guidelines, together with standard form tender and contract documents, have also been published and are in regular use by contracting authorities, and are helping to further improve the public procurement system. The PPB has delivered extensive training on a range of procurement issues to the procurement community. A process to appoint and train a group of 35 to 40 public procurement trainers is also underway.

At the end of November 2008 the new independent State Appeals Commission (SAC) started its operations.

However, there has been no progress in the area of concessions and public-private partnerships (PPPs). The concessions law, adopted in 2008, has proven to be an imperfect tool for attracting private investors (no projects have yet been awarded under the new law). Work on a new concessions/PPP law has started, but the timeline for its adoption remains unclear.

1.2 Main Characteristics (strengths and weaknesses)

The PPL is nearly fully compliant and harmonised with the new EC Public Procurement Directives. However, it seems that provisions in the Law on Construction (as amended in 2008), requiring local registration of individuals and companies working within the construction industry, do not comply with the *acquis* and create a barrier to free trade.

The practical roll-out of the PPL, and the new procurement procedures and structures it introduces, have been very well supported by the PPB through a range of activities, including training, guidelines, standard form documents and day-to-day telephone and e-mail assistance. The PPB website is comprehensive and easily accessible. Electronic publishing of notices for contracts over the national threshold is obligatory and the system is functioning well. The PPB already has plans to support the further use of e-procurement systems (including electronic tendering) and e-auctions.

A number of areas are to be developed further and/or require ongoing review. These include the use of framework agreements and central purchasing, the requirement to advertise both on the PPB website and in the *Official Gazette*, and the use and availability of guarantees.

Specific support is required to strengthen the knowledge and expertise of procurement commissions. Further operational support to procurement processes in general is required for smaller authorities, and for authorities in the health and education sectors in particular.

In order for the PPB to fulfil its new strengthened position, it will need a sufficient budget to allow it to continue to develop its wide-ranging work and responsibilities.

The establishment of the SAC is a positive step in addressing concerns about the operation of the remedies system. However, it remains the weak link in the procurement system. The SAC currently lacks sufficient funding to carry out its activities properly (it is lacking basic office equipment). It will require extensive support and training in both the short and longer term to ensure that problems with the appeals process and any perceptions of bias in decision-making are tackled and resolved.

The other main area of concern is the lack of positive developments in the PPP and concessions law. Legislation on concessions and PPPs remains unsatisfactory, and several amendments to the

¹ In this report, the former Yugoslav Republic of Macedonia will hereafter be referred to as "Macedonia".

concessions law will be needed to bring it in line with EU requirements. For the law to be implemented successfully in practice, there will need to be clear and strong leadership. A centre of expertise is also needed to support contracting authorities in preparing projects, conducting contract award procedures, and contract management for PPPs and concessions.

1.3 Recommendations for Reform

1.3.1 Short-term priorities

- Public Procurement Bureau (PPB): Continue to provide support (training, publication of standard tender documents, guidelines, manuals, daily assistance) to contracting authorities and economic operators in implementing the PPL, with an emphasis on new procurement procedures and techniques (framework agreements, e-auctions, central purchasing);
- Promote the popularisation and full implementation of e-procurement tools (e-auctions, e-procurement);
- State Appeals Commission (SAC): Allocate an appropriate budget to the SAC, which currently lacks sufficient funding to carry out its activities properly; provide extensive support and training in both the short and longer term to ensure that problems with the appeals process and any perceptions of bias in decision-making are tackled and resolved. The SAC itself should establish and implement accountable internal procedures to make its work fully transparent;
- PPPs and concessions: Adopt a new concessions/PPP law, in line with EU requirements; ensure proper institutional support to champion and lead projects (such as a centre of expertise to support contracting authorities in the preparation of projects, conduct of contract award procedures, and contract management).

1.3.2 Medium-term priorities

- Ensure stronger co-ordination of all legislative work relevant for chapter 5 of the negotiations with the EU;
- Further strengthen the capacity of the central public procurement institutions (PPB, SAC);
- Ensure the full harmonisation of the procurement regime for utilities with EC Directive 2004/17;
- Develop a sustainable national training system for public procurement;
- Simplify the method for disseminating procurement notices (only electronic publication on the PPB website instead of dual publication on the website and in the *Official Gazette*);
- Support e-procurement (including the provision of sufficient funds for the PPB to maintain and develop the required hardware and software);
- Develop sophisticated auditing tools (for the performance audit of public procurement).

1.4 Recommendations for Assistance

The EC Delegation in Skopje has already planned significant assistance for the PPB and the SAC (to be started in 2010: 1 million EUR and 200,000 EUR respectively). These projects will focus on:

- capacity-building of central institutions (PPB, SAC);
- development of operational tools (guidelines, manuals);
- mass training for public procurement officers and economic operators;
- support for e-procurement.

In addition to the projects already planned, the EC assistance should include material support (hardware and software, office equipment) for the SAC, as its very limited budget means that it would not be able to function properly without external support.

2. Assessment of the Public Procurement/Concessions System

2.1 Legislative Framework

Since the adoption of the first public procurement law in 1998, Macedonia has progressively developed its public procurement legal framework, with a view to meeting EU requirements and international good practice. Sigma has described the legislative history in detail in previous assessment reports.

2.1.1 Public Procurement Law

The most important legal initiative was taken in 2007, with the adoption of a completely new *Public Procurement Law (PPL)*, which was effective as from 1 January 2008. This law ensures nearly full compliance with the new EC Public Procurement Directives.

Amendments to the PPL were introduced by the *Law on Amendments and Modifications to the Law on Public Procurement 2008*, which has been in effect since October 2008. This law makes a number of technical amendments, as well as introducing more substantive changes. Of particular note are provisions which:

- establish the Public Procurement Bureau as a separate legal body and broaden its formal responsibilities to include the provision of training;
- introduce financial thresholds below which the use of Common Procurement Vocabulary (CPV) references is not required;
- cover contracts that will last for longer than a year;
- reduce timescales for appeals and standstill period for contracts awarded under the simplified procedures; and
- introduce an obligation to use electronic auctions for awarding 30% of public contracts as from 2010, increasing to 100% by 2012.

The new PPL covers the classical and utilities sectors and all types of procurement (works, supplies and services), except for concessions. The rules concerning the utilities sector are provided in a separate chapter. The PPL also contains provisions for remedies, the establishment and operation of the State Appeals Commission and the operation of the Public Procurement Bureau. The exemptions allowed by the PPL for contracting authorities in the classical sector and for utilities are in line with EC rules.

Utilities: At present most utilities are still publicly-owned contracting authorities. Private companies (and other legal entities) carrying out utilities functions are also required to comply with the provisions of the PPL when awarding utilities contracts. However, the provisions for utilities do not reflect the more relaxed regime permitted under EC Directive 2004/17/EC, such as the freedom for utilities to decide which procurement procedure to use, flexibility on the award of contracts under framework agreements, the availability of periodic indicative notices and qualification systems. Macedonia should consider introducing a regime for utilities that is fully harmonised with Directive 2004/17/EC.

New procurement methods and a simplified procedure: The new PPL implements all of the new instruments regulated by the EC Directives (apart from dynamic purchasing systems), such as competitive dialogue, framework agreements, central purchasing bodies and electronic procurement. Competitive dialogue is not yet being used in practice and new central purchasing bodies have not yet been established. Contracting authorities are using framework agreements for purchasing — both single provider (often referred to in practice as repeat or successive purchasing) and multi-provider. Framework agreements are generally only established for one year due to procurement planning and budget requirements. Plans for electronic procurement are high profile and well advanced, with additional legal provisions requiring the use of electronic auctions introduced by the Law on Amendments and Modifications to the Law on Public Procurement in 2008.

The procedural changes introduced in the PPL continue to improve practice and are clearly welcomed by the procurement community. The simplification of procedures for low-value contracts has been particularly welcomed. The *Law on Amendments and Modifications to the Law on Public Procurement* further simplifies the process. It removes the requirement to use CPV references for contracts below specified thresholds, and it reduces timescales for appeals and standstill for contracts awarded under the simplified procedures.

Public procurement commissions: The operation of procurement commissions raises some practical concerns about members' levels of expertise and knowledge. Commission members are now drawn from a wider range of officials, some of whom may have limited experience of procurement obligations and purchasing processes. Further support and training may therefore be needed for these public procurement commission members.

By-laws: A set of 14 by-laws related to the new PPL was adopted between 2007 and the end of 2008 in accordance with the required timescales. These by-laws significantly improve procurement practice by making tender practice consistent and by updating standard procurement approaches.

Guidelines and model documents: Further important steps towards good procurement practice were taken during 2008 and early 2009, with the preparation of guidelines, brochures, model tender documents and model contracts (prepared with the assistance of Sigma and external experts). All of these documents will be made available free of charge from the PPB website in easily downloadable format (many are already available). The published documents have been generally welcomed by the procurement community. Some contracting authorities choose to adopt the model tender documents with minimal amendments, whilst others adapt them to meet their own local needs. Contractors have commented on the positive effect of this increased standardisation on the procurement process.

2.1.2 Law on Construction

The *Law on Construction* (amended in July 2008) requires local registration of individuals and organisations in the construction industry, including construction managers, designers, construction companies, supervising engineers and maintenance managers. However, there are no provisions allowing foreign individuals and organisations to prove their capacity by other means, such as providing evidence of registration in other states, or ensuring that they will be treated no less favourably. This situation constitutes a potentially significant barrier to trade and contravenes well-established EU principles preventing discrimination on national grounds.

2.1.3 Law on Concessions and PPPs

In its 2008 assessment report Sigma pointed out the need for significant modifications to the newly-adopted Concessions Law for it to comply with EU requirements and good international practice. However, the Concessions Law, which is the responsibility of the Ministry of Economy, has still not been amended. Therefore it still does not comply with EU requirements and does not deliver projects in accordance with good international practice. In early 2009 Sigma experts have been collaborating with the Working Group for the PPP and Concessions Law, which is led by the Ministry of Economy. This work has focused on the changes needed to bring the law into line with EU requirements. A new concessions law then should also be fully harmonised with the Public Procurement Law. However, timescales are currently unclear regarding the production and adoption of amendments to produce an EU-compliant law. In Sigma's opinion the legislative process needs stronger leadership.

What is clear is that there is a continued fundamental lack of understanding and expertise in project financing, which is an essential requirement for many PPP structures. Without considerable further assistance and training, the working group will not be able to produce secondary legislation (which is the responsibility of the Ministry of Finance) or guidance on how to prepare a PPP project for the market or how to deliver a project. Public bodies in Macedonia do not currently have the expertise to negotiate a PPP project. If the international PPP market were to focus on Macedonia at the moment, they would probably not invest due to the country's lack of political will and the absence of

institutional structures to deliver such projects. However, if they were interested, the Macedonian authorities would not be in a position to properly define and protect their interests.

A properly trained PPP body, either separate or within a ministry, will be needed to provide a centre of expertise and to champion and lead projects in Macedonia. As the experience of the most successful EU Member States has shown, such a body should co-operate closely with private business (representatives of potential investors).

Summary

Positive developments continue to be achieved in the practical roll-out of the new legislative framework. The PPL, amended in 2008, fundamentally complies with EU requirements, although the regime for utilities could be further harmonised with the EC Directive. A number of improvements have been introduced in areas that are not directly covered by the detailed provisions of the EC Public Procurement Directives. Electronic publication is standard and electronic procurement systems and e-auctions are being proactively developed. Secondary legislation, standard tender forms and contract documents, together with practical guidelines and brochures, are improving procurement practice. In conclusion, the legal basis for public procurement in Macedonia continues to be very good.

The legislative situation for concessions and PPPs remains unsatisfactory, and several amendments to the Concessions Law are needed to bring it in line with EU requirements. There needs to be clear and strong leadership and a centre of expertise in PPPs and concessions in order to achieve the successful roll-out and practical implementation of the law.

2.2 Central Public Procurement Institutions

2.2.1 Public Procurement Bureau

The Public Procurement Bureau (PPB) was established in 2005 and started operating in June of the same year. The PPB's main tasks are regulated by the PPL. At the beginning of April 2009 the PPB had 12 staff, including the director; this number will increase to 18 permanent staff by the end of 2009.

The PPB is currently a government administrative body based within the Ministry of Finance, and its budget is provided directly by the ministry. The director is appointed for a four-year term and may be dismissed by the government on the proposal of the Minister of Finance. Previous Sigma assessment reports have pointed to the importance of avoiding the possible politicisation of the PPB in terms of its location within the Ministry of Finance, the rules governing the appointment and dismissal of the director, and its budget allocation. *The Law on Amendments and Modifications to the Law on Public Procurement* establishes the PPB as a separate legal body with effect from September 2009. This is a step in the right direction. The PPB's budget will continue to be allocated by the ministry.

The PPB's activities and services are clearly appreciated by contracting entities and economic operators. It is known for exercising its tasks in a proactive, responsible and efficient manner. The 2008 Law on Amendments and Modifications to the PPL widened the PPB's formal responsibilities to include the provision of training. The various training activities organised by the PPB are attended by the staff of contracting authorities, economic operators and other public bodies with an interest in public procurement, such as the State Audit Office and the State Commission for the Prevention of Corruption. The readily available advice of PPB staff on practical day-to-day issues (by telephone, in writing or by e-mail) is a particularly good, and frequently cited, example of the PPB's positive role and reputation within the procurement community.

The PPB's comprehensive, user-friendly and well-structured website contains a wide range of information (also in English), including a full set of primary and secondary public procurement legislation, contract notices, standard tender forms and contract documents, decisions of the State Appeals Commission, and frequently asked questions. The website is regularly updated.

2.2.2 Ministry of Economy

The second most important player in Macedonia's procurement set-up is the Ministry of Economy (MoE), which is responsible for the primary legislation on concessions and PPPs (as indicated above, responsibility for the secondary legislation falls under the Ministry of Finance).

However, the 2008 Concessions Law has not proven to be a very useful tool (the number of concessions awarded in 2008 amounted to zero), and there is not much progress in developing new concessions/PPP legislation.

In order to successfully implement and deliver complex PPPs and concessions contracts, clear and strong leadership is essential, based on skills in commercial law, finance and economics. Various countries use different models to draw together this expertise for delivering successful projects. It is recommended to develop a centre of expertise that can provide clear leadership on all aspects of the development and implementation of PPPs and concessions.

Summary

Public procurement: *The activities and services of the Public Procurement Bureau (PPB) are clearly highly appreciated by contracting entities and economic operators. The PPB exercises its tasks in a proactive, responsible and efficient manner. However, the Bureau will need further strengthening and an appropriate budget if it is to effectively support PPL implementation. This is especially true for the introduction and development of new procurement structures and processes, such as all aspects of e-procurement and e-auctions, central purchasing and framework agreements, as well as for the development of integrity in public procurement.*

Concessions and PPPs: *Public bodies in Macedonia do not currently have the expertise to negotiate a PPP project. If the international PPP market were to focus on Macedonia at the moment, it would not invest due to the lack of political will and institutional structures to deliver such projects. A properly trained PPP body, which is either independent or within a ministry, is required to provide a centre of expertise and to champion and lead projects in Macedonia.*

2.3 Procurement Operations and Practice

Electronic publication system: On 1 January 2008, at the same time as the new PPL came into force, a new electronic publication system was launched by the PPB. The system, which is based on unified standard forms modeled on the SIMAP/TED formats for notices, is an important step in improving the procurement system. The use of the publication system is obligatory, and is an excellent information source on business opportunities in the private sector. In the case of contract notices that are also published in the *Official Gazette*, the electronic publication is free of charge; in the case of low-value contracts, published only on the website, the cost of publication is 15 EUR (covered by contracting authorities). Access to notices published by the system is free of charge for economic operators and the general public.

All low-value procurement contracts are advertised only on the website, while high-value procurement contracts currently must also be published in the *Official Gazette* (the cost of publication is covered by contracting authorities). Contract notices for international tenders may also be advertised on TED.

The dual requirement to advertise on the electronic publication system and in the *Official Gazette* seems to be unnecessary. This requirement should be analysed; if economic operators are found to have sufficient access to the electronic system of notification so as to ensure clear and open competition, then the requirement to also advertise in the *Official Gazette* could possibly be removed. The elimination of this dual requirement could lower operational costs for contracting authorities.

Initial technical problems with the electronic publication system have generally been quickly resolved, and contracting authorities and economic operators have commented on how easy the system is to use now. Some contracting authorities commented that in some sectors economic

operators were not initially aware of the switch to electronic advertising, which led to a reduction in competition. However, this issue also appears to have been resolved.

An additional major advantage of the electronic publication system is that it allows the PPB to gather procurement data and compile statistics easily as part of its monitoring functions. Sufficient funds will be needed to ensure that the system can be further updated and improved, particularly for data collection.

Electronic procurement system: The PPL permits the use of electronic procurement. The development of a web-based procurement system to enable the entire procurement procedure to be conducted electronically is now well underway². Initial intensive pilot testing and training occurred during 2008. However, it is still the early days in the implementation of the system and its use is not obligatory. By April 2009, 222 contracting authorities were registered on the e-procurement system, 40 procedures had been conducted on the system and 1,300 individuals had been trained in using the system. Furthermore, a number of other contracting authorities are intending to use it in 2009.

Electronic procurement will certainly be an effective method and a natural part of the future public procurement system. The main current issue of concern has been related to the use of e-signatures. This use seems to be driven by a number of factors: the need to obtain relevant authorisations that are not necessarily forthcoming, genuine nervousness about the potential for abuse, and the more practical issue of the availability of the necessary software. A number of safeguards are needed, especially common technical platforms and inter-operability, to ensure equal access to the system by all tenderers, including small and medium-sized enterprises (SMEs). The PPB will therefore need sufficient resources for investment in the system and for its development and promotion.

e-auctions: The PPL permits the use of e-auctions as the final phase of the following procedures: open procedure, restricted procedure, simplified competitive procedure with publication of notice and negotiated procedure with publication of notice. The use of e-auctions has so far been limited for most authorities, although article 24 of the *Law on Amendments and Modifications to the Law on Public Procurement (2008)* includes new obligations for the use of e-auctions by contracting authorities. By 2010 contracting authorities must be using e-auctions for at least 30% of the estimated value of planned procedures for the award of public contracts. This proportion will rise to 50% by 2011 and 100% by 2012.

These e-auctions are generally welcome as they increase the streamlining and transparency of procurement processes. However, care is needed to ensure that e-auctions are used appropriately and that contracting authorities understand the circumstances in which an e-auction may not be appropriate. The PPL does state that e-auctions should only be used where technical specifications have been precisely defined. It also specifically excludes contracts that include intellectual services, design and other similar activities. However, Sigma recommends that the PPB provide clear guidelines on when e-procurement should and should not be used; this issue should also be covered in e-auction training. The budget should also be sufficient to allow the PPB to maintain and develop the e-auction system.

Standard documents: In 2008 and 2009 the PPB prepared and published an updated set of standard tender and qualification documents and model contracts. The tender documents are regularly used as a basis for tender processes by contracting entities, even though they are not obligatory. Some authorities use the standard documents without many changes, while others adapt them to meet their specific purchasing needs. The new standard documents seem to be generally accepted by contracting authorities and welcomed by economic operators as a means of further standardising and simplifying procurement processes.

Central purchasing: The new PPL allows for central purchasing bodies and co-ordinated purchasing arrangements to be set up, but so far none has been established. The Office of Common and Mutual Matters is in fact responsible for centralised purchasing of certain goods and services for the government sector, and the use of its services is mandatory for all government bodies.

² System development has been supported by the United States Agency for International Development (USAID).

Framework agreements: Framework agreements were also introduced by the new PPL, but their use is patchy. They appear to be used primarily for maintenance-type contracts and — due to procurement planning and budgetary constraints — tend to be limited to one year. There is evidence of the establishment of both single-supplier and multiple-supplier frameworks. Some contracting authorities have expressed uncertainty about how to use frameworks effectively in practice. The PPB has prepared *Guidelines on the Use of Framework Agreements*, and it will be delivering training on frameworks in June 2009. Both the guidelines and the training should help to further expand and strengthen the use of frameworks. The PPB should continue to review the sectors and types of purchasing in which frameworks are being used and identify areas for further guidelines, training and support if necessary.

Guarantees: The PPL has removed the mandatory use of tender guarantees and performance guarantees, which is a clear improvement, but in practice guarantees are still widely used. Inappropriate requests for guarantees may affect participation and restrict competition. In particular, small and medium-sized companies may be discouraged from participating. In practice, however, guarantees are apparently still required quite regularly, especially in certain sectors (e.g. construction and information technology). There is some evidence that contracting authorities consider such issues as the value and risks of the contract when deciding whether a guarantee is required. It also seems that the current global economic crisis is affecting the availability of bank guarantees in some sectors and circumstances. We also understand that there can be problems with the timing of the provision of guarantees, with some banks being unwilling to provide these guarantees early enough in the tender process. The PPB will need to keep this issue under review. It might also consider preparing further guidelines and/or training with regard to the appropriate circumstances for seeking tender securities and guarantees.

Statistics: The annex to this report sets out the basic procurement statistics for 2008. The number of contracting entities covered by the PPL amounted to about 1,000 (based on estimates of the number of budget-users and public enterprises), with approximately 900 entities registered for electronic advertising with the PPB. In 2008, 5,926 contracts above the national procurement thresholds were awarded, with a total estimated value of approximately 384.5 million EUR; contracts worth a total of about 57.4 million EUR fell below the thresholds (refer to row D1 in the annex). In total, the value of public contracts awarded under the PPL amounted to 6% of gross domestic product (GDP).

Levels of competition: Generally, economic operators' interest in competing for public contracts appears to be high in most areas. Some contracting authorities appear to have experienced an increase in the number of economic operators participating in procurement processes since the introduction of electronic advertising. However, contracting entities indicate that some sectors attract insufficient interest, probably due to the monopolistic nature of these market segments. 200 contract notices have been published internationally. According to data provided by the PPB, in 2008 the number of contracts awarded to EU economic operators was 46 (for a total value of 15.4 million EUR) and 32 contracts were awarded to non-EU foreign companies (for a total amount of 5.2 million EUR). The market share of domestic companies was 94.7%.

Knowledge of the law: The main purchasers from the central government and the utilities sector, as well as the major economic operators, seem to have a good knowledge and ability to apply the PPL. However, much still remains to be done to strengthen operational capacity, especially within local government and in smaller contracting authorities, particularly in the health and education sectors.

Training: The PPB has been proactive in preparing and delivering training. Since the implementation of the new PPL, the PPB has organised extensive training workshops and seminars in the correct application of the law, with support from USAID and Sigma. This training has involved 1,300 participants from all over the country and has covered such topics as completing forms, effective planning and conduct of procedures, e-procurement and e-auctions, security-related procurement, and audit.

One area where ongoing guidance and training on practical implementation is required is the assessment of non-pricing issues in tender evaluation. A linked issue is the potential confusion in practice (not in the PPL) between assessing quality at the selection stage and at the tender evaluation

stage. One or the other of these two issues was raised by nearly all of the bodies consulted in the preparation of this report. In 2008 two sets of guidelines were prepared by the PPB, which go some way to addressing this issue: *Guidelines on Tender Evaluation for Public Procurement* and *Guidelines on the Qualitative Selection of Economic Operators on Public Procurement Procedures*. A by-law has also been passed on the methodology for expressing criteria as points.

Training of trainers: An important project for the PPB in 2009 is the organisation of training for trainers. This USAID-funded project will train a group of 35 to 40 public procurement trainers. The project is already underway: public advertisements have been posted, applications received and a core group of applicants is now being selected through testing. The next phase will involve the training itself, which will take place at the Faculty of Law in Skopje. This training will help to increase professionalism amongst contracting entities. From the core group of trainers a national network of shared expertise will be established on both practical and legal issues; the longer-term roll-out of training (to be delivered by trainers) will assist in the professional development of procurement officers across the country.

To create sufficient training capacity in the future, the private sector should be encouraged to play a wider role in providing procurement training. There are many good examples of this kind of training being provided in EU Member States. Institutionalising public procurement training is another important method of ensuring long-term sustainability.

Summary

The PPB has made considerable efforts to support contracting entities and economic operators by providing training and information and by publishing secondary legislation, guidelines and model tender and contract documents. This support has in general been very positively received. However, further support to purchasers is required, in particular to smaller local authorities and authorities in the health and education sectors, to strengthen the operational side of public procurement. Other key areas for support include general procurement training for tender committees, clear guidance and/or training on when and how to use e-auctions, and evaluation of the quality of tenders. The competitive side of the public procurement market is satisfactory, and the absence of any preferential-treatment rules is a positive feature of the Macedonian system.

2.4 Control, Review and Integrity

2.4.1 Complaints Review: State Appeals Commission

Operational overview: After some delays, the new State Appeals Commission (SAC), which replaced the Complaints Committee, started work on 26 November 2008. It is defined by the PPL as an independent state authority, with the status of legal entity [art. 201 (1)]. The rules governing the establishment and operation of the SAC are set out in the PPL, and the SAC Rules of Procedure were adopted in November 2008.

The SAC is composed of a chairman and four members appointed by parliament following a public announcement. The chairman and one of the four members now in place held the same posts on the Complaints Committee. The SAC is currently assisted by a professional service of four expert associates, all of whom are lawyers; two of them have public procurement expertise, and one is an archivist. As the SAC's budget does not cover professional services or expert technical advice for matters outside the competence of its members, the SAC relies on informal support when it needs assistance, for example in understanding the technical aspects of a particular specification.

The SAC is due to move to its own premises in 2009 (May - June), but budget constraints mean that there are genuine concerns about its ability to equip those premises. The SAC has limited IT facilities and, whilst it does comply with requirements of the Law on Archiving and thus keeps various records electronically, it is not currently able to publish its own decisions electronically (these decisions are published on the PPB website).

Right to appeal: Any economic operator with a legal interest in the contract award procedure who has suffered, or could suffer, damage by an alleged legal infringement may initiate an appeal. The

appeal can be lodged against the contracting entity's decisions, actions or failure to take action during the contract award procedure. In addition, the Attorney General can initiate an *ex officio* appeal whenever he/she feels it necessary for the protection of the interests of the Republic of Macedonia or of the public interest.

Appeals fee: The PPL states that a complainant must pay a fee. This requirement was introduced to reduce the number of unfounded appeals. The fee size depends on the value of the contract in question and varies from 50 EUR (for low-value procurement) to 300 EUR (for contracts above 200,000 EUR). These fees are quite reasonable and do not seem to restrict the right to lodge a complaint. However, fees should remain at this moderate level to avoid serving as a disincentive to the submission of justified complaints.

Statistics: The number of appeals remains high, despite the introduction of the fee. The SAC made decisions on complaints relating to 479 contracts between 26 November 2008 (when it became fully operational) and 31 March 2009. On 31 March 2009, another 51 complaints were still being processed (the original number of complaints received was higher, but 70 were withdrawn by the economic operators when asked to pay the complaints fee). Of the 479 decisions, 62 were rejected for late submission or illegibility, 269 were refused, 54 were accepted and the procedure was referred back to the contracting authority for re-examination, and 27 were accepted and the procedure was cancelled.

Conduct of appeals: The PPL sets out the processes to be followed for appeals to the SAC. The SAC must consider the content of the complaint, but it may also investigate more widely (*ex officio*) where there is a major infringement of the law. Major infringements are defined in the PPL.

An appeal must be lodged within specified time periods. The time periods for low-value contracts are shorter under the simplified competitive procedure that has been introduced by the Law on Amendments and Modifications to the Law on Public Procurement 2008. Once an appeal is lodged, the signing and execution of the public contract are suspended. The SAC must make a decision within 15 days of receiving all of the specified documentation. The SAC meets weekly to consider and decide on cases so that decisions are made within the statutory period. The SAC's decisions, which are published on the PPB website, include a short written rationale. However, the fact that the time period for decision-making starts on the date upon which all specified documentation is available means that there can be longer than 15 days between receipt of the appeal and the decision.

The SAC needs to improve its statistical system. No accurate statistical information is available on the subject matter of the appeals, but most complaints relate to the tender evaluation stage. There is also no statistical information on the value of the contracts that are the subject of appeals.

The PPL provides the possibility of a public hearing, which can be requested by the parties concerned. The SAC decides whether or not to hold the hearing. The SAC can also decide on its own to hold a hearing if it believes that it is necessary in order to clarify complex legal issues. The SAC has held one public hearing so far, and the appeal was rejected in that case.

Appeal of SAC decisions: The decisions of the SAC can themselves be appealed. Such an appeal occurs as an administrative dispute before a competent court; the court is to handle public procurement cases as a matter of urgency. 32 cases in total have been appealed to the courts.

Annual report: The SAC is obliged to submit an annual report to parliament by the end of March; the contents of this report are specified in the PPL. As the SAC has not yet completed a full year of operation, an annual report has not yet been prepared and submitted (only a first quarterly report has been submitted to parliament).

Areas for improvement: The new PPL has created the framework for a review system that is more efficient and that complies with EU requirements. The establishment of the SAC is a good starting point and goes a considerable way to addressing previous concerns. Other concerns about delays in review procedures and the significant backlog of decisions have also been fully addressed by the SAC. Decision-making by the SAC is now timely and there is no major backlog of reviews.

However, the appeals system remains the weak point in the public procurement system and now substantial efforts and support are needed for the effective implementation of these provisions. The

main weakness is the economic operators' perception that decision-making is heavily biased towards contracting authorities and focuses mainly on procedural issues. While Sigma has not had the opportunity to investigate the reality of this perception, statistics on the rejection and acceptance of appeals do not fully support it. A key problem seems to be that the published SAC decisions do not contain enough detail on the facts and findings for each case reviewed. This means that economic operators may not be satisfied that the issues have been fully and properly considered or may not understand how a decision has been reached. Whatever the truth of the matter, it is clear that the negative perceptions among economic operators must be addressed if the SAC is to win the confidence of the whole procurement community.

It is important that the newly established SAC receives sufficient organisational and budgetary support. It needs to be well-staffed by experts and administrators, underpinned by adequate technology, including office facilities and IT systems. It must also have the financial capacity to seek independent specialist technical advice where necessary.

It is important to provide the SAC's newly recruited members and staff with the extensive training, advice and technical support that they require, both during the first couple of years of its operation and in the long term. In particular, training is required on how to prepare and write decisions for publication.

Summary

The establishment of the SAC is a positive step in addressing concerns about the operation of the appeals system. However, it remains the weak link in the procurement system. The SAC currently lacks sufficient funding to properly carry out its activities. It will require extensive support and training in both the short and longer terms to ensure that problems with the appeals process and any perceptions of bias in decision-making are tackled and resolved.

2.4.2 External Audit

Macedonia's supreme audit institution is the State Audit Office (SAO), which was established in 1999. The SAO's mandate covers all state budget-users and funds — including state-owned enterprises and local government — and also the audit of projects funded by the EU. The SAO may carry out both financial audit and performance audit.

The annual audit, where relevant, includes a chapter on public procurement. This audit primarily determines compliance with the PPL. The SAO checks the entire process, from preparation (*e.g.* securing funds) to the conclusion of the contract, including the outcome of the contract execution (final prices in the contracts, completion dates, etc.). In addition, the SAO can choose to conduct special audits of public procurement. Contracting authorities have 90 days in which to set out in writing how they will respond to recommendations made in the SAO report, and the SAO monitors compliance with these responses. This monitoring by the SAO is a potentially powerful tool for improving procurement practice.

At the time of this assessment, the SAO was unable to comment on the implementation of the new PPL in 2008, as the annual audit programme had not yet been concluded. It did comment, however, on the dramatic increase in compliance with procurement requirements since 2000. The SAO pointed out that resourcing issues meant that smaller contracting authorities more often faced problems in complying with public procurement rules.

In February 2009 the SAO set up a task force comprised of SAO members who were specialised in public procurement. The aim of this task force is to develop a public procurement audit methodology that addresses: (1) organisational issues: how the contracting authorities' own internal systems assess risk levels and controls; and (2) procedural compliance: using detailed tests for each public procurement to identify irregularities and determine financial impacts. The SAO plans to carry out horizontal audits on a thematic basis (covering several institutions) in the area of public procurement. It has decided to wait until 2009/10 at the earliest to undertake these audits so that it will have the opportunity to assess at least two years of operational experience.

Summary

The State Audit Office continues to play a key role in reviewing procurement processes and in setting out steps aimed at improving procurement practice and increasing the integrity of the process. The SAO's new task force on public procurement is a welcome development, as are future plans to carry out horizontal audits of procurement.

2.4.3 Integrity of Procurement Operations

Public Procurement Law: The PPL does not include any specific provisions for tackling corruption in public procurement, other than conflict-of-interest provisions. However, the aim of the PPL in general is to prevent corrupt and fraudulent practices. The PPL ensures the transparency of public procurement procedures by laying down extensive publication rules and favouring open competitive procedures. As mentioned above, the PPL also contains rules on conflict of interest, which provide better guarantees for fair and impartial procedures that are potentially free from biased decisions or irrelevant influences.

State Commission for the Prevention of Corruption (SCPC): The SCPC investigates corruption complaints and allegations raised by a range of sources, including the State Audit Office, local auditors, citizens and the press. The SCPC has identified public procurement as an area at great risk of corruption; its annual report always addresses this issue in a separate chapter. As its goal is to prevent corruption, the SCPC prioritises allegations of corruption in procurement. This means that any complaint received about the conduct of an ongoing public procurement procedure must be dealt with swiftly if the corrupt award of a contract is to be prevented. In 2008 the SCPC referred 16 procurement cases to the public prosecutor with recommendations for criminal procedures. All of these cases related to the misuse of public funds by municipalities.

According to the SCPC, the most frequent problems relate to the determination of award criteria and their inappropriate application, particularly in the construction sector (works contracts). It considers the new PPL to be an important step in reducing corruption.

The SCPC has been heavily involved in training under the State Programme on Conflict of Interest. This training has been delivered to all municipalities country-wide, and has included mayors, counsellors and key officers. It covers nine areas of risk; procurement is identified as an issue in three of these nine areas. The training of trainers programme in public procurement also covers conflict of interest.

Sigma integrity report: In 2008 Sigma prepared an assessment report on integrity in public procurement as support to a national policy and action plan on integrity and corruption in public procurement (delivered to the PPB in January 2009, the report is currently being analysed by the Macedonian authorities). This report recommends key elements for the design of a national policy on enhanced integrity in public procurement and also proposes actions for enhancing integrity in public procurement. These recommendations and proposed actions highlight the importance of co-operation and proactive work among the State Audit Office, the State Appeals Commission, the State Commission for the Prevention of Corruption, and the PPB.

Summary

Public procurement is acknowledged as a high risk area for corrupt practices. The PPL has introduced helpful clarity into the law. The general training and support provided by the PPB and the consequent increased professionalism of procurement officers are also helping to reduce the potential for corruption. The implementation of training on conflict of interest and the proposed national policy and action plan on integrity in public procurement are other important and positive elements in tackling this issue.

3. Reform Dynamics

The Public Procurement Bureau (PPB) has certainly proven its ability, skills and capacity to develop the public procurement system, although for some of its work it has received external assistance. The PPB's work is of high quality, proactive and highly appreciated by the procurement community.

However, the PPB will need sufficient resources for the further and extensive strengthening of its central capacity. Support for implementing the new Public Procurement Law (PPL) and for introducing new business models — such as central purchasing, framework agreements, and e-procurement — will become major challenges in the coming years and will require the PPB's full attention and commitment. The PPB will also require continuing government support, especially in terms of resources and stability.

The same positive picture does not yet apply to the Ministry of Economy's work on concessions/PPPs. Stronger leadership is needed for drafting the new concessions/PPP law. Further efforts will shortly be needed to build institutional capacity — ideally by creating a centre of expertise — and to improve the legal framework.

4. Recommendations for Assistance

The EC Delegation in Skopje has already indicated that the EU has planned to provide significant assistance to the Public Procurement Bureau (PPB) and the State Appeals Commission (SAC), which will begin in 2010 (1 million EUR and 200,000 EUR respectively). These projects will focus on:

- Capacity-building of central institutions (PPB, SAC);
- Development of operational tools (guidelines, manuals);
- Mass training for public procurement officers and economic operators;
- Support for e-procurement.

In addition to already planned projects, EU assistance should include material support (hardware and software, office equipment) for the SAC, as its very limited budget means that it would not be able to function properly without external support.

Annex

PROCUREMENT/CONCESSIONS STATISTICS for 2008³

A. Number of contracting entities		
Central government	99	
Regional and local authorities	89	
Other (bodies governed by public law)	706	
Utilities	57	
Total number of contracting entities	951	
B1. Awarded public contracts/contracting entities <i>(not including low-value procurement)</i>	Total (estimated) value (millions of EUR)	Total number
Central government	67.1	902
Regional and local authorities	56.2	612
Other (bodies governed by public law)	156.0	3 595
Utilities	105.2	817
Total number of public contracts awarded	384.5	5 926
B2. Awarded concessions/contracting entities		
Central government	N/A	N/A
Regional and local authorities	N/A	N/A
Other (bodies governed by public law)	N/A	N/A
Utilities	N/A	N/A
Total number of concessions awarded	N/A	N/A
C1. Awarded public contracts above the EU thresholds	N/A	N/A
Works	N/A	N/A
Services	N/A	N/A
Goods	N/A	N/A
Mixed contracts	N/A	N/A
Total number of public contracts above the EU thresholds	N/A	N/A
C2. Awarded concessions above the EU thresholds	N/A	N/A
Works	N/A	N/A
Services	N/A	N/A
Other	N/A	N/A
Total number of concessions above the EU thresholds	N/A	N/A
D. Procurement methods used (for contracts above the national thresholds)		
Open procedure	337.1	4 823

³ Statistical data provided by the Public Procurement Bureau

Restricted procedure	5.1	22
Negotiated procedure with prior publication of notice	15.1	17
Negotiated procedure without prior publication of notice	23.2	1 025
Other procedures (competitive dialogue, etc.)	4.0	39
D1. Low-value procurement (estimated)	57.4	14 953
E. Participation rate (average number of submitted tenders)		
Works	/	4
Services	/	4
Goods	/	5

F. The 10 largest procuring entities

	Name of contracting authority	Main activity (estimated)	Annual procurement budget (millions of EUR)
1.	Macedonian power plants	Utilities	57.4
2.	Ministry of Interior	Public order and safety	15.6
3.	Ministry of Education and Science	Education	13.7
4.	Macedonian Railways – Transport	Transport	11.4
5.	Toplifikacija AD – Heating	Utilities/private JSC	11.0
6.	City of Skopje	General public services	10.9
7.	Municipality of Gazi Baba	General public services	10.0
8.	Institute for Oncology and Radiotherapy	Health	9.9
9.	Directorate for Technological Industrial Development Zones	General public services	9.6
10.	Macedonian Radiodifusion	Other	9.0

G. The 10 largest public contracts/concessions awarded and/or advertised in 2009

	Subject of contract	Name of CA	Contractor	Value (estimated) millions of EUR	Time of execution
1.	Excavating and transport services for coal	Macedonian power plants	Granit AD	12.9	18.12.2008 1 year
2.	Supply of liquid fuel - heating oil	Toplifikacija A.D. - Heating	Okta AD - Skopje	11.1	10.10.2008 3 years
3.	Equipment repairs	Macedonian power plants	Tacraf - Germany	8.9	11.11.2008 1 year
4.	Oil and oil derivates	Macedonian Railways - Transport	Makpetrol AD - Skopje	5.9	18.12.2008 1 year
5.	Materials and equipment for electronic connecting for the project "Computer for Every Pupil"	Macedonian Radiodifusion	Elektroelement Skopje	5.2	20.06.2008 3 months
6.	Oil derivates	Macedonian power plants	Makpetrol AD - Skopje	5.0	08.08.2008 1 year
7.	Various medical products	Institute for Oncology and Radiotherapy	Promedika - Skopje	4.0	09.09.2008 1 year
8.	Electrical equipment (metres)	EVN Macedonia	Iskra ATG	3.6	04.11.2008 1 year
9.	Installation services for the equipment and materials for electronic connections for the project "Computer for Every Pupil"	Macedonian Radiodifusion	Kabtel - Macedonia	3.3	11.06.2008 4 months
10.	Construction works for terminal	Directorate for Technological Industrial Development Zones	Pelagonija Engineering DOO - Skopje	2.1	16.10.2008 9 months