

3.3.2 Public procurement

3.3.2.1 Legal framework

The Procurement Law is based on the UNCITRAL model.

On 26 July 1995 Parliament adopted the Public Procurement Law (PPL) no. 7971, which became effective on 1 November 1995. The PPL is based on the UNCITRAL Model Law but also reflects influences from other sources, such as the World Bank, the WTO Government Procurement Agreement (GPA), and the European Directives on public procurement. Between 1995 and June 2003, Parliament amended the PPL five times: no. 8039 dated 23 January 1995; no. 8074 dated 22 February 1996; no. 8112 dated 28 March 1996; no. 8767 dated 5 April 2001; and no. 9064 dated 8 May 2003.

Since 1995, the Council of Ministers has adopted various implementing regulations in the form of decisions and instructions. The implementing regulations in effect as of June 2003 are: (1) Decision no. 335 dated 23 June 2000 as updated by Decision no. 228 dated 24 May 2002; (2) Decision no. 675 dated 20 December 2002; (3) Instruction no. 1 dated 1 January 1996 as updated by an Instruction issued in the *Fletorja Zyrtare*, June 2002; and (4) Decision no. 45 dated 11 March 2003. Each of these regulations elaborates the legal framework set out in the law. Decision no. 335, as amended, sets thresholds and deadlines as required in the PPL. Decision no. 45 describes the staffing and organisational plan for the Public Procurement Agency. The Instructions set out very specific rules and procedures for planning and conducting the procurement process.

Procurement has now been centralised and standard documents prepared.

However, Decision no. 675, issued in December 2002, drastically changed the operations of the public procurement system by centralising most procurement proceedings. Designated ministries are given exclusive responsibility to conduct all procurement in assigned categories. For example, the Ministry of Economy is now charged with conducting all procurement for computers and other IT equipment.

Further, the World Bank has twice provided assistance to develop standard tender documents and operational guidance. A complete set of Standard Tender Documents was developed in 1997 along with a handbook of general operational guidance. In 2003 a second complete set of Standard Tender Documents was developed with a User's Guide providing instructions for using the Standard Tender Documents. This guide also includes standard forms for maintaining procurement records. If the Council of Ministers mandates use of the new Standard Tender Documents, the rules, procedures and conditions set out in these documents will further expand the legal framework regulating public procurement.

Further work is required to align the Law with EU Directives.

Therefore, as a general framework, the PPL and its implementing regulations and documents establish the basic principles for procurement reform. However, they are not fully in compliance with the European Directives or with the GPA.

A number of areas, including the following, need improvement:

- The secondary legislation needs to be more transparent. The decisions and instructions implementing the law are set out in numerous documents, and each is subject to frequent amendments. This makes it difficult to establish with certainty the current state of the law. There needs to be a single point of access where all updated and current procurement laws and regulations are readily available.
- The secondary legislation needs to be drafted with greater clarity. Many provisions are vague or ambiguous. This has created confusion and leads to conflicting interpretations of the law.
- Standard Tender Documents (STDs) need to be adopted and made mandatory. Equally important, a process needs to be in place to ensure that the documents are kept current as the law is amended. The STDs developed in 1997 were never used because they were never properly implemented or updated.
- The newly established system of centralised procurement should be monitored closely. This structure may adversely impact on small businesses and also significantly increase the potential to create monopoly power, rendering the system more vulnerable to corruption.

Other issues The budgeting process and rules for announcing the budget limit distort the procurement process. The Instructions require that the procuring entity must establish and publish the budget limit for the procurement in its advertisement. In practice, the “funding limit” significantly impacts on the entire procurement process. This limit operates as the ceiling price as well as the desired minimum contract value, even though the Instructions specifically state that no ceiling or minimum prices are allowed. Consequently, during a procurement process, procuring entities usually seek to acquire the most – in quantity, quality or both – they can get with the funds allocated for the procurement rather than to get the lowest price for a definite, specific object of the procurement. In effect, this means that bidders are not actually competing on price despite the rhetoric and regulation that price must be the major evaluation criterion, weighted at no less than

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80% for goods and 70% for works.

The process for preparing the specifications of the procurement needs improvement. Users should be more involved in identifying the needs and requirements of the procurement. Considerably more guidance is needed in developing technical specifications.

The rules and procedures for announcing procurement proceedings need to be more efficient. The PPL requires that procurement opportunities be announced in the Public Procurement Bulletin and in two national publications. In Open International Tendering, the advertisement must also be published in an international publication. The Bulletin prepared by the Public Procurement Agency (PPA) is published only three times per month, which is too infrequent to be efficient. Further, all three publications (all four in International Tendering) are considered "official publications", so the time limit is considered to run as from the date of the last publication. The result is a chaotic notice procedure that can unreasonably delay the procurement process and can be manipulated to give advance notice to favoured bidders.

Procedures are very restrictive

Bid submission procedures are very restrictive. In Open Tendering, the bids must be submitted at the place, time and date specified in the Invitation to Bid. This is interpreted and applied literally. The bid must be hand-delivered personally by the supplier or its authorised representative at the bid opening. No early delivery is accepted. Further, the supplier or its authorised representative must have attended the bid opening. An exception is made in Open International Tendering for accepting bids before the designated opening.

The process for qualifying bidders needs to be improved. Presently, the bidder qualification process focuses almost solely on formalities and documents. Except for procurement of works and design, there is little or no assessment of the actual capability of the suppliers or contractors to perform the procurement contract.

Procedures need to be in place to provide fair notice and due process rights for rejection of bids for illegal activity. The PPL adopts the UNCITRAL Model Law provisions that require bids to be rejected if the bidder engages in illegal activity. However, the Model Law lacks procedures to implement this requirement fairly, and the rule is therefore very vulnerable to abuse and corruption. The same gap is found in the PPL.

The mandatory use of Tender Evaluation Commissions is in line with practice in most central and eastern European (CEE) countries. Tender Commissions have a tendency to dilute the focal point of responsibility and make it more difficult to draw clear lines of accountability.

The 2003 amendments introduced a unique rule that needs to be clarified. In the situation where the first selected bidder fails to sign the contract, the new rule makes it possible to award the second bidder, but only if the difference between the first and second bids is greater than the amount of bid security collected from the first bidder. The purpose of this limitation is not clear.

The Law does not cover contract administration.

Too little attention has been given to key issues of contract administration. The PPL and implementing regulations are silent about contract conditions and administration, except that the PPL states that the Civil Code applies to procurement contracts. However, the Standard Tender Documents, if approved, will advance significantly the regulation and administration of procurement contracts. These documents include general and special conditions of contract for each category of procurement (goods, works and services).

3.3.2.2 Institutional framework

The Public Procurement Agency is not a central purchasing authority.

The Public Procurement Law (PPL) establishes the Public Procurement Agency (PPA) and defines its role and functions in article 8. The PPA is not a central procuring entity. Rather, its main responsibilities are to draft legislation and regulations, monitor procurement activities, produce the Procurement Bulletin, perform administrative review of complaints, and assist procuring entities with advice and other support to ensure proper and uniform application of the PPL. In addition, the 2003 amendments expand the statistical functions of the PPA. The Director of the PPA is appointed by the Prime Minister, but prior to the 2003 amendments, the PPA reported directly to the Council of Ministers. With the 2003 amendments, all authority and responsibility previously held by the Council of Ministers is transferred to the Prime Minister. Further, the Prime Minister has appointed an inter-disciplinary Consultative Board, composed of representatives from major procuring entities at central and local government levels. The role of the Board is to provide advice on the overall functioning of the procurement system and on proposals prepared by the PPA for consideration by the Prime Minister.

On 11 March 2003 the Prime Minister issued Decision no. 45, setting out the organisational structure of the PPA. The Decision authorises a staff of 25, including the director and his/her assistant, and organises the PPA into four functional departments: Procurement and Law (with a section chief and six specialists), Control (with a section chief and four specialists), Statistics and Finance (with a section chief, four specialists and one operator) and Administration (with a staff of five). Given the broad duties and responsibilities of the PPA, these staffing levels are low, especially in the Department of Procurement and Law.

The PPA is poorly equipped and its staff lack training

Since its establishment in 1995, the PPA has had numerous directors. The staff have also suffered from frequent turnover, although most of the present staff have now served one year or more. Historically, members of the PPA have not been under the Civil Service Code, but with the 2003 amendments to the PPL, section chiefs and specialists now have civil service status, and other staff members are under the Labour Code. Still, the pay for PPA staff is low and the working conditions are difficult, as office space, technical equipment (computers, photocopiers, etc.) and other resources and supplies are inadequate. The fact that the PPA still lacks its own reliable e-mail service is indicative of the present circumstances.

The lack of training and procurement expertise seriously hampers the functioning of the PPA. Although some donors have supported various training opportunities for PPA staff over the past eight years, due to the high turnover very few of the current staff have received training or benefited from professional development opportunities.

The PPL designates the PPA as responsible for the handling of administrative complaints concerning public procurement proceedings. The PPA is responsible for issuing corrective measures with respect to complaints from dissatisfied suppliers and for imposing fines on the responsible persons in the procuring entities concerned.

The PPA acts as an appeal tribunal in the complaints procedure.

The complaint procedure is a two-stage process. The complainant first lodges a complaint with the procuring entity and thereafter, if the complainant is not satisfied with the decision, the complainant can appeal to the PPA. The time limit for suspension of the procurement proceedings is 15 days in the first instance. In cases where the PPA is involved in the review, the suspension period may be extended to a maximum of 30 days. The decision of the PPA is final. A complainant is not entitled to request damages through the courts.

While the structure of this review process raises several issues, it absolutely fails to provide adequate due process. It lacks independent, objective review, which is fundamental to ensure due process. Decisions are made and issued by the same unit within the PPA that provides advice on conducting the procurement. Basically, the staff are the judges at their own trial. This is a fundamental flaw that must be remedied. At a minimum, a separate office of complaints should be established within the PPA, and decisions of the PPA should not be issued by the same officer (or director) who had previously provided formal or informal advice to the procuring entity during the procurement proceedings.

Current procedures for handling complaints do not meet recognised international standards. A new complaints review mechanism in line

with EC Directives and the GPA needs to be elaborated and implemented.

Raising the professionalism of the procurement function in the procuring entities has been an uneven process marked by only a few significant milestones. Instruction 1, as updated in 2002, requires procuring entities to establish procurement units staffed with one or more procurement specialists. However, the government has not yet established a certification system for procurement professionals, and there is no formal post description or classification for a procurement specialist in the government. Informally, however, procuring entities attempt to staff these positions with persons who are familiar with the PPL and who have some level of experience in procurement. Given this lack of professional standards, formal post descriptions and recruitment experience, the level of professional competence and procurement expertise varies greatly among procuring entities. This problem is compounded by the lack of any formal system for delivery of procurement training.

There is no provision for procurement training.

Although the PPL has been in effect since 1995, Albania still lacks a strategy and the resources to deliver procurement training. The PPL does not charge the PPA with responsibility for procurement training, and this is reflected in the organisation of the PPA, where there is no department or person responsible for training-related activities. Given this framework, procurement training over the past eight years has been a haphazard and ad hoc process. It appears that the most significant training has been carried out through donor programmes aimed at building capacity in a particular ministry, which has also included procurement training for the ministry staff. For example, the procurement staff of the Department of Defence have benefited from various procurement training opportunities as part of NATO programmes.

The lack of training and professional development is also slowing down the development of the procurement system itself. Basically, the law, procedures, process and contract forms are still at the first level of sophistication. More complex procurement techniques have not been introduced. Even the framework contracting mechanism is not yet understood or in use.

Training opportunities in the private sector are even fewer than those available in the public sector. The PPA has not developed an information outreach programme, and no formal training has been conducted. Nevertheless, the attractiveness of the public procurement market for private sector companies is obvious. There are many participants in the public procurement process, and the response to invitations to bid is generally satisfactory in all categories of procurement.

3.3.2.3 Reform agenda and capacities

A national strategy for reforming the public procurement system is required.

No coherent and systematic approach has yet been taken to the process of reforming the public procurement system, other than the steps described above. A desirable next step would be to formulate a national strategy for advancing the reform process, including the elaboration of a set of clear objectives, identification of priorities, and formulation of an action plan – in short and medium-term perspectives, as well as allocation of the budget means required for the reform process. It is important for the government to realise that a successful reform process relies heavily on the availability of adequate capacity and ability to lead the reform process. It also must determine the basis and conditions in which co-operation with external partners should be planned and conducted by the government's representatives.

3.3.2.4 Assessment

The frequent amendments to the PPL and implementing regulations demonstrate a certain capacity to improve the system. However, frequent changes also suggest a lack of capacity to analyse and evaluate external recommendations and pressures for change. Fundamentally, considerable effort still needs to be focused on building capacity at all levels and among many disciplines in both the public and private sectors. This capacity-building is a prerequisite to putting in place a modern, efficient and effective public procurement system.

In summary, procurement reform in Albania is moving forward, but progress has been exceptionally slow. Based on experience elsewhere, we know that passing laws is far easier than building the capacity to implement provisions efficiently and effectively.

3.3.2.5 Recommendations

The existing PPL provides some of the elements required in a modern procurement system. However, substantial work is needed to build the capacity for operating an efficient and effective procurement system with adequate safeguards to protect public funds from waste and corruption.

The main areas for development should include:

- Review and correction of procedural flaws;
- Review of the institutional capacity of the PPA and elaboration of an action plan for strengthening its capacity to perform its functions,

including the provision of adequate equipment and resources;

- Elaboration, in co-operation with the training institute, of a national training strategy to institutionalise procurement training;
- Implementation of a training development programme, with specialised training courses for practitioners within procuring entities and programmes for the private sector; in addition, special training programmes for auditors and investigators to provide training in identifying procurement fraud schemes;
- Support for the use of electronic information systems to disseminate procurement contract information, collect and compile procurement statistics, and increase accessibility to guidelines and official documentation;
- Complete revision of the complaints review article of the PPL and procedures so as to give responsibility for these procedures to an independent administrative and/or judicial review body.

3.3.2.6 External assistance

World Bank – PAR Project - Component 1.9: “Strengthening public procurement capacities” – the technical assistance for this project is being funded in part by the Public Administration Reform Project Credit (No. 3328 – ALB). Work was carried out in 2003.

European Commission – A draft € 3M CARDS 2002 fiche for “Support to public procurement” has been prepared.

USAID – A number of training seminars have been conducted during the past two years, mainly at local level. USAID does not foresee any further assistance in this area.