

3.3.2 Public Procurement

State Level

3.3.2.1 Legal Framework

At the present time there is no legislation directly regulating public procurement procedures at the State Level in Bosnia and Herzegovina.

There is no state public procurement law, instead Entities legislation is applied

The State Government issues annual decisions on procurement procedures for execution of the state budget in a given year (e.g. Decision No. 211 of 22 August 2002 on the procedure for purchasing goods and services and the procedure for awarding public works to meet the needs of institutions in Bosnia and Herzegovina in 2002). In these decisions the Government refers only to the Entities' regulations on public procurement procedures: the *Law on the Procedure for Purchasing Goods and Services and for Awarding Public Works (RS)* and the decree on the *Procedure for Purchasing Goods and Services and for Awarding Public Works (FBiH)*.

As a result, when awarding contracts funded from the State budget, the state institutions of Bosnia and Herzegovina may apply either the procedures provided by the law of Republika Srpska or the procedures provided by the decree of the Federation of BiH, according to their free, unconditional choice. The decision and supervisory functions which are vested by both Entities' regulations in their respective Ministries of Finance are, at the State level, located in the State Ministry of Finance and Treasury.

Since the public procurement regulations existing at the level of both Entities are weak, incomplete and incompatible with international standards and EC legislation, the procurement procedures applied at State Level share all these weaknesses.

Brčko procurement regulation leaves too much discretion

In the Brčko District, procurement procedures were introduced by the *Book of Rules on Procedures for Purchasing Goods and Services and for Awarding Public Works* (issued on 8 May 2002). This extensive regulation, issued by the Government of the District, is a kind of manual, with detailed technical instructions, rather than procurement legislation as commonly understood. The regulation leaves, however, considerable room for discretionary decisions by contracting officers and does not provide sufficient guarantees for transparent and fair procurement practices.

3.3.2.2 Institutional Framework

Procurement contracts awarded by the State institutions of Bosnia and Herzegovina constitute a tiny portion of all procurement contracts awarded by public institutions in the country – less than 4% in terms of value (the rest is awarded by institutions of the Entities – FbiH 33% and RS 16% – and local self-governments).

No support is provided for the implementation of procurement procedures. No training is in place, and there are neither manuals nor guidelines. The low level of procurement practice in State institutions of BiH reflects the weaknesses of the regulations and the lack of enforcement.

There is no state-wide procurement market

Procurement notices are not published on the State Level, but only in the media confined to one of the two Entities. There is no State-wide procurement market; all contracts are awarded locally within one of the Entities.

Ministry of Finance neglects its responsibility for public procurement

There is no Governmental institution dealing with procurement matters or with developing State policy in this area. The State Ministry of Finance and Treasury, formally responsible for legislation and policy-making on public procurement, has not allocated any staff or resources to this area. Governmental institutions at the State Level are completely dependent on work carried out by the Entities and by foreign experts.

3.3.2.3 Assessment

The poor quality of regulations and lack of support for implementation result in the low quality of procurement operations. Evidence has shown (World Bank *Country Procurement Assessment Report* and reports of the State Audit Institution) that even the existing regulations are not observed correctly by the contracting Entities. Procurement practices in Bosnia and Herzegovina are vulnerable to nepotism and corruption. Review mechanisms barely work.

The basic principles of transparency, accountability and equal treatment are not properly implemented. The common practice (when awarding the smallest as well as the largest contracts) is to avoid the open procedure. Potential contractors are not granted equal, open, access to Government contracts.

The interests of economic operators participating in these procedures are not sufficiently protected. The efficiency aspect of procurement operations is neglected.

There are currently no Governmental institutions at the State Level aiming to improve the situation in the area of public procurement.

Federation of BiH

3.3.2.4 Legal Framework

Public Procurement regulations are based on the UNCITRAL model

Public procurement procedures in the Federation are currently regulated by the *Government Decree on Procedure of Procurement of Goods, Services and Contracting of Works Construction* (published on 14 August 2003 in the Official Gazette of F BiH, No. 40/03). Since 15 August 2003 the new decree replaced the previous regulation on public procurement procedures – the Government Decree of April 1998 (which had been amended twice, in 2002 and 2003).

However, the new regulation repeats most of the old provisions, and the differences between the old and new decrees are few and of rather minor importance. The new decree is based on the UNCITRAL Model Law on Procurement of Goods, Construction and Services, but includes many deviations from the original UNCITRAL text.

There is no formal law on public procurement. The fact that the procurement

regime is introduced and regulated only by the decree issued by the Executive has critically undermined its status and contributed to a low level of compliance.

The procurement decree is largely incompatible with EU legislation

The decree does not provide a strong base for a sound procurement regime. The existing regulation does not meet internationally recognised standards and is incompatible with EC procurement legislation in many aspects. The most striking weaknesses and discrepancies include:

- The list of contracting authorities obliged to follow the procurement rules is imprecise and incomplete (e.g. public and private Entities operating in the utilities sector are not included);
- The list of exclusions is too broad, exempting some types of contracts from the scope of the procedures;
- There are no clear provisions on standards to guarantee the objective and non-discriminatory description of the subject of procurement (technical specification); therefore the use of brand names and other references to the producer or source of origin is not prohibited;
- The qualification procedure is not clearly and exhaustively described (the decree does not provide the list of documents which may be required from the candidates);
- Not all types of procurement notices required by EC legislation are provided (lack of prior indicative notices and contract award notices).
- The minimum content of contract notices and tender documents is not precisely set;
- Procurement methods are extensively incompatible with those provided by EC Directives;
- Minimum time limits for the submission of bids are lacking;
- Evaluation criteria are very poorly described, wide discretion is given to the evaluation committee, and the objectivity and accountability of the selection
- Preferential treatment (10%) is given to local companies; process are not guaranteed;
- The procedure for reviewing complaints filed by unsuccessful candidates is ineffective.

Most of the above-mentioned weaknesses seriously undermine the transparency and objectivity of the procurement process. Gaps in the legislation cause legal uncertainty and discourage economic operators from participation.

3.3.2.5 Institutional Framework

The Federal MoF has not allocated sufficient capacities to public procurement

There is no separate FbiH Governmental institution responsible for the development and functioning of the procurement system. The responsibility for developing, implementing and enforcing the procurement regulation is formally the remit of the Ministry of Finance.

The Federal Ministry has not allocated sufficient resources or capacities to the task.

There is no separate unit within the Ministry dealing with procurement matters. Only three staff members deal with procurement issues, preparing ministry procedural decisions and reviewing complaints. Within the Ministry of Finance no one works on drafting legislation or on developing the procurement system.

Knowledge of procurement rules is limited;

Training is not available

There is no system of training for procurement specialists; no training sessions have been organised, or manuals or guidelines published. The lack of any training possibilities and the absence of any guidelines or interpretations is one of the causes for the low level of knowledge and skills of the staff responsible for procurement operations within public institutions.

The knowledge of procurement rules is very limited, both among public officials and business people, who should potentially be interested in participating in public tenders.

The legal tools for practical implementation of the decree are weak or non-existent. No standard tender documents have been elaborated and distributed among the contracting Entities. The uniform, common application of such documents would make it possible to standardise practices and save time and costs, for both contracting authorities and economic operators participating in public tenders.

3.3.2.6 Assessment

The legal framework is generally deemed to be both incomplete and insufficiently robust to provide a clear, sound, rule-based environment for conducting public procurement in a fair and efficient way.

The *Decree on Procedure of Procurement of Goods, Services and Contracting of Works* provides only a weak, incomplete framework for the conduct of public procurement. Its status (decree issued by the Executive rather than a law passed by the parliament) undermines its efficiency. The regulation is in many aspects incompatible with EC procurement legislation.

The principles of transparency are not fully respected. The decree does not impose objective and non-discriminatory technical specifications and an objective and transparent process of selecting the best bid.

The participants (economic operators) are not efficiently protected against the arbitrariness of contracting Entities. Review procedures are insufficient and do not provide fast and effective protection against infringement.

The procurement system is vulnerable to fraud and corruption.

Republika Srpska

3.3.2.7 Legal Framework

Public Procurement law exists; however, based on FbiH decree, it is not in

Public procurement in the Republika Srpska (RS) is currently governed by the *Law on Procedures regarding Procurement of Goods, Services and Works* (PPL), adopted by the National Assembly on 2 May 2001 and put into

line with EU rules

effect by a presidential decree on 8 May 2001. The PPL is closely modelled on the *Decree on Public Procurement* issued by the Federation of Bosnia and Herzegovina (FbiH) on 18 August 1998, which in turn is based on the UNCITRAL Model Law.

The current PPL contains a number of serious weaknesses and deficiencies and does not meet international standards. The PPL shares most weaknesses with the FbiH Decree on which it is based, i.e.:

- The principles on transparency and non-discrimination are not fully implemented;
- The objectivity and the accountability of the procurement process are not efficiently safeguarded;
- The scope of the PPL is too narrow (public and private Entities operating in the utilities sector are not included);
- There are too many possibilities to shift to non-competitive procedures or to even completely ignore the procedures;
- The qualification procedure is unclear and non-transparent;
- Procurement methods are incompatible with EC legislation;
- Minimum time limits for the submission of bids are not provided;
- Evaluation and selection procedures (criteria) are insufficiently regulated;
- The review procedure is not reliable (not sufficiently independent).

3.3.2.8 Institutional Framework

According to article 2 of the PPL, the Ministry of Finance of RS is responsible for supervision of the implementation of the law. The MoF unit responsible for public procurement is also in charge of issues related to money-laundering. The Department for Public Procurement (PPD) has three professional staff, including one lawyer. The main functions of the PPD are to issue instructions on the correct application of the PPL, to make decisions on requests of contracting Entities for prior approval to use non-open tendering procedures, and, finally, to make decisions on complaints lodged by dissatisfied candidates.

No guidelines have been issued; no training has been delivered

No implementing regulations have been issued to support the practical application of the PPL. Due to the lack of budget resources, no training initiatives or information seminars have been organised since the adoption of the PPL for contracting Entities or the private sector on the correct application of the law. The PPD has reviewed and made decisions on 38 appeals in the course of 2003.

Corruption is generally considered a serious problem in RS, but on the other hand to date very little has been substantiated, The Supreme Audit Institution of RS (SAI) confirms that contracting Entities frequently apply the PPL incorrectly, but this fact does not necessarily imply the existence of corrupt practices; it could be merely a case of poor practice.

3.3.2.9 Assessment

The current situation, in many aspects, remains unsatisfactory; in particular,

concerns are raised regarding the quality of the PPL, the weak institutional set-up, the total absence of implementation support to contracting Entities and economic operators, the inappropriate complaint review mechanism, and the serious lack of budget resources allocated to support public procurement.

Bosnia and Herzegovina – all levels

3.3.2.10 Reform Agenda and Capacities

Intergovernmental working group exists to draft new laws for all BiH

The Government of BiH, with the support of the International Community, in particular consultancy support financed by the European Commission, is preparing a new PPL which, to the extent possible, will be aligned with EC Directives on Public Procurement. For this purpose, a working group has been established, made up of representatives of the State and of the two Entities, which has been given the task of preparing a single draft PPL for adoption by the BiH, F BiH and RS Governments early 2004.

As part of the same approach, there is a plan to establish

- a central public procurement office (PPO) with traditional set-up of functions, where the main tasks will be to support the implementation of the PPLs and to monitor public procurement operations in the country;
- an independent Procurement Review Body (PRB), with its own legal status, which represents a vital measure considering the weakness of the current review mechanisms.

The reforms have been significantly delayed because it has proved difficult to resolve a disagreement (involving both the International Community and the Entities), about the competences to legislate in the area, and the advisability of pursuing a centralised versus decentralised reform approach.

3.3.2.11 Recommendations

The overall objective is to ensure that BiH develops a sound robust and transparent procurement regime, operating in an integrated market, in which companies in each Entity can freely compete for procurement contracts in both Entities on equal terms. The issue of centralisation/decentralisation is less important than the need to create a procurement regime(s) which would be aligned with EU *acquis*.

The main recommendation is, therefore, to unblock the situation by accepting whichever solution is most easily available and expending the effort on ensuring alignment of law and practice with EC norms.

The main reform areas which should be subject to immediate attention and which, without exception, are in line with current plans, are:

- adoption of new legislation aligned to EC Directives and international good practice;
- elaboration and introduction of secondary legislation (including

standard tender documents);

- elaboration and distribution of guidelines, manuals and other explanatory materials
- establishment of a public procurement central institution having the capacity and resources to support the effective implementation of the PPL;
- establishment of an independent review body;
- provision of effective support to the functioning of central procurement institutions (office equipment, IT support, training, experience-sharing, etc.);
- provision of training and information for staff of procuring Entities, auditors and the private sector, and preparation and publication of training programmes and materials;
- introduction of co-ordinated purchasing, including framework agreements.

3.3.2.12 *External Assistance*

Existing assistance

The European Commission has allocated funds for developing the public procurement system in BiH. In March 2003 the project, "Technical Assistance to the Establishment of a Public Procurement Framework in Bosnia and Herzegovina", was launched. This 1.5M Euro project will continue until the end of October 2004.

All principal decisions relating to the implementation of the project are made in consultation with the Steering Committee, consisting of representatives of the EC Delegation, State Ministry of Finance and Treasury, Ministry of Finance of the Federation of BiH, Ministry of Finance of RS, State Ministry of Foreign Trade and Economic Relations, the World Bank, Office of the High Representative (OHR) and business organisations.

A World Bank Country Procurement Assessment report was issued in June 2002. No other activities of the World Bank are currently planned.

For the implementation phase of the new procurement law, the next CARDS project (starting directly after the present project), is currently under consideration.

The following activities should be included in this project:

- support for the development of operations of the future Public Procurement Office (PPO) and Procurement Review Body (PRB);
- provision of an extensive training programme for the staff of the two future procurement institutions, and of support to experience-sharing with corresponding institutions in the region and in EU Member States;
- support for the preparation and conduct of a comprehensive training programme, targeting contracting officers (in contracting institutions at all levels), business people willing to participate in public tenders,

- and auditors (both internal and external);
- support for the introduction of modern techniques for tendering and contracting, such as electronic procurement and framework agreements.