

### 3.3.1 Public procurement

#### 3.3.2.1. Legal framework

Since its adoption in 1998, the Public Procurement Law (PPL OG 26/98) governs the public procurement regime in the Republic of Macedonia. The law was changed in 2002, but the changes were of minor scope and importance. The primary law is supplemented by a number of government regulations and decisions.

*The existing law partly adheres to international standards, but has weaknesses*

The existing procurement law partly adheres to international standards and to good practice in public procurement, although it has several weaknesses. Some provisions strictly follow the EC Directives, but there are still some crucial inconsistencies with the *acquis*. The Macedonian law is more rigid, costly, time-consuming and bureaucratic and less flexible than the EU regime, but it also allows for more contracts to be awarded outside of competitive procedures. The legitimate interests of contractors are less protected against the arbitrariness of contracting authorities. The principles of transparency and accountability are not fully implemented. The efficiency factor is neglected.

The main substantial discrepancies between the Macedonian public procurement law and the EU procurement legislation include:

- different (more narrow) scope of application (application based on the source of funds and not on the legal and functional status of entity; lack of concept of bodies governed by public law; private utilities not included);
- dubious exclusion of defence-related procurement (too broad a list of exclusion established in the Government Decisions of 6 July 1998 and 26 January 1999);
- non-implementation of all types of notices required by the Directives [the lack of the Prior Indicative Notices (PIN) and Contract Award Notices (CAN)], and absence of any reference to nomenclature of the Common Procurement Vocabulary (CPV);

- time limits incompatible with those stated in the Directives (too short), and different method of calculation of time limits;
- different list of procedures, modelled on the UNCITRAL Model Law on Procurement of Goods, Construction and Services rather than on the EC Directives regulating public procurement; preference only for open procedure (restricted as exceptional one);
- lack of special regulation for procurement of some categories of services (especially intellectual services);
- incompatible provisions on standards and technical specifications;
- conditions for application of direct settlement too imprecise and liberal as compared to similar EU provisions;
- the function, composition and status of the central Public Procurement Complaint Committee do not meet the requirements of the Remedies Directive.

Other important weaknesses:

- unclear, inconsistent and incomplete drafting, leading to misunderstanding and circumvention of the law's provisions; technical instructions are mixed with the principles;
- rigid, bureaucratic, and time-consuming administration of procedures (obligation to obtain several approvals or consents from Ministry of Finance and from the superior authorities in the course of procedure; necessity for establishment of tendering committee even in smaller contracts);
- complex and bureaucratic regulation for procurement of smaller contracts;
- insufficient (and mistaken) regulation of qualification procedure (the procedure is strictly formal and therefore deprives the contracting authority of the possibility of checking and verifying the reliability of candidates and their ability to properly perform the contract in question, but good tenders are rejected because of the slightest formal mistakes);
- application of two-envelope system and maximum price clause to all types of contracts.

3.3.2.2 *Institutional framework*

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At the central level of government no separate institution is responsible for the functioning and development of the procurement system. The weakness of the enforcement mechanism evidently undermines the efficiency of the procurement law. The responsibility for implementing and

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enforcing the public procurement law is formally the remit of the Ministry of Finance. The Ministry has not allocated sufficient resources or capacities to carry out that task. Not even the smallest division has been designated to deal exclusively with public procurement matters. Employees involved in that area carry out these tasks among their other responsibilities.

In fact, the activity of the Ministry of Finance in the area of public procurement is almost exclusively focused on drafting the new procurement act.

The Ministry has not exerted effective supervision over the activities of contracting entities. It is unable to aggregate or analyse the information on the results of procedures, which, according to article 9, are compulsorily submitted quarterly by all contracting entities.

The Ministry is to issue, in the course of the procurement procedure, decisions confirming the availability of funds for the contracting authority. The process of issuing these decisions does not rely on the quality of the procurement procedure, but is rather an instrument for assuring budgetary discipline. This process is rather deficient, and long delays here (of several weeks or even months) cause significant delays in procurement procedures.

*The Ministry  
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publish  
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procedures..*

The Ministry has not published any explanatory materials or guidelines explaining procurement practice. There are no available official interpretations of dubious and ambiguous provisions of the law, although there is an enormous need for such interpretations. There are no model standard tender documents. Uniform common application of such documents would make it possible to standardise practice and save time and costs for both contracting authorities and economic operators participating in public tenders. There is no governmental web site dedicated to public procurement matters, which would make available both procurement notices and supporting materials. In effect, the practical implementation of the procedures varies considerably from entity to entity.

*..and has not  
initiated  
training*

Despite the clear obligation formulated in the PPL (article 10a), the Ministry of Finance has not initiated (organised) any training system for procurement officers, has not prepared any training materials, and has not authorised any training programmes or activities organised by other public or private educational institutions. Lack of any structured and permanent system of training is one of the causes for the low level of knowledge and skills of persons organising procurement procedures within public institutions, and in effect, for the ineffective conduct of the procedures. The awareness of public procurement rules and procedures is still low, both among public employees obliged to follow the law and among potentially interested business people.

The Government, under provisions laid down in the PPL, appointed an Appellate Committee (AC) to undertake reviews of complaints received

from suppliers. The AC consists of nine members. It has no permanent secretariat and only one person works on the preparation of appeal hearings. The AC may decide to confirm an award decision, to annul the tender proceedings and request re-tendering, or to invalidate an award decision and request that a new contractor be selected. The AC should in normal cases conclude the review of a complaint within 15 days.

The PPL places authority for conducting public procurement with each individual procuring entity on a decentralised basis. A Public Procurement Commission (PPC), comprised of a president and two members, is appointed within each procuring entity by the heads of the above-mentioned entities. The appointment is for a period of two years. The PPC conducts procurement procedures within each entity. However, authority for initiating and approving procurement actions, including contract signature, remains with the head of the individual procuring entity.

### *3.3.2.3 Reform agenda and capacities*

Article 68 of the Stabilisation and Association Agreement (SAA) commits the Republic of Macedonia to approximate its Public Procurement Law with the EU Procurement Directives within a deadline to be set. Article 72 of the SAA requires that the Republic of Macedonia progressively open its public markets to European Union companies, on a reciprocal and non-discriminatory basis, at the latest within five years after the entry in force of the SAA. The World Bank, following the publication of its Country Procurement Assessment Report in June 2002, has pushed the changes in public procurement law and practice.

*The Government seems determined to reform its public procurement regime*

The Government seems determined to undertake a serious reform of its public procurement regime. The preparation of the new procurement law has significantly advanced; the establishment of a separate body within the central administration responsible for public procurement matters is envisaged.

Since the late summer of 2003 a working group, consisting of representatives of all ministries and chaired by officials of the Ministry of Finance, has been preparing a new draft procurement law. The new law is to replace wholly the existing procurement law. The new draft should be adopted by the Government in January 2004. The adoption of the new law by Parliament is envisaged by the end of March 2004. Immediately after finalising the new procurement act, the Ministry of Finance (or the envisaged Agency for Public Procurement) will prepare all secondary legislation (including the complete set of standard bidding documents), accompanied by explanatory guidelines. The idea is to have the whole legislative framework constructed before the end of 2004. Drafting of the new secondary legislation is partly dependent on foreign assistance, as it will be prepared within the project financed by the World Bank.

The intention of drafters of the new procurement law is to make it closer to, and more compatible with, international procurement practice, the procedures of the World Bank, and the procurement legislation of the European Union.

The new draft law represents real progress in comparison to the existing legislation, but is still incompatible with the *acquis communautaire*. Achievement of full compliance with EU procurement legislation will require an additional effort.

Current plans are to organise, after the adoption of the new law, wider training activities as well as a public awareness campaign. The training programme will be financed mainly by foreign funds.

The drafters of the new law are discussing the idea of establishment of the Public Procurement Agency or Public Procurement Bureau, a new institution within the central government (or within the Ministry of Finance) responsible for public procurement matters. It is envisaged that the new institution would become fully operational as from 1 January 2005. The responsibilities of the proposed institution will include:

- drafting legislation in the area of public procurement;
- monitoring the implementation of the procurement law;
- submitting the annual report to the government on the functioning of the public procurement system;
- maintaining the registry of all public procurement procedures; making the registry publicly available on its web site;
- publishing in its bulletin the public procurement notices of all contracting authorities;
- organising training on public procurement procedures.

*No information is available concerning the proposed Public Procurement Agency...*

The operational plan for the establishment of the Public Procurement Agency has not yet been prepared, and no data is available regarding its future structure, staffing and resources. If the Agency is provided with sufficient capacity to fulfil its tasks, it may significantly contribute to implementation of the new law and improvement of the quality of procurement operations in the Republic of Macedonia. The Ministry of Finance will use foreign funds for the equipment of the Agency.

*...but it could make a significant contribution*

The new draft also provides for the creation of a standing Public Procurement Complaint Committee for reviewing complaints filed by candidates in the course of the procurement procedure. The members of the Committee would be nominated by the Government for a fixed two-year period, and their membership could not be revoked without sufficient reason. The establishment of a standing professional Complaint Committee should increase the quality of the review procedure and guarantee its independence (although the decisive elements of the review procedure are to be regulated by the future secondary legislation).

#### 3.3.2.4 Assessment

*The Macedonian public procurement law is incompatible with EU legislation in some crucial aspects.*

The Macedonian public procurement law is incompatible with EU legislation in some crucial aspects. The law is stiff, costly, time-consuming, bureaucratic and inflexible, but it is also too liberal in allowing for the application of non-competitive procedures. The legitimate interests of contractors are insufficiently protected against the arbitrariness of contracting authorities. The principles of transparency and accountability are not fully implemented. The efficiency factor is neglected. The unclear, inconsistent and incomplete drafting leads to misunderstanding and circumvention of the law's provisions. The introduction of the new procurement law might remove some problems, but many weaknesses would remain.

At the central governmental level there is no institution which properly cares for and develops the public procurement system. The lack of institutional, everyday support for contracting entities results in the low quality of implementation. The establishment of the public procurement central institution, envisaged by the new draft PPL, may improve the situation provided that the new institution will be sufficiently staffed and funded and its professionalism will be safeguarded.

#### 3.3.2.5 Recommendations

The public procurement system in some respects meets EU requirements and other aspects of good procurement practice. However, further substantial changes in the PPL (including the development of a comprehensive set of implementing regulations) will be required in order to bring it in line with the EC Directives. Substantial work will be required to upgrade the administrative capacity and the systems for monitoring and controlling procurement activities (including the independent control and audit functions outside the procurement system itself). Continuing efforts to improve the efficiency of the public procurement system at the operational level are needed in order to ensure fair competition and professional handling of tenders, and to encourage the development of competition in the domestic market. The presence of corruption and fraud in the awarding of public contracts needs to be seriously addressed by the government.

Priority should be given to the following actions:

full compliance with the EC public procurement legislation, and to this end all existing discrepancies should be removed;

- The PPL should also be reviewed from two points of view: clarity and consistency of the law, and efficiency and integrity of procurement procedures;
- Extensive support must be given to the drafting of secondary legislation to support the implementation of the PPL;
- Standard (model form) documentation, guidelines, and instructions for potential tenderers on tender preparation requirements will also have to be prepared;
- The Public Procurement Agency, as a central governmental regulatory and policy-making body for public procurement matters, and the Public Procurement Complaint Committee for review of complaints should be established, and properly staffed, equipped and funded;
- Continuous development of training on public procurement for both private and public sector personnel is necessary;
- Consideration should be given to how internal and external audit should be organised to secure the integrity of the procurement process.

#### *3.3.2.6 External assistance*

An EU-funded project to support the creation of a public procurement office was foreseen in the 2003 annual programme under "Economic & social development - Private & financial sector development". The envisaged programme of 1,5 M euro will be provided to the Ministry of Finance to support the establishment of the PPO, training of its staff and training of contracting officers in public institutions, and to assist the countrywide public awareness campaign promoting the new procurement law. Implementation of the project has not yet begun.