



SIGMA

Support for Improvement in Governance and Management

A joint initiative of the OECD and the European Union, principally financed by the EU

KOSOVO

PUBLIC PROCUREMENT SYSTEM

ASSESSMENT JUNE 2007

1. Summary

The new Public Procurement Law (PPL) no. 02/L-99 in Kosovo (amending Law no. 2003/17 promulgated by UNMIK¹ Regulation no. 2004/3 of 9 February 2004) was passed by the Assembly of Kosovo on 8 February 2007, pursuant to chapters 5.1 (b), 5.7, 9.1.1, 9.1.26 (a), 9.3.3 and 11.2 on a Constitutional Framework for Provisional Self-Government in Kosovo (UNMIK Regulation no. 2001/9 of 15 May 2001). However, due to the current special status and constitutional framework of Kosovo, the legislative process has not been completed yet, and the approval of UNMIK is still required. The new PPL is expected to enter into force in mid-2007.

The new PPL aims to bring procurement activities in Kosovo generally into compliance with European Union requirements and with internationally recognised best standards and practices. It introduces *inter alia* a number of new definitions, higher thresholds, requirements, appointment rules regarding procurement officers (including their training), framework agreements, and new rules on the Public Procurement Regulatory Commission (PPRC, section 81), the Public Procurement Review Board (PRB, sections 94-104), and the Public Procurement Agency (PPA, sections 90-93). Most importantly, it removes the prior approval requirement for the restricted procedure, which will therefore be much easier to use in practice (section 31). Increased flexibility and the establishment of the independent review body PRB are the most significant innovations of the new law.

However, as the legislative process for adoption of the new PPL has not been completed, the current public procurement system is still based on Public Procurement Law 2003/17. Therefore, the legal framework and practice have not changed since the last Sigma assessment in June 2006.

2. Public Procurement Legislation

The current Public Procurement Law (PPL 2003/17), which entered into force in June 2004, provides procedures that are modelled on the pre-2004 EU procedures and introduces measures required by the relevant EC Directives. Below the thresholds, simplified procedures are indicated. PPL 2003/17 consists of 121 articles, which are structured in nine chapters. It covers all stages of the procurement process, including detailed provisions for the review of procurement decisions, and it applies to contracts for goods, services and works. PPL 2003/17 provides for open, restricted and negotiated procedures (with and without a prior call for competition). However, the preferred method of procurement is the open procedure. PPL 2003/17 covers many more of the procedural requirements of procurement than is common in most EU Member States (many of which could be moved to secondary legislation). Many of the requirements of the 2004 EC Directives have not been transposed into this PPL and, as indicated in the June 2006 Sigma assessment, further action is needed with respect to frameworks, competitive dialogue, electronic procurement (there is only a limited provision to use electronic procurement and auctions, requiring government consent for each procurement), concessions procedures for public works, need for justification of the use of the restricted procedure, methods for estimating the value of contracts and for aggregating contracts, technical specifications and standards; unwarranted restrictions on the participation of sub-contractors, inadequate timescales for negotiated procedures, procedures and criteria for the qualification of participants (allowing assessment of the relative capability of suppliers), and procedures and criteria for contract award (excessive emphasis on price in the selection of the best tender, reference to taking into account the objectives of reconstruction of regions in the receipt of state aid). As mentioned above, the new PPL, which addresses many of these issues, is awaiting the completion of the complicated legislative process.

Generally, Kosovo contracting entities criticise the current PPL for its lack of flexibility and excessive complexity. The following more detailed points concentrate on the most important issues concerning the current Kosovo public procurement system and discuss whether those issues are addressed in the new PPL. These concern the use of the open procedure, the lowest price award criterion, the time-limits, the

¹ Since June 1999 the province of Kosovo has been governed by the UN Interim Administration Mission in Kosovo (UNMIK).

requirement of a minimum of three responsive offers, the fact that there is no separate regime for utilities, the issue of follow-up orders, the decentralisation of procurement in Kosovo, the complex secondary legislation, and budget constraints.

Kosovo contracting entities use the open tendering procedure for nearly all of their tenders. While the request for quotations procedure is used for low-value tenders below 500,000EUR, the only other significant procedure used by contracting authorities is the negotiated procedure. The restricted procedure in particular is rarely used. The open procedure is used in over 90% of the tenders, for example in the municipalities of Pristina (largest municipality in Kosovo) and Mitrovica (second largest municipality) and in the Ministry of Health (pharmaceutical procurement), Kosovo Energy Company (largest utility), Kosovo Public Safety Academy in Vučitrri, Kosovo Protection Corps, and Ministry of Culture. The situation is comparable in the other 110-odd contracting entities in Kosovo.

According to the current PPL 2003/17, contracting authorities are only free to use the open tendering procedure. All other procedures, including the restricted tendering procedures, are subject to prior approval of the Public Procurement Agency (PPA).

The situation may change, since the new PPL makes the use of the restricted procedure much easier, since it removes the prior approval requirement. However, the new 2007 version of section 30 still provides that “unless a provision of Sections 31 – 36 specifically authorizes the use of different procurement procedures, a contracting authority shall select and use open procedures when conducting procurement activities leading to the award of a public contract.” According to the new article 31 of the PPL, a contracting authority may use the restricted procedure to conduct a procurement activity leading to the award of any public contract if the concerned procurement officer, on the basis of objectively verifiable factors and without any discriminatory intent, makes a formal written determination that the concerned product, service or works – by reason of its/their highly complex or specialised nature – can only be supplied, provided or performed by an economic operator having adequate technical, professional and/or financial capacity, and that it would be more economically efficient for the contracting authority to first review the qualifications of interested economic operators and then to invite those possessing certain specified minimum qualifications to submit tenders. The written determination required by section 31.1 is to be included in the tender dossier. While there is therefore still a certain limitation on the use of the restricted procedure, under the new PPL it will be easier to use in practice.

Paragraph 3 of the new article 31 reads: “Following the receipt of requests to participate, a contracting authority shall invite to submit a tender all candidates that fulfil the minimum selection criteria specified in the contract notice and the tender dossier in accordance with Section 49 of the present law.” It is assumed that this means there is a shortlisting based on the selection criteria – although this is not entirely clear from the wording of the law. Generally, the new law is not very clear or detailed on the restricted procedure, which might limit its use in practice.

However, the legal constraints *de lege lata* are possibly not the only reason for not using the restricted procedure to date. The objectives and advantages of the restricted procedure as a compromise between the objectives of competitiveness and transparency on the one hand and addressing the practical problems of handling too many tenders on the other do not appear to be fully appreciated by contracting officers.

Moreover, the dominance of the open procedure in the PPL *de lege lata* and in practice can also be understood as a reflection of the attitude that the PPL is mainly – or at least to a considerable extent – a tool against corruption and fraud in public procurement. In this context, the dominance of the open procedure is closely connected to the dominance of the lowest price award criterion, as will be explained in more detail under the next sub-heading of this report. The restricted procedure provides for a shortlisting of candidates after an initial open call for requests to participate. The shortlisting phase necessitates a large margin of discretion for contracting officers and thus potentially facilitates corruption to an extent that is not possible in the open procedure. Therefore the international donor community, the Office of the Auditor General, and some members of the political establishment might have reservations about the use of the restricted procedure.

Moreover, so far Kosovo contracting authorities have not had to handle large numbers of offers (normally there have been about six and rarely more than ten per tender). One contracting entity even suggested that a restricted procedure was not really needed. In a more open market, where more companies from outside Kosovo will want to bid for contracts, it will be more difficult for contracting authorities to use the open procedure; with too many bids, the open procedure becomes expensive and burdensome. Based on the experience of EU Member States, this will especially apply to the larger contracting authorities and contracts (for example, the Ministry of Health or Kosovo Energy Company).

Kosovo contracting entities use the lowest price award criterion for most of their tenders. It is used for the open procedure as well as for the low-value request for quotations procedure. The predominant use of the lowest price award criterion is closely connected to the dominance of the open procedure, and again reflects the view that the PPL is mainly a tool for fighting fraud and corruption.

According to the new article 58 (1) of the PPL, the lowest price will remain the main award criterion.

3. Central Procurement Organisation

According to the existing Public Procurement Law no. 2003/17, two main institutions manage the system: the Public Procurement Agency (PPA) and the Public Procurement Regulatory Commission (PPRC).

In addition, the PPL provides for a permanent working group – the Public Procurement Rules Committee, established by the PPRC, PPA and Ministry of Finance – to be responsible for developing detailed rules for implementation of the PPL (regulations, instructions, guidelines, standard documents and forms).

The composition and functions of the **Public Procurement Agency (PPA)** are currently regulated in Title VI (sections 90-93) of the PPL. The PPA is an executive agency, established within the government. The director and members of the executive board of the PPA are nominated by the government and appointed by parliament for a three-year term.

The main function of the PPA is central purchasing. The PPA may decide that any procurement procedure to be conducted by any contracting authority in Kosovo will be conducted by the PPA instead of the concerned contracting authority, for reasons of professional expertise, cost-effectiveness, efficiency or other legitimate concerns, as formulated in the PPL.

The PPA also performs some technical and regulatory functions whenever procurement procedures are conducted directly by contracting authorities. The PPA maintains the Public Procurement Register, where all notices, invitations, tender dossiers, reports, complaints and decisions related to each procurement activity are kept. All contract notices and contract award notices are published in electronic form on the website of the PPA (<http://ks-gov.net/prokurimi>).

Each contracting authority is obliged to submit to the PPA at the beginning of the fiscal year a preliminary procurement forecast, identifying works, supplies and services that the institution intends to purchase during the year. After the budget for the year is approved, the final forecast must be sent to the PPA.

Every time a contracting authority wishes to apply a procedure other than the open procedure (i.e. general or special restricted procedures, negotiated procedures with or without publication of contract notice), it is obliged to obtain the written consent of the PPA prior to initiating the procedure.

Also if a contracting authority intends to establish shorter time-limits, the prior written consent of the PPA is required.

At the moment the PPA has 13 employees.

The composition and key functions of the **Public Procurement Regulatory Commission (PPRC)** are defined by Title V of the PPL (sections 81-89).

The PPRC is an agency responsible for the overall development of the system, monitoring and review.

The PPRC consists of five members nominated by the government and appointed by parliament for five years. At least three members should possess the same qualifications as those required for judges.

At the moment the PPRC has 18 support staff. The PPRC is organised in the following units: Complaints Department, Rules Department, Audit Department, Training Department, and Administration.

The main functions of the PPRC are as follows:

- General development of the public procurement system in Kosovo;
- Audit of public procurement procedures (the PPRC may also audit a procurement procedure before the contract is awarded and may object to signing the contract);
- Investigation of alleged violations of the PPL;
- Decision-making on appeals submitted by dissatisfied tenderers in the review procedure;
- Provision of advice to contracting authorities and economic operators;
- Conduct of training;
- Establishment of criteria for certifying public procurement officers and for issuing certificates;
- Maintenance of a list of contracting authorities in Kosovo;
- Preparation of an annual report to the government.

In addition, according to the PPL, if a contracting authority has received fewer than three valid tenders, it is obliged to cancel the procedure, unless it receives the consent of the PPRC to continue. In 2006 a total of 345 such consents were issued (in 146 cases the PPRC refused requests to continue the procedure).

The new Public Procurement Law no. 02/L-99 amending Law no. 2003/17 (adopted by parliament on 8 February 2007, not promulgated yet) brings significant changes to the institutional set-up of the public procurement system in Kosovo and allocates the functions of central procurement institutions in a different way:

- Instead of the PPRC, from now on the Kosovo Institute for Public Administration will be responsible for the training and certification of procurement officers.
- Instead of the PPRC, from now on the PPA will be responsible for authorising the continuation of the procedure if fewer than three valid tenders have been received.
- Prior consent from the PPA will no longer be required to initiate the restricted procedure.
- Procurement notices will be published by the PPRC, not by the PPA. The PPRC will also maintain the Public Procurement Register and a procurement website.
- The reduction of time-limits will be decided directly by contracting authorities, without the need to seek the prior approval of the PPA.
- The PPRC will no longer be competent to decide on complaints in the review procedure.

According to the new PPL, a new institution – the Procurement Review Body (PRB) – will be established.

The **Procurement Review Body (PRB)** will be a quasi-judicial body competent to review administrative decisions issued by central procurement institutions (PPA and PPRC) with regard to the conduct of procurement procedures and to review appeals from tenderers in the review procedure. Members of the PRB will be nominated by the government and appointed by parliament for five years. They can be removed under the same conditions and following the same procedure as for the removal of judges.

4. Procurement Operations and Practices

Many of the larger contracting entities see the requirement to recommence a procurement procedure whenever they have not received three responsive offers as a major obstacle to effective procurement in Kosovo. For many technologically more complex products there is only a very small market, as they are produced by only a small number of companies. This situation applies, for example, to many tenders of the Ministry of Health, the Kosovo Energy Company and Pristina Airport. The market is also limited,

because many providers are not interested in bidding for contracts in Kosovo. This reluctance is caused by the undecided status of Kosovo, the security situation, and the banking system, which is not yet fully operational. Moreover, there appears to be a substantial problem with non-responsive offers. While the current PPL provides the possibility to request that this requirement not be applied, such a request is not always approved.

The 15-odd utilities in Kosovo need to follow the same strict rules as public contracting authorities. The largest utilities companies – the Kosovo Energy Company and Pristina Airport – criticised this arrangement and argued for a specific regime for utilities. There are very few utilities in Kosovo and the lack of a specific utilities regime appears to be partly caused by a traditional view that utilities are part of the public sector. However, modern utilities, such as Pristina Airport, need to have a higher degree of flexibility to operate in the market.

5. Audit and Complaints Review Procedures

5.1 External audit

In accordance with the PPL, the Public Procurement Regulatory Commission (PPRC) monitors and performs the audit of public procurement operations governed by the PPL.

The PPRC may perform regular or ad hoc audit.

Within its audit competences, the PPRC may:

- access all data, documents and information relevant for a given public procurement procedure;
- order any person to provide testimony regarding any matter that the PPRC considers relevant;
- suspend or set aside the award of a public contract;
- require a contracting authority to suspend or terminate a public procurement procedure;
- require a contracting authority to correct a violation of the PPL.

5.2 Complaints review procedure

The review procedure is regulated by Title VIII of the PPL.

At any stage in the procurement process any interested party may file a complaint. As the definition of “interested party” is in line with the definition provided by EC Directive 89/665 (“*any person having or having had an interest in obtaining a particular public contract*”), the measure is not limited to the actual participants in the procedure (tenderers/candidates).

A complaint should be submitted to the PPRC no later than eight days after publication of the contract award notice. The PPL prescribes detailed conditions for the contents of the complaint. Submission of a complaint results in the automatic suspension of the concerned public procurement procedure, unless the PPRC decides otherwise.

To review a complaint in the first instance, the PPRC appoints a review expert (selected from a list of qualified experts). Within seven days, an expert presents his/her opinion on the case to the contracting authority. Then, within five days the contracting authority is obliged to communicate its decision regarding the complaint. If the contracting authority denies the complaint, does not respond or fails to implement its corrective decision, the complainant may within three days bring the case before a review panel of the PPRC.

The Review Panel of the PPRC is established by the President of the PPRC and consists of three PPRC members. The Review Panel may suspend, terminate or order to correct the public procurement procedure in question. The Review Panel may also decide on damages. A decision should be reached by the Review Panel within 10 days of receipt of the full documentation on the case (plus an additional 10 days in particularly complex cases). The decisions of the Review Panel may be appealed to a competent court.

In 2006 the Review Panel of the PPRC considered a total of 243 complaints. In the course of its 120 sessions during the year, the panel took 220 decisions regarding complaints:

- 65 procurement procedures were annulled;
- 86 procurement procedures were approved;
- 24 cases were sent back to contracting authorities for re-evaluation;
- 45 complaints were rejected for reasons of formality.

The new PPL envisages the introduction of a new and independent public procurement body that is separate from both the PPA and the PPRC to serve as the main review body for public procurement cases. This new review body represents possibly the most important innovation of the new law. While sections 94-104 of the PPL referring to this new body – the Procurement Review Body (PRB) – describe an independent review and remedies system that is compliant with EU requirements “on paper”, it will be necessary to observe the system in practice for a certain period of time before making a full assessment.

6. Reform Agenda and Capacities

As indicated in the June 2006 Sigma assessment, the Public Procurement Law (PPL) 2003/17 has improved the correspondence with the *acquis* and appears to have been well communicated to contracting authorities. The independence of both the Public Procurement Regulatory Commission (PPRC) and the Public Procurement Agency (PPA) seems well established, and the resources, although still limited, are growing. Work is nevertheless still required to develop the PPL so that it fully meets the requirements of the *acquis*, and more resources and political support may be needed to ensure that the new PPL will be implemented quickly, effectively and in a co-ordinated manner. This implementation should include the introduction of appropriate secondary legislation and supporting documentation, together with active support to contracting authorities (including measures to improve professional procurement skills and more systematic guidance on the interpretation of the law). Since the legislative process for adoption of the new law has not been completed yet, its innovations have of course not yet had an impact on the public procurement system of Kosovo.

7. Assessment

The public procurement system in some respects meets EU requirements and other aspects of good procurement practice. However, further changes in the PPL will be needed to make the law more flexible. Further substantial work will be required to upgrade administrative capacity and systems for monitoring and controlling procurement activities (including 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.

8. Recommendations

- Consider the introduction of the free use of the restricted procedure, especially for utilities;
- Place more emphasis on the use of the restricted procedure in future training in public procurement;
- Place more emphasis on the use of award criteria other than lowest price (“economically most advantageous offer”) in future training in public procurement;
- Consider the introduction of a specific utilities procurement regime based on EC Directive 2004/17.