



SIGMA

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KOSOVO

PUBLIC PROCUREMENT

ASSESSMENT MAY 2008

1. Comparative Summary

The new Public Procurement Law (PPL) was passed by the Kosovo Assembly on 8 February 2007.¹

The legislative process for adopting the secondary legislation has not yet been completed, although some official documents came into force on 1 January 2008.

The 2007 legislative reform is a step in the right direction in improving the public procurement system. It is also generally considered as a major improvement by the stakeholders in both public and private sectors of the country. Nevertheless, a review of the PPL has revealed several areas of non-compliance with the directives and/or international good practice, which will need to be addressed in future work.

The continued failure to set up the Procurement Review Body (PRB) remains a major obstacle for establishing a complete and operational procurement system in Kosovo.

2. Public Procurement Legislation

Public procurement is regulated by Law 2003/17 which entered into force in June 2003 and was amended in June 2007. In general, the PPL transposes well, at this stage, many of the provisions of EU Directive 2004/18, but there remains room for improvement.

The purpose of the law is to ensure the efficient, cost-effective, transparent and fair use of public funds. It refers to all stages of the procurement process, including review of procurement decisions, and it applies to contracts for goods, services and works. The PPL also regulates an important part of procedural activities which are not covered by the *acquis* in the field of public procurement, and which could be demoted to secondary legislation.

The definition of contracting authorities includes:

- (i) public authorities: *i.e.*, central, regional or local institutions which exercise legislative, administrative or judicial powers, bodies governed by public law and associations of one or more of such authorities and/or bodies;
- (ii) public service operators; and
- (iii) public undertakings.

The category of public service operators generally includes the utilities sector, which needs to follow the same strict rules as public authorities. Including public undertakings (other than those which are carrying out relevant activities) in the definition of contracting authorities has great potential to create difficulties in the

¹ Law no. 02/L-99 in Kosovo (amending Law no. 2003/17 promulgated by UNMIK Regulation no. 2004/3 of 9 February 2004), pursuant to chapters 5.1 (b), 5.7, 9.1.1, 9.1.26 (a), 9.3.3 and 11.2 of the *Constitutional Framework for Provisional Self-Government in Kosovo* (UNMIK Regulation no. 2001/9 of 15 May 2001).

daily activity of those entities that have exclusively commercial operations and must cope with market pressure.

The rules governing tender documentation allow technical specifications to be defined either by reference to national standards which implement European standards, European technical approvals, common technical specifications or in terms of performance and functional requirements. But in practice, the contracting authorities lack expertise in implementing these provisions (explained in more detail in the next part of this report). The PPL doesn't contain any specific provisions for including environmental characteristics in tender documentation.

The PPL provides for open, restricted and negotiated procedures (in the latter case with and without prior publication of a notice). Contracting authorities are free to use only the open procedure. When using the restricted procedure it is still necessary to make a formal written determination. This must state that the product, service or work — due to its complexity — can only be supplied/provided/performed by an economic operator with specific capacity (similar to UNCITRAL rules) and that it would be more economically efficient to first review the qualifications of interested economic operators and then to invite those with the minimum qualifications to submit tenders.

The negotiated procedure with prior publication of a notice is only allowed when it is impossible to award a contract according to the rules governing open or restricted procedures, or when the nature of the works, supplies or services, or their related risks, do not permit prior overall pricing. This procedure is not allowed for:

- irregular or unacceptable tenders;
- public contracts;
- work performed solely for research purposes, testing or development; or
- work which aims to ensure profitability or to recover research and development costs.

As mentioned above, contracting entities from the utilities sector do not benefit from the normal flexibility provided by Directive 2004/17/EC; thus the negotiated procedure with prior publication of a notice is only allowed under the same conditions as cases in the classical sector. There are no provisions for competitive dialogue.

Simplified procedures are outlined for low value contracts (between EUR 1 000 and 10 000) and minimal value contracts (less than EUR 1 000). PPL contains provisions for framework agreements/contracts that can be awarded through the use of open and restricted procedures. Framework agreements/contracts can be concluded only with one economic operator; there are no provisions for concluding such contracts with several economic operators.

Rules on advertising and transparency are well developed within the PPL. A contracting authority has to publish an indicative notice when it intends to award a contract with an estimated value higher than EUR 250 000. The PPL also obliges the contracting authority to publish a contract notice where it intends to conduct an open, restricted or negotiated procedure with prior publication. If a contracting authority has awarded a contract using an open, restricted, negotiated or price quotation procedure, this authority must publish a contract award notice.

The notices must be in Albanian and Serbian, and, if considered necessary, in English too. The notices are sent to the Public Procurement Regulatory Commission (PPRC), which will publish all language versions on the PPRC's website and in the Public Procurement Register.

Time limits start from the day of publication. For example, for an open procedure for the award of a large contract, the period provided for the receipt of tenders shall be not less than 40 days. If the contract is not large (estimated value lower than EUR 100 000 for supply and services contracts, and EUR 350 000 for works contracts), this period must be not less than 25 days. The end users pressurise PPRC to reduce the time limits, which are considered to be a burdensome obligation in the procurement process.

The PPL distinguishes between: (i) criteria for qualitative selection (so called "eligibility requirements"); and (ii) contract award criteria. The first category includes criteria on the personal situation of the candidate/tenderer, such as professional suitability, economic and financial standing, technical and/or professional capability and quality assurance standards. There are no provisions for environmental management standards.

Contract award criteria include both the lowest price and the most economically advantageous tender. The PPL suggests that the lowest price criterion should be the general rule, while the most economically advantageous criterion is a specific exception.

The PPL is considered to be an important safeguard against fraud and corruption in public procurement. This is the main reason why the rules don't allow for greater flexibility, and why an open procedure — along with the lowest price criterion — is the main approach in the procurement process.

For the same reason, Section 30A.4 of the PPL contains a specific rule which generates significant delays in the current procurement activities of contracting authorities. The rule provides for mandatory cancellation of the procedure if less than three responsive tenders or, where applicable, requests to participate, are received. In this case, the contracting authority must initiate a new procedure if it still wants to procure the items.

A very specific problem that has not yet been resolved relates to certain differences between the Albanian and the English version of the PPL. The PPRC considers there to be mistakes in the substance, translation and technical content of the Albanian version, and these mistakes make implementation of the PPL more difficult. Steps could be taken by the Kosovo Assembly to eliminate these mistakes from the Albanian version, but it is not clear whether (or when) this will occur.

The legislative process for adopting the secondary legislation has not been completed, though PPRC has started to finalise the secondary legislation; June 2008 is the deadline. Some official documents came into force on 1 January 2008, such as models for notices (indicative notice, contract notice, contract notice for newspapers, design contest notice, design contest notice for newspapers, contract award notice, contract award notice for newspapers, design contest result notice, design contest result notice for newspapers, cancellation notice, cancellation notice for newspapers); models for annual reports for public signed contracts, and certain elements of the ethics code (declaration under oath for the procurement officers, declaration under oath for the members of the evaluation committee, declaration under oath for the employees of PPRC, Public Procurement Agency and Procurement Review Body).

Many of the requirements of the 2004 EU Directives have not been translated into the PPL and further improvement is needed in the areas listed in the 2007 Sigma assessment: competitive dialogue, electronic procurement, framework agreements concluded with more than one economic operator, criteria for selection, contract award criteria, etc.

3. Central Procurement Organisation

As before, two main institutions continue to manage the system: the **Public Procurement Agency (PPA)** and the **Public Procurement Regulatory Commission (PPRC)**.

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 PPA currently has 14 employees.

The main function of the PPA is to waiver approval and, to some extent, central purchasing. Whenever 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 must first obtain the written consent of the PPA.

The **PPRC** is an independent agency responsible for the overall development of the system, monitoring and review. The amended PPL law has introduced some changes in its functions and roles (including announcement publication). The PPRC consists of five members nominated by the government and appointed by parliament for five years. At the moment the PPRC has 26 staff. The PPRC is organised into four departments: IT and Statistics, Rules, Supervising and Monitoring, Training and an Administration Unit.

The main functions of the PPRC are as follows:

- General development of the public procurement system in Kosovo;
- Auditing public procurement procedures (the PPRC may also audit a procurement procedure before the contract is awarded and may object to signing the contract);
- Investigating alleged violations of the PPL;
- Providing advice to contracting authorities and economic operators;
- Maintaining a list of contracting authorities in Kosovo;

- Preparing an annual report to the government;
- Drafting secondary legislation;
- Maintaining the register and announcements publication (see www.ks-gov.net/krpp).

Under the new PPL a new institution — the **Procurement Review Body (PRB)** — will also be established (see Chapter 5).

4. Procurement Operations and Practices

In Kosovo there are 137 contracting authorities, including classical and utilities sectors. During 2007 these awarded 15 218 contracts of differing values. The total value of these procurements was more than EUR 400 million; almost 17% of GDP.

Of these contracts, 10 872 were supply contracts, 3 085 were services contracts and 1 201 were works contracts. The contracting authorities organised 60 design contests. Seventy percent of the contracts were awarded by contracting authorities from the classical sector, and 30% were awarded by public companies. In terms of the value of the contracts, the classical sector accounted for only 47% of the procurement value while that of public companies represented 53%.

Despite of the fact that there was only a small number (668) of large value contracts (equal or greater than EUR 100 000 for supply and services contracts and equal or greater than EUR 350 000 for works contracts), their total value was significant (EUR 286 million, or 71% of the total value).

The preferred method of procurement was the open procedure, given that these procedures made up 81% of the total value of awarded contracts. The restricted procedure was used in only 28 cases and the value of the contracts awarded using this procedure was also very low (EUR 1.8 million, or 0.44%).

The main contracting authority is KEK (Kosovo Energy Corporation), whose contracts account for more than 37% of the total value of procurements in Kosovo. The second largest contracting authority is the Ministry of Transport and Telecommunications, which represents 5.61%. Other important contracting authorities which can be included in the “top ten” are Post and Telecommunication of Kosovo, KOSTT, Municipality of Pristina, Municipality of Prizeren, the Ministry of Education, Science and Technology, Kosovo Police Service, Pristina Airport and the University Clinical Centre of Kosovo.

During 2007, 231 contracts were awarded to foreign economic operators, but the value of these contracts was significant (EUR 130 million, or more than 32% of the value of all procurements).

Usually, the procurement department within a contracting authority has between two and four members of staff. According to the PPL, every contracting authority must designate a person to act as Procurement Officer, who is responsible for all procurement activities. This person must hold a university degree and a “procurement professional certificate” issued by KIPA. KIPA will only issue the procurement professional certificate to people who have participated in a specific training course and who, on the basis of testing, have satisfactorily demonstrated their knowledge of procurement law. The certificate is valid for one year. Any interested person may attend a procurement professional training course.

In 2007, training sessions were focused on the amendments to the PPL, how the official public procurement website works, and fulfilling standard documents. The professional certificate was awarded to 414 people that year.

Unfortunately, by 2008 KIPA had not yet not started the training courses. Further action is needed in this regard, given that until certification must be finalised for all public procurement officers by the end of the year.

Generally, the public procurement officers consider the training courses to be too theoretical. It seems that the curriculum has remained much the same over the last three years, but people expect more practical examples of how to conduct a procedure, particularly how to prepare technical specifications. Other practical issues are how to use the most economically advantageous tender as a criterion for awarding the public procurement contract, how to establish the weights for different criteria and how to deal with certain problems during the procurement process. Contracting authorities need guidelines and PPRC may also have a role in preparing this type of operational tool.

Most Kosovo contracting authorities are satisfied with the changes in the PPL, but they consider that the rules need to become more flexible.

Time limits seem to be a general problem for all the contracting authorities. The time limits specified in the PPL are not excessive, at least for large value contracts. In some cases the constraint lies more with the limited capacities to manage procurement operations. If a decision is made to reduce the time limits, any modification should take into consideration only the small value contracts.

The concentration of the procurement procedures in the latter part of the year could also cause difficulties in this process, but the problem of budgetary constraints is not necessary an issue that could be resolved by public procurement legislation.

Contracting authorities complain about the procedure to cancel the procurement if three responsive tenders can't be obtained, and the additional time taken to obtain derogation to this requirement from PPA. In many situations there is only a small market with a small number of companies (*e.g.* fuel); in other cases, even if the market is well developed the number of economic operators which express an interest in participating can be less than three. The main reasons for many not participating seem to be the impossibility of fulfilling the selection criteria, and for long-term contracts, the impossibility of keeping within the price mentioned in their tender.

In emergencies contracting authorities have to ask for acceptance from the PPA before applying the negotiated procedure. This system raises two risks: (i) responsibility is transferred from the contracting authority to the PPA; the latter can only make a decision based on the information sent by the contracting authority and without any concrete verification of the facts; and (ii) the solution for resolving the emergency is abnormally delayed, sometimes with serious consequences.

5. Audit and Complaints Review Procedures

5.1 External Audit

External audits are carried out by the Office of the Auditor General (OAG). The OAG's procurement capacities are slowly being developed. The OAG focuses on the legal aspects of the procurement process in order to determine compliance with procurement legislation, but it intends also to gradually look into performance aspects of public procurement. However, capacity constraints mean that the OAG cannot review procurement procedures thoroughly enough. There is also a need to further strengthen the SAI's understanding of public procurement through training, since so far procurement specific activities have been very limited.

The PPRC also audits public procurement operations governed by the PPL. The main duties and responsibilities of the PPRC's Supervising and Monitoring Department are as follows:

- supervising the implementation of the PPL and other procurement rules;
- monitoring public procurement activities; and
- providing advice to contracting authorities during the procurement process.

During 2007, PPRC's Supervising and Monitoring Department accomplished the following:

- 9 inspections of the procurement activities in different contracting authorities, according to the annual plan;
- 7 *ad hoc* inspections as a result of requests;
- monitoring 13 tender opening activities;
- fulfilling 3 requirements for interpreting the PPL.

More than 125 dossiers of procurement procedures were verified during these inspections. The most usual types of violation identified were the improper use of standard forms (26 times); improper examination, evaluation and comparison of the tenders (25 times, although this issue seems to be linked with unclear and/or immeasurable (sub)criteria); lack of notifications to eliminated candidates/tenderers (24 times); lack of procurement forecasts (22 times); and using a valuation method to reduce the estimated value of the contract below certain thresholds (11 times — again this violation is sometimes connected with the inability of the contracting authority to clearly define purchase requests).

5.2. *Complaints Review Procedure*

The new PPL provides for the establishment of a new independent authority — the Procurement Review Body (PRB) — separate from both the PPRC and the PPA. The PRB is to be responsible for implementing the review procedures, as regulated by Title VIII of the PPL.

A complaint may be submitted to the PRB by any interested party at any stage of the procedure, but no later than eight calendar days after the date of publication of the concerned contract award notice. The complaint can be about any act or omission by the contracting authority that infringe the PPL.

All complaints lodged with the PRB shall be heard by a review panel composed of one to three members, depending on the value of the contract or on the difficulty of the issue raised by the case (if the case is of significant importance and interest, the review panel should be composed of all five members of the PRB).

Submission of a complaint results in the automatic suspension of the procedure unless and until the review panel decides otherwise.

The first step in reviewing a complaint is for the PRB to appoint a review expert (selected from a list of qualified experts; whenever possible, the PRB shall engage people that hold a current and valid procurement certificate as review experts). Within seven days, the expert shall: (i) review the contracting authority's documentation and other related records; (ii) interview any official or consultant of the contracting authority or the complaining party; and (iii) provide a written assessment of the case to both the review panel and the contracting authority. Within four calendar days after receiving the review expert's assessment, the contracting authority is obliged to communicate its decision to the review expert, the review panel and the complainant. If the contracting authority denies the complaint, does not respond or fails to implement corrective measures, the complainant has three calendar days to bring the case before the review panel.

The review panel has the power to suspend or terminate the procurement activities; to cancel or revoke a decision by the contracting authority; to prevent any further damage to the complainant; and to impose any necessary corrections to the procedure, including removing discriminatory technical, economical or financial specifications, requirements or criteria contained in notices, tender dossiers or contract documents. The review panel also has the power to oblige the contracting authority to pay compensation to a complainant.

The decision of the review panel may be appealed in the competent court.

In general, the review procedure and the provisions for institutional building mostly fulfill the objectives of the Remedies Directives. The remaining problem lies in implementing these provisions. It is important to underline that, by April 2008 the PRB members had not yet been nominated.

According to Section 89A.2 of the PPL (Transitional Provisions), in order to ensure the continuity of the review procedures, the PPRC is entitled to exercise the functions and responsibilities of the Procurement Review Body until October 31, 2007.

In 2007 PPRC considered a total of 246 complaints, or 3.16% of all public procurement procedures. This was a very similar number to complaints submitted during 2006 (243 complaints). Dealing with all these complaints required 210 decisions, since more than one complaint was submitted in some cases. The most complaints were received by the Ministry of Transport and Telecommunication (33), Kosovo Energy Corporation — KEC (19) and Kosovo Post-Telecom (17).

In the course of its 73 sessions PPRC took the following decisions:

- 56 procurement procedures were annulled;
- 80 procurement procedures were approved;
- 27 cases were sent back to contracting authorities for re-evaluation; and
- 52 complaints were rejected for reasons of formality.

Since 31 October 2007, the Assembly has still not appointed the members of the PRB. On the other hand, PPRC has not received any communication about prolonging the transitional provisions. Until the end of 2007, PPRC tried to create awareness about this problem, but an official response was only received in 2008. An Executive Decision (2008/1) issued by SRGC on 18 January 2008 on the extension of the transitional procurement review functions and responsibilities of the Public Procurement Regulatory Commission, retrospectively entitled PPRC to exercise review functions for another transitional period (1 November 2007 to 31 March 2008).

This final date has now passed, and, as mentioned above, the PRB members have still not been appointed. This creates a real gap in the functioning of the public procurement system and there are serious concerns about how this problem can be resolved promptly.

5.3 Integrity of Procurement Operations

A memorandum of cooperation with the Kosovo Anticorruption Agency is being prepared in order to coordinate actions in this field.

6. Reform Agenda and Capacities

Over the past year the public procurement system has undergone a number of positive changes: especially the adoption of the new Law on Public Procurement, based on EC directives, as well as a comprehensive set of implementing regulations, templates for standard bidding documents, etc., training of contracting authorities and suppliers. The restructuring of the complaints review mechanism in order to meet the requirements of both EC law and good international standards should also become a priority task.

In many respects the public procurement system meets EU requirements and other aspects of good procurement practice. However, further changes to the PPL will be needed to make it more flexible. Continuing efforts to improve the operational efficiency of the public procurement system will also be needed to ensure fair competition and professional handling of tenders and to encourage the development of competition in the domestic market.

External Assistance

A follow-up to the 2006-7 EAR TA is planned to start in early 2009. The terms of reference for a 24-month, 1.5 mln EUR project have been developed.

7. Summary and Next Steps

As previously underlined in the 2007 Sigma assessment, Kosovo's public procurement system has moved in the right direction in recent years due to political commitment and external assistance. In particular, the availability of new public procurement legislation modelled on EC Directives, and the creation of a fairly independent PP institutional structure, have been positive improvements during this period. Further progress is nevertheless still required, especially on capacity-building of the contracting authorities and the organisation of the review process.

Priority should be given to the following actions:

A. To be applied (or started) in the short term (or next 12 months):

- Appoint the members of the PRB and start independent review operations;
- 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;
- Introduce a specific utilities procurement regime based on EC Directive 2004/17.

B. To be applied (or started) in the medium term (or next two years):

- Provide more assistance to procurement officers — such as publication of guidelines and manuals and interpretation of the public procurement legislation;
- Develop the instruments and methods provided by the new EC Directives (e.g. framework agreements and e-procurement) and provide support for their practical implementation.