



SIGMA

Support for Improvement in Governance and Management

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

MONTENEGRO

PUBLIC PROCUREMENT SYSTEM

ASSESSMENT MAY 2008

1. Summary

There have been no changes to the 2006 Public Procurement Law (PPL) of the Republic of Montenegro since the last Sigma assessment in May 2007. Hence the basic legislative framework remains unchanged, although a number of pieces of secondary legislation have been adopted and came into force during the autumn of 2006.

The 2006 legislative reform is a step in the right direction in improving the public procurement system. Nevertheless, a review of the PPL reveals several areas of non-compliance with the relevant EC Directives and/or international good practice, which will need to be addressed in future work.

However, there is now considerable practice and experience with the 2006 PPL, and stakeholders in the public and private sectors of the country generally consider it to be a major improvement.

There have been changes to Montenegro's central procurement organisation and capacity. Most importantly, several competences of the State Commission have been transferred to a newly established Public Procurement Agency (PPA).

2. Legislative Framework

General

The Public Procurement Law (PPL) was adopted and published in the *Official Gazette of Montenegro* in July 2006 and came into force three months later.

The 2006 PPL aims to implement the provisions of Directive 2004/18/EC (public sector), Directive 2004/17/EC (utilities), Directive 89/665/EEC and Directive 92/13/EEC (remedies).

The PPL applies to any contract awarded on behalf of state or local authorities. Companies which are covered by Directive 2004/17/EC in the EU when they operate networks in the areas of drinking water, energy, transport and postal services are not expressly covered by the PPL, but they are likely to be included in the wider definition of contracting entities (in the case of public undertakings). Unlike Directive 2004/17, the PPL does not include private companies operating in the utilities sectors on the basis of special or exclusive rights.

Six different procedures can be used: open procedure; restricted procedure; negotiated procedure (with or without prior publication of a contract notice); framework agreement; direct solicitation of tenders (shopping method, only for supply or service contracts below EUR 10 000 and works contracts below EUR 30 000); and direct agreement (only for contracts below EUR 2 000). The contract award criteria are "lowest price" and "economically most advantageous tender". There are rules about qualification and compliance, as well as a review system. For more detailed comments see below.

The PPL stipulates that a list of parties subject to the PPL must be published, but this remains to be done.

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Generally, the PPL maintains a good standard and is basically in line with the main principles of the EU public procurement system.

However, detailed review of the PPL reveals the following areas which do not comply with EU public procurement legislation and practice:

Separate procurement regime for utilities

The EU public procurement system provides a separate and more flexible regime for publicly and privately owned utilities in Directive 2004/17/EC. The 2006 PPL does not provide for such a separate regime — neither as a separate law nor as a section of the PPL. While this situation is not prohibited by the EU legislation, the lack of a more flexible utilities regime is in contrast to common practice in the EU and is symptomatic of the PPL's generally more inflexible and formal approach. The need for a utilities procurement regime also has to be seen against the backdrop of Montenegro's current restructuring of the utilities sectors, particularly the move towards privatisation. It appears that utilities in Montenegro do not consider the current PPL to be a fully adequate instrument for procurement in their context.

Prior approval for use of some procedures

Under the PPL, contracting entities must request prior approval from the PPA when they intend to use the negotiated procedure (with or without prior publication of a contract notice) or to award a framework agreement. This requirement should be reconsidered in future since it creates a conflict of interest and goes against the principle of a decentralised procurement system, in which contracting entities are delegated the authority to make decisions for which they are accountable.

Restricted procedure

The use of the restricted procedure requires justification by the contracting authority and may be used only in specific circumstances. Furthermore, the only award criterion allowed in this procedure is the lowest price. As a result, this procedure is not on a par with the open procedure, and therefore the PPL does not comply with Directive 2004/18/EC in this respect.

Qualification documents

In order to prove their professional, economical and technical standing, tenderers have to submit ten or more individual documents with each individual bid (Article 51 PPL). These documents relate to, *inter alia*, licences, liquidity, bankruptcy, commercial court proceedings, petty crime, taxes, etc. Under the 2006 PPL even more documents are required than before. These documents have to be either originals or photocopies which have been certified as genuine copies of the original by a municipality or court (the cost of certification usually amounts to EUR 100). Tenders with an incomplete set of these documents are rejected. Preparing this formal part of the tender can be very costly and time-consuming, especially for tenderers participating in dozens or even hundreds of tenders. More time can be spent collecting and processing the required documents than on the substance of the tender. The law is not clear on whether these documents are also needed for the simplified shopping method, but they are required in practice.

A related problem is the fact that the 2006 PPL does not include an equivalent of Article 51 of Directive 2004/18/EC, which allows contracting authorities to invite tenderers to supplement or clarify supplied documents.

Cost of tender documents

In Montenegro's economic context, tender costs of up to EUR 100 are relatively high, especially when the contract value is small.

Opportunities for using electronic means are only rarely provided in practice and never for the tender documentation. The costs of producing hard copies of tender documentation (for potential suppliers) can reach EUR 800. Article 42 (2) PPL is rather precise: "*costs of copying and distribution only*". However, it appears that in practice contracting authorities often ignore this limitation and overcharge for tender documents. The discretion over these costs enjoyed by contracting entities has been criticised.

Time limits

The PPL's minimum time limits for submission of tenders (applications for participation) for the open, restricted and negotiated procedures (Art. 62-64) are significantly shorter than those prescribed by the Directives.

Formal procedures for low-value contracts

Contracting entities have to apply the normal procedures laid down by the law (open, restricted and negotiated procedures, framework agreements) for contracts exceeding EUR 10 000 (supplies or services) or EUR 30 000 (works). However, the Directives intend these procedures to apply to much larger contracts (EUR 130 000 for supply or service contracts, EUR 5 million for works). The use of procedures that are disproportionate to the size and nature of a contract unnecessarily complicates the procurement process. This may discourage potential candidates from taking part in the procedure and thereby limit competition.

Low-value public procurement contracts (between EUR 2 000 and 30 000) are governed by Article 77 PPL (the shopping method). Article 77 (8) of the PPL stipulates that: "Procedure related to public contracts awarded under the shopping method may be carried out twice a year at the most, individually for each subject matter of the public supply, service or works contracts." On 14 January 2008 the PPA interpreted this provision to mean that the shopping method can only be used six times a year (twice each for supplies, services or works). This interpretation prevents contracting entities from using the shopping method more widely for contracts where this approach is proportionate to the scale of small contracts and economically adequate. It has been frequently criticised by stakeholders and especially municipalities. This interpretation should be reconsidered.

Other relevant legislation

The 2006 PPL is accompanied by a wide range of secondary legislation, which covers, *inter alia*:

- conditions and methods for estimating the value of public contracts;
- a public procurement plan;
- methodological regulations for expressing criteria as an appropriate number of points and regulations for tender evaluation, comparison method and procedure;
- tender documents for goods, works and services;
- tender public opening report;
- tender notices;
- evaluation and comparison of tenders;
- recording of public procurement data.

Finally, a new law on concessions is currently in preparation, to replace the 2002 Law on Concessions.

Conclusions

The legal situation under the new 2006 PPL is generally considered to be a major improvement over the old law. However, there is an almost unanimous view on both sides of the procurement relationship that there is room for improvement. In other words, it appears that the new 2006 PPL is still considered to be too complex, inflexible and bureaucratic. Some provisions are still not fully harmonised with the *acquis communautaire*. Several areas of possible improvement have been indicated above.

The qualification process and documentation requirements should be simplified for suppliers. One solution would be to establish an optional qualification list where tenderers could have all their required documents checked every six months or every year. They could receive a certificate to include in the tender in place of copies of all the documents. This option would be particularly attractive for tenderers preparing many tenders. This list should also be available for utilities. This idea has the unanimous support of both contracting officers and tenderers and has been discussed for some time now. The major obstacle is deciding who would administer it. Giving this responsibility to PPD would put additional strain on its overworked and underpaid personnel.

Other options would be to reduce the number of documents required, make the number required proportional to the size and complexity of the contract, or to permit photocopies rather than originals or officially certified copies — apart from when there are serious doubts about their authenticity.

3. Central Public Procurement Organisation

The 2006 PPL provided for the establishment of a new central institution: the Public Procurement Agency. The PPA's tasks include:

- participating in preparing laws, subsidiary legislation and other regulations;
- designing appropriate standard forms for applying this law;
- monitoring and reviewing the implementation of the public procurement system in terms of compliance with EU legislation, and proposing measures to ensure compliance;
- giving prior approval to contracting authorities for the choice of procedure in the cases envisaged by this law;
- offering advisory and consulting services on public procurement to contracting authorities, when asked to do so;
- participating and co-operating in organising staff training in public procurement activities;
- preparing, publishing and updating a list of covered parties under this law on its website;
- monitoring public procurement procedures and ensuring that they meet the needs of the general public;
- publishing procurement notices; and
- collecting statistical data.

Under the previous legislation most of these functions used to be carried out by the State Commission for the Control of Procurement Procedures. Under the 2006 PPL the commission will deal only with reviewing appeals submitted by aggrieved tenderers.

However, the establishment of the new institution has been seriously delayed. According to the original text of the PPL, the PPA should have been established within 90 days of the new PPL becoming effective (*i.e.*, by the end of October 2006). In fact the director of the PPA was only appointed in June 2007. The PPA is still in the organisational stage. Its budget for 2008 comes to EUR 256 000. The PPA currently has 15 employees, only six of which are procurement experts. The rest are supportive (administrative) staff.

So far the PPA has mostly focused on getting organised (recruiting staff, defining tasks and procedures, etc). It has organised a few training workshops for procurement officers, and the help-line has been activated (providing interpretation of the PPL and advice to contracting authorities and tenderers). The collection of reports data on awarded contracts has been started in order to implement the monitoring system and develop an annual report. The PPA has started working on detailed commentary to the PPL (in co-operation with the State Commission, described below). The State Commission is in charge of the review procedures.

Conclusions

The establishment of the PPA is a step in the right direction. The separation of a review function (the State Commission) from other central public procurement functions is in line with EU standards. Since the PPA is still being set up, it is too early to evaluate its activities fully, but to reach its full potential, the PPA should undoubtedly be strengthened in terms of staff, resources and technical assistance.

4. Procurement Operations and Practices

Accurate aggregate statistical data on public contracts awarded were not available while we were writing this report.

In 2007 about 1 700 contract notices were published (2 145 contract award notices). Supplies made up 42% of all contracts, works 33% and services 25%. The total value of the public procurement market in the country is estimated by PPA to be EUR 550 million per annum (2007).

The numbers of procurement operations differ depending on the size of the entity and its budget. The Public Works Authority has conducted about 270 public tenders since the introduction of the new law in 2006,

Montenegrin Railways conducted 75 in 2007, the Public Supplies Agency conducted 38 in 2007, the (smaller) municipality of Danilovgrad 11 and the (largest) municipality Podgorica 20 (excluding works which are awarded by an administratively independent municipal works authority). In addition to these formal tenders the shopping method is frequently used for smaller contracts. For example, in 2007 it was used 25 times by Podgorica municipality (average value about EUR 6 000), and six times by Danilovgrad municipality.

The number of procurement officers in Montenegrin contracting entities depends mainly on the size of the entity and its procurement budget. A small municipality like Danilovgrad will have one contracting officer; a utility like Montenegrin Electric Enterprise has five; and a larger utility such as Montenegrin Railways has 32 (public procurement and warehousing form one department). Larger contracting entities employ lawyers, economists, and engineers in these departments. Smaller municipalities and utilities usually have only one officer dealing partly or completely with public procurement. These officers often receive internal administrative training or management training. Procurement personnel do not receive specific independent or internal public procurement training; they learn largely on the job. Public procurement is not a recognised profession and there is little procurement training generally.

There is generally room to improve the availability of training and professional support for contracting officers. There are seminars and conferences organised with the support of the EU or national aid programmes, but almost no sustainable independent national training programme. Electronic procurement has been developed and is partly in use in some places. There are no rules to specifically favour national tenderers although some stakeholders would appreciate some form of protection.

Observance of the PPL

It appears that contracting authorities do not always observe the requirements of the PPL without any sanctions being applied. There appear to be some cases where contracting officers favour certain bidders. For example, payment dates might be indicated as a decisive sub-criterion of the contract and tenderers might offer different payment dates, 120 days or 240 days. Tenderers who offer 240 days might win the contract, but there is no way for the other tenderers to check whether this was an important factor in the contracting authority's decision or whether the successful tenderer was in fact paid much later.

Quality as an award criterion

PPL quality should be an important award criterion, especially according to Articles 66 and 70 (2) of the PPL. If necessary these can be subdivided into sub-criteria for different aspects of quality. But the quality criteria and sub-criteria are often not well defined or sufficiently published in the contract notices, making it difficult for tenderers to influence these crucial aspects of their tenders. Apparently the absence of transparent quality sub-criteria frequently leads to a rather arbitrary evaluation of tenders. This lack of transparency is allegedly often intentional or due to a lack of ability to properly define quality sub-criteria.

Ad hoc tender committees

Ad hoc tender committees are established for each tender procedure. They are composed of members appointed for one year, plus experts for the opening and evaluation. At the same time, procurement officers are to be appointed and assigned a number of procurement responsibilities. With the future need for co-ordination, continuity and professionalisation, the current reliance on *ad hoc* committees may be insufficient. Instead, more permanent solutions should be sought, involving a stronger dependence on line organisation and on procurement departments.

Conclusions

Despite the positive fact that considerable effort has been made to support contracting entities, as well the private sector, with training, information and the publication of secondary legislation (including model tender and contract documentation), better support to purchasers will be required to strengthen the operational side of public procurement. It will be extremely important to increase professionalism in public procurement by reconsidering the role of tender committees and instead strengthening the line organisation by appointing procurement officers or establishing procurement departments, where justifiable, within the contracting entities. The option of co-ordinated purchasing between small contracting entities should also be considered. This recommendation becomes particularly important in the light of the implementation of new procedures and instruments, such as e-procurement and

framework agreements. The competitive side of the public procurement market is satisfactory, and the absence of any preferential treatment rules is a positive factor.

5. Audit and Complaints Review

5.1. External Audit

External audit activities are carried out by the State Auditors Institution (SAI), which was set up in 2003. This institution, which is independent from the government, includes five full members (who constitute the Senate). According to its Rules of Procedure, the SAI should have a staff of 40 auditors, plus the five Senate members. However, currently only 15 of the SAI staff are auditors, four are junior auditors and the remainder are support staff. The SAI issues a report once a year, along with recommendations. To date the SAI has been interested mainly in the legality of public expenditure, rather than its efficiency and effectiveness.

It should be pointed out that the SAI's resources — especially the number of auditors — are very limited. There is no special training for SAI staff in auditing public procurement.

Despite the fact that the new PPL represents a clear improvement compared with the previous law, the SAI finds that contracting authorities need much more training and guidance to overcome ignorance and old habits, although the PPL seems to be correctly applied for larger projects.

Conclusions

The SAI's auditing of public contracts is still in its infancy. The SAI considers the new PPL to be clearer than the previous one, but further efforts are needed to support its implementation. The SAI focuses its work on the legality of the procurement process in order to determine compliance with the legislation. However, it intends to gradually look into performance aspects of public procurement. These plans are ambitious, considering that only a very few countries worldwide control the efficiency of their public procurement, and will take a long time to implement. Due to a lack of skills and capacity, the SAI is not in a position to review procurement procedures thoroughly. 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.

5.2. Review of Complaints

Any person who considers that his/her rights may be harmed by a decision taken by a contracting entity may submit an objection to the contracting entity within eight days of the decision being adopted. Objections can also be submitted by a competent state prosecutor, the SAI or other competent bodies. Such an objection prevents any further activities by the contracting entity, which must consider the objection within eight days of its receipt. A complaint may be lodged with the State Commission against the decision taken by the contracting entity with respect to this objection, or if the contracting entity fails to make a decision within the required eight-day time period. In 2007, 170 complaints were lodged with the State Commission. Of these, 55 were approved, 92 refused and 23 rejected (for formal reasons).

The State Commission is an autonomous body headed by a president appointed by the government on the proposal of the Ministry of Justice, and two members appointed on the proposal of the Ministry of Finance and the Community of Municipalities. The president must be a law school graduate who has passed the bar examination and with at least 15 years of relevant work experience. The two other members must have tertiary education and no less than 10 years of relevant work experience. The president and the two members are appointed for four years. The State Commission has a secretary, appointed by the government on the proposal of the President of the State Commission. The secretary must be a law school graduate with no less than five years' experience in the public procurement area. The commission has three supporting staff and its annual budget amounts to EUR 200 000.

The State Commission must decide on a complaint within 15 days of receiving the file and complete documentation. The commission can either reject a complaint as groundless or else adopt it, and it can annul the public procurement procedure partly or fully by a reasoned decision:

The decision of the State Commission shall be final in an administrative procedure, but for the purpose of establishing its legality, an administrative dispute procedure may be undertaken, by

means of an action, against it before the administrative Court of the Republic of Montenegro (Art. 102 of the PPL).

The decisions of the State Commission have been criticised by some stakeholders, who consider it to be overly bureaucratic, ordering the annulment of a tender for small formal irregularities.

The percentage of tenders challenged in the Commission appears to be within normal parameters. In the small municipality of Danilovgrad, none of the 11 tenders in 2007 were challenged and in the largest municipality of Podgorica three complaints were made in the same year (of the 20 tenders and 25 shopping procedures). Eight of the 75 tenders of Montenegrin Railways in 2007 were challenged. These challenges concerned procedural matters and were all dismissed. There were no challenges to the 270 tenders of the Public Works Authority or the 38 tenders of the Public Supplies Agency. Many of the more competitive companies appear to be very wary of bringing review proceedings since they do not wish to compromise their chances in the next contract. This is understandable in a relatively small economy “where everybody knows everybody”, and the sentiment appears to be particularly strong in the construction industry.

Conclusions

The establishment of the PPA and transfer of all other functions except review to the new PPA is a positive step; it will allow the State Commission to focus on its main review role without being distracted and without risking conflicts of interest.

The State Commission appears to work satisfactory, but its capacity should be strengthened (in terms of support staff).

5.3 Integrity of Procurement Operations

The PPL provides for basic rules for avoiding corruption (Art. 13) and conflicts of interest in public procurement procedures (Art. 14). It also provides for penal provisions for infringements to procurement rules (both for contracting authorities and tenderers: Art.103-104). So far the provisions have never been applied and nobody has been fined.

According to the law on free access to information, all documents related to the public procurement process (including all tenders submitted after the contract award decision) are public. This option is frequently used by companies and NGOs to check the integrity of the process.

In August 2006 the government adopted an action plan for fighting corruption and organised crime. In March 2007 a National Commission for monitoring this action plan was established. The action plan contains a section on public procurement. However, many of its recommendations for public procurement have not yet been implemented.

6. Capacity to Further Develop the System

Montenegro’s public procurement system has noticeably undergone a number of positive changes over the past years, in particular the adoption of legislation based on the EC Directives, a comprehensive set of secondary legislation, a programme for training and information for contracting entities and the private sector, and the creation of a review mechanism.

However, any capacity development will depend on the availability of central institutional resources for supporting and monitoring public procurement efficiently.

The establishment of the new PPA should be considered as a positive step. There is, however, a risk of competence wars between the PPA and the State Commission.

Currently the PPA is planning a development strategy for the public procurement system in Montenegro.

External assistance

Under CARDS 2005 funding, a technical assistance project, managed by the EAR in Podgorica and amounting to EUR 300 000, started in October 2006. The project, Capacity Building of the Public Procurement Commission (PPC), was initially envisaged to be completed in November 2007. It has been extended by an additional seven months until early June 2008, and an extra EUR 150 000 has been allocated.

The overall objective of the project was to build a transparent public procurement and review system in Montenegro, in accordance with the *acquis communautaire*. The project's objectives were: (1) a strengthened legal and operational framework for public procurement; (2) an established institutional framework for public procurement; (3) enhanced professional skills and capacities of the public procurement officers; (4) increased awareness about the new public procurement review system; and (5) a strategy for developing an information system for managing public procurement notices and tender documentation.

7. Summary and Next Steps

As mentioned above, Montenegro's public procurement system has moved in the right direction over the past year with the adoption of new legislation based on the EC Directives, and a comprehensive set of secondary legislation.

Priority should be given to the following actions:

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

- Consider a number of procedural improvements to establish a legal framework that both promotes sound procurement practices and reduces the currently overly bureaucratic, legalistic approach.
- Strengthen the capacity of both central public procurement institutions (the PPA and the State Commission).
- Further strengthen and professionalise procurement in practice by institutionalising training and education in public procurement.

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

- Provide more assistance to procurement officers through the publication of guidelines and manuals and the interpretation of the public procurement legislation.
- Introduce new ways of organising and managing the procurement processes within contracting entities.
- 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.