



SIGMA

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PUBLIC PROCUREMENT SYSTEM

ASSESSMENT MAY 2009

¹ In accordance with UN Security Council Resolution 1244, since June 1999 Kosovo has been governed by the UN Interim Administration Mission in Kosovo (UNMIK).

1. Summary

1.1 Main Developments since last year

No changes were made to Kosovo's public procurement legislation in 2008. However, in 2008 the Public Procurement Regulatory Commission (PPRC) issued 23 standard forms or letters to be used between 1 August 2008 and 1 January 2009 by contracting authorities during tendering procedures. Such documents have obviously contributed to the proper application of the public procurement legislation.

The main development since last year has been the setting up of the Procurement Review Body (PRB), which has been in charge, since 1 August 2008, of reviewing complaints lodged by economic operators, who allege that they have been or could be harmed by contracting authorities' decisions that are contrary to EU law in the area of public procurement or to national rules transposing that law.

Unlike the PPRC, which had previously performed this function of complaints' review, the PRB is a quasi-judicial body that is empowered to take any measures provided for by Directives 89/665/EEC and 92/13/EEC, in particular by adopting interim measures, setting aside decisions taken unlawfully, removing discriminatory specifications, and awarding damages to persons harmed by an infringement to the public procurement legislation. The PRB deals with the complaints independently from the government and any contracting authority, and its decisions can be annulled or amended only by the Court of Kosovo. Its members, appointed by parliament, are independent from any governmental authority or political body as well as any contracting authority. Thus the review procedure mostly fulfils the objectives of the EC Remedies Directives.

1.2 Main Characteristics (strengths and weaknesses)

As underlined in previous Sigma assessments, Kosovo's public procurement system is moving in the right direction, thanks to political commitment and external assistance. However, a number of significant measures should be initiated in both the short and medium terms to improve the system.

Law 2003/17 on Public Procurement (PPL) largely incorporates the key mandatory provisions of Directive 2004/18/EC. However, it also includes internal provisions that create bureaucratic constraints for contracting authorities, without really strengthening competition between candidates and suppliers. Moreover, although it includes public utilities as defined in Directive 2004/17/EC, as well as any public company, it does not allow them to use the more flexible procedures adapted to commercial undertakings that are authorised by this Directive.

The Law on the Procedure for Awarding Concessions (Law 02/L-44) is more limited than EU legislation since it only applies to works concessions for infrastructure projects and not to all of the works concessions covered by Directive 2004/18/EC. Furthermore, it does not comply with the provisions laid down by this directive; for example, it authorises contracting authorities to award concessions without having published any notice. A new draft law on concessions has been prepared by the government and is currently being reviewed within the administration. The Sigma assessment team has not yet been able to analyse this draft.

1.3 Recommendations for Reform

1.3.1 Short-term Priorities

Consideration should be given to carrying out a full revision of the PPL so as to align it with EC Directives 2004/17 and 18 (to the extent practicable) and with international good practice, including in the area of concessions.

If a full revision of the PPL is not possible in the short term, as a first step consideration could be given to developing a specific utilities procurement regime based on EC Directive 2004/17, as well as to removing some of the most controversial provisions of the PPL, such as the purchase of electricity and the prior approval procedure.

The government should provide strong support, including by soliciting external assistance, particularly from the EC project (see below), to the Public Procurement Regulatory Commission (PPRC), the Procurement Review Body (PRB) and the Public Procurement Agency (PPA) to ensure their efficient operations.

1.3.2 Medium-term Priorities

In the event that a full revision of the PPL, as described above, is not possible in the short term, such an action is definitely needed in a medium-term perspective.

The professionalisation of procurement functions at the level of contracting entities requires the improved training of procurement officers. This training should include re-designing the certification scheme as well as providing assistance to procurement officers through guidelines, manuals and interpretation of public procurement legislation;

It will be necessary in the medium term to develop the instruments and methods provided by the new EC Directives (e.g. framework agreements and e-procurement) and to provide practical support for their implementation.

2. Assessment of Public Procurement/Concessions System

2.1 Legislative Framework

Public procurement in Kosovo is regulated by Law 2003/17 on Public Procurement (PPL), which entered into force in June 2004 and was amended in June 2007. In general, the PPL has successfully incorporated many of the provisions of EC Directive 2004/18 and international good practice. However, the PPL still includes a number of provisions inspired by sources other than the EC Directives, such as the World Bank guidelines or the UNCITRAL model law² (for contracts with a value not exceeding 10,000 EUR). It does not consistently implement EC Directive 2004/18 correctly, and EC Directive 2004/17 on utilities has not been introduced at all.

The PPL defines contracting authorities as:

1. public authorities, i.e. central, regional or local institutions that exercise legislative, administrative or judicial powers; bodies governed by public law and associations of one or more of such authorities and/or bodies;
2. public service operators;
3. public undertakings.

The public service operator category generally includes the utilities sector, which needs to follow the same strict rules as public authorities. The inclusion of public undertakings (other than those carrying out relevant activities) in the definition of contracting authorities has a strong potential to create difficulties in the daily activity of those entities that have exclusively commercial operations and must therefore cope with market pressures.

The rules governing tender documentation allow for the definition of technical specifications. These specifications can be defined either by reference to national standards that implement European standards, European technical approvals or common technical specifications, or in terms of performance and functional requirements. In practice, however, contracting authorities lack expertise in implementing these provisions. The PPL does not contain any specific provisions for including environmental characteristics in tender documentation.

The PPL provides for open, restricted and negotiated procedures (the last procedure can be with or 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 determination must state that the product, service or work — due to its complexity — can only be supplied/provided/performed by an economic operator with specific capacities (similar to the 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 required qualifications to submit tenders.

The negotiated procedure, with prior publication of a notice, is only allowed when it is impossible to establish the contract specifications in a manner that would permit the award of the contract by selecting the best tender 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;
- work performed solely for research purposes, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

As mentioned above, contracting entities from the utilities sector do not benefit under the PPL from the normal flexibility provided by Directive 2004/17/EC; thus the negotiated procedure with prior

² UNCITRAL is the United Nations Commission on International Trade Law.

publication of a notice is only allowed under the same conditions as for cases in the classical sector. There are no provisions for competitive dialogue.

Simplified procedures are available for low-value contracts (between 1,000 EUR and 10,000 EUR) and for minimal-value contracts (less than 1,000 EUR). The PPL also contains provisions for framework agreements/contracts that can be awarded through the use of open and restricted procedures. However, framework agreements/contracts can be concluded with only one economic operator; there are no provisions for concluding such contracts with several economic operators. There are also strict conditions under which a contracting authority is permitted to use framework agreements. These differ from the rules of the Directive in that a contract award notice must be published for call-off contracts under the framework agreement and that the call-off contract is strangely subject to the review procedure in a context with only one contractor.

2.1.1 Advertising and Transparency

The PPL has well-developed rules on advertising and transparency. A contracting authority has to publish an indicative notice when it intends to award a contract with an estimated value of more than 250,000 EUR. It must also publish a contract notice if 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, it must publish a contract award notice.

The notices must be in Albanian and in Serbian, and for large-value contracts in English as well, if considered necessary. The notices are sent to the Public Procurement Regulatory Commission (PPRC), which publishes all language versions on its website and in the Public Procurement Register.

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

2.1.2 Selection and Award Criteria

The PPL distinguishes between (1) criteria for qualitative selection (“eligibility requirements”) and (2) 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 (MEAT). The PPL suggests that the lowest-price criterion should be the general rule, while the most economically advantageous criterion (MEAT) is a specific exception, with rules that have more in common with the rules of IFIs³ on lowest-evaluated price than with the award criterion of the EC Directives.

The PPL is considered to be an important safeguard against fraud and corruption in public procurement. This is the main reason why the rules do not 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, article 30A.4 of the PPL contains a specific rule that generates significant delays in contracting authorities’ procurement activities. This article states that the procedure must be cancelled if fewer 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 wishes to procure the items or it must request the consent of the PPA if it wishes to continue with fewer than three tenders.

³ International Financial Institutions

Another unresolved problem is related to some differences between the Albanian and English versions of the PPL. The PPRC has noted mistakes in the substance, translation and technical content of the Albanian version, and these mistakes make the implementation of the PPL more difficult. The Kosovo Assembly may take steps to eliminate these mistakes from the Albanian version, but it is not clear whether (or when) this will occur.

The legislative process for adopting secondary legislation has now been completed. However, the secondary legislation should be complemented by operational guidelines for selecting and evaluating tenders.

2.1.3 Compatibility with EU Legislation

The PPL is basically modelled on the EC Public Procurement Directives, but contains many additional provisions that are not found in the EU legislation.

The following elements of the PPL need to be discussed and potentially reconsidered in future legislative initiatives:

- A priority for Kosovo is the development of a specific regulatory framework for utilities that is in line with the EC Directives. This framework should reflect EC Directive 2004/17 by offering a more relaxed set of procedures and rules adapted to the particular operations of utilities.
- The purchase (import) of electricity should be excluded from the scope of the PPL in future revisions (it is not included in the EC Directives). This provision represents a particular burden for the Kosovo Energy Corporation (KEK). KEK should instead have the right to use sound commercial practices. The specific guidelines for the purchase of electricity could be defined in more detail in co-operation with the PPRC.
- Reconsideration should be given to the requirement for public enterprises of a commercial and industrial nature to follow the strict rules of the PPL. These rules do not promote the efficient and effective operation of these enterprises.
- Reconsideration should be given to the inclusion in the PPL of procurement of immovable property contracts; normally these contracts are outside the scope of public procurement legislation. It is difficult to understand how such tender proceedings can be organised so as to obtain a level playing field for tenderers.
- Reconsideration should be given to the structure and extent of thresholds for determining the types of contracts; the current thresholds appear to be debatable, requiring contracts to be carefully pre-valued since the thresholds greatly influence the procedures that are acceptable, including time-limits for the submission of tenders and the use of tender and performance securities. Too many thresholds may unfortunately encourage contracting authorities to split the tender or estimate the contract value incorrectly in order to keep from having to follow the rules. The design of technical specifications closely follows the EC Directives, which is good in principle. However, it is not clear to what extent these rules apply to the situation in Kosovo or to contracts other than high-value contracts.
- A re-examination is necessary of the way in which the restricted procedure is designed. The restricted procedure should not require any justification for its use since it has the same standing as the open procedure in the EC Directives. In the European context the restricted procedure is an open procedure with pre-qualification or short-listing. It is thus suitable for large works contracts or service contracts where a purchaser wishes to reduce the number of tenders. It is also difficult to understand how the pre-qualification phase of the restricted procedure is organised in the PPL; the PPL is not clear on this issue. Furthermore, the restricted procedure is rarely used in Kosovo — and it was not used at all in 2008.
- A new simplified competitive procedure for low-value contracts of all types should be introduced. The price quotation procedure allowed for minimal and low-value contracts (up to 10,000 EUR) for supplies and services (not works) is normally designed for the purchase of supplies and simple works contracts to satisfy recurrent needs, where the lowest price is the

only criterion. It is not usually suitable for service contracts, where other factors need to be considered in the evaluation.

- Framework agreement rules need to be brought in line with the EC Directives. As mentioned above, framework agreements/contracts can only be concluded with one economic operator; there are no provisions for concluding such contracts with several economic operators. There are also strict conditions under which a contracting authority is permitted to use framework agreements, such as the requirements for a contract award notice to be published for call-off contracts under the framework agreement and for the call-off contract to be subject to the review procedure (even when there is only one contractor).
- Reconsideration should be given to the need for and length of the numerous time limits and deadlines for the publication of notices (indicative, contract and contract award notices) as well as for the submission of requests to participate and tenders, accelerated procedures, and clarifications of tenders, etc. Their length will depend on how the thresholds are set in the future.
- The design of award criteria should be re-examined. As mentioned above, 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 (MEAT) is a specific exception, with rules that have more in common with the IFI rules on lowest-evaluated tender than with the specific award criterion of the EC Directives. To the extent possible, the contracting authority should express sub-criteria, which need to be quantifiable, in monetary terms. The sub-criteria are specified in the PPL (article 50.3) and differ extensively from the non-exhaustive list of evaluation factors included in the EC Directives. Contracting authorities have limited discretion to decide on the award criteria, and it appears to be very difficult to design tender dossiers for the procurement of services and contracts where price and quality play a central function. Consequently, contracting authorities prefer to use the lowest-price criterion, which may result in contracts that hardly consider quality and life-cycle costs.
- The widespread use of tender and performance securities for large and medium-sized contracts should be reconsidered. Such securities may hinder participation and undermine competition, especially for small and medium-sized companies.
- The rules on the qualification and selection of tenderers need to be reviewed. While they are not incorrect, their general application for all large and medium-size contracts places a serious burden on economic operators and may restrict participation and competition.
- Consideration should be given to relaxing the rules requiring another tender proceeding in order to extend an existing contract. Under certain justifications, the EC Directives allow for additional deliveries of up to a maximum of 50% of the original contract value; the PPL only allows for 10%.

Other important aspects of the PPL, such as the role of the PPA and the PRB as well as the certification system for procurement officers, are discussed later in this assessment report.

Summary

Kosovo's PPL is basically modelled on the EC Directives (for the classical sectors). However, it also includes a number of provisions and arrangements inspired by other international procurement regulatory sources, such as the World Bank guidelines and the UNCITRAL Model Law, which could be seen as an adaptation to the specific circumstances governing the public sector market in Kosovo. This mixture of regulatory sources results in added and unnecessary complexity, potential confusion, and difficulties in applying the law and in preparing secondary legislation and guidance documentation.

Another key concern involves the overall complexity of the PPL and its insufficient adaptation to the size and nature of contracts; in principle, contracting authorities are forced to use the same

complex set of procedures and rules irrespective of the contract value. There is no simplification for smaller contracts. The EC Directives are designed for high-value contracts that might attract cross-border trade within the EU, not for the majority of contracts that normally follow more simplified national provisions.

However, the PPL also has a number of very positive features, such as its requirement to prepare and submit annual procurement plans, its ambition to increase professionalism among practitioners; its preference for open competitive procedures based on European rules and good practice; debriefing; and the strong institutional set-up that it promotes.

2.2 Concessions Legislation

The award of concessions is regulated by Law 02/L-44 on the Procedure for Awarding Concessions (hereafter referred to as the Concessions Law), adopted on 3 October 2005. In fact, this law applies only to works concessions for infrastructure projects, and not to works concessions for buildings (prisons or hospitals, for instance) or to services concessions. Furthermore, the law's procedures, which are based on UNCITRAL's *Legislative Guide on Privately Financed Infrastructure Projects*, do not comply with Directive 2004/18/EC: for cases not forecast by the EC Directive, the Concessions Law authorises contracting authorities to award concessions without having published any notice. Although no concession seems to have been awarded in pursuance to this law, the law nevertheless needs to be thoroughly amended so as to comply with the EC Directive. Other key observations relate to the incorrect application of definitions, insufficient co-ordination with the PPL, and a number of provisions that are entirely contract-specific.

A new draft law on concessions has been prepared by the government and is currently being reviewed within the administration. The Sigma assessment team has not yet been able to analyse this draft.

2.3 Central Public Procurement Organisation

As reported in the previous assessment, two main institutions continue to manage the system: the Public Procurement Agency (PPA) and the Public Procurement Regulatory Commission (PPRC).

2.3.1 Public Procurement Agency (PPA)

The PPA is an executive agency established within the government. The director and members of the PPA's executive board are nominated by the government and appointed by parliament for a three-year term. However, in accordance with the amended PPL, the executive board will be dissolved by 30 June 2009 and the management replaced by one director only. The PPA is organised into two main departments: (1) Centralised Procurement and Special Projects, and (2) Department of Control and Approval. The PPA currently has 15 employees but it has the right to fill two more positions.

The PPA's main function is central and co-ordinated purchasing. For reasons of professional expertise, cost-effectiveness, efficiency or other legitimate concerns (as listed in the PPL), the government, on the proposal of the PPA, may decide that any procurement procedure planned by any contracting authority in Kosovo is to be conducted by the PPA. The PPA also sets up framework agreements on behalf of the government administration. 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 it intends to purchase during the year. After the budget for the year is approved, the final forecast must be sent to the PPA. The PPA is also responsible for implementing a number of World Bank projects.

The PPA's next most important role – its second main function – is to perform some important control functions whenever procurement procedures are conducted directly by contracting authorities. This function involves two main responsibilities: (1) to approve a request by a contracting authority to use the negotiated procedure without prior publication, irrespective of the contract value (article 34.1); and (2) to consent to a request by a contracting authority to continue a procurement procedure even though fewer than three tenders have been submitted (article 30.A, and see above section 2.1.2). Contracting authorities are frequently irritated by and critical of the need for PPA approval in these

two circumstances. Sigma was not able to obtain any statistics for 2008 during the assessment mission, but the following data dating from 2007 concern these two control functions:

Approval of the use of negotiated procedure without publication of a contract notice (2007):

Number of requests= 830

Number of approvals= 564

Decisions to revoke Article 30.A for less than three responsive tenders (data for second half of 2007):

Number of requests= 243

Number of approvals= 125

We understand that the number of requests within these two categories was more or less the same in 2008. On the positive side, the amended PPL has decreased the number of areas that are subject to PPA approval. Previously, the PPA had to approve all procedures other than the open procedure, as well as the reduction of time limits beyond those stipulated by the PPL for all contracts and contracting authorities, including utilities.

Our recommendations are as follows:

1. The use of the negotiated procedure without publishing a contract notice reduces transparency in the award of public contracts. This practice may, in turn, increase the risks of abuse and irregularities in procurement processes. The EC Directives treat the negotiated procedure as an exceptional procedure that needs clear and well-defined justifications for its use. However, it is normally the responsibility of contracting authorities to make these justifications, to decide on the use of this procedure, and to be accountable for their decisions. On the other hand, control is exercised by efficient procedures for complaints review and remedies, as well as systems for internal and external audit. In Kosovo, the presence of the new Procurement Review Body (PRB) and the Office of the Auditor General (OAG) may justify changing the use of the negotiated procedure without publishing a contract notice. Furthermore, its use will probably be significantly reduced, with a more flexible procurement regime in general and the introduction of more appropriate procedures for medium and low-value contracts. In terms of contract value, the purchase of electricity by the Kosovo Energy Corporation (KEK) is one main reason for the extensive amount associated with the negotiated procedure (see section 2.1.3 above). Sigma accepts that during a transition period the government may wish to exercise a certain level of control over the use of the negotiated procedure without the publication of a contract notice. However, this prior approval procedure should be limited to large contracts only.

2. Our view regarding the need to launch another call for tender whenever fewer than three responsive tenders have been received is that the procedure should urgently be reconsidered. It is very burdensome for the PPA, causes delays for contracting entities without adding any clear benefits, and is not in line with good European practice. There is no reason why a contracting authority should not finalise a tender proceeding where the tender has been subject to an open invitation through the publication of a contract notice. All economic operators in the market have been given the chance to respond and unless there are major problems/mistakes in the tender documentation, re-tendering is not likely to meet with any more success. On the contrary, re-tendering may encourage collusive practices. Furthermore, in the case of fewer than three tenders being received in conjunction with the use of a request for quotations, a contracting authority is not even allowed to request an approval from the PPA, but must continue with new calls for tender until more than three tenders have been received.

Summary

As the PPA is itself an executing agency and major contracting authority, it should not exercise regulatory functions that conflict with its basic contracting functions. Instead, it should focus on developing its capacity as a central purchasing body and on becoming the main co-ordinating point for the management of framework agreements and electronic procurement. Therefore, all prior

approval functions should be removed from the PPA's remit. If kept, prior approval of the negotiated procedure should be assigned to the PPRC or perhaps placed with a special "Exceptions Committee" until the need for such prior approvals is phased out of Kosovo's public procurement system.

2.3.2 Public Procurement Regulatory Commission (PPRC)

The PPRC is an independent agency formed under section 81 of the PPL. The PPRC started to function in February 2005. With the 2007 amendment to the PPL (Regulation 2007/20), the PPRC's duties and responsibilities have changed.

The PPRC is managed by a board comprised of five members, who are proposed by the government and appointed by the Assembly of Kosovo. Amendments to the PPL are likely to reduce to three the number of permanent members, although the existing members of the PPRC are to continue to serve until the end of their mandates. The PPRC currently has 26 staff and is organised into four departments: IT and statistics; rules, supervising and monitoring; training; and administration.

The PPRC's main functions are to:

- Be responsible for the overall development, operation and supervision of Kosovo's public procurement system;
- Establish detailed rules to ensure the proper implementation of the PPL;
- Provide and publish written interpretations, and offer technical help and advice to contracting authorities and economic operators for the implementation of the PPL provisions;
- Establish and maintain an informative website that offers unlimited public access to data on public procurement in Kosovo, and improve publications required under the PPL (see www.ks.gov.net/krpp);
- Support the Kosovo Institute of Public Administration (KIPA) and other public training and education authorities in providing training and increasing the skills of public procurement officers;
- Initiate and support the development of electronic procurement and communication concerning public procurement;
- Collect, analyse and publish information about public procurement procedures and all awarded public contracts in Kosovo;
- Co-operate with other organisations at home and abroad on matters associated with public procurement;
- Propose measures to the government and to the Assembly for improving the public procurement system and public procurement legislation.

In 2008 no draft law or regulation was adopted, but a complete set of 41 documents (standard notices, standard tender dossiers for works, supplies, services and small contracts, standard forms or letters to be used during the tendering procedures, model declaration under oath, and procurement code of ethics) entered into force. These documents, which are available in three languages on the website of the PPRC, are very useful since they help the procurement officers in charge of awarding contracts to properly apply the legislation even if they are not lawyers specialised in public procurement.

The PPRC also monitors and reviews public procurement operations governed by the PPL. The main duties and responsibilities of the PPRC's Supervising and Monitoring Department are to supervise the implementation of the PPL and other procurement rules; monitor public procurement activities; and provide advice to contracting authorities during the procurement process. In 2008 the department accomplished the following:

- 12 inspections of the procurement activities of various contracting authorities, according to the annual plan;

- five *ad hoc* inspections following requests;
- monitoring of seven tender-opening activities; and
- fulfilment of 13 requirements for interpreting the PPL.

Summary

The PPRC's main focus seems to be on monitoring, supervision and legal interpretation. The annual statistical report is an excellent compilation of facts on how the public procurement system works in Kosovo. However, it needs to be further developed so as to place a stronger emphasis on guidance and advisory support and on the establishment of a help-desk function. The need for various capacities within the PPRC will increase in the future with the implementation of framework agreements and electronic procurement.

2.4 Procurement Operations and Practices

Statistics

In Kosovo there are 142 contracting authorities, including both classical and utilities sectors. In 2008 these authorities awarded 14,317 contracts of differing values. The total value of this procurement was more than 826 million EUR, compared with 400 million EUR in 2007. The 2008 value is almost 22% of GDP, which is very high.

Of these contracts, 9,169 were supply contracts, 3,601 were services contracts and 1,485 were works contracts. The contracting authorities organised 62 design contests. Contracting authorities from the classical sector awarded 76% of the contracts, while 24% were awarded by public companies. In terms of the value of the contracts, the classical sector accounted for only 55% of the procurement value while that of public companies represented 45% of the total value.

Despite the fact that there was only a small number of high-value contracts (858 or 6%)⁴, their total value was significant (680 million EUR, or 82% of the total value). Small and minimal contracts (11,000 in all) accounted for 27 million EUR, or only 3% of the total value, but represented 76% of all contracts signed.

The preferred procurement method was the open procedure, making up 77% of the total value of contracts awarded. The *restricted procedure was not used at all in 2008*, which is an extraordinary finding. The negotiated procedure was used in 475 cases and amounted to 164 million EUR, or 20% of the total value of contracts awarded. However, KEK (Kosovo Energy Corporation) used the negotiated procedure for the purchase of electricity, and its total contract value amounted to 53 million EUR. If this contract is removed from the analysis, the negotiated value drops to 111 million EUR or 13% of the total contract value. The price quotation procedure for small contracts was used in 3,726 cases.

Interestingly, the lowest-price award criterion was used in 13,754 tenders (96%), but the total value of the contracts awarded with the use of MEAT exceeded 361 million EUR (44%), which refers to a few very large contracts. Generally, the MEAT criterion is rarely practised by contracting authorities.

The main contracting authority is KEK, whose contracts accounted for more than 31% of the total value of procurement in Kosovo. The second largest contracting authority is the Ministry of Transport and Telecommunications, which represents 21% of the total value. Other important contracting authorities that can be included in the "top ten" are Post and Telecommunications of Kosovo, KOSTT, Municipality of Pristina, Ministry of Education, Science and Technology, Ministry of Public Service, Kosovo Police Service, Pristina Airport, Ministry of Health, and Kosovo Protection Corps.

In 2008, 307 contracts were awarded to foreign economic operators, but the value of these contracts was significant (239 million EUR, or almost 29% of the value of all procurement in Kosovo).

⁴ Equal or greater than 100,000 EUR for supply and services contracts and equal to or greater than 350,000 EUR for works contracts

Training and Qualifications

The procurement department within a contracting authority usually has between two and four members of staff. According to the PPL, every contracting authority must designate a person to act as Public Procurement Officer, who is responsible for all procurement activities. The person must hold a university degree and a Procurement Professional Certificate issued by the KIPA. The KIPA will only issue the certificate to persons who have participated in a specific training course (10 days/year) 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.

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 four years. The officers in training expected to be given more practical examples of how to conduct a procedure, particularly how to prepare technical specifications. Other practical topics could focus on the use of the MEAT as a criterion for awarding a public procurement contract, the establishment of weights for various criteria, and ways of dealing with common problems during the procurement process. Contracting authorities need guidelines and the PPRC may also have a role in preparing this type of operational tool. In this respect, it should be noted that the PPRC has prepared manuals for purchasing officers, which will be in force as from 1 July 2009.

Views on PPL Amendments

Most Kosovo contracting authorities are satisfied with the changes to the PPL, but they consider that the rules need to become more flexible. Time limits seem to be a general problem for all contracting authorities. However, the time limits specified in the PPL are not excessive, at least for large-value contracts. In many cases the constraint lies more with the limited capacities to manage procurement operations. If a decision is made to reduce the time limits, it should only apply to small-value contracts.

The concentration of procurement procedures in the latter part of the year could also cause difficulties, but such problems cannot necessarily be resolved by public procurement legislation.

As described earlier, contracting authorities complain about the procedure to cancel the procurement if three responsive tenders cannot be obtained and about the additional time taken to request the PPA to waive this requirement. In many situations there is only a small number of companies (e.g. fuel); in other cases, even if the market is well developed, the number of economic operators expressing an interest in participating can often be fewer than three. The main reasons for the non-participation of many economic operators 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. Of the 4,566 contract notices published on the PPRC website in 2008, 1,612 (35%) were cancellation notices, which is far too many. This high cancellation rate probably reflects the problems with article 30.A (discussed above in sections 2.1.2 and 2.3.1).

Summary

There is a need to simplify the regulatory framework and remove unnecessary barriers to participation, especially by withdrawing article 30.A of the Public Procurement Law. The public procurement market in Kosovo is relatively small (826 million EUR) which in turn, of course, is a reflection of the size of the economy. The competitive situation in many sectors of the market is generally unsatisfactory, which adds to the problems of insufficient tender participation and excessive cancellation of tenders. However, in some sectors (such as small works and supply contracts) the private sector operates satisfactorily. Many contracting authorities complain about the lack of direct access to foreign manufacturers and the resulting obligation to rely heavily on local representatives and agents.

The PPRC's annual statistical report is an excellent compilation of data on the public procurement market in Kosovo and deserves wide recognition.

A principal problem of great magnitude concerns the function and responsibilities of the Public Procurement Officer. He/she is assigned the sole responsibility of formally making the award decision on behalf of the contracting authority regarding any contract, irrespective of the size of the contract. The evaluation committee makes a recommendation concerning the award, but it is left to the procurement officer to undertake his/her own review of the evaluation process and to decide. The rationale for the procedure may have some good grounds to ensure the integrity of the process, but it raises at the same time some fundamental questions. With this system, the procurement officer is forced to accept a function and role that normally does not correspond to his/her competence and authority within the line organisation. It cannot be reasonable for a procurement officer at a rather low management level to be solely responsible and accountable, for example, for a multi-million euro investment contract. This arrangement should be changed so that – for all contracts other than low-value contracts – the relevant manager within the line organisation (i.e. the person with budget responsibility) assumes the responsibility and makes the decisions on the basis of a sign-off by the Public Procurement Officer.

The certification scheme for public procurement officers, including the training, needs to be reconsidered. There should be no need for a procurement officer to be re-certified annually, especially if that officer has remained in the profession without disruption. Normally, a procurement officer would increase his/her knowledge with time in the profession. The training course needs to become more specialised and practice-oriented. Sigma's work on the training project may promote this development. The KIPA also has some organisational problems (high staff turnover, for example) that need to be given serious attention.

2.5 Control, Review and Integrity

2.5.1 Complaints Review

The amended PPL has established a new independent authority — the Procurement Review Body (PRB) — that is independent of both the PPRC and the PPA. The PRB, which is responsible for implementing review procedures as regulated by Title VIII of the PPL, started its operations on 1 August 2008.

A complaint can be submitted to the PRB by any interested party at any stage of the procedure, but not later than eight calendar days after the contract award notice was published. The complaint can concern any infringement (act or omission) of the PPL by the contracting authority. Interestingly, any complaint filed with the PRB must be accompanied by a deposition fee representing 5% of the contract value (but for not less than 1,000 EUR and for a maximum of 5,000 EUR). The intention is to deter frivolous complaints.

All complaints lodged with the PRB are heard by a review panel composed of one to three members, depending on the value of the contract or the difficulty of the issue (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 expert⁵. Within seven days, the expert is to: (1) review the contracting authority's documentation and other related records; (2) interview any official or consultant of the contracting authority or the complaining party; and (3) provide a written assessment of the case to both the review panel and the contracting authority. Within four calendar days of the date of receipt of the review expert's assessment, the contracting authority must 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.

⁵ Selected from a list of qualified experts; whenever possible, the PRB will engage as review experts persons who hold a current and valid procurement certificate.

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. These corrections can include removing discriminatory technical, economic 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 institution-building for the most part fulfil the objectives of the EC's Remedies Directives. The remaining problem lies in implementing these provisions. The five members of the board have been appointed and the number of staff amount to 18. A website publishing the cases has been successfully launched. In 2008 (from August to December) the PRB considered 179 complaints.

Another new function of the PRB is to decide on a request by a contracting authority to review and potentially revoke a decision by the PPA regarding article 30.A of the PPL and the negotiated procedure without publication. The PRB has reviewed 28 appeals from contracting authorities since August 2008. Interestingly, the PRB approved the requests of the contracting authorities and revoked the PPA decisions in 22 of these cases.

Summary

The ability of a contracting authority to challenge a decision by the PPA on article 30.A of the PPL is highly questionable, for both principle and practical reasons. The PPA has been assigned the authority under the PPL to decide on prior approvals, and its decision should be final. The ability of the PRB to overrule a decision made by the PPA delays the process and, most importantly, may constitute a conflict of interest. As a public procurement review body, the PRB should not take part in a dispute between two administrative entities. If it does so, it risks eroding its own credibility by potentially becoming party to its own decision (the risk that an economic operator files a complaint with respect to such a case). This function should be removed from the PRB (as should the whole prior approval procedure, possibly with the exception of the negotiated procedure — see above).

2.5.2 External Audit

External audits are carried out by the Office of the Auditor General (OAG). A new Auditor General was appointed at the beginning of 2009. The OAG has 58 auditors out of a total of 83 staff. The OAG's procurement capacities are slowly being developed. It focuses on the legal aspects of the procurement process to determine compliance with procurement legislation, but it intends also to gradually look into the performance 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, as to date procurement-specific activities have been very limited.

No annual report for 2008 has yet been issued. However, some statistics are available on the audit of 427 contracts among 16 central government bodies. The extent of findings amounts to 529 and the major problems relate to mistakes in the preparation of tenders (availability of funds), discrepancies between contract and tender amount, paid amount higher than contract amount, proceedings with fewer than three tenders (no approval), incorrect valuation of contracts or split of tenders in order to avoid a certain procedure, and incorrect technical specifications.

2.5.3 Integrity of Procurement Operations

Sigma was informed that the Office of the Auditor General had discovered three cases of potential corruption, which had been handed over to the prosecutor for review. There may be additional cases of public money not being properly used. However, the Kosovan authorities are aware that public procurement may be subject to corrupt practices and more generally to mismanagement of public money, and are trying to overcome this problem.

The PPL includes clear and acceptable rules on conflict of interest (articles 61.1 and 61.A), rules on excluding an economic operator from tender proceedings if irregularities are found by a competent court (article 61.2), as well as strict rules on irregularities in public procurement in terms of unlawful influence and retribution, with clear definitions of corrupt and fraudulent practices (article 117). It also includes fines for contracting authorities who violate the PPL. Fines are imposed by the PRB and are not less than 5,000 EUR. Furthermore, a civil servant of a contracting authority who fails to implement a decision by the PRB is to be dismissed and fined not less than 1,000 EUR (article 118).

Moreover, a draft law amending the Anti-Corruption Law as well as a draft law on whistle-blowing and protection of witnesses are under preparation. In addition, a memorandum of co-operation with the Kosovo Anti-corruption Agency is being prepared in order to co-ordinate actions in this area.

Summary

By strengthening the legal and institutional framework, training purchasing officers and providing them with operational tools and advice, the authorities will gradually limit the risk of corrupt practices. The reforms and implementing measures currently under preparation should help to improve the situation in Kosovo, at least in the medium term.

3. Reform Dynamics

The adoption of the new PPL and its amendments has resulted in a clear improvement of the public procurement system. However, a number of problems have been identified that need to be remedied in the course of future public procurement reform. On the positive side, the PPL is accompanied by a comprehensive set of templates for notices and standard tender documents. However, the PPRC will need to develop operational guidelines and its help-desk function, as well as strengthen its own capacity and procurement professionalism *as a main entity in charge of designing and driving the public procurement policy of Kosovo.*

The establishment of the PRB in 2008 is a very positive step and creates a sound division of responsibilities between the administrative bodies engaged in the public procurement system. The review and remedies system follows EU rules, but needs to be amended in order to take into account the most recent EC remedies directive regarding the standstill period. The PRB is a young and inexperienced organisation and will need much support and training in the coming years if it is to operate efficiently, with credibility and trustworthiness.

The main critical observations of the public procurement system include the confusion between various legal models; the strict regime for utilities; the inclusion of purchase of electricity; the tender procedure if fewer than three tenders are received; and, to some extent, the negotiated procedure without publication of a contract notice; the design of the restricted procedure; the certification system; and the role of the public procurement officers.

In this respect, phase 3 of the project “Reform to Public Procurement System” delivered by Europe Aid⁶, which started on 19 January 2009 and will run for two years, should be helpful. Its aims are to help develop Kosovo’s public procurement system, ensure that it is compatible and up-to-date with EU standards and that it promotes efficiency and transparency in the use of public funds. These aims will be achieved by:

- providing continuous legal advice to the Public Procurement Regulatory Commission (PPRC);
- ensuring that the PPL is up-to-date with EU legislation and its implementation, i.e. in line with the EC Directives;
- providing technical assistance to the PPRC and to the Public Review Body (PRB) for implementing the new secondary legislation framework;

⁶ Europe Aid/126497/C/SER/KOS

- providing advice on management structure and organisational improvement for the PPRC and the PRB; and
- providing assistance to the PPRC and the Kosovo Institute of Public Administration (KIPA) to improve the training and certification framework for public procurement.

Continuing efforts to improve the operational efficiency of the public procurement system are needed to ensure fair competition and professional handling of tenders and to encourage the development of competition in the domestic market. *In this context, we recommend simplifying the PPL to make it more flexible and functional for contracting authorities and more attractive for economic operators. Indeed, the outcome expected from any legislation can be achieved only if this legislation is really implemented in practice. Any external assistance should also take account of this imperative.*

ANNEX

PROCUREMENT/CONCESSIONS STATISTICS for 2008ⁱ

1.1.1 A. Number of contracting entitiesⁱⁱ		
1.1.2 Central government	79	
1.1.3 Regional and local authorities	34	
1.1.4 Other (bodies governed by public law)	1	
1.1.5 Utilities	28	
1.1.6 Total number of contracting entities	142	
1.1.7 B1. Awardedⁱⁱⁱ public contracts/Contracting entities	Total (estimated) value (Mio EUR)	Total number^{iv}
Central government	376 458 565,80	6 148
Regional and local authorities	80 237 154,52	4734
Other (bodies governed by public law)	160 682,75	4
Utilities	369 627 159,60	3431
Total public contracts awarded	826 483 562,67	14317
1.1.8 B2. Awarded concessions/Contracting entities		
Central government		
Regional and local authorities		
Other (bodies governed by public law)		
Utilities		
Total concessions awarded		
1.1.9 C1. Awarded public contracts above the EU thresholds^v		
Works ^{vi}	148 039 362,19	11
Services ^{vii}	20 943 847,39	40
Goods ^{viii}	258 187 488,16	190
Mixed contracts	427 170 697,74	241
Total public contracts above the EU thresholds		

1.1.10		
1.1.11 C2. Awarded concessions above the EU thresholds		
Works ^{ix}		
Services ^x		
Other		
<i>Total concessions above the EU thresholds</i>		
1.1.12 D. Procurement methods used^{xi} (above the national thresholds^{xii})		
Open procedure	635 247 646,07	2614
Restricted procedure	#	#
Negotiated procedure with prior publication of a notice	31 305 268,41	20
Negotiated procedure without prior publication of a notice ^{xiii}	164 156 690,61	465
Other procedures (competitive dialogue, etc.)	4 359 210,04	6499
1.1.13 D1. Low- value procurement (estimated)	18,288,457.42	3726
E. Participation rate (average number of submitted tenders)		
Works		
Services		
Goods		

F. A list of 10 largest procuring entities (name, main activity, (estimated) annual procurement budget):

No.	Contracting Authorities:	Contract description	Contract value (€)
1	Kosova Energy Corporation	Complete reparation with turnkey of transporting tape system- fold removal of ashes in the Mining of Coal in KEC	49,983,528.52
2	Kosova Energy Corporation	Complete reparation with turnkey of transporting tape system- fold removal of ashes in the Mining of Coal in KEC	22,157,385.00
3	Post and Telecommunications of Kosova	Expanding network of Vala/PTK-Phase 5 (Vala Network Extension-Phase 5)	20,498,331.00
4	Kosova Energy Corporation	Remounting of two excavators SchRs 650 (E 9 & E10)	19,920,512.00
5	Ministry of Public Services	Overall renovation of Media Building – Tower and auditorium	14,694,453.67
6	Kosova Energy Corporation	Purchase of Electrical energy during period 04.10.08--31.03.2009	14,141,960.00
7	Ministry of Transport and Telecommunications	Construction of roundabout in the crossroads of M9 and M2 Pristina	11,750,446.99
8	Post and Telecommunications of Kosova	Building of 29 local cable networks with turnkey	10,318,737.46
9	KOSTT	Communication network	9,214,769.00
10	Kosova Energy Corporation	Purchase of electrical energy for the period 4 January 2008 until 15 March 2008	9,073,520.00

- i Statistics should cover contracts awarded in the period 1 January 2008 – 31 December 2008
- ii As for 31 December 2008
- iii Statistics should refer to contracts awarded (based on contract award notices), if not available, please give the data on contracts advertised (based on contract notices)
- iv Please indicate whether the data include the low value contracts
- v Please indicate whether the data include contracts awarded by the utilities sector
- vi Above 5.150.000€
- vii Above 137.000€ for public institutions, 412.000€ for utilities
- viii Above 137.000€ for public institutions, 412.000€ for utilities
- ix Above 5.150.000€
- x Above 137.000€
- xi Both for public contracts and concessions
- xii Including contracts above EU thresholds
- xiii Including single-source procurement