



SIGMA

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BOSNIA AND HERZEGOVINA

PUBLIC PROCUREMENT SYSTEM

ASSESSMENT MAY 2008

1. Summary

Since the 2007 Sigma assessment of public procurement in Bosnia and Herzegovina (BiH) there have been no major changes in the primary legislative framework, despite the recommendation of the last report to amend the Public Procurement Law (PPL). The amendments proposed by the government in June 2007 were rejected by the BiH Parliament (in January 2008) for technical legal reasons. It was argued that the degree of amendment proposed was not in line with the BiH rules on legislative procedure. Opinions were also expressed that the rejection of the amendments represented collateral damage of the political conflicts in the BiH Parliament. Nevertheless, after the rejection of the draft amendments, parliament asked the government to submit a completely new draft public procurement law. In April 2008 the government instructed the Public Procurement Agency (PPA) to elaborate a new draft PPL.

There is also a case pending before the Constitutional Court relating to the alleged unconstitutionality of the existing PPL. It is not yet known when the Court will hear this case or the extent to which the case will affect the proposal for a new PPL.

Two twinning-light projects are now in operation to enhance institution-building, with the objective of strengthening the capacity of the Public Procurement Agency (PPA) and the Procurement Review Body (PRB) to act professionally and independently. The PPA and the PRB must continue to build their respective organisations, administrative structures and routines, and to develop and consolidate their positions as centres for public procurement development and complaints review. These are some of the main prerequisites for the successful development of the public procurement system in Bosnia and Herzegovina.

2. Legislative Framework

The majority of public expenditure, and consequently of public procurement, is managed by the two entities of Bosnia and Herzegovina – there is little expenditure at the state level or in the District of Brcko.

The Law on Public Procurement of Bosnia and Herzegovina (PPL) was adopted by the BiH Parliament on 23 and 27 September 2004 and published in the *Official Gazette of BiH* on 2 November 2004.

As indicated in the 2007 Sigma assessment, the PPL mainly:

- provides a uniform public procurement regulation for the whole country;
- establishes a fully decentralised public procurement system, which grants the responsibility for public procurement to contracting authorities;
- requires transparency by the mandatory requirement of publication of public procurement opportunities and procedures;
- is modelled on, but not fully compliant with, EC procurement legislation;
- is aimed at promoting cost-effective public procurement and the economical use of public funds;
- safeguards the legitimate interests of tenderers by introducing review mechanisms and procedures;

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- ensures implementation of public procurement legislation through the establishment of two implementing and monitoring institutions, the Public Procurement Agency (PPA) and the Procurement Review Body (PRB). The PPL applies to any public procurement contracts awarded by any public authorities of BiH State, BiH Federation (FBiH), Republika Srpska (RS) or District of Brcko. As a result, all of the public or private economic operators established in any part of BiH have the same rights and obligations in the public procurement area, regardless of the contracting authority.

The PPL of BiH entered into force on 10 November 2004 for institutions at state level, but later for institutions at entity level: in January 2005 in FBiH and in May 2005 in RS. The PPL is mainly modelled on Directives 92/50/EEC, 93/36/EEC and 93/37/EEC (services, supplies and works contracts awarded by public authorities), with some elements from the Directive 93/38/EEC (utilities). In particular, the PPL covers procurement contracts awarded by any public company carrying out its activity in the areas of drinking water, electricity, transport and telecommunications.

Although the law is broadly compliant with the *acquis communautaire*, it still includes provisions for domestic preference (to be abolished by 2011). It does not include many of the special provisions related to utilities or the new provisions of EC Directives 2004/17 and 2004/18. It thus does not provide for the procurement of any private utilities that carry out their activity within the “utility” areas of EC Directive 2004/17 on the basis of special or exclusive rights granted by a public authority. This does not create any legal difficulties at present as such bodies do not exist. However, the legislation of BiH would not comply with EU law if private entities carried out their activities under such conditions or if public companies currently covered by the PPL were privatised and excluded from the scope of the PPL, without being submitted to fully open competition.

Furthermore, the PPL does not include the exemptions specifically laid down by EC Directive 2004/17 intended to allow flexibility for bodies operating in a commercial and operational environment. Examples of this are the limited scope for using frameworks and the inability to use standing lists of qualified suppliers (qualification systems) as well as some special exemptions, such as that relating to purchases of energy or products purchased in order to produce energy. This over-regulation can have significant effects on the efficiency of operations of such bodies in BiH.

In November – December 2006 the PPA, together with the PRB, elaborated a comprehensive amendment to the PPL. The main objective of the draft amendment was to further align the law with EU requirements (although it did not provide full transposition of EC Directives 2004/17 and 2004/18) and to simplify public procurement procedures.

In April 2007 the Ministry of Finance of the RS proposed to the PPA to amend the law in order to provide for a PPA and a PRB at entity level. In parallel, MPs representing RS in the state-level parliament submitted the existing PPL for judgment to the Constitutional Court, claiming that it was unconstitutional. It remains to be seen whether the decision of the Court will have an impact on the interpretation of article III/5 of the BiH Constitution, which allows – under certain conditions – for a transfer of legislative responsibilities of the entities to the state level.

The amendment to the PPL was rejected by the state-level parliament (on 30 January 2008), in part for technical legal reasons (according to the BiH rules on legislative procedure, if more than 50% of the articles of a regulation are being amended, a whole new consolidated law should be proposed).

It is understood that the PPA has recently (24 April 2008) been asked by the Council of Ministers to draft a revised PPL to replace the law currently in force. A complicating factor is the referral of this issue to the Constitutional Court, which may take some time to rule.

Sigma’s view is that the basic structure of the current PPL is sound but its practical operation would be improved if the changes proposed in the amendment to the PPL could be adopted.

In July 2007 three sets of standard tender documents were adopted by the PPA – separately for works, goods and services (published in the *BiH Official Gazette*, no. 56/2007).

Slight amendments to the secondary legislation were adopted recently (31 March 2008), – amending the Instruction on the opening of tenders (*BiH Official Gazette*, no. 27/2008).

The PPL does not transpose EC Directives 2004/17 and 2004/18, and thus most of the new elements of these directives have not been introduced into the public procurement legislation. The current legislative framework is seen as overly complicated by all actors in the procurement system. The key problems

identified during the assessment related to the bureaucratic nature of the law's provisions, particularly in relation to smaller contracts, as well as some unnecessarily detailed requirements relating to the qualification of suppliers, which added to costs and reduced effective competition. A full transposition of the directives is not necessary for the time being, but it would be advisable to partially implement certain procedures, including provisions relating to the special position of utilities, provision for central purchasing bodies, and improved arrangements for framework agreements (with several suppliers or providers of services). Simplified procedures, in particular for low-value procurement where the threshold is 30,000/60,000 BAM, would considerably increase the efficiency of operations. A new or significantly amended PPL, supported by additional interpretative guidance from the PPA on a pragmatic approach by contracting authorities to the application of the law, would considerably improve the economic effectiveness of the law without damaging regularity.

3. Central Public Procurement Organisation

The 2004 Public Procurement Law (PPL) provided for the establishment of two new institutions at state level to be responsible for implementation of the public procurement system – the Public Procurement Agency (PPA) and the Procurement Review Body (PRB, described below in section 5.2).

In accordance with article 48 of the PPL, the Public Procurement Agency (PPA) has been established as an independent administrative organisation with legal personality and directly responsible to the government. It has two branch offices in Banja Luka (RS) and Mostar (FBiH), but these offices are not authorised to make decisions without the approval of the PPA central office. The PPA's function is to ensure proper application of the PPL, in particular by:

- proposing amendments to the PPL and its implementing regulations;
- raising awareness among contracting authorities and suppliers of the public procurement legislation and its objectives, procedures and methods;
- publishing procurement manuals, guidelines, standard forms and models;
- providing technical assistance and advice to both contracting authorities and suppliers;
- establishing systems for monitoring the compliance of contracting entities with the PPL;
- collecting, analysing and publishing information on public procurement procedures;
- developing an information system to supplement the *Official Gazette*;
- initiating and supporting the development of electronic procurement;
- publishing training information;
- maintaining a register of accredited trainers in public procurement.

The PPA has a director and a board, comprised of seven members. The establishment of the PPA was significantly delayed – it only became fully operational in the summer of 2006, i.e. 18 months after the original deadline. The number of staff is expected to rise by the end of April 2008 to 17, six of whom will work in the branch offices of Banja Luka and Mostar (three in each). There are real challenges in prospect for the PPA to attain the capacity required to undertake its duties professionally. Its likely involvement in drafting a new PPL will increase the scale of these challenges.

A twinning-light project with Germany is shortly to commence, providing potentially some relief to the capacity problems experienced by the PPA.

The PPA has been active since the last assessment, with the issuing of standard tendering documents in July 2007 and the completion of training courses by PPA-approved trainers for nearly 1300 officials in 2007. The PPA recently adopted a training methodology and programme for training in 2008, which incorporates a more practical, case study-based training approach, and discussions are planned with the Civil Service Agency on its possible future participation in procurement training. The Council of Ministers has been asked to approve a new PPA rulebook strengthening its role in monitoring procurement by contracting authorities and increasing the dissemination of information via the Internet.

There are also some courses on public procurement available from private providers.

The implementation of e-procurement has not been started yet.

The PPA is now well established and was the subject of positive feedback from all actors interviewed, but is still understaffed to fully meet its obligations. The effects of these capacity problems may be reduced by assistance received as part of the twinning-light project, but may also be exacerbated by the PPA's involvement in the forthcoming changes to the PPL. The role and position of branch offices is under debate (representatives of the Republika Srpska in particular want to strengthen the branch offices or even to establish separate institutions at the entity level).

4. Procurement Operations and Practices

The aggregate statistical data on contracts awarded in 2007 were not available at the time of writing. The current trends nevertheless seem stable since 2006.

According to the annual report published by the PPA, the total value of public contracts awarded in 2006 amounted to almost 1,210,000,000 BAM (more than 500,000,000 EUR). The majority of public money is being spent at regional level (Federation of Bosnia and Herzegovina – 66.62%; Republika Srpska – 30.25%; District Brcko – 0.23%). State institutions spend only 2.90%.

The open procedure is most commonly used (79.78% in terms of the value of awarded contracts), whereas other procedures are significantly less frequent: restricted procedure – 4.18% and negotiated procedure – 16.03%.

Discussions with contracting authorities and suppliers indicated a good understanding of the requirements of the law and its practical effects on procurement operations. All actors reported problems with some of the terminology of the PPL (which arises in part from differences between the EC Directives and the different legal tradition in BiH), but contracting authorities considered that they had adapted to the new requirements. Although more written guidance would be helpful, most thought that the guidance received from the PPA was generally helpful.

Although contracting authorities identified some problems with the details of the law, most thought that it had improved the quality of tenders (including an improvement in the commercial terms offered, as well as in the regularity of the process). Information from contracting authorities suggested that a very small percentage (<10%) of procedures resulted in first-instance objections, and fewer than 2% resulted in appeals to the PRB. Many objections by suppliers were seen as “bad faith”, and it was noted that there had been few cases where a supplier's appeal was upheld.

Suppliers were particularly concerned with the excessive costs and the difficulty in meeting the requirements of bureaucratic procedures, particularly for low-value contracts, and considered that there was still considerable evidence of preference for favoured suppliers. Some of this preference was considered to arise from corruption, but much was attributed to a tendency to work with “trusted” suppliers.

Recent training organised by the PPA and certified trainers proved to be successful and useful. Some increase in the professional capacity of procurement officers was welcomed by both suppliers and contracting authorities. More detailed interpretative documents on some aspects of the PPL, e.g. use of negotiation without a call for competition, would also be helpful. Contracting authorities used both central and localised procurement (including tender commissions) as suited their needs.

Auditors also welcomed the reduced bureaucracy and greater clarity of interpretation of some aspects of the law, and drew attention to some worrying breaches of the law in relation to some very large contracts (including the new government building in Banja Luka).

Particular issues that arose with regard to current practice:

Cost of publication of contract notices

All actors considered that the cost of publication in the *Official Gazette* was excessive (currently it is about 350 BAM or 180 EUR). Sigma drew attention in its previous report to this anomalous approach to publication. The cost of the notice for contracts, which are mostly of very low value in EU terms, is considered disproportionately high in BiH. For instance, for a contract amounting to 30,000 BAM (15,690 EUR), the cost of the notice publication constitutes 1.2% of the value of the contract, which could be comparable to the differences between the prices proposed by the tenderers in response to the call for

competition. The cost seems unnecessary and is likely to reduce acceptance by contracting authorities of the need to advertise their requirements.

Over-regulation

The PPL makes little distinction between the rules for lower and higher-value procurement, which leads to excessive delays and costs to contracting authorities and suppliers alike. The law is particularly strict for those entities in the utilities sector, where the commercial environment is quite different to that of government bodies. As pointed out in section 2 above, such authorities would in the EU be able to take advantage of the much more flexible rules of EC Directive 2004/17.

Implications of BiH budget laws

Auditors and contracting authorities drew attention to the inflexibility of the budget legislation. Delays in adopting central budgets (at state and entity levels) and delays involved in the procurement process, together with the budget law's limitations on contracts exceeding one year's duration, often made it impractical to award contracts.

Excessive documentation requirements

All actors agreed that the documentation required to prove supplier capacity appeared excessive, and this was exacerbated by the legal interpretation in BiH of provisions allowing the production of certain documents where the word "may" in the EU regime is interpreted as "must" in BiH. This causes inefficiency, particularly where lower-value contracts are concerned.

In the BiH PPL there is no possibility to supplement or clarify submitted documents, with the result that tenders offering good quality and price often have to be rejected for minor, formal reasons.

In many cases the result of a strict approach to the submission of capacity documentation has been the need to re-advertise contracts, with considerable cost and inconvenience to contracting authorities and suppliers.

Limitations on the use of framework agreements

Many of the excessive costs associated with smaller contracts could be reduced by the greater use of framework agreements. The PPL does make (very limited) provision for framework agreements, but only with one supplier and only for a limited range of "off-the-shelf" supplies.

If the law were to allow for multi-supplier framework agreements, with provision for second-level "mini-competitions" when needs arise, the capacity problems and delays experienced by contracting authorities could be considerably reduced.

It is nevertheless recognised that there is currently little understanding of the benefits of framework agreements and some uncertainty as to whether they could be awarded for more than one year. The introduction in the PPL of more extensive provisions for framework agreements would need support from the PPA through interpretative documents, training, etc.

The considerable efforts to improve training, information and the publication of secondary legislation and model tender and contract documentation have improved the capacity of the actors in the system. There is nevertheless still scope for maintaining and increasing this support.

Professionalism in public procurement should be further promoted by reconsidering the scope for appointing procurement officers or establishing procurement departments, where justifiable, within contracting authorities. The option of co-ordinated purchasing between small contracting entities should also be considered (although some explicit reference to this in the PPL might be needed). The competitive side of the public procurement market is satisfactory, but the proper application of resources would be improved by streamlining the approach to low-value contracts.

Implementation of provisions equivalent to article 51 of EC Directive 2004/18, which permits economic operators to supplement or clarify pre qualification certificates and documents, would ease the problem of documentation required from suppliers. In addition, the establishment of a mandatory qualification list would be helpful. With a mandatory qualification list, tenderers could have all of the required documents checked every six months or every year, and a corresponding certificate could then be provided, the copy of which could be included with the tender instead of copies of all of the documents. This option would be

particularly attractive for tenderers participating in several tenders. Another possibility to be considered is a reduction in the number of required documents, making some items voluntary and others mandatory, at the discretion of the procuring entity. In the case of utilities in particular, the introduction of qualification systems is likely to be beneficial.

5. Control, Review and Integrity

5.1 Complaints Review

Procurement Review Body

The Procurement Review Body (PRB), located in Sarajevo, is an independent administrative organisation with a legal personality. The PRB is responsible for ensuring the enforcement of PPL rules and for acting as a second instance in the review procedure. According to article 49 (5) of the PPL, the PRB should consist of six members, three of whom are chosen from among selected experts in administrative law and/or administrative procedure. Their status should be equal to that of an independent judge, and their PRB membership is incompatible with any direct or indirect, permanent or periodical duty, with the exception of academic activities. The other three members are to be experts in the area of works, public purchases, transportation or strategic business management, and they are selected through open competition, as provided for in the implementing regulations to the PPL.

Members of the PRB are proposed by the government and thereafter appointed by parliament at the state level.

The establishment of the PRB was severely delayed. The PPL provided a transition period of three months for the establishment of the PRB; the original transition period was scheduled to expire on 10 February 2005. However, for various reasons this transition period was extended a number of times, and in fact the PRB did not become operational until mid-September 2006. The PRB now has four members; two positions have been vacant since 2006. The number of support staff amounts to 14 persons. In general, the PRB has experienced great difficulties in recruiting its members. As the adoption of a rulebook on internal organisation is still pending, all support staff members have been employed on a temporary contractual basis (they do not enjoy the full rights of civil servants).

The PRB issued a Rulebook on Procedures on 26 December 2006, which was amended in April 2007. The Rulebook on Procedures is currently being challenged before the Constitutional Court of BiH for alleged incompatibility with the Law on Administrative Procedure.

According to article 49 (4) of the PPL, the Chairman of the PRB should adopt a rulebook on internal organisation of the PRB within two months of the establishment of the institution. The Rulebook on the Internal Organisation of the PRB was conditionally adopted by the government on 24 May 2007. The government requested the incorporation of remarks submitted by the Ministry of Justice (MoJ). However, as the PRB has not reached an agreement with the MoJ in this regard, the rulebook has still not been promulgated. Among other remarks, the MoJ proposed that the Chairman of the PRB be nominated and suspended by the BiH Council of Ministers (instead of being elected by all members of the PRB). In the opinion of the PRB, this change would undermine its independence.

The PRB is currently receiving assistance from the Slovenian National Procurement Review Commission under a twinning-light EU-funded project (250,000 EUR).

The activities of the project focus on the following areas:

- development of legal framework;
- reinforcement of the capacity of the PRB;
- training for the staff of the PRB;
- day-to-day assistance in handling cases;
- preparation of a remedies handbook.

Review procedures

Any person who considers that his/her rights have been infringed by a decision taken by a contracting entity may submit an objection to this entity within five days of the date on which the decision was made. If the contract has not yet been awarded, such an objection excludes any further activities of the contracting entity, which has to consider the objection within five days of the date of its receipt. A complaint may be lodged with the Procurement Review Body (PRB) against the decision taken by the contracting entity or in the event that the contracting entity fails to make a decision within the five-day time-period. Upon receipt of a copy of the complaint, the contracting entity has to suspend the procedure for a five-day period, unless otherwise decided by the PRB, which can annul in whole or in part any decision of the contracting entity, order the termination of the procedure, or award damages to the complainant. If the complaint was submitted to the PRB after the contract had been awarded, the PRB can award damages to the complainant.

The decisions of the PRB may be appealed to the courts of BiH within 45 days.

In the period between 1 April 2006 and 19 September 2006, when the PRB was formally established but not yet operational due to the lack of a quorum, 464 appeals were received. About 200 of those appeals still unresolved. The PRB plans to deal with all backlog cases by the end of 2008.

In 2007 the PRB received in total 1,144 appeals, and 1,215 cases were solved.

In 2007 in total 44 procedures against PRB decisions were initiated before the courts (as compared with six procedures in 2006). Of the 44 only five cases have been decided by the courts (four in favour of the PRB); the remaining 39 cases are still pending.

Both the number of cases submitted to the PRB (in relation to the total number of procedures launched) and the number of PRB decisions appealed against before the courts appear to be within the regular trends that are common for the region.

5.2 External audit

External audit activities are carried out by three supreme audit institutions (SAIs), which are competent respectively for BiH State, BiH Federation (FBiH) and Republika Srpska (RS). The SAIs have set up a Co-ordination Board in order to ensure the consistency of audit standards and audit quality and to determine audit responsibilities in the case of joint activities.

In general no specialist audits of procurement procedures have been carried out, but auditors have worked closely with the PPA on procurement issues and have found a number of PPL violations during normal financial audits. In some cases the violation was considered to have been the result of a lack of practical understanding of the new law, together with the perceived inflexibility of the law whenever authorities needed to carry out procurement quickly for a large number of small-value contracts.

Auditors also drew attention to the impact of delays in the adoption of annual budgets, which often made it very difficult to award contracts in accordance with the law. In some cases, in particular for larger-value contracts where some political involvement in contract decisions occurred, there was evidence of preference that could be considered to have involved corruption.

5.3 Integrity of procurement operations

While the PPL includes no specific requirements related to the fight against corruption in public procurement, much of the strict regulation referred to elsewhere in this report has the effect of making the corrupt use of procurement procedures more visible.

Auditors referred to a number of cases where they had identified breaches in procedures, and it has been their practice to refer any suspicion of criminality to the relevant authorities. In the case of the Federation, adverse audit reports were made public, thereby ensuring transparency.

There was anecdotal evidence from suppliers of a considerable incidence of corruption in public procurement in BiH, a view that has been reflected in the experience of the World Bank.

An anti-corruption body has been created within the Ministry of Security, but its involvement in procurement operations is unclear.

Formally, in accordance with the PPL, the review and remedies system is acceptable, but in practice the remedies system represents the weakest part of the public procurement system and requires urgent attention by the government. A number of amendments to the PPL are proposed, including the shortening of time-limits for the effectiveness of decisions by the PRB, but the foreseen date of adoption of these amendments by parliament remains unclear. The organisation of the PRB, in particular in terms of support staff, needs to be enhanced considerably. The legal situation of the PRB should be stabilised. The further recruitment of PRB members is required, so that the PRB reaches its foreseen capacity of six members.

6. Capacity to Further Develop the Public Procurement System

In general, the public procurement system of Bosnia and Herzegovina has developed in the right direction over the past three years, with the adoption of new legislation based on the EC directives, including secondary legislation, and the establishment of the Public Procurement Agency (PPA) and the Procurement Review Body (PRB).

There is an urgent need to resolve the situation following the BiH State Parliament's rejection of the amendments to the Public Procurement Law (PPL), which are still clearly necessary to allow better alignment between the EC Directives and the BiH legal system, as well as to support the development of professional procurement in BiH.

Urgent action is needed to correct the weaknesses identified in the review systems, and care is needed to ensure that adequate support is provided to the PPA. The twinning-light projects that have just started with both the PPA and the PRB will help, but further support is likely to be needed.

While the understanding of the PPL by suppliers and contracting authorities seems reasonable, further training and professional capacity-building is likely to be needed, particularly if a new PPL is enacted.

7. Summary and Next Steps

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

- The state government should revise the PPL in order to further align it with the EC Directives and with international good practice, especially by introducing procedural simplifications in the PPL, and adopt practical implementation tools. Most of the attention in aligning the PPL to the current EC Directives should be focused on providing flexibility to bodies, as covered by 2004/17/EC, and on the flexible implementation of provisions regarding framework agreements and central purchasing bodies.
- The work of the previous year in building the capacity of the PPA should be continued – the twinning-light project should help in this regard. The PPA will nevertheless still need further resources to carry out its functions efficiently. The constraints on the PPA's resource requirements are likely to increase as a result of the need to revise the PPL.

The current review mechanism is the weakest part of the BiH implementation process, and action needs to be taken by parliament to appoint the two remaining PRB members provided for in the PPL, increase the number of support staff, and improve the effectiveness of its operations.

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

- The procurement function at operational level should be further strengthened and professionalised by institutionalising training and education in public procurement, introducing new ways of organising and managing procurement processes within contracting entities, and improving the services of the PPB. Supplier understanding of, and confidence in, the law would also be enhanced by training and briefing. The PPA should play a key role in the process.
- Consideration should be given by the PPA to the development of the instruments and methods set out in the new EC Directives (e.g. framework agreements and, in due course, e-procurement) and to the provision of support for their practical implementation.