



## **2<sup>nd</sup> Preparatory Meeting under the 20<sup>th</sup> Economic and Environmental Forum, Dublin 23-24 April 2012**

### **Session III: Promoting sound management of public resources and budget spending**

### **Public Procurement System in Bosnia and Herzegovina**

#### **Public Procurement Law**

The main legal act regulating award of public contracts in Bosnia and Herzegovina is the Public Procurement Law (PPL) of Bosnia and Herzegovina published in the *Official Gazette* of BiH no. 49/04 on 2 November 2004. The BiH Public Procurement Law 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 Directive 93/38/EEC (utilities). The Directives currently in force in the EU (2004/17 and 2004/18) have not been transposed.

PPL is to be applied by:

- any administrative authority at the State, entity, cantonal, city or municipal level,
- public entities established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, having legal personality and dependent, controlled or financed by contracting authorities mentioned above (bodies governed by public law),
- public undertakings operating in the water, energy, transport and telecommunication sectors.

#### **Public Procurement Agency**

The Public Procurement Agency was established by the 2004 PPL as one of two institutions at state level responsible for implementation of the public procurement system. The other institution is the Public Review Body. The PPA has been established as an independent administrative organisation with legal personality and directly responsible to the government. The PPA's function is to ensure proper application of the PPL. In particular, it is responsible for:

- proposing amendments to the PPL and its Implementing Regulations;
- reinforcing 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 to be used by contracting authorities;
- 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 electronic information system to supplement the *Official Gazette*;
- initiating and supporting the development of electronic procurement and communication within the field of public procurement;
- publishing training information, manuals and other aids for professional development in public procurement;
- maintaining a register of accredited trainers in public procurement; and
- submitting annual reports to the Council of Ministers of BiH.

The PPA has a director and a board. The board is composed of seven members and two observers. The role of the board is to consider acts that refer to the public procurement system and give approval for Implementing Regulations produced by the Director of the PPA.

In keeping with the adopted *Strategy of Bosnia and Herzegovina Public Procurement System Development for the Period 2010-2015* (Strategy) and 2010 Work Plan of the Public Procurement Agency, one of the priorities is further harmonisation of the legislative framework, since adoption of the new PPL is expected to transpose the EC Public Procurement Directives.

The PPA is active in the dissemination of information, issuing written opinions concerning the application of PPL provisions as well as organising meetings with representatives of contracting authorities. The PPA publishes a selection of its opinions on its website under FAQ. Models of standard tender documents for supply, works and services are also uploaded on its website, and are widely used by contracting authorities. The PPA offers a help phone desk where employees answer questions from contracting authorities or economic operators. The help phone desk is available Tuesdays (branch office in Banja Luka), Wednesdays (branch office in Mostar) and Tuesdays (Sarajevo).

Procurement procedure monitoring is one of the components in the competences of the PPA: the Rulebook on Monitoring of Public Procurement Procedures (*Official Gazette* no. 48/08) defines the source and scope of monitoring conducted by the PPA. Monitoring activities are focused on legal compliance of individual award procedures carried out by contracting authorities and examine value of procurement, severity of irregularities and indirect significance. Among the functions of PPA is establishing systems for monitoring the compliance of contracting entities with the Public Procurement Law (PPL) as well as collecting, analysing and publishing information on public procurement procedures. The PPA analyses procurement notices (no monitoring TD), etc. As a result, the PPA gains a comprehensive overview of irregularities that take place throughout the administration on both the national and the entities level. Another important function of the PPA is publishing manuals and guidelines, development of standard forms and models in order to assist contracting authorities. The handbook outlines typical indicators of possible corrupt activities, their consequences and suggested countermeasures.

BiH's business community perceives the practice of public procurement as frequently unprofessional and prone to corruption and political pressure.

### ***Preventing corruption in public procurement system in Bosnia and Herzegovina***

Inter-agency co-operation focused on prevention and suppression of corruption is present, but not adequate. There is necessity for close, everyday co-operation between institutions of the public procurement system (PPA, PRB) and the bodies in charge of investigating and prosecuting corruptive activities (existing or one to be established, e.g. State Investigation and Protection Agency (SIPA), Ministry of Interior Affairs). Nevertheless, established inter-agency co-operation mechanisms are a good starting point for gradual elimination of corruption in public procurement.

Comprehensive training is central to the suppression of corruption for contracting authorities, and tenderers, but also for other important stakeholders such as media. However, all activities of bodies within the public procurement system on overall strengthening of the system should be also considered as activities to suppress corruption. Therefore, bodies within the public procurement system should be

conducting awareness-strengthening activities, especially those focused on contracting authorities and tenders.

In five cases, the Procurement Review Body submitted against contracting authorities criminal charges i.e. reports on committed criminal deeds to the competent prosecutors' offices on the basis of doubt on committed criminal deeds in public procurement; and only in one case, in the beginning of March 2011, the Procurement Review Body submitted against a contracting authority to the competent prosecutor's office a criminal charge i.e. report on committed criminal deed to the competent prosecutor's office on the basis of doubt on committed criminal deed in public procurement.

### ***The main risk for corruption in public procurement***

#### *Conflict of Interest*

No special conflict of interest rules apply to public officials involved in the public procurement procedures. Section 27, Clause 2 of the Law on Public Procurement for Bosnia and Herzegovina obliges contracting authorities to act in accordance with the relevant legislation of BiH or related internal rules in case of actual or possible conflict of interest.

The Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina governs the obligations of elected officials, executive officeholders and advisors in the institutions of the government of Bosnia and Herzegovina. Thus members of procurement commissions would almost never be covered by the law.

One specific conflict of interest disclosure provision, which concerns particularly public procurement, is found of the Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina requiring that „a bid on procurement of goods and services made to the Government by a public or private enterprise shall be accompanied by a written statement together with a list of any contributions to political parties that the enterprise has made within the preceding two years. The statement shall also list all elected officials, executive officeholders and advisors who have been employed by, or served on the management board, steering board, supervisory board, executive board, or acted in the capacity of an authorized person of the enterprise within the preceding two years.”

#### *Public procurement contracts*

The PPL does not contain any specific provisions dealing with the issues of procurement contracts. It states only that the contract should be awarded to the qualified supplier who submitted the best evaluated offer in accordance with predetermined and published criteria (the lowest price or the most economically advantageous tender).

#### *Technical specifications*

Subject matter of public procurement should be described in a non-discriminatory way to allow unrestricted, genuine competition. Technical specifications used to describe the subject matter of public procurement should respect the rules provided in Article 56 PPL draft, which offers the flexibility (including functional specifications, environmental features and energy efficiency) called for in the Directives 2004. In such a case, the CA must make it clear that it will accept, notwithstanding the specific reference, equivalent products, services or works.

#### *The role of procurement commissions*

In accordance with good international practice, PPL requires public procurement procedures to be conducted by procurement commissions (although the final decision is always the responsibility of the head of contracting authority).

Implementing regulations define also in a general way obligations of the procurement commission, by stating in particular that the commission functions on behalf of the contracting authority within the scope of the powers granted to it; its role is to provide the contracting authority with a recommendation together with a report on work and a statement of reasons supporting that recommendation; the final decision on the award of the contract remains the responsibility of the contracting authority which is to be held accountable for the procurement.

## ***Conclusion<sup>1</sup>***

The PPA is not an anti-corruption agency and it is not supposed to be. Given the experience of the PPA in monitoring the implementation of public procurement procedures, as a source of expertise it should cooperate closely with the new Agency for Corruption Prevention. There is a need of more training by PPA for contracting authorities and for economic operators. Also more data and analysis of typical violations are needed: there seems to be a trend noted by auditors that there are less violations of procedures, but this does not necessarily mean less corruption. It can be that the actors simply learned to use/abuse procedures. The PPA should become a valuable source of information and advice for the Agency for Corruption Prevention and thus help it design new methods for the identification of signs of corruption and develop preventive measures.

Future steps in developing the public procurement system will include, among other things, the implementation of the e-procurement system and specific and targeted training and detection measures in contracting authorities.

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<sup>1</sup> This document used particular statement from the SIGMA document “Mechanisms for ensuring integrity in public procurement in Bosnia and Herzegovina“