

Public Procurement

An overview of regulation in
37 jurisdictions worldwide

Contributing editor: Hans-Joachim Prieß



Freshfields Bruckhaus Deringer

2013



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Public Procurement 2013

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Public Procurement 2013
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
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First published 2005
Ninth edition 2013
ISSN 1747-5910

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Kosovo

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Legislative framework

1 What is the relevant legislation and who enforces it?

Public procurement in Kosovo is regulated by Law No. 04 /L-042 'On Public Procurement in Republic of Kosovo', dated 19 September 2011 (the Law on Public Procurement – PPL). This law must be observed by persons, economic operators, undertakings, contracting authorities, works concessionaires and public bodies conducting, or involved, participating or interested in, a procurement activity involving or relating to the use of such funds or resources.

2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

Kosovo is not an EU member state, thus the EU Procurement Directives are not applicable in Kosovo.

3 Are there proposals to change the legislation?

The National Council for Economic Development of Kosovo undertook on 19 October 2012 to amend the present Law on Public Procurement to support national companies and their products by state institutions during public procurements. To date the stakeholders have not taken any concrete action to amend the law.

4 Is there any sector-specific procurement legislation supplementing the general regime?

No. There is no specific procurement legislation for military equipment, but the present public procurement law envisages special rules for diplomatic and consular missions.

Applicability of procurement law

5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

According to article 4(1)(13) of the Law on Public Procurement, a contracting authority is defined as: a public authority, public service operator, public undertaking or any person, committee or private company operating on the basis of a special or exclusive right, or undertaking carrying out a procurement activity on behalf of or for the benefit of a public authority, public service operator or public undertaking. Moreover, among public bodies and authorities, publicly and socially owned companies and other private entities operating based on exclusive rights, such as concessions or privatised public services (eg, telecommunications or public infrastructure) are obliged to conduct procurement activities based on Public Procurement Law. The entities that are excluded from implementation of provisions of the procurement law are private entities that have privatised socially owned companies.

6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

Pursuant to article 4(1)(13) of the Law on Public Procurement, entities mentioned in the definition of 'contracting authorities' have the status of a contracting authority in dispute.

7 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

According to article 19 of the Law on Public Procurement, the set threshold for the classification of contracts is the following:

- high-value contract:
 - a supply contract or a service contract with an estimated value equal to or greater than, or can reasonably be expected to be equal to or greater than, €125,000; or
 - works contracts with an estimated value equal to or greater than, or can be reasonably expected to be equal to or greater than, €500,000;
- medium-value contract:
 - a supply contract or a service contract with an estimated value equal to or greater than, or can reasonably be expected to be equal to or greater than, €10,000 but less than €125,000; or
 - works contracts with an estimated value equal to or greater than, or can be reasonably be expected to be equal to or greater than, €10,000, but less than €500,000;
- low-value contract:
 - any public contract with an estimated value equal to or greater than, or can reasonably be expected to be equal to or greater than, €1,000, but less than €10,000; and
- minimal-value contract:
 - any public contract with an estimated value which is less than, or can reasonably be expected to be less than, €1,000.

Moreover, the same monetary thresholds are also applicable to design contests.

8 Does the extension of an existing contract require a new procurement procedure?

Pursuant to the PPL, in cases where the procurement activity is concluded by a contract, a negotiated procedure may be applied without publication of a contract notice provided that the contracting authority has obtained a formal written authorisation from the higher contracting authority, namely the Public Procurement Agency with the relevant provisions for such circumstances. Moreover, article 35 of the PPL stipulates that the public contract may be awarded through negotiated procedure without publication of notification to one economic operator for artistic or technical reasons, or for protection of intellectual property and if it is justified with extreme urgency.

- 9** Does the amendment of an existing contract require a new procurement procedure?

A public framework contract shall not be extendible or renewable and its terms may not otherwise be changed.

If an economic operator has already submitted a tender, such an economic operator shall be permitted to submit an amendment to such a tender, but such an amendment shall be limited to changes that are reasonably related to such additional or clarifying information.

Any eventual amendment to an existing contract does not require for a new procurement procedure though such cases are rather unusual and rare in public procurement practices in Kosovo.

- 10** May an existing contract be transferred to another supplier or provider without a new procurement procedure?

The existing contract may not be transferred to other entities without a new procurement procedure. According to article 30 of the PPL, the tenderer must indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors. Such indication has no effect on the contractual liability of the tenderer in relation to the contracting authority or others.

- 11** In which circumstances do privatisations require a procurement procedure?

According to Law No. 03/L-087 'On Public Owned Enterprises', the tender for privatisation of publicly owned enterprises procedure shall be opened in accordance with the Public Procurement Law.

- 12** In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

The PPP Law envisages that the contracting authority shall apply a procurement procedure at the invitation of pre-selection proceedings.

Furthermore, pursuant to article 17(5) of Law No. 04/L-045 'On Public-Private Partnership', the procedure for appointment of the transaction advisers is conducted in accordance with the Law on Public Procurement.

Moreover, according to article 14(1) of the PPP Law, a public authority that is conducting a procedure leading to the award of a works concession, the value of which equals or exceeds €6.242 million excluding value added tax, shall also comply with the publication and advertisement requirements set forth in the Law on Public Procurement.

In addition to this, article 46 of the PPP Law provides that complaints and review procedures by the Procurement Review Body shall be conducted in accordance with PPL.

- 13** What are the rules and requirements for the award of works or services concessions?

Based on article 3(5) of the PPL, procurement activities leading to the award of a service concession contract shall be governed by the PPP Law. Such procurement activities shall be subject to PPL to the extent specified in the PPP Law. For further explanations in this respect please refer to the answer to question 12.

- 14** To which forms of cooperation between public bodies and undertakings does public procurement law not apply and what are the respective requirements?

According to article 3(3) of the PPL, this law shall not apply to an employment contract if such a procurement activity is subject to other rules that are established by a law or other regulation. Similarly, current law will not apply to contracts in relation to postgraduate

training or vocational training by employers for specific skills development of individual workers. Furthermore, the law shall not apply to procurement solely aimed at representation in the form of offering food and beverage.

Moreover, the provisions of PPL shall not apply to contracting authorities for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon, unless otherwise foreseen by special laws.

The procurement procedures

- 15** Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

Yes. Article 7 of PPL endorsed fundamental principles in this regard. The fundamental principles are equal treatment and non-discrimination, transparency and competition.

- 16** Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The PPL is intended to promote the establishment of an institutional culture of unbiased, ethical and materially disinterested professionalism among all public officials, civil servants and other persons conducting or involved in a procurement activity by requiring such individuals to conduct themselves in a manner that is informed solely by the objective of achieving the most efficient, cost-effective, transparent and fair use of public funds and public resources while strictly complying with the procedural and substantive requirements of the PPL.

- 17** How are conflicts of interest dealt with?

Conflict of interest in Kosovo is regulated by Law No. 04/L-051 'On Preventing Conflict of Interest in Exercising Public Function'. Based on this law, definition of conflict of interest is determined as the situation of non-compliance between the official duty and the private interest of an official, where while exercising its function the official or related person has private wealth interest or personal non-wealth interest, direct or indirect interests that influences or may influence in correctly accomplishing the public function when in situations of possible violations of principles, limitations, or obligations under the provisions of the present Law. Article 15 of this law sets forth an obligation for officials or managing institutions to prevent any situation of conflict of interest. In order to avoid conflict of interest this law stipulates an obligation to refer it to the Kosovo Agency for Anti-Corruption.

- 18** How is the involvement of a bidder in the preparation of a tender procedure dealt with?

An economic operator shall not be eligible to participate in a procurement activity or in the performance of any public contract if such economic operator, or any employee, executive, manager or director thereof, received assistance in preparation of its tender or a request to participate from a person or undertaking who participated in the preparation of the concerned contract notice or tender dossier.

- 19** What is the prevailing type of procurement procedure used by contracting authorities?

Unless otherwise determined with special provisions of the PPL for using different procurement procedures, a contracting authority shall select and use open or restricted procedure when conducting procurement activities leading to the award of a public contract.

20 Can related bidders submit separate bids in one procurement procedure? If yes, what requirements must be fulfilled?

No. If a tender is submitted by a group, the group is required to submit its tender with a signed statement from each of the members, confirming their participation in the group and that they do not participate in any other group taking part in the same procurement procedure. Therefore, in our opinion, related bidders cannot bid separately or in consortium with other groups.

21 Are there special rules or requirements determining the conduct of a negotiated procedure?

PPL recognises two types of negotiated procurement procedures, Negotiated Procedures after Publication of a Contract Notice and Negotiated Procedures without publication of a Contract Notice.

According to article 34 of the PPL, a contracting authority in exceptional cases may use negotiated procedure after publication of contract notice on the basis of it being objectively verifiable due to the nature of the services (financial, insurance, banking or intellectual work) or risk. The negotiation shall serve for the contracting authority to adopt its tender or proposal.

A contracting authority that is a public authority or a public undertaking may use Negotiated Procedures without publication of a Contract Notice to conduct a procurement activity only after it has complied with article 34 and received a written authorisation from the Public Procurement Agency.

22 When and how may the competitive dialogue procedure be used? Is it used in practice in your jurisdiction?

Please note that Kosovo's public procurement legislation does not provide for the application of competitive dialogue, though we consider that the 'negotiated procedure after publication of contract notice' is the most similar type of procurement activity applied in Kosovo.

In such cases, the contracting authority shall then negotiate with each tenderer to try to adapt its tender or proposal to the requirements that the contracting authority has set out in the contract notice and the tender dossier.

23 What are the requirements for the conclusion of a framework agreement?

A public framework agreement may not be awarded through the use of any other procedure except open, restricted or negotiated procedures. A public framework agreement can be awarded by a contracting authority only when it plans to award several identical agreements over the period to be covered by the public framework agreement and the conclusion of a public framework contract covering such contracts would reduce the procurement and administration costs of the contracting authorities concerned.

24 May a framework agreement with several suppliers be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

The PPL envisages the possibility to open mini-tenders under the framework agreement where part of the mini-tenders can only be economic operators that are under framework agreement. This is conditioned participation of at least three economic operators. In this respect additional competitive procedure for mini-tenders is not required.

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

A member of the group of economic operators may change during the procurement activity at any time prior to the award of the contract providing that the new member meets in total the exact requirements in terms of the specific expertise, financial viability or other specific requirements as set forth for that procurement activity.

26 Are unduly burdensome or risky requirements in tender specifications prohibited?

According to article 7(3) of the PPL, the contracting authority shall ensure the elimination of practices, criteria, requirements and technical specifications that discriminate in favour or against one or more economic operators. Therefore in our interpretation burdensome or risky requirements in tender specifications are prohibited.

27 What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

Pursuant to procurement rules the contracting authorities must ensure the following when they conduct the assessment process of the tenderers qualifications:

- accordance with best international practice;
- provision for adequate competition and transparency;
- implementation of the principle of non-discrimination; and
- compliance with all applicable provisions of the laws and procurement rules in Kosovo.

28 Are there specific mechanisms to further the participation of small and medium enterprises in the procurement procedure?

According to article 5(g) of Law No. 02/L-05 'On Support to Small and Medium Enterprises', the government of Kosovo through the Agency for Supporting SMEs shall create a favourable environment for SMEs by ensuring that SMEs are provided with fair and non-discriminatory opportunities to compete for public procurement contracts.

To date there is no specific mechanism for SME participation in the procurement procedure. But as mentioned in question 3, SMEs may benefit from the planned proposal to amend the PPL to support national companies.

29 What are the requirements for the admissibility of alternative bids?

In practice, alternative tenders are permissible provided that the work plan variations do not exceed or breach the overall project benchmarks or objectives.

Where a tenderer wishes to submit a tender involving modifications that are not specifically provided in the tender invitation, it should be submitted as an 'alternative tender', which is required to be in conformity with the tender invitation and be fully priced showing how and where costs would differ.

30 Must a contracting authority take alternative bids into account?

Provided that the alternative tenders are submitted in compliance with the legal requirements as set out above, the contracting authority is obliged to take into account such alternative tenders.

31 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

In the absence of clearly defined guidance in the procurement legislation on this question, we quote the following article:

If a tenderer can show in his tender, by any appropriate means (such as a technical dossier or a test report by an independent third party), that the solution proposed by the tenderer satisfies in an equivalent manner the requirements defined by a technical specification, a contracting authority may not reject a tender on the grounds that the product or service tendered does not comply with a technical specification.

Based on the above we consider that there are no consequences if the bidder changes tender specifications pursuant to its business company requirements.

32 What are the award criteria provided for in the relevant legislation?

Pursuant to relevant legislation the award criteria are the following:

- that the contract shall be awarded to the economic operator submitting the lowest-priced tender; or
- that the contract shall be awarded to the economic operator submitting the most economically advantageous tender.

33 What constitutes an 'abnormally low' bid?

An 'abnormally low' tender is considered, upon objective review, one that gives rise to a reasonable belief that the economic operator has submitted an unperformable tender. According to article 61 of the PPL, if an economic operator submits a tender that, considered objectively, is or appears to be abnormally low, the contracting authority shall send a written request to the tenderer asking for the tenderer to supply a written submission providing a detailed breakdown of the relevant constituent elements of the tender and explanations.

34 What is the required process for dealing with abnormally low bids?

In such cases, the contracting authority shall send a written request to the tenderer asking for the tenderer to supply a written submission providing a detailed breakdown of the relevant constituent elements of the tender and explanations, addressing any of the matters described in paragraph 2 of article 61 of the PPL, regarding the bases for its tender.

35 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Applicable legislation does not provide for a clear guidance on this matter, though in our reading and understanding of the relevant provisions we have reason to believe that 'self-cleaning' is not applicable as such unless it is accompanied by the evidence of the relevant authorities.

Otherwise, we deem it necessary to stress that the history of public procurement legislation is less than 10 years old in Kosovo and some of the measures that may be imposed on economic operators have a duration of 10 years. So in practice there are not many (if any) precedents of regaining suitability status in Kosovo.

Review proceedings and judicial proceedings

36 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

The only authority entitled to review applications in procurement activities is the Public Review Body (PRB). According to article 119 of the PPL, the complainant may request the Administrative Department of the Basic Court of Pristina to review such a decision.

37 How long does an administrative review proceeding or judicial proceeding for review take?

Administrative review proceedings take 30 days, according to administrative procedure. As to judicial review, there is no legal term that obliges the Administrative Department of the Basic Court of Pristina to issue a decision with regard to judicial review procedure. Based on our experience, these cases may last longer than one year.

38 What are the admissibility requirements?

The admissibility requirements are:

- the application for review shall be submitted within the deadline of 10 calendar days foreseen by the PPL; and
- formal condition of complaint as envisaged by the PPL.

39 What are the deadlines for a review application and an appeal?

The PRB shall issue its final written decision, together with a written statement of the factual and legal bases justifying such decision, and any order required to give effect to such decision, not later than 15 days following the expiry of the time limit.

40 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

Unless and until the concerned review panel makes another determination in writing, the filing of a complaint shall automatically require the concerned contracting authority to suspend the conduct of the procurement activity to which the complaint relates.

Notwithstanding the foregoing, if requested by the contracting authority, the president of the PRB may issue an order removing the automatic suspension required above taking into account the probable consequences of such a suspension for all interests likely to be harmed, including the public interest and the complainant's interest.

41 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

Whenever a contracting authority eliminates a candidate or tenderer from further participation in a procurement activity, such contracting authority shall immediately notify such candidate or tenderer in writing.

Such notification must at least contain information specifying such reasons in accordance with the following:

- in the case of an eliminated candidate, the statement shall specify the reasons for the rejection of that candidate's request to participate;
- in the case of an eliminated tenderer who was eliminated for submitting an irregular or otherwise non-responsive tender, the statement shall specify the deficiencies in such tender; and
- in the case of an unsuccessful tenderer who submitted a responsive tender, the statement shall specify the characteristics and relative advantages of the winning tender and the name of the winning tenderer.

42 Is access to the procurement file granted to an applicant?

Upon the request of any person, a contracting authority shall provide such a person prompt and reasonable access to the records.

43 Is it customary for disadvantaged bidders to file review applications?

No.

Update and trends

Following the restructuring of the entire judicial system under Law No. 03/L-199 on Courts, the competence to review decisions of the Public Review Body has been transferred from the Supreme Court of Kosovo to the Administrative Department of the Basic Court of Pristina, at the national level.

Furthermore, on 19 October 2012 the National Council for Economic Development of Kosovo undertook to amend the present Law on Public Procurement to support national companies and their products by state institutions during public procurement activities.

- 44** May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

A public contract or design contest may be voidable, in whole or in part, by the PRB or the Administrative Department of the Basic Court of Pristina if any of these bodies determines that a public contract has been granted in violation of the PPL.

- 45** Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Legal protection is available in both criminal and administrative procedures.

- 46** If a violation of procurement law is established in an administrative or judicial review proceeding, can disadvantaged bidders claim damages? If yes, please specify the requirements for such claims.

Yes. If an allegation made by the complainant is determined to be valid, the PRB may:

- assign a member to calculate, in accordance with the applicable normative acts, the damages, if any, suffered by the complainant as a result of the violations committed by the concerned contracting authority; and
- issue an order requiring such contracting authority to pay the amount of such damages to the complainant.

Moreover, if a court or the PRB finds that there is substantial evidence of wrongful conduct (such as failing to meet the eligibility criteria) by the economic operator that prevailed in the original procurement activity, they may require such economic operator to pay damages to the contracting authority or other economic operator harmed by such conduct.



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