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ASSESSMENT

FORMER YUGOSLAV REPUBLIC OF MACEDONIA

2011

PUBLIC PROCUREMENT

Main Developments since the Last Assessment (May 2010)

The legal framework in the former Yugoslav Republic of Macedonia (FYRoM) with regard to **public contracts** has stabilised in recent years, with a few minor amendments in August 2010 and April 2011¹ to the Public Procurement Law (PPL), which are mainly linked to changes in the Budget Law and in the Criminal Code. The improvement of models of standardised tender documentation has continued. The Rulebook on the Manner of Using the Electronic System of Public Procurement was amended² so as to harmonise with the legal regulations on the protection of personal data and to introduce the most economically advantageous tender (MEAT) as alternative award criterion in reversed electronic auctions as from 2011.

This trend is to be linked to the progressive move towards the systematic use of e-auctions that has been pursued, with the initial target of 70% in 2011 and 100% in 2012. However, the use of e-auctions is no longer defined with regard to “the estimated value of the planned procedures for awarding public contracts” but rather “from the number of published contract notices”, a requirement that is slightly more flexible. The objective *per se* is nevertheless questionable, because the whole procurement system runs the risk of being “adjusted” exclusively to reach the single objective of 100% e-auctions, thus reversing the proper logical order, according to which an e-auction should simply be an alternative technique for the award of a contract.

The strengthening of the administrative capacity of the Public Procurement Bureau (PPB) has continued. Seven additional staff joined the Bureau in 2010 and four in 2011, meaning it now employs 22 full-time employees. Training of both the existing and the newly employed staff is a continuous activity. The PPB is also participating in the IPA multi-beneficiary project on “Training in Public Procurement in the Western Balkans and Turkey” organised by the European Commission.

With respect to contracting authorities and economic operators, 18 training courses were held by the PPB in 2010 and were attended by 354 participants from 173 contracting authorities and 17 economic operators. In 2011, 4 sessions involving some 80 people have already been organised at the time of writing (April). On average 20 persons attended each session. In addition to the original six training modules, a seventh module on conflict of interest and corruption in public procurement has been provided since February 2011. Furthermore, seven sessions, attended by 540 participants in January 2011, introduced the new concept of e-auctions using the MEAT award criterion. Active support has also been provided by the PPB through a call center, as well as through a Question and Answer facility provided by the Electronic System for Public Procurement (ESPP).

Despite these important and continuous capacity building efforts, concerns remain about the practical implementation capacity at the level of contracting authorities.

With regard to the award of **concessions and public-private partnerships (PPPs)**, much of the activity in this area has not been reported and has also not been recorded in a single register, despite a requirement in the law No. 7/2008 that is currently in force, under the responsibility of the Ministry of Finance. The Ministry of Transport is currently seeking tenders for a highly significant project of privately financed highways, with an estimated investment value of 1bn EUR (advertisements have been placed in the international media and in the *Official Journal of the European Union*). Large power generation projects are either in preparation or in the process of procurement by ELEM, the state-owned electricity utility. A total of 47 smaller power generation projects have been implemented, most of which were hydroelectric schemes, following announcements in the *Official Gazette of the Republic of Macedonia* and in the *Financial Times*. The Ministry of Economy (MoE) has

¹ Official Gazette of the Republic of Macedonia”, nos. 97/2010 and 53/11.

² Official Gazette, no. 170/2010.

advertised a further 44 opportunities, with an estimated combined investment value of 63m EUR, with a deadline for expressions of interest in May 2011.

The capacity of the unit for concessions and PPPs in the MoE remains limited to only one person (no developments in this regard).

Concerning **review and remedies**, two new employees joined the State Appeals Commission (SAC) for public procurement in 2010, and its total number of staff is now 12 (foreseen full staffing level: 19). The SAC's administrative capacity has been further developed by a number of actions for economic operators, including the preparation of a *Guide on Legal Protection in Public Procurement Procedures*. The SAC's hardware and software facilities, especially a Document Management System (DMS), are being elaborated in the framework of a project funded by the United Kingdom. There has been good progress towards the SAC's development as a mature review authority.

Main Characteristics

The key institutions for ensuring fair and transparent public procurement in fYRoM are the following:

- Public Procurement Bureau (PPB), a separate legal entity within the Ministry of Finance in charge of public contracts;
- State Appeals Commission (SAC), in charge of review and remedies;
- Ministry of Economy, responsible for preparing a new Law on Concessions and PPPs;
- State Audit Office (SAO);
- State Commission for Prevention of Corruption (SCPC).

The Public Procurement Law (PPL) ensures a high level of harmonisation with the *acquis communautaire* and is well on the way to being in full compliance with the EC Directives. The PPL covers the classical and utilities sectors and all types of procurement (works, supplies and services), except for concessions. The rules concerning the utilities sector are provided in a separate chapter. The PPL also contains provisions for remedies and for the establishment and operation of the State Appeals Commission (SAC) and the Public Procurement Bureau (PPB).

The PPL largely follows the logic of the EC Directives in a co-ordinated fashion and regulates the procurement process from the planning of procurement until the conclusion of the contract. Furthermore, most of the provisions of the law have the same or very similar wording as the provisions in the Directives. There are still some issues to be resolved concerning a few conceptual differences, imprecise implementation of some of the provisions of the Directives, and minor gaps in the implementation of some relevant details of the Directives. Some provisions of the Directives have not been fully transposed (mostly those provisions dealing with utilities and remedies). A set of 15 pieces of secondary legislation has been issued on the basis of the PPL since it was enforced in order to facilitate its implementation. In this regard, the PPB has already taken steps towards incorporating a more in-depth view of procurement in its strategy for the period 2010-2012. The added aspects include training for economic operators in addition to the training provided for contracting authorities. The focus of training has been widened to cover aspects that are outside the scope of public procurement legislation but that affect procurement discipline to a large extent. Issues related to corruption and codes of ethics are the first steps towards a more comprehensive view of issues that have an impact on the procurement field. In addition, the PPB provides standard tender documents and standard contracts on its website for the disposal (not mandatory) of contracting authorities and it has added some sectoral guidelines and standard tender documents.

The total value of the procurement market in Macedonia amounts to EUR 743 million (11% of GDP), and the government and other public institutions are the main trading partners for many businesses.

Compared with 2008, when the most economically advantageous tender (MEAT) criteria were used in 85% of procurement procedures, there is clearly a declining trend (74% in 2009, 56% in 2010), as a result of the large scale use of e-auctions. Such trend could undermine the effectiveness and economy of public procurement by neglecting quality and long-term costs. Whilst there would be compensating factors if quality was integral to technical specifications, only rarely does that appear to be the case. That situation might change in 2011, as e-auctions have been developed using the MEAT criteria in addition to the lowest price auctions that have been used by contracting authorities so far.

The Public Procurement Bureau (PPB) is a key institution, and although it has neither sufficient staff nor adequate premises, it has certainly proven its ability, skills and capacity to develop the public procurement system. The PPB is proactive and is regarded by the procurement community and throughout the administration as being supportive and knowledgeable.

The State Appeals Commission has successfully managed to establish itself as a respected institution and to cope with its workload. There are no delays in decision-making, it is transparent (decisions are published online), and the legal basis of decisions is properly explained. However, it is important that the SAC continues to receive sufficient organisational and budgetary support, especially including the possibility of seeking the technical expertise of independent specialists where necessary.

It appears that until now, when auditing procurement processes, the State Audit Office (SAO) tends to focus on procedural compliance and less on value-for-money issues. In some cases it interprets the requirements of the PPL in a formalistic manner. This approach potentially has a negative secondary effect on the procurement practice of contracting authorities (CAs). As CAs try to avoid criticism by the SAO, even when the law permits the exercise of discretion in the procurement process, they are more likely to refrain from anything that is not explicitly allowed, in a legalistic, often overly bureaucratic way. This is another obstacle to procuring value-for-money. However, the SAO will from now on also develop performance audit in the field of public procurement.

Of the approximately 1,000 complaints received in 2010 by the State Commission for Prevention of Corruption (SCPC), only 31 were procurement cases. Seven procurement cases were referred to the public prosecutor, with recommendations for criminal procedures. According to the SCPC, these cases terminated at the public prosecutor's level. Three out of 34 dismissals of officials from the civil service concerned procurement cases.

The SCPC has been heavily involved in training under the State Programme on Conflict of Interest. This training has been delivered to all municipalities throughout the country, and has included the participation of mayors, counsellors and key officers. The training covers nine areas of risk, with procurement identified as an issue in three of these nine areas. The training offered by the Public Procurement Bureau (PPB) also covers a module on conflict of interest developed in co-operation with the SCPC.

Public procurement is acknowledged as a high-risk area for corrupt practices. The general training and support provided by the PPB and the consequent increased professionalism of procurement officers are also helping to reduce the potential for corruption. The implementation of training on conflict of interest and the proposed national policy and action plan on integrity in public procurement are other important and positive elements in tackling this issue.

The framework in fYRoM for concessions and public-private partnerships (PPPs) remains the most obvious weakness of the public procurement system, and further support and improvements to the legal and institutional arrangements will be necessary in order to arrive at a fully functioning system

that would be comparable to the standards in many EU Member States. There are examples of PPP-style projects in the country, some of which are quite impressive, but these projects are being supported mainly by international financial institutions (IFIs), and they relate mainly to very substantial infrastructure projects. Effective and efficient PPPs that are prepared and procured by public bodies in fYRoM and supported by private equity and debt financing from commercial banks still remain a future prospect.

A second, substantial current concern in the area of concessions and PPPs is the absence of effective institutional co-ordination, as reflected by the absence of data attached to this report.

Reform Capacity

The comprehensive overhaul of the PPL, which was planned for late 2010, has been postponed so as to be part of the activities of a 16-month twinning project with the German Federal Ministry for Technology and Economy. This project was initially foreseen to start at the end of 2010, but its launch is still pending.

The preparation of a new Law on Concessions and PPPs (CPPPL) by a working group under the responsibility of the MoE is still underway. The submission of its draft to the government has been postponed twice (in May and September 2010). It has currently been forwarded to the EC for its opinion, and it would subsequently be discussed and adopted by the government and enter into the parliamentary procedure. However, parliament has been out of session since 12 April 2011. Pending early elections to be held on 5 June, followed by the formation of a new government, there would obviously still be sufficient time to improve the current draft CPPPL if need be, taking into account the EC's comments.

Considering the time-frame of the drafting work, launched in 2008 and still ongoing, the recent history of developing the legal framework for concessions and PPPs has created an environment of doubt about the government's capacity to successfully implement a new, effective law that regulates this area and to provide the political and institutional support that will be necessary to implement it.

Recommendations

1. In the light of past developments, further support should be given to the Ministry of Economy in order to assist in the elaboration of a robust set of regulations and guidance that can bolster the finalisation of the draft Law on Concessions and PPPs. A rapid and effective harmonisation of other national laws, especially sectoral laws which regulate individual sectors of the economy, for example energy, should be undertaken once the CPPPL has been adopted. However, the scale of efforts needed to carry out this task is likely to overwhelm the existing capacity of the Ministry of Economy, and external assistance will therefore probably be required.
2. Regarding public contracts, the transposition of the EC Directives into the national legislation is a target that has almost been accomplished. **There are no serious reasons to recommend the acceleration of this process.** The required adjustments do not represent a top priority for the time being, and it is not necessary to force the adoption of the amendments immediately. Attention should be shifted more and more to the practical aspects in order to ensure the smooth implementation of the existing legal provisions and to provide legal certainty.
3. In particular, rather than focusing on the introduction of new electronic tools (DPS, e-catalogues), concentrating on stabilising the already existing e-auctions system and reconsidering its further extension is recommended. Further training of contracting authorities also needs to be provided on the functioning of the system, on how to make the

most efficient use of the system, and especially on how to use the system's assistance in order to obtain value-for-money.

4. There are several areas of procurement beyond the implementation of the *acquis* that the Macedonian authorities have not yet fully taken into consideration. In particular, matters of organisational, economical, technical and legal aspects of contract management should be incorporated into the materials provided on the PPB's website and also into the training that it provides for contracting authorities.

PROCUREMENT/CONCESSIONS STATISTICS for 2010

A. Number of contracting entities		
State bodies	145	
Bodies of local government units and of the city of Skopje	101	
Legal entities established for specific purpose of meeting public interest needs-indent b), paragraph 1, Article 4 of the Law	787	
Associations established by one or more contracting authorities	12	
Public enterprises, joint stock companies and limited liability companies in the concerned areas	109	
Other contracting authorities	65	
Total number of contracting entities	1219	
<u>B1. Awarded public contracts/Contracting entities (above national thresholds – low-value procurement not included)</u>	Total (estimated) value (Mio EUR)	Total number
State bodies	230.7	963
Bodies of local government units and of the city of Skopje	94.3	971
Legal entities established for specific purpose of meeting public interest needs-indent b), paragraph 1, Article 4 of the Law	205.1	5527
Associations established by one or more contracting authorities	4.7	50
Public enterprises, joint stock companies and limited liability companies in the concerned areas	122.1	978
Other contracting authorities	11.3	20
Total public contracts awarded	668.1	8509
B2. Awarded concessions/Contracting entities	n/a	n/a
Central government		
Regional and local authorities		
Other (bodies governed by public law)		
Utilities		
Total concessions awarded		
C1. Awarded public contracts above the EU thresholds		
Works	104.9	12
Services	65.4	136
Goods	144.3	281
Mixed contracts	/	/
Total public contracts above the EU thresholds	314.7	429

C2. Awarded concessions above the EU thresholds	n/a	n/a
Works		
Services		
Other		
Total concessions above the EU thresholds		
D. Procurement methods used (above the national thresholds)		
Open procedure	563.3	7246
Restricted procedure	46.5	93
Negotiated procedure with prior publication of a notice	12.6	68
Negotiated procedure without prior publication of a notice	34.5	827
Other procedures (competitive dialogue, etc)	/	/
D1. Low-value procurement (estimated) <i>Include: - simplified competitive procedure without publishing a notice</i> <i>-simplified competitive procedure by publishing a notice</i> <i>- public service contracts (category of service 17- 27)</i>	80.3	16014
E. Participation rate (average number of submitted tenders)		
Works	/	4
Services	/	3
Goods	/	6
F. Review procedures	n/a	n/a
Number of complaints received	868	95.47%
Number of complaints treated	820	5.53%
Number appealed to the Court	94	10,83%
Number of decisions with interim measures	non-existing jurisdiction	

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

	Name of Contracting Authority	Main Activity	Annual procurement
1.	Macedonian Power Plants	Utilities	73.5 mil eur
2.	Ministry of Transport and Communications	General public services	69.2 mil eur
3.	General and administrative matters division - Government of RMacedonia	General public services	33.5 mil eur
4.	Ministry of Health	Health	20.4 mil eur
5.	PE Macedonian Forests	General public services	19.4 mil eur
6.	Ministry of Culture	Sport and culture	17.0 mil eur
7.	City of Skopje	General public services	15.0 mil eur
8.	Cultural Heritage Protection Office	General public services	14.0 mil eur
9.	Medical clinic for radiotherapy and oncology	Health	12.5 mil eur
10.	Minucipality of Center	General public services	11.9 mil eur

G. A list of 10 largest public contracts/concessions awarded and/or advertised in 2010 (subject of the contract, name of the contracting authority and contractor (if selected), (estimated) value, and time of execution):

	Subject of contract	Name of CA	Contractor	Value (eur)	Time of exec.
1.	Purchase of 202 new two-story buses	Ministry of Transport and Communications	Zhengzhou Yutong Group Co. Ltd	41.5 mil	3.8 years
2.	Supply and installation of mining equipment	Macedonian Power Plants	THYSSEN KRUPP GMBH	17.2 mil	2 years
3.	Construction of new building for Ministry of Foreign Affairs	General and administrative matters division - Government of Macedonia	Beton AD - Skopje	15.8 mil	1.5 years
4.	Construction of new buildings for Public Prosecution Office and Department of Financial Police	General and administrative matters division - Government of Macedonia	Beton AD - Skopje	13.1 mil	1 year
5.	Reconstruction works and adaptation of the building of the Assembly	Assembly of Republic of Macedonia	Beton AD - Skopje	12.6 mil	2 years
6.	Purchase of new one-story buses	Ministry of Transport and Communications	Lvivski Avtobuski Fabriki	11.7 mil	1.8 years

7.	Construction works and adaptation of the building of Ministry of Finance	Ministry of Finance	Energoplan Engineering - Skopje	10.4 mil	1.6 years
8.	Reconstruction of St. Kliment's University in Ohrid	Cultural Heritage Protection Office	Konstruktor Engineering - Split	9.0 mil	2.2 years
9.	Translation, computer editing, printing and delivery of 500 law books from eminent authors (100 pieces of a book)	Ministry of Education and Science	ARS Lamina	6.8 mil	2.5 years
10.	Construction works – Theatre Veles	Ministry of Culture	Svetlost Teatar DOO - Belgarde	4.7 mil	0.6 years