



POLICY NOTE

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Public procurement practices at the municipal level: A statement of preliminary findings

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Summary Points:

- A. The public procurement at the municipal level is exposed to corruptive behaviours and favourism for certain politically linked economic operators;
- B. Both the behaviour of the procurement officers and the low level of professionalism make the procurement practice at the municipal level to be perceived as corrupted and dominated by partisan interests;
- C. Public procurement at the municipal level is characterized by problems related to the signing of contracts without sufficient commitment of funds and/or contracts exceeding the municipal budget;
- D. Public procurement at the municipal level is characterized by problems related to payments that exceed contractual value and/or work carried out;
- E. Public procurement at the municipal level is characterized by problems related to projects financed without proper supervision;
- F. Public procurement at the municipal level is characterized by problems related to failures in completing works under the contractual deadline;
- G. Public procurement at the municipal level is characterized by problems related to the application of both the performance and the tender guarantees;
- H. Public procurement at the municipal level is characterized by problems related to the initiation of procurement procedure without appropriate authorization;
- I. Public procurement at the municipal level is characterized by problems related to missing documents and irregularities in procurement folders;
- J. Public procurement in municipal level is characterized with the problem of not informing the unsuccessful bidders.

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PUBLIC PROCUREMENT PRACTICES AT THE MUNICIPAL LEVEL: A STATEMENT OF PRELIMINARY FINDINGS

Public procurement practice in Kosovo is often referred as one of the main sources of corruption. Another argument, hence, speaks for the fact that this practice is mainly a result of both central and local level institutions' behaviour. In this policy note, though, the aim is to highlight the main problems with public procurement at the municipal level. The focus, therefore, is to emphasise the main problems related to the misuse/circumvention of the public procurement rules of behaviour determined by the law on public procurement with regard to the procurement activities undertaken by municipal institutions. In particular, we refer mainly to secondary data and information acquired from the findings of, inter alia, the office of the Auditor General, Public Procurement Regulatory Commission (Department for Supervision and Monitoring), Procurement Review Body decisions, and from our staff field research activities.

Of note is the fact that the annual public procurement market in Kosovo in 2010 was about 800 million EUR, representing approximately 14% of the GDP, including the public procurement activities undertaken by central and local level institutions as well as publicly owned companies.¹ In general, the public procurement system in Kosovo is complex due to both the legal framework and institutional set-up. This complexity is further aggravated by the pathetic behaviour of the public authorities both at local and central level.

In general, the European Commission progress reports recognise that public procurement in Kosovo remains a challenge also due to the high turnover of the procurement officers and provisions which expose public procurement officers to political pressure and interference by economic operators linked with political parties.² It is therefore argued that the behaviour of the procurement officers and the low level of professionalism makes the procurement practice in Kosovo exposed to

corruptive conduct and favourism for certain politically linked economic operators.³

Therefore, this Policy Note, in the following part, will address the prevalent problems of Kosovo's municipalities related mainly to the misapplication of the rules governing public procurement process.

PRELIMINARY FINDINGS

I. Entering into contracts without sufficient commitment of funds and/or contracts exceeding municipal budget:

The Law on Public Procurement (LPP) requires that public authorities should, in advance, determine and plan their procurement activities. That being said, municipalities have the obligation to prepare and evidence their needs, and accordingly, plan, on the basis of their annual budget, the financial implications that a concerned need can require. This provision of the law limits the possibility of concerned authorities to misuse municipal funds for different personal and/or political interests. Therefore, a common problem that has been evidenced in several municipalities is that municipal authorities have entered into contractual obligations without commitment of funds in their annual budgets.⁴ In a number of cases, this problem has overburdened the municipal budget and has raised concerns whether the decision to sign public contracts without the proper budgeted is being used for mere political purposes. Therefore, according to the evidence, municipal institutions have frequently initiated procurement procedures and signed contracts with economic operators which were not planned and/or included into annual procurement

¹ See Sigma/OECD (2011) 'Kosovo General Assessment'. May, 2011, available at: <http://www.sigmaxweb.org/dataoecd/40/29/48970710.pdf>.

² See for more Commission Staff Working Document: 'Kosovo 2011 Progress Report'. Commission of the European Communities, SEC(2011) 1207, Brussels, p. 38; and, Commission Staff Working Document: 'Kosovo 2010 Progress Report'. Commission of the European Communities, SEC(2010)1329, Brussels, p. 36.

³ A similar opinion has been expressed by 30 business managers in 6 different municipalities. Interviews with business managers, who choose to remain anonymous, dated 9, 10, 11, 13, 16, and 19 October 2011, in Peja, Prishtina, Skenderaj, Prizren, Gjakova and Ferizaj.

⁴ See Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2010'. No. 22.14.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Ferizaj for the Year ended 31 December 2010'. No. 22.17.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2010'. No. 22.0.1-2010-08, Prishtina, July 2011; Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Peja for the Year ended 31 December 2010'. No. 22.6.1-2010-08, Prishtina, June 2011.

plans of the municipalities.⁵ It is argued that ad-hock decisions of the municipal authorities to initiate procurement procedures and to sign contracts with economic operators is against the provisions and the rules of the said law. Moreover, as a result of these contracts, municipal institutions have increased their financial liability vis-a-vis the economic operators, leaving room for huge legal uncertainties.

Another negative trend that falls within this category is the practice of signing contracts for a planned activity that exceeds the approved annual budget of the municipality.⁶ Thus, several municipalities have signed contracts in excess of approved budget, thereby producing a situation where municipalities rearrange their budgets on an ad-hock basis.⁷ Furthermore, this has shown that

municipalities constantly use funds committed for other projects to finance certain unplanned tenders. On the other hand, the practice of signing contracts above the approved budget is exposing municipalities to the risk of not being able to fulfil the contractual obligations, and making them liable to different economic operators.

II. Payments in excess of contractual value and/or work carried out:

One important finding relates to the payments made in excess of the contractual value. That being said, the evidence suggests that municipalities often pay more than the provisions of the contract permit.⁸ This tendency, nonetheless, raises several concerns as to whether the procurement process has been developed under the required standards. In addition, there are several cases when municipalities have paid for a given product more than the price of the product estimated in the market.⁹ Another interesting development or circumvention of the procurement rules relates to the increase of the bid after the given economic operator has been nominated by the evaluation committee as the most favourable one, wherein including into its bid the expenses for other related services.¹⁰ Therefore, this case shows that the contracts were not awarded to the operators which best satisfied the criteria for the given project.¹¹

There are several cases when the payment made by municipal authorities did not match with the performance and/or the work carried out by the given economic operator. Thus, for example, a project is paid by the municipal authority up to 70% of the contractual value, while the works were only completed by 35%.¹² Last, some municipalities have

⁵ See Public Procurement Regulatory Commission (2010) 'Report of the Supervising and Monitoring Department: Municipality of Gjiilan'. No. 10/2010, 10 May 2010; Public Procurement Regulatory Commission (2010) 'Report of the Supervising and Monitoring Department: Municipality of Prizren'. No. 26/2010, 11 October 2010; Public Procurement Regulatory Commission (2010) 'Report of the Supervising and Monitoring Department: Municipality of Rahovec'. No. 27/2010, 04 October 2010; Office of the Auditor General (2011) 'Independent Auditor's Report and Financial Statements of Municipality of Shtërpce for the year ended December 31, 2010'. Prishtina, June 2011; Public Procurement Regulatory Commission (2009) 'Report of the Supervising and Monitoring Department: Municipality of Ferizaj'. No. 13/2009, 22 June 2009; Public Procurement Regulatory Commission (2009) 'Report of the Supervising and Monitoring Department: Municipality of Gjakova'. No. 34/2009, 10 October 2009; Office of the Auditor General (2010) 'Financial Statements and Independent Auditors' Report Municipality of Mamusha for the year ended December 31, 2009'. Prishtina, June 2010; Office of the Auditor General (2010) 'Independent Auditor's Report and Financial Statements of Municipality of Shtërpce for the year ended December 31, 2009'. Prishtina, June 2010.

⁶ See Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2010'. No. 22.14.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Ferizaj for the Year ended 31 December 2010'. No. 22.17.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2011) 'Independent Auditor's Report and Financial Statements of Municipality of Shtërpce for the year ended December 31, 2010'. Prishtina, June 2011; Office of the Auditor General (2010) 'Financial Statements and Independent Auditors' Report Municipality of Mamusha for the year ended December 31, 2009'. Prishtina, June 2010; and Office of the Auditor General (2010) 'Independent Auditor's Report and Financial Statements of Municipality of Shtërpce for the year ended December 31, 2009'. Prishtina, June 2010.

⁷ Office of the Auditor General (2010) 'Independent Auditor's Report and Financial Statements of Municipality of Shtërpce for the year ended December 31, 2009'. Prishtina, June 2010; Public Procurement Regulatory Commission (2010) 'Report of the Supervising and Monitoring Department: Municipality of Gjiilan'. No. 10/2010, 10 May 2010; Public Procurement Regulatory Commission (2010) 'Report of the Supervising and Monitoring Department: Municipality of Prizren'. No. 26/2010, 11 October 2010; and Public Procurement Regulatory Commission (2009) 'Report of the Supervising and Monitoring Department: Municipality of Ferizaj'. No. 13/2009, 22 June 2009.

⁸ See Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Peja for the Year ended 31 December 2010'. No. 22.6.1-2010-08, Prishtina, June 2011.

⁹ Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2009'. No. 22.01-2009-08, Prishtina, June 2010.

¹⁰ See Public Procurement Regulatory Commission (2010) 'Report of the Supervising and Monitoring Department: Municipality of Gjiilan'. No. 10/2010, 10 May 2010; and Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2009'. No. 22.01-2009-08, Prishtina, June 2010.

¹¹ Interview with a former procurement officer who choose to remain anonymous, dated 15 October 2011.

¹² Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2010'. No. 22.0.1-2010-08, Prishtina, July 2011.

also made incorrect budgetary estimations, whereby permitting that the planned estimation be significantly higher than the offers and the contract signed to that purpose.¹³ Therefore, incorrect budgetary estimations create a perception that the bid was successful, fair and open, which does not stand in reality and produces false insights.

In general, cases of payments made outside the contractual estimations, and the increase of the bid after the preliminary qualification procedure has ended, raise several concerns as to whether public money are being spent with proper control.

Table 1

(Explaining the number of complaints submitted to the Procurement Review Body against the municipal procurement offices during 2009 and 2010)

	RC	RWC	A	RA	RT	RJ	W
2010	136	102	54	29	20	27	6
2009	111	79	52	19	8	28	1

Source: Procurement Review Body, Annual Report 2009 and 2010

Legend	
1. Received complaints (against municipal authorities)	RC
2. Reviewed cases (from received complaints)	RWC
3. Approved	A
4. Reassessed	RA
5. Retendered	RT
6. Rejected	RJ
7. Withdrawn	W

III. Projects financed without proper supervision:

The law on public procurement requests that the contracted project be supervised by a committee as to whether the project is being implemented

¹³ Office of the Auditor General (2010) "Independent Auditor's Report and Financial Statements of Municipality of Peja for the year ended December 31, 2009", Prishtina, June 2010.

according to the dynamic plan, and whether the works are being executed in accordance with the specified technical standards. That said, many projects contracted by municipal offices have not been supervised in terms of their dynamic plan and/or in terms of the implementation of the required standards.¹⁴

On the other hand, it is estimated that municipalities have weak control over the projects that are being financed, whereby resulting in the execution of payments without having first accepted the contracted good.¹⁵ In addition, due to the weak procurement control, municipalities have included into procurement files acceptance reports that do not belong to the given projects.¹⁶

Another problem falling within this category relates to the membership of the supervisory committees. In some cases, for example, the same members that have participated in the evaluation procedure are also appointed at the supervisory committee.¹⁷ This certainly is a pure conflict of interest for those members holding double positions for the same project. In the end, it should be noted that municipalities are failing to enforce their internal supervisory mechanisms, which in turn is exposing them to ineffective public expenditures.

IV. Failure to complete works under the contracted deadline:

Very often, projects financed by municipal budgets are not properly supervised. As a result, many projects are not performed within the deadline

¹⁴ See Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Peja for the Year ended 31 December 2010'. No. 22.6.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2009'. No. 22.01-2009-08, Prishtina, June 2010; and, Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Ferizaj for the Year ended 31 December 2010'. No. 22.17.1-2010-08, Prishtina, June 2011.

¹⁵ See Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Ferizaj for the Year ended 31 December 2010'. No. 22.17.1-2010-08, Prishtina, June 2011; and Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2009'. No. 22.01-2009-08, Prishtina, June 2010.

¹⁶ See Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2009'. No. 22.01-2009-08, Prishtina, June 2010.

¹⁷ Interview with a former procurement officer who choose to remain anonymous, dated 18 October 2011.

determined by the contract.¹⁸ In addition, municipalities often fail to issue penalties for those economic operators who have not performed their work within the dynamic plan determined by the authorities.¹⁹ Therefore, on the one hand, the negligence of the economic operator, and on the other, of the municipal authorities is resulting in delays and continuous failures to execute the projects on the basis of the contract. This trouble, therefore, results from the lack of internal control of municipalities with regard to the implementation of the rules set by the law.

V. Performance and tender guarantees missing in procurement dossiers:

One of the most common irregularities reported are those related to the tender and performance guarantees. As such, the law on public procurement affirms that the contracting authority should request from the economic operators a specific amount of cash or equivalent of cash to serve as a tender guarantee. This amount ensures that the economic operators, among others, have in good faith prepared and presented to the contracting authority their offer. Thus, the contacting authority holds the right, in cases when the economic operator has acted against the rules of the law, to use the tender security as a fine or penalty against the concerned operator. It is therefore argued that the municipal institutions have continuously not imposed/requested a tender guarantee, wherein violating this provision of the law.²⁰ In addition, the law also requires from public authorities to demand from economic operators the performance guarantee. This guarantee applies only to those

operators which have signed a contract, and serves as a guarantee that a given operator shall perform all duties acquired under the contract. Similar to the abovementioned problem, the evidence suggests that several municipalities have not requested from operators a performance guarantee.²¹

VI. Initiation of procurement procedure without appropriate authorization:

It should be noted that it is under the authority of the Mayor of any given municipality to issue an authorization for initiating procurement procedure for a given planned project. In some cases, officials within municipalities have initiated and authorized procurement processes without having the right and/or authorization of the Mayor, or the authorization of the law.²² Therefore, initiating procurement process without proper authorization contradicts the provisions of the law on public procurement, and seems to have been a common feature of the municipal procurement practice.

VII. Missing documentation and other irregularities in procurement folders:

It should be noted that for each procurement procedure developed by the given municipal procurement unit, the law requires that the latter should prepare a tender dossier, which, among others, contains all necessary documents related to the procurement procedure. The tender dossier/file is nonetheless very important when it comes to possible investigation of an alleged corruption case. That being said, the evidence suggests that in several municipalities tender dossiers and other associated documents have been missing. For example, in some cases, both the document for appointing the supervisory committee and the decision for the appointment of the technical

¹⁸ See Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2010'. No. 22.0.1-2010-08, Prishtina, July 2011; Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2010'. No. 22.14.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2009'. No. 22.14.1-2009-08, Prishtina, June 2010.

¹⁹ See Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2010'. No. 22.0.1-2010-08, Prishtina, July 2011.

²⁰ See Office of the Auditor General (2010) "Independent Auditor's Report and Financial Statements of Municipality of Peja for the year ended December 31, 2009", Prishtina, June 2010; Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2009'. No. 22.14.1-2009-08, Prishtina, June 2010.

²¹ See Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2009'. No. 22.14.1-2009-08, Prishtina, June 2010; Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Ferizaj for the Year ended 31 December 2010'. No. 22.17.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2011) "Financial Statements and Independent Auditors' Report Municipality of Mamusha for the year ended December 31, 2010". Prishtina, June 2011.

²² See for example Office of the Auditor General (2011) 'Independent Auditor's Report and Financial Statements of Municipality of Shtërpce for the year ended December 31, 2010'. Prishtina, June 2011.

acceptance committee were missing.²³ In other circumstances, documents such as ‘photocopies of the newspapers for publishing the tender and announcement of winning company...’, ‘the signature of committee members are missing from tender evaluation forms and opening bid committees decisions as well as reports of evaluation commissions...’, and ‘contracts signed with the suppliers there are no clear specifications of prices as well as of items that will be provided according to those contracts’, were all missing.²⁴ Here again, in several cases, the date of the signing of the contract was the same with the date of the technical acceptance report.²⁵ Overall, both the missing of documents as well as other evidenced irregularities in tender documents suggest that procurement practice has been implemented against the standards of the law and in contrast to the good practices.

As a results of this unlawful behaviour, unsuccessful operators frequently become unable to challenge the decision of the given municipality within the legal deadline.

VIII. Informing unsuccessful bidders:

For a procurement process to be fair and just, necessary protection mechanisms are applied. An important mechanism related to the right of the bidders to challenge the decision of the evaluation committee to the Procurement Review Body and to courts is get informed about the result of a tendering process. This right is materialized once an economic operator becomes informed about the result of a tendering process where it was a part of. As the evidence suggests, this right is being continuously violated by municipal institutions. Municipalities have rarely informed economic operators about the decision of the evaluation committees and the reasons after their decisions.²⁶

²³ See Office of the Auditor General (2010) “Independent Auditor’s Report and Financial Statements of Municipality of Peja for the year ended December 31, 2009”, Prishtina, June 2010, p. 16.

²⁴ See Office of the Auditor General (2010) ‘Independent Auditor’s Report and Financial Statements of Municipality of Shtërpce for the year ended December 31, 2009’, Prishtina, June 2010, p. 52.

²⁵ See Office of the Auditor General (2010) ‘Independent Auditor’s Report and Financial Statements of Municipality of Shtërpce for the year ended December 31, 2009’, Prishtina, June 2010, p. 52.

²⁶ See Public Procurement Regulatory Commission (2010) ‘Report of the Supervising and Monitoring Department: Municipality of Prizern’. No. 26/2010, 11 October 2010; Public Procurement Regulatory Commission (2010) ‘Report of the Supervising and Monitoring Department: Municipality of Rahovec’. No. 27/2010, 04 October 2010; Public Procurement Regulatory Commission (2010) ‘Report of the Supervising and Monitoring Department: Municipality of Gilan’. No. 10/2010, 10 May 2010; Public Procurement Regulatory Commission (2009) ‘Report of the

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