

STANDARDS AND CHALLENGES OF PUBLIC PROCUREMENT

PhD, Anjeza Licenji

Faculty of Law, University of Tirana, Albania

Abstract

Public Procurement in general is a new field and activity that occurs in modern countries, especially in countries that have had rapid development trends from the planned economy to a market economy. The presentation of public procurement is the main need for the governments of modern and contemporary states, because every government is the biggest buyer of goods, services and works.

The purpose of this paper is to take a look at the emergence and evolution of the concept of "public procurement" in the Albanian reality, first in organic connection with the legal framework and the social development of the EU's countries, its impact on the social - economic structure and legal reality.

Keywords: Public Procurement, EU, legislation, membership guidelines

Introduction

The public procurement has a relatively long history. The contracting, the public-private partnerships and the risk management are not new principles. Great Britain has been a rich source of historical facts regarding the procurement, enabling the best use of some of the most important aspects of the procurement, including the negotiations and the agreements, the strategic alliances, the competitive pricing and the management of suppliers. For about 150 years, since the beginning of the sixteenth century, the commercial focus of a period called the *mercantilist era* was focused on the accumulation of gold, the development of shipping (to aid the development of the British fleet) and a strong interest in the increase of Britain as a nation-state.

In Great Britain, the political and economic framework of the industrial development was rooted in the name of the creation of the national economic supremacy. The trade was important and while the parliamentary democracy emerged, the traders and the other members of the lower classes were given a voice in the House of Representatives. Thus, at the beginning

of the Industrial Revolution, Great Britain had strong internal markets, potential of export markets for the trade and parliamentary support. In fact, the spirit of trade was a driving force. Further, the notion of the contract was developed to the point that it contains elements of obligation, ethical behavior and legal foundations of a juridical relationship (Maine H, 1861).

Up to the technological developments of the past 20 years, the conventional ideology considers the procurement as an administrative process based on the practice of goods and services purchase, required to satisfy the functional needs of the managers. The rules, regulations, procedures and protocols were typical features of the process. The procurement staff stood as a financial and operating guard between the managers and their material requirements, centralizing the office of supply and controlling or managing the costs. The procurement was a powerful position, sometimes hated for its virtual monopoly on the profits.

Public Procurement in Albania.

The history of public procurement in Albania, to the current law, is relatively short. Up to the 90's there was no market economy in Albania, as a result, the public procurement concept did not exist. The Decision of the Council of Ministers no. 400, dated November 17, 1990 "On the purchase and provision of services outside the state sector" can be considered as the first legal act that paved the way for the private-state relationship.

It was still early to talk about a real act regulating the public procurement, however, through this act the state-owned enterprises were enabled to buy from the cooperatives and privates, the main tools (a limited list). Then the DCM No. 191, dated March 22, 1993 "On the system of public purchases and purchasing activities and services performed by the enterprises and institutions funded from the state budget" (Official Gazzette, 1993) marked a further step towards in the introduction of the concept of public procurement, but yet we do not find the term "public procurement".

This term, is used for the first time in the Decision of the Council of Ministers no. 467, dated 17.08.1993 "On the procurement of state funds" (Official Gazzette, 1993). This decision disciplines more complete and detailed procedures for the public procurement. In this decision, for the first time, are included the investments, providing that the contracts for their implementation have to go through the process of public procurement. The decision gives the definition of the procurement process itself and all its elements, as well as provides for the first time some types procurement procedures and where they can be used.

Despite the introduction of the concept of public procurement, in Albania up to 1995, there was not a public procurement law, making the legal framework still incomplete. This decision takes a very important value,

since it is the first normative act that provides and disciplines the public procurement system in Albania.

The first law on public procurement is Law No. 7971, dated July 26, 1995 “On Public Procurement”, as amended (under UNCITRAL). In Article 4 of this law we have the sanction of the liability to recognize the prevalence of the international obligations to its provisions, which seems a first step towards the harmonization with the European regulatory framework in this field (United Nations Commission on International Trade Law). The law provided also the international procurement procedures through the international open tender (the Law no.7971, 1995) in order to achieve an effective competition.

This law was abolished in 2006 by the law in force, Law no. 9643, dated November 20, 2006 “On Public Procurement”, as amended. The Draft Law of the UNCITRAL “On procurement of goods and works” was meant to serve as a model for the countries to assess and improve their procurement law and the preparation and approval of procurement legislation in those countries where it did not exist yet, as was the case of Albania in 1993.

With the law of 2006, it was established another institution, the Procurement Advocate. As there was not yet an independent institution of review, the Procurement Advocate was created as an alternative to the economic operators dissatisfied from the procurement procedures. It was not a review institution, but it had the possibility of a full administrative investigation in a procurement procedure and was enabled to make recommendations. This institution depended from the Parliament.

In the frame of the membership, Albania, among others, has also the obligation of approximating the public procurement legislation with the EU legislation. The obligation to completely approximate the Albanian procurement legislation with the respective directive (Official Gazzette, 2004) is extended in time. Consequently, since it derives from a UNCITRAL (United Nations Commission on International Trade Law) draft it was decided that the transposition of the directive should not be immediate after the contracting authorities and the economic operators would find the adjustment difficult.

On the other hand, the directive leaves the decision-making to the institutions, the contracting authorities, which in the Albanian circumstances could create space to abuse. For this reason it was decided a gradual approximation of the directive into the national law. The approximation of the public procurement legislation with the *acquis communnataire*⁵³ at this stage was only partial.

⁵³ *Acquis communautaire* means the legal basis of the European Union, which is in continuous modification. It includes the political objectives of the treaties; the adapted

As with the adoption of this new law on public procurement, the approximation with the relevant EU Directives is partial; this legislation is accompanied by changes during the period 2007-2013.

Currently, the Albanian legislation has a satisfactory approach to the Directive (conclusion of the multi-donor study on the Albanian law). After signing the Stabilization and Association Agreement in 2006 and its entry into force in 2010, the legislation on public procurement in Albania should be approximated within 4 years from the entry into force, ie up to 2014.

The first law of public procurement, according to the model of the European Directive, the applicable law, was drafted with the assistance of the project “Support to the public procurement in Albania”, funding of CARDS (Community Assistance for Reconstruction, Development and Stabilisation).

Finally, Albania has been assisted by a twinning project with Romania (as a new member state) and Poland, where the work is focused on the drafting of the amendments to the law on public procurement and the one of concessions, to further approximate them with the directive. Albania has the rights of observer in the World Trade Organization, and while has already met the obligation in the procurement field, the one of removing the barriers for the foreign economic operators.

European standards of Public Procurement.

In 2004, the European Union has approved two new directives on public procurement – the Directive on works, services and public procurement, and the Directive on the municipal activities, which include energy (electricity, heat, gas), water, transport (including airports and ports), and postal communication. These directives, which are intended to ensure the development of the internal market and non-discrimination of the contracting parties from other countries of the European Union, must be implemented and enforced in the national or regional law, but depending on the lawmaker system in the defined states.

The public procurement legal framework is different. The states members of the EU which have a developed procurement tradition have their own lawmaker framework, which tends to improve, and to ensure

legislation in their application as well as the jurisprudence of the Court of Justice; the declarations and resolutions approved in the frame of the European Union; the different acts approved in the field of justice, internal affairs, foreign politics and security; the international agreements of the Community as well as the agreements stipulated between the member states in the domain of activity of the EU.

The acceptance of the «*acquis communautaire*» from the member states is a pre-condition for the adhering in the UE. This means the adaption of the national legislations to the CE legislation and their implementation in the adhering moment.

consistency with the EU legislation. Other countries just transcript the EU rules.

In the case of public procurement, it is necessary to look the procurement Directives itself, but also the context in which they are approved. Even with the adoption of the Directives a lot of general provisions of the Treaty of Rome are applied, as well as more general principles of law which govern the interpretation of directives. We will refer collectively to these elements as “the *acquis* legislation of the EU” throughout this paper.

In the center of European Union law primarily was an economic union through the creation and functioning of the common market aiming the unification of the economic practices of the Member States under an integrated legal, economic and political (Cristopher H. Bovis) model.

The Treaty of Rome of 1957 (and subsequent the treaties amending the Treaty of Rome) does not include any explicit provision related to the public procurement. However, this does not mean that it does not contain provisions relating to the public procurement in the EU. Rather, the Treaty contains a number of fundamental principles on which the EU is based. These principles apply equally in the field of public procurement. From these basic principles, the most important related to public procurement are: *the prohibition of discrimination on the grounds of nationality*⁵⁴; *the free movement of goods and the abolition of quantitative limits on the imports and exports and the measures having the same effect*⁵⁵; *the right and freedom of establishment of a business (Article 43 and following of the Treaty of Rome)*; *the right to provide services (Article 49 and following of the Treaty of Rome)*. Very often the practical application of these principles is been clarified by the decisions of the European Court of Human Rights.

The Albanian procurement legislation is drafted in respect of the directive, because of the obligation of the Government of Albania to approximate the Albanian legislation with that of the EU. As Albania is not yet a member state even because of some significant problems with the transparency in the public procurement procedures, often is found that the Albanian law is stricter than the directive.

The member States are obliged to take all the appropriate measures to ensure the fulfillment of the obligations arising from the Treaty or resulting from the action taken by the Community institutions. The procurement

⁵⁴ Article 12 of the Treaty of Rome: “Within the applicability field of the present Treaty and without prejudice to any of the single provisions of its content, it is prohibited every discrimination on the grounds of nationality”

⁵⁵ Article 28 and following of the Treaty of Rome: “All the quantitative limits on the imports and the measures having the same effect are prohibited between the member states”. See <http://www.eurotreaties.com/eurotexts.html>

directives, as all other directives, according to definition are not applied directly, ie. they do not apply automatically.

In order to give effect within the Member States, they should be included or “transposed” into the national law. For this reason, member states are required to take the measures necessary to give full effect to the provisions of the Directives into the national law and to ensure that no other national provisions undermine their applicability.

In the frame of the membership, Albania, among others, has also the obligation of approximating the public procurement legislation with the EU legislation. The obligation to completely approximate the Albanian procurement legislation with the respective directive is extended in time.

Consequently, since it derives from a UNCITRAL draft it was decided that the transposition of the directive should not be immediate after the contracting authorities and the economic operators would find the adjustment difficult. On the other hand, the directive leaves the decision-making to the institutions, the contracting authorities, which in the Albanian circumstances could create space to abuse. For this reason it was decided a gradual approximation of the directive into the national law. Currently, Albanian legislation has a satisfactory approximation with the Directive.

As Albania has signed the Stabilization and Association Agreement in 2006 (which came into force in 2010), through its implementation it took over the performance of the process of harmonization and approximation of the national legislation with the legislation of the Community.

Features and organization of Public Procurement in Albania.

The public procurement means a purchase, or other formal contracts, for works, supplies and services by public bodies that use public funds. It includes the purchase, the lease or dealing with any other contractual goods, civil works and public services needed by the public sector. It also includes the situations in which the public funds are transferred to purchase goods, works and services even if the government is not directly involved.

One of the core features is the harmonization of the public procurement system in Albania with the provisions of the “*acquis*” of EU and the best international practices, and to promote efficiency and effectiveness in the use of public funds.

The effective communication and the access to the public procurement information with all parties involved is one of the basic prerequisites for the success of the entire system. The accountability is a central pillar of any system of public procurement. Without transparent and accountable systems that enable the government and citizens to engage in a mutually and responsibly, the major sources directed through the public

procurement systems enable an increased risk of corruption and misuse of funds.

The mechanisms of accountability for the public procurement can be initiated and supported by the government, the citizens, or both of them. The key is an effective and sustained engagement. The tools include: participatory budgeting, public expenditure transfer, monitoring from the citizens and evaluating the provision of the public services.

Another element that has defined the framework of the procurement system in our country is the further dynamic harmonization of the legal framework on the procurement, especially in view of the new Directives of the EU.

Law no. 9643 dt.20.11.2006, "Public Procurement", as amended, is a legal act, which defines institutions in the public procurement system and their duties.

Implementation and enforcement of procurement regulations is mainly on the national level. In the case of Albania, the following institutions have been set up to carry out these tasks. Institutions that operate in the public procurement system in Albania are:

a) The Public Procurement Agency is the institution which deals with the supervision of the public procurement system, monitors the execution of public procurement procedures, submit proposals for the procurement rules in the Council of Ministers, it promotes and organizes training of officials of central and local government to deal with public procurement activities, edits and issues of the Bulletin of public procurement, etc.

b) The Contracting Authority is responsible for the procurement of public funds, which are made available in accordance with the provisions of this law and the regulations issued pursuant to it. The contracting authority must keep complete records and documentation for procedures performed in determining the winner of the contract, so as to allow the enforcement of the law.

c) The Public Procurement Advocate is a body already abolished by amendments to legislation.

d) Public Procurement Commission (PPC) is a specific state body which has the power to provide legal protection in public procurement. PPC was established by the Public Procurement Law, as the highest authority in the procurement system, which provides legal protection for tenders and public interest at all stages of the procedure of public procurement, concessions, auctions and mining licenses. Public Procurement Commission (PPC) is the highest administrative body that reviews administrative appeals of economic operators participating in public procurement procedures.

Legal frame.

In the frame of the membership, Albania, among others, has also the obligation of approximating the public procurement legislation with the EU legislation⁵⁶. The obligation to completely approximate the Albanian procurement legislation with the respective directive is extended in time. Consequently, since it derives from a UNCITRAL draft it was decided that the transposition of the directive should not be immediate after the contracting authorities and the economic operators would find the adjustment difficult.

On the other hand, the directive leaves the decision-making to the institutions, the contracting authorities, which in the Albanian circumstances could create space to abuse. For this reason it was decided a gradual approximation of the directive into the national law.

The fundamental law that disciplines the activity of public procurement is the Law no. 9643 dated November 20, 2006 “On public procurement” modified⁵⁷. This law has been modified different times from the date of its approval, by means of the laws no. 9800, dated September 10, 2007, no. 9855, dated December 26, 2007, no. 10170, dated October 22, 2009, no. 10309, dated July 22, 2010, no. 22/2012, no. 131/2012, no. 182/2014.

In the article 1 of the Law on public procurement, “Object and purpose”, it is defined that the purpose of the law is:

to increase the efficiency and efficacy in the public procurement procedures, carried out by the contracting authorities;

- a) *to ensure the good use of public funds and to reduce the procedural costs;*
- b) *to encourage the participation of the economic operators in public procurement procedures;*
- c) *to encourage the competition between the economic operators;*
- d) *to ensure the equal treatment and non-discrimination for all the economic operators participating in the public procurement procedures;*
- e) *to ensure integrity, public trust and transparency in public procurement procedures.*

This law has the objective to set out the rules that will be applied to the purchase of goods, works and services by the contracting authorities.

⁵⁶ Article 70 of the Law no. 9590, dated July 27, 2006 “On the ratification of the Association and Stabilization Agreement between the Republic of Albania and the European Communities and their member states”.

⁵⁷ This law is elaborated considering the directive 2004/17/EC of the European Parliament and Council dated March 31, 2004 “On the coordination of the procurement procedures for the supply of water, energy, transport and mail services”, Official Gazzette of the European Union, Series L, no.134, dated April 30, 2004, page 1-113.

The law disciplines all the types of procurement, including the purchase of goods, works, services, and the consulting services. From its implementation are exempted:

- The procurement procedures in the field of the national defense;
- The secret contracts, the contracts requiring special security measures and the contracts dictated by the fundamental interests of the state;
- The contracts of the public service for the purchase or lease, with any financial mean, of real estate or rights thereon, except for the contracts for the financial services, stipulated *ad hoc*, before or after the contract of purchase or lease in any form, which are subject to this law; the acquisition, development, production, co-production of programs or advertising to be broadcasted by the television operators or published in print and airtime contracts; the services of the arbitration or conciliation; the financial services for the sale, purchase or transfer of securities or other financial instruments, in particular the actions of the contracting authority for the accumulation of cash value or capital, and the central bank services; services of research and development, the results of which are used by everyone, except when the benefits go only to the contracting authority for the use of its affairs, and provided that the work performed is completely paid by the contracting authority; the services provided in the Article 58/3 (Contracts for purposes of resale or lease to the third parties) 58/4 (contracts of enterprise stipulated with a consortium or a contracting entity, which is part of a union of economic operators) 58/5 (specific exemptions for the energy and water sector) 58/6 (Exemption from purchasing electricity, fuel and water) 58/7 (exception of transport by bus services), Chapter V / 1 “Development of procedures for contracts sector”; Service contracts, awarded on the basis of exclusive rights.

In Article 2 of the law⁵⁸ are provided the principles on which is based the public procurement system in our country.

The secondary legislation, the by-laws implementing the procurement law are (www.app.gov.al):

- Decision of the Council of Ministers No. 1, dated January 10, 2007 “On Public Procurement Rules”, as amended;
- Decision of the Council of Ministers No. 659, dated October 03, 2007 “On the rules of conducting the public procurement procedures by electronic means”⁵⁹;

⁵⁸ Article 2 of the Law no. 9643, dated November 20, 2006, “On Public Procurement”, modified: the selection of the winners for the public contracts is realized according to the following general principles: *a) non-discrimination and equal treatment of the bidders or candidates; b) transparence in the procurement procedures; c) equality in the treatment of the requests and liabilities, in charge of the bidders or candidates.*

- Decision of the Council of Ministers no. 45, dated January 21, 2009 “On the realization of the electronic procedures”⁶⁰;
- Decision of the Council of Ministers No. 53, dated January 162009 “On the charge of the Ministry of Interior for conducting public procurement procedures, for some goods and services, on behalf of the Prime Minister, the ministries and the subordinate institutions” as modified;
- PPA Instruction No. 1, dated February 06, 2009 “On the public procurement procedures for some goods and services on behalf of the Prime Minister, the ministries and the subordinate institutions of central government; purchasing body, the Ministry of the Interior”;
- Instruction of the Public Procurement Agency, No. 2, dated February 18, 2008 “On the procedure for procurement of low value”;
- Standard Bidding Documents for each procedure, which are prepared and approved by the PPA;

Under the Albanian law, the mechanisms for the correction of a decision or action which is inconsistent with the procurement legislation are the decisions of the Public Procurement Commission (administrative way) and then the court. Since April 1, 2010, it has started its activity of the Public Procurement Commission (PPC)⁶¹.

The PPC is the highest administrative body decision-making in the field of procurement; it is a body of review and which takes a final decision in the treatment of a complaint in an administrative way.

If the economic operator is disappointed by the decision of the PPC, he has the right to appeal the case to court.

Conclusion

The field of public procurement in Albania is new, but is a very important field in the management and spending of public money, because

⁵⁹ This decision disciplines in details the base notions of the electronic procurement, as the use of the electronic system in procurement, the requests for the communication means, the integrity and security of data, the notifications and electronic access in the tenders documents, delivery of bids in electronic forms etc.

⁶⁰ DCM no. 45, dated January 21, 2009 “On the realization the the procedures in electronic form” sanctions that all the procurement procedures should be realized by electronic means, eliminating the use of the the procurement procedures with paper documents.

⁶¹ Article 19/1 of the Law on Public Procurement: “The Public Procurement Commission is the highest body in the field of procurements, which analysis the complaints on the procurement procedures, in accordance with the requirements defined by the Law on Public Procurement. The Public Procurement Commission, at the conclusion of the analysis, takes decisions, which are administratively final. The Public Procurement Commission is a public juridical person, depending on the Council of Ministers, funded by the State Budget. The Public Procurement Commission submits an annual report to the Council of Ministers. The content of the report is defined in the rules of public procurement.

the public procurement is the department where the filtering of public money is realized and the main goal is to have less abuse, to have financial stability of the government bodies and to have them the most influential in the operation and development of professional activities.

The public procurement in Albania is on the right way, although it should work even more in the professional capacity building and in the reform of the legal framework in this field.

The Albanian legal framework has a good quality; it provides many safeguards and is constantly supervised by two separate bodies, the Public Procurement Agency and the Public Procurement Commission.

Albania has implemented a system of "e-procurement" which has made the process more transparent by making public offerings on the website of the Public Procurement Agency. Despite this, concerns remain about the effectiveness and the real extent of the reduction of corruption in public procurement.

Public procurement is treated in Albania as an administrative function and not recognized as a particular profession. On the other hand procurement officials are expected to comply with increasingly complex regulations.

Lack of appropriate skills and specialized knowledge, technologies, innovations or market developments will become increasingly important as procurement officers will have not only to provide value for money, but also take into account strategic considerations.

Theoretically, this law leaves little room for abuse. However, more room for abuse is created by the lack of will to enforce the law correctly, with zero tolerance, by many public authorities, starting from the contracting authorities, the Public Procurement Commission, the Public Procurement Agency, and followed by the Council of Ministers, the Supreme State Audit, the Prosecution Office, the Administrative Courts and the Criminal Courts.

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