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PUBLIC PROCUREMENT IN KOSOVO
CHALLENGES OF THE BUSINESS COMMUNITY

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# Table of Contents

**Table of Contents**

* Preface and Acknowledgments  

I. Introduction  
II. Methodology  
III. Analysis of Results  
   i. Respondents' Satisfaction with Procurement Procedures  
   ii. Businesses’ perception regarding the Law on Public Procurement  
   iii. Businesses’ perception regarding the work of the Procurement Review Body  
   iv. Businesses’ stance on e-procurement  
IV. Legal Review  
V. Conclusions and Recommendations
Preface and Acknowledgments

Public procurement has proven to be a dedicated follower of political fashion not only in Kosovo but throughout the world. Historically, we see consistent attempts to link public procurement with the government policy in areas as diverse as economic development policies, reducing unemployment, improving employment conditions, support for businesses, local development and decreasing the level of unemployment, to mention only a few.

The study analyses the public procurement practices which are implemented in Kosovo in terms of transparency and accountability of procuring bodies. Furthermore, the effects of these practices will be analyzed in terms of their effects on the business community. This study also examines the level of harmonization of Kosovo’s legal framework on public procurement and the policies implemented by procuring bodies with the EU Acquis Communautaire.

The American Chamber of Commerce in Kosovo would like to express its gratitude to the Kosovo Foundation for Open Society for financing this study, to the business community in Kosovo for their patience and willingness to respond in the survey and to Mr. Abdyl Limani from the Public Procurement Regulatory Commission and Mr. Arjan Behra from the Procurement Review Body for their contribution during the research phase of this project.
I. Introduction

Public Procurement in Kosovo is a very problematic area that triggers many complaints from the business community. Problems related to procurement practices are plenty. In addition to the damages which businesses themselves suffer because of irregularities faced in this regard, the budget of Kosovo suffers as well. The prevalence of corruption in procurement activities in Kosovo is also thought to be high, while favoritism seems to have become an accepted phenomenon among the society when applying for public tenders.

These are only few of the perceptions that exist regarding public procurement in Kosovo. Understanding the importance which public procurement has in the economy and to private businesses, the need for improvements and structural reforms is evident. In order to understand and quantify businesses’ satisfaction and overall perception regarding procurement activities, AmCham conducted a survey, which was distributed to a large pool of businesses. Results of the survey have been included in later parts of this study.

Furthermore, this study contains an analysis and comparison of the procurement practices used in Kosovo by public institutions with those used in European Union and the region. The law of public procurement has also been analyzed in terms of harmonization with the EU Acquis Communataire.
II. Methodology

For compiling a comprehensive study on procurement, the project implementation team conducted both primary and secondary research, in the period between June through September 2012.

In terms of primary research, AmCham conducted a survey with businesses operating in Kosovo. The survey was distributed to roughly 250 businesses of different sizes pertaining to diverse industries. This list contains both members and non-members companies of AmCham. Out of these businesses, 80 of them responded to the survey, results of which have been used to draw conclusions and recommendations. In addition, procurement experts from the Public Procurement Regulatory Commission and from the Public Review Body were interviewed to find out their opinion in one of the most important topics for the private sector in Kosovo.

As far as secondary research is concerned, it mainly consists of literature review and analysis of reports published by domestic and state institutions. The purpose of conducting secondary research was to see what has been done so far in analyzing the area of public procurement.
III. Analysis of Results

Respondents to the survey included companies operating in different industries. A considerable number of businesses operated in various industries. The following graph summarizes the responses of respondents regarding the industry on which they operate:

As the graph itself explains, the majority of the respondents either operated solely on the industry of professional services, or at least offered professional services as part of their business activities, followed by production, retail/wholesale, and trade. This relatively reflects the overall composition of the private sector in Kosovo, especially in terms of professional services and retail/wholesale of goods, given that these two business activities are the most common among Kosovo businesses.

In terms of number of employees, the majority of respondents to the survey employ 1-50 employees, as shown in the graph below:

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1 Answers under “Other” include: Construction (4), Telecom Infrastructure Solutions, Software Development, Customs Services, Hotel, Telecommunication, Graphic Design, Auto Industry
In terms of total annual turnover, the most common response among respondents was that their turnover amounts to more than € 2,000,000, while an annual turnover between € 100,000 and € 1,000,000 was also a frequent response:

The majority of respondents (58%), responded that they were involved in procurement activities over the last two years, while forty-two percent said that they did not apply for procurement projects. Out of the second group (those who did not apply for procurement projects), some of respondents said that the reason for not applying to procurement projects is because their line of business does not rely on procurement bids, while others claim to be reluctant because of many irregularities faced on this field in the past:

**Figure 3** Respondents' Annual Turnover

**Figure 4** Respondents' Reasons for not applying at Procurement Projects
On the other hand, from the respondents who are involved in procurement activities, the degree to which their business activities are dependent upon public procurement varies. While the majority of companies claim to have implemented 1 to 5 public procurement projects over the course of the last two years, a number of respondents claim to have had more than a hundred projects, signifying the importance of procurement in their business. In terms of turnover derived from public procurement projects as a percentage of total company turnover, respondents provided the following answers:

As the graph above illustrates, the majority of respondents (roughly 62 %), do not rely heavily on procurement projects. However, approximately 30 percent or respondents fall in the range where procurement projects account for 50 to 100 percent of total company turnover, highlighting the importance of fair and transparent procurement procedures.
The previous part of the study provided a general overview of the profile of companies who participated in the survey, and the degree to which procurement projects are important on their business. While the overwhelming majority of businesses do not rely solely on procurement projects, there are some companies that their dependence on procurements is large. This part of the study analysis the satisfaction of businesses (respondents) regarding public procurement in Kosovo. The vast majority of businesses that participate in procurement activities reported that they have faced at least some sort of problems when applying for or implementing a procurement project. The following graph provides a clear picture of the extent to which businesses have faced problems in procurement:

The fact that 92.5 percent of respondents claim to have encountered problems in procurement activities is concerning and this by itself is a sign of the need for immediate reforms in this field. While some respondents claim to have faced problems at either the central or the local level of governance, the majority state that problems in procurement were faced at both levels of governance, as the graph below illustrates:
In order to analyze the most common types of issues/problems faced in procurement activities, respondents were asked to select the issues which they faces with most frequently, in dealing with tenders. The table below summarizes the most frequent problems businesses face, based on the answers of our respondents:

As provided by the graph above, the main two problems mentioned by respondents in relation to the types of problems faced in procurement, are the over-reliance on the lowest price criterion and technical specifications, which are drafted in a manner to favor a specific company.

a) Over-reliance on the lowest price criterion: Roughly, 66 percent of respondents who have participated in procurement projects claim to have faced these two types of problems on procurement projects. The problem of over-reliance on the lowest price criterion becomes more alarming when considering projects related to health and safety (e.g. medicine).

b) Technical Specifications: As to the drafting of technical specifications, the fact that sometimes they are drafted in a manner to favor a specific company shows that not always the best company wins a particular project. This may result in unsatisfactory quality of work and as a result, tenders have to be re by the re-announced by procurement agencies, resulting in unnecessary expenditures for the state, the burden of which falls to taxpayers. According to the answers of our respondents, on average, the percentage of times when technical specifications are correctly specified is 39%, while in 61% of cases, technical specifications are not correctly specified and favor a specific company, which is in contradiction with the law on public procurement. This problem has been confirmed as being a pressing one by officials of Public Procurement Regulatory Commission and Procurement Review Body, stating that while in
some cases technical specifications may indeed be prepared to select the winner beforehand, in other instances favoritisms may occur by the lack of expertise of people drafting the technical specifications.

The arbitrary cancellation of tenders, presence of corruption, and problems related to the law itself, are also ranked among the most common problems in procurement processes.

c) Arbitrary cancellation of tenders: In preparing for a larger tender, companies often engage a large number of their staff in preparing the application package and making sure that everything is in accordance with the requirements. The preparation period may take weeks, or even months of work, which is translated to companies as costs of doing business, because in the meanwhile they have to pay their employees for their work. Thus, by canceling tenders arbitrarily, both the state budget, as well as the budget of companies is damaged.

d) Corruption: The presence of corruption (or at the least the perception of its existence) is believed to be high by the respondents in cases of public procurement. Some companies go as far as saying that public procurement is the most corrupt chain of the “system”, which should be addressed immediately. The percentage of respondents to claim that they have encountered corruption in procurement activities is 58%. According to these respondents, the most commonly encountered corruption types are: favoritism, bribery and extortion. Similarly, 52.4% of respondents claim to have heard of cases when companies within their sector made unofficial payments to guarantee the success of their bids in procurement activities.

e) Problems with the law itself: a number of respondents mentioned Problems related to the law and to the implementation of the law. The Law on Public Procurement and its harmonization with the EU Acquis Communautaire is analyzed separately in following sections of this study.

Other problems mentioned by companies which they claim to occur in procurement projects are the weak rule of law, discriminatory practices used by procurement bodies, unnecessary requirements for documents (3) etc. On the other hand, the unfavorable execution period for tenders is listed as a problem by 17 percent of respondents to have participated in procurement projects.
In a section of the survey, respondents were asked to provide their opinion regarding the current Law on Public Procurement, in terms of transparency and harmonization with international standards. When asked whether they think that the Law on Public Procurement is correctly defined and in line with international procurement standards or not, respondents provided the following answers:

Furthermore, respondents were asked their opinion on whether there are any problems with the law itself. None of the respondents claimed that there is no problem with the law, while their answers were divided in two options, as provided in this graph:

The majority of respondents say that the problems emerge from the improper implementation of the law, rather than the law itself, suggesting the need for an increased effort for the improvement of procurement practices.

Despite the fact that the Assembly approved the new Law on Public Procurement No.
04/L-042 in 2011, only 28 percent of respondents believe that the law promotes transparency, while 30 percent believe that provisions of this law encourage fair competition. This opinion of respondents is perhaps influenced by the encountered problems in their experience, and whether indeed the problems come from the law or its misinterpretation should be investigated. In this regard, the answers of respondents regarding the times when they believe procurement practices used by different procurement bodies were as following:

As provided in the graph, according to our respondents, the average percentage of times when procuring bodies of different state institutions actually implement the procurement procedures as foreseen by the law itself is 46 percent. In other cases (54 percent), respondents claim that procuring bodies do not implement proper procurement practices.

**iii. Businesses' Perception of the work of Procurement Review Body**

Procurement review body is by law the institution in charge of carrying out complaint procedures for review of procurement cases, and is responsible for reporting to the Assembly on annual basis for its performance. The Supreme Court of Kosovo can review decisions taken by the Procurement Review Body, upon request of economic operators. This part of the study examines the performance of the Procurement Review Body, while also revealing the perception which businesses have on the work of this institution in terms of transparency and accountability. During 2011 alone, this body received 419 complaints for procurement cases, 386 out of which coming from economic entities. According to the annual report of the Procurement Review Body for 2011, out of 386 complaints received from economic entities, this body evaluated 367 procurement cases, results of which have been summarized in the next figure:
In 2011, 190 complaints (49%) were refused because allegations of economic entities were not based on legal arguments, while in a total of 177 cases (44%), the Procurement Review Body determined the presence of irregularities in procurement procedures. As a result, PRB requested the reevaluation of offers in 106 cases, while tenders had to be re-announced because of “irregularities in the tender dossier, unfair evaluation of offers or developing procurement procedures with deficiencies”. As a result of complaints submitted by economic entities, because of cases when the appeal decision went against their favor, the PRB managed to collect €98,500. According to the annual work report, the most complaints received by economic entities for procurement activities were for tenders announced by the Ministry of Infrastructure, Kosovo Energy Corporation, Kosovo Police, Municipality of Prishtina, Ministry of Health, Ministry of Public Administration etc.

From respondents who claimed to have faced problems in procurement activities in the past, 51.2% of respondents reveal that they have complained to PRB, while the other 48.8% decided not to appeal the decisions of contracting authorities, because of various reasons, as explained below:

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2 Based on the data from the annual work report from the Procurement Review Body
3 i.d., pages 94-98
Respondents claim that their main reluctance to submit a complaint to the Procurement Review Body in cases when they are not satisfied with the decision of a contracting authority, is because they are afraid that the procuring body/contracting authority of that institution will damage the company in procurement activities in the future. The fact that companies have to pay a fee of 500 euro for every complaint made to the procurement review body has been mentioned as a problem, especially in cases when the project itself is of a lower value.

However, those respondents who submitted a complaint to PRB, rate this institution very well in terms of providing responses on time (within the legal deadline):

![Figure 14 Timeliness of providing responses by PRB](image)

92% of respondents claim that the Procurement Review Body provided an answer to their complaints/inquiries in a timely manner, as provided by law. 64% of respondents inform that the decision of PRB was to approve the decision of the contracting authority, 23% claim that the decision of PRB was on their favor, while 13% claim that there are still waiting for a decision. In the other hand, respondents’ evaluation of PRB is not as good in terms of transparency:

![Figure 15 Performance of PRB based on transparency](image)

As the graph provides, respondents rate PRB very lowly on transparency. While recognizing the possible bias in these answers due to bad experiences in the past, the fact that none of respondents claim to have found PRB very transparent in handling businesses’ complaints is worrying. According to representatives of PRB, this institution functions and handles cases very transparently based on a set of regulations, and the satisfaction of businesses with this institution is increasing thanks to the new Law No. 04/L-042 on Public Procurement. He said that the complaints of businesses after the law has entered into force are prepared much better, making the job of PRB easier as well.
iv. Businesses’ stance on e-Procurement

Businesses are almost unanimous in their opinion of beginning to conduct procurement activities electronically, listing a number of advantages and benefits. Various definitions exist on e-procurement, and the scope it covers, one of them being: “... e-Procurement refers to the use of Internet-based (integrated) information and communication technologies (ICTs) to carry out individual or all stages of the procurement process including search, sourcing, negotiation, ordering, receipt, and post-purchase review” (Vaidya, Sajeev and Callender 72).

When asked whether procurement activities in Kosovo should be conducted electronically, 92% of respondents provide a positive response, while 8% are against e-procurement. According to the respondents, benefits derived from e-procurement are various:

According to these answers, the largest benefit derived from e-procurement would be the increased transparency of the overall procedures. As evidenced earlier in this document, businesses have many complaints in terms of transparency during procurement activities, and e-procurement can help in improving this aspect of the field. Respondents also believe e-Procurement will provide for more efficient procedures by contracting authorities and the lower costs for companies. In addition, e-procurement will certainly have a positive environmental impact, given that tender applicants will not have to print a large number of documents required for different projects. Another positive result from e-procurement, according to respondents, will be the increased competitiveness in procurement projects, given that companies will not have to travel long distances just for submitting an offer for a certain project. This will lead to better results from procurement projects, given the possible larger number of applications per project.

Conducting procurement electronically is in line with EU principles. EU Directive 2004/17/EC and Directive 2004/18/EC set up the basis for allowing procurement activities to be conducted electronically in Europe. Given that, the Government of Kosovo has pledged to undertake all necessary measures to harmonize the legislation and practices with the EU Acquis Communautaire, implementing e-procurement would not be in conflict with this approach.
IV. Legal Review

The creation and proper functioning of the common market rest in the heart of European Union law. The Treaties establishing the European Union have envisaged a system of legal, economic and political integration which is to be achieved through the progressive convergence of the economic policies of member states. The Acquis on public procurement is based on the **general principles** deriving from the Treaty on the Functioning of the European Union (TFEU), Part Three, Title IV und Title VII, and from the jurisprudence of the European Court of Justice, such as transparency, equal treatment, free competition and non-discrimination. In addition, specific EU rules apply to the coordination of the award of public contracts for works, services and supplies, for the classical sector and for the utility sector. The scope of application is defined according to contracting authorities/entities, contracts covered and application thresholds and specific exclusions. The acquis also specifies rules on review procedures and the availability of remedies.

The award of public contracts (public works, public supply and public service contracts) is coordinated by two specific directives: Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts regarding the so-called "traditional contracting authorities" (the “classical sector”) and Directive 2004/17/EC concerning the coordination of procurement procedures of entities operating in the fields of water, energy, transport and postal services (the “utilities sector”).

Further to the award of public contracts, the procurement acquis entails three directives on remedies: Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; Directive 92/13/EEC on coordinating the laws, regulations and administrative provisions relating to the application of EU rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sector and Directive 2007/66/EC amending the other two directives to improve the effectiveness of review procedures concerning the award of public contracts. The remedies directives contain requirements for the establishment of effective and independent review procedures against any action or inaction of contracting authorities liable to produce legal effects. Review bodies have to be equipped with the adequate capacity to guarantee the effectiveness of the system as a whole.5

The entire acquis in public procurement is covered by the EEA Agreement with the exception of two technical Directives (2006/97/EC and 2007/24/EC) and the new Remedies Directive (2007/66/EC).

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The transposition of the Procurement Directives is specifically important for Kosovo as it is foreseen for the first stage of implementation of the Stabilization and Association Agreement (SAA):

During the first stage as defined in Article 6, approximation shall focus on fundamental elements of the Internal Market acquis as well as on other important areas such as competition, intellectual, industrial and commercial property rights, public procurement, standards and certification, financial services, land and maritime transport – with special emphasis on safety and environmental standards as well as social aspects – company law, accounting, consumer protection, data protection, health and safety at work and equal opportunities.

Although there is no contractual relation between the European Union and Kosovo as of October 2012, the European Commission commenced the so-called Stabilization and Association Process Tracking Mechanism (STM) as of 2002. Stabilization Tracking Mechanism is the mirror instrument of the Stabilization and Association Process (SAP) specifically designed for Kosovo to ensure that the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Provisional Institutions of Self-Government (PISG) follow EU-compatible practices in the political, economic and sectoral reform process. The process aimed at building an institutional, legislative, economic and social framework directed by the values and models subscribed to by the European Union, as well as at promoting the transition to a market economy.

As part of 2012 Enlargement Package adopted by the European Commission, the Commission commenced a Feasibility Study for a SAA between Kosovo and the European Union. In the report issued by the Commission on October 10, 2012, it confirms that Kosovo is largely ready to open negotiations for a Stabilization and Association Agreement:

The Commission will propose negotiating directives for such an agreement once Kosovo has made progress in meeting short-term priorities.

The study examined whether the political, economic and legal criteria for the Stabilization and Association Agreement are fulfilled:

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6 Art 70(3) Stabilization and Association Agreement between the Republic of Albania and the European Union and its Member States
“Kosovo has put in place a stable institutional and legal framework necessary to start negotiating a Stabilization and Association Agreement. It is also essential that Kosovo continues implementing in good faith all agreements reached between Belgrade and Pristina to date and that it engages constructively on the full range of issues with the facilitation of the EU.”

On this understanding, the Commission will propose negotiating directives for such an agreement, once Kosovo takes several steps on improving the rule of law, public administration, protection of minorities and trade aspects. Most importantly, the study confirms that there is no legal obstacle to conclude a Stabilization and Association Agreement between the EU and Kosovo.

Although this marks an important step in the process of European integration of Kosovo, it also states the need for further reforms in the area of the rule of law in order to accept obligations deriving from SAA.

**Public Procurement Law in Kosovo**

Law on Public Procurement (LPP) No. 04/L-042 has been passed by the Assembly of Kosovo on August 29th, 2011, published in the Official Gazette of Kosovo No. 18 and entered into force on October 05th, 2011. The purpose of LPP as provided in its Article 1 is to ensure the most efficient, cost-effective, transparent and fair use of public funds, public resources and any other funds and resources of contracting authorities in Kosovo by establishing the requirements and rules that shall be observed, the procedures that shall be followed, the rights that shall be respected, and the obligations that shall be performed, 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 and/or resources.

As part of the tendencies to improve the implementation of LPP, the Public Procurement Regulatory Commission (PPRC) has been worked on several secondary acts, which have been properly enacted. As of October 2012, public procurement secondary legislation includes:

- Procurement Regulation and Operational Guidelines
- Standard Tendering Documents and Forms
- Regulations for Contract Management
- Procurement Code of Ethics

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8 Ibid.
Documents for Diplomatic Missions of Kosovo

PPRC has concluded that all of the secondary legislation of procurement according to the Law No. 04/L-042, is completed. At the end of 2011, PPRC approved over 70 secondary acts that deal with all tender dossier, contract notices, Procurement Code of Ethics, documents for Diplomatic Missions of Kosovo, whereas has entered into force on January 1st, 2012. During January 2012, PPRC promulgated 4 secondary acts: Procurement Regulation and Operational Guidelines, as well as Work Regulation of PPRC with Operational Guidelines, which has entered into force February 1st, 2012. During February 2012, PPRC promulgated 7 secondary acts that deal with the sale of assets, which have entered into force on March 1st, 2012.

Institutional Setup

Based on LPP No. 04/L-042, two central procurement institutions have been established:

Public Procurement Regulatory Commission (PPRC)
Procurement Review Body (PRB)

The Central Procurement Agency (CPA) has been established under the Ministry of Finance as a Contracting Authority. For reasons of professional expertise, cost-effectiveness, efficiency or other legitimate concerns the Minister of Finance has been granted the authority to designate the CPA as the responsible contracting authority for the conduct of any procurement activity. In that case, the Minister of Finance shall notify the concerned contracting authority or authorities of such determination, the latter having no longer any authority to conduct the concerned procurement, and the CPA shall be deemed the “contracting authority” for the concerned procurement activity. The Minister of Finance has to obtain the agreement of the relevant supervisory board if the contracting authority is a Publicly Owned Enterprise.

All of the contracting authorities in Kosovo Public Institutions have established their Procurement Departments. According to PPRC, as of December 31st, 2011, there are over 161 contracting authorities, with 489 licensed procurement officers throughout Kosovo.

Public Procurement Regulatory Commission is lead by 3 Board members proposed by the Government and nominated by the Assembly, with a 5-year mandate. The PPRC is an independent regulatory agency, meaning that no public official may exert or attempt to exert any influence over the PPRC with respect to any specific operational or regulatory decision or action of the PPRC. The PPRC is a public authority and a budget organization.
The PPRC is therefore subject to all applicable provisions of all other laws and regulations of Kosovo to the same extent as any other public authority or budget organization.\(^9\)

PPRC is competent for the overall development, functioning and supervision of the public procurement system in Kosovo. In addition, PPRC has the authority and responsibility to:

- Conduct investigations of procurement activities and contract management;
- Perform monitoring of procurement activities in Kosovo;
- Prepare and publish the complete secondary legislation on procurement;
- Publish all types of notices on public procurement;
- Prepare training programs in public procurement;
- Monitor the implementation of contract by the contracting authorities;
- Cooperates with foreign institutions in the field of public procurement;
- Prepare and submit to the Government and Assembly of Kosovo the Annual Report on public procurement activities.\(^{10}\)

**Procurement Review Body**

The PRB is an independent administrative review body. The PRB consists of five (5) Board members. For administrative support the PRB is assisted by a Secretariat led by Head of the Secretariat. No person or public official may exert or attempt to exert any political or illicit influence over the PRB or any of its employees with respect to any specific decisions. The PRB is responsible for implementing the procurement review procedures established by LPP. All decisions issued by the PRB may be reviewed by the competent Court in accordance with the law on the judicial review of administrative matters.\(^{11}\) As of October 2012, the competent court to review the decisions of PRB (process an administrative conflict) is the Supreme Court of Kosovo. This is expected to change as of January 2013 with the establishment of Department for Administrative Disputes within the Basic Court in Pristina, pursuant to the new law on courts.

Procurement Review Body has the following competencies according to LPP:

- Reviews all complaints addressed to the PRB regarding the possible violations of the LPP.
- Conducts investigation on its own initiative or upon request of any party involved in the procurement process relating to any irregularities during the performing of procurement activities.

\(^9\) Article 68(1) and 68(2) Law on Public Procurement No. 04/L-042 of the Republic of Kosovo
\(^{10}\) For more see Article 86 and 87, Law on Public Procurement No. 04/L-042 of the Republic of Kosovo
\(^{11}\) For more see Article 98 and 99, Law on Public Procurement No. 04/L-042 of the Republic of Kosovo
Complaints are reviewed by the Review Panel, established by PRB, consisting of one, three or five members. PRB prepares and submits to the Assembly of Kosovo the Annual Report on performance of procurement complaints.

**Legal Training of Procurement Officers**

The CAO of any contracting authority shall designate one person to serve as the contracting authority’s Responsible Procurement Officer. If other employees of the contracting authority are civil servants, the Procurement Officer shall also be a civil servant. A person may serve as a responsible procurement Officer if the person holds a university degree, and a valid basic or advanced procurement professional certificate issued in accordance with LPP.

All previous laws on public procurement between 2004 and 2010 have required in a mandatory manner the training of procurement officers within 10 days. Since 2011, the Law on Public Procurement requires that the training of the procurement officers is prolonged into 15 days, by classifying the trainings in two levels: Basic level and Advanced level.

According to PPRC, during 2011, over 489 procurement officers have completed the basic training and have obtained basic procurement license, valid for three years, whereas these officers now are attending the advanced training on public procurement.

**Compliance with EU Law**

One of the most important principles of the Public Procurement Directives is the principle of transparency. The principle of transparency serves two main objectives: the first is to introduce a system of openness into public purchasing in the member states, so a greater degree of accountability should be established and potential direct discrimination on grounds of nationality should be eliminated. The second objective aims at ensuring that transparency in public procurement represents a substantial basis for a system of best practice for both parts of the equation, but is of particular relevance to the supply side, to the extent that the latter has a more proactive role in determining the needs of the demand side. It can be argued that the Law No. 04/L-042 on Public Procurement in the Republic of Kosovo transposed the majority of requirements of the Directive 2004/18/EC including works concessions. Essential parts of the LPP are a transposition of the Directive.

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12 Christopher H. Bovis, “EU Public Procurement Law”, Elgar European Law 2007, p. 66
2004/18/EC. Article 7 of LPP mentions explicitly the procurement principles of equal treatment and transparency.

However, LPP does not extend the principle of non-discrimination to entities that are granted special or exclusive rights to carry out public services.

A Handbook that describes the tender procedures and provides for legal interpretation and advice for practical implementation of the law has not been made available by PPRC to and used by all contracting authorities. This may lead to misinterpretation of LPP and its secondary legislation.

Very limited number of standard forms and the EU Common Procurement Vocabulary (CPV) set out in Regulation No 2195/2001 has been incorporated into LPP and secondary legislation.

The LPA sets out the legislative framework for work concessions following Directive 2004/18/EC. With a very limited exception, concessions are excluded from the scope of the LPA. The PPA transposes the respective provisions of EU law on public procurement applicable to procedures above the value thresholds.

Law on Public Procurement covers both the “classical” and the “utilities” sectors, govern all public contracts above 1,000 EUR for supplies, services and works. These thresholds are much lower than the requirement of the procurement Directives (2004/18/EC and 2004/17/EC).

Of paramount importance to the internal structure of the Public Procurement Directives is the comprehensive and clear definition of the term contracting authorities, a factor which determines the applicability of the relevant rules. The term contracting authorities for the purposes of public purchasing regulation should not pose considerable conceptual difficulties; it should cover authorities which disperse public funds in pursuit of or on behalf of public interest. EC public procurement law characterizes as contracting authorities the state and its organs, interpreted in functional terms. The term state covers central, regional, municipal and local government departments. The above contracting authorities are primarily responsible for the core procurement requirements of supplies, works and services in a society. The Public Procurement Directives include detailed lists of all central and regional government departments that fall under their remit. LPP provides for different types of contracting authorities and entities including the state, local authorities, their institutions and other public entities in line with definitions in Directive 2004/18/EC.

14 Christopher H. Bovis, “EU Public Procurement Law”, Elgar European Law 2007, p. 63
The definitions of the central purchasing body and design contests are properly
transposed. The LPP also provides for specific rules on design contests in line with
this directive, whereas the PPRC has enacted secondary legislation to properly address
this issue.

The specific exclusions set out in Article 3 of the LPP do not go beyond the procurement
directives. Secret contracts and contracts requiring special security measures for the
protection of the essential interests of the state are covered.

As stated above, the domestic value thresholds are considerably lower than the value
thresholds of the procurement directives.

The Award Criteria

A contracting authority shall in the contract notice and the tender dossier specify the criteria
to be used for awarding the contract. The criteria can be either lowest price only or the
economically most advantageous tender.  

The lowest price criterion reflects a numerical comparison of tendered contract prices. The
tenderer who submits the cheapest offer must be awarded the contract. Subject to
qualitative criteria and financial and economic standing, contracting authorities do not rely
on any factor other than the price quoted to complete the contract. The reasons for utilizing
the lowest price criterion are: simplicity, speed, less qualitative consideration during the
evaluation of tenders.

The assessment of what is the most economically advantageous tender offer is to be based
on a series of factors and determinants chosen by the contracting entity for the particular
contract in question. These factors include: price, delivery or completion date, running
costs, cost-effectiveness, profitability, technical merit, product or work quality, aesthetic
and functional characteristics, after-sales service and technical assistance, commitments
with regard to spare parts and components and maintenance costs, security of supplies.
The above list is not exhaustive and the factors listed therein serve as a guideline for
contracting authorities in the weighted evaluation process of the contract award. The order
of appearance of these factors in the invitation to tender or in the contract documents is of
paramount importance for the whole process of evaluation of the tenders and award of
the contract. The most economically advantageous factors must be in hierarchical or
descending sequence so tenderers and interested parties can clearly ascertain the relative
weight of factors other than price for the evaluation process.

15 A. 52(1), Law on Public Procurement No. 04/L-042 of the Republic of Kosovo
Conclusions and Recommendations

The facts and data presented in this study show that despite all efforts, and despite the continuous changes in legislation, public procurement remains a problematic and challenging field for businesses. From the large number of problems which were identified by respondents to our survey, the following ones seem to be more prevalent in procurement activities:

- Over-reliance on the lowest price criterion
- Technical specifications often drafted to favor specific companies
- Arbitrary cancellation of tenders
- Prevalence of corruption
- Unnecessary document requirements
- Problems with the law itself/weak rule of law
- Discriminatory practices

A large number of businesses base their existence predominantly (and sometimes solely) on public procurement projects, making improvements in this field a necessity. Thus, in order for the situation in this sector to improve, changes in legislation should be followed by a better implementation of these laws, by all involved parties, from contracting authorities and businesses to the procurement review body. The following recommendations emerged after analyzing the data from our respondents, as well as from our interviews with field experts, with the purpose of serving to stakeholders in improving the current situation:

1. **Contracting authorities should carefully consider their options when selecting a contract award criterion:** While opting for the lowest price criterion as opposite to the economically most advantageous offer can be easier in terms of evaluating bids, it is not necessarily the adequate criterion to be used in all procurement cases. Some fields, such as health, should require the usage of the economically most advantageous offer criterion in evaluation, due to the importance it has to the overall society and due to the sensitivity of the field. If necessary, contracting authorities should consult experts to make sure the basis of evaluation is transparent and can provide the best possible results. This will increase the probability that companies offering higher quality products/services will win more projects. As a result, in the long run, the budget of the country will

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Conclusions from the Commission Staff Working Document accompanying the document Commission Communication on a Feasibility Study for a Stabilization and Association Agreement between the European Union and Kosovo¹⁶

“To meet its obligations under an SAA, Kosovo needs to put more emphasis on ensuring compliance, in particular as concerns the Procurement Agency. The integrity and transparency of the processes needs to be increased. Further efforts are required to ensure that corruption and fraud cases are addressed and prosecuted successfully. Corruption in the field of procurement needs to be addressed. The professionalism of procurement officers needs to be further improved with more emphasis on high-quality trainings. The turnover of procurement officers is still significant and needs to be addressed.

Under an SAA, Kosovo would be required to ensure that EU companies are granted access to contract award procedures under treatment no less favorable that of domestic companies, subject to a transitional period to be negotiated for EU companies not established in Kosovo. Kosovo would need to ensure that its public procurement legislation is in line with that of the EU. It would also need to strengthen the relevant institutions and judiciary so that public procurement procedures are properly implemented.”

¹⁶Accessed through
2. Technical specifications should necessarily be drafted by experts of the field: Ministries, agencies, municipalities, and other public institutions that are subject to procurement laws, should budget separate funds for hiring field experts in order to ensure the drafting of technical specification that are truly needed for the project at hand and are in line with best EU practices. This will enable a more transparent process, helping reduce the occurrence of favoritism. Necessary amendments should also be made to the law in power to provide for the hiring of experts in cases when sector-specific expertise is needed in drafting technical specifications. After all, the law on public procurement has been drafted to promote fair competition, and this should be in line with those principles.

3. Contracting authorities should make sure that there are enough funds to cover for the expenses of the project, before announcing the tender: As explained earlier in this study, the cancellation of tenders causes many losses to businesses in terms of time and money, but also to the state budget. Although sometimes unpredictable circumstances which affect the implementation of a project might arise, contracting authorities are advised to take all the necessary steps to make sure that the necessary means are available.

4. Contracting authorities should avoid the practice of requiring extensive documentation of applying for tenders: Extensive documentation requirements do not only increase the costs of applying for a particular project, but also increase the probability of a procurement process to fail due to the lack of companies able to fulfill requirements. Companies claim that in some cases, contracting authorities require documents that are completely unrelated to the work which is to be conducted by the winning company, and sometimes, these documents cannot be obtained in Kosovo. In order to reduce the bureaucracy of doing business and to enable more companies to bid on different projects, the list of document requirements should be constrained only to those fundamental to the implementation of the project.

5. E-procurement platform should be established: As argued in this study, benefits derived from implementing an electronic platform for public procurement are plenty. E-procurement, will increase transparency, decrease costs, improve efficiency, lower environmental impacts, increase competition in procurement processes.

6. Corruption should be fought systematically: While fighting corruption remains a challenge in many spheres of society, businesses perceive that this negative phenomenon is present in procurement processes as well. With this regards, the Assembly Kosovo should take measures to unilaterally adopt Council of Europe Criminal Law Convention on Corruption and the Civil Law Convention on Corruption. This will help in fighting and preventing corruption in many sectors, including procurement.

7. Proper implementation of the legal framework is necessary for improving the results and transparency of public procurement in Kosovo: While there are differing views between the business community and field experts regarding the law on public procurement, problems mainly arise in the implementation of the law. Thus, increased efforts in the proper implementation of the law and better monitoring will improve the results of public procurements.

8. Time limit for submission of complaint on technical specifications should be introduced: The current law does not provide for any limitation in submitting complaints on technical specifications, resulting in delays in the review process from the Procurement Review Body. Introducing a deadline will make the complaint procedure more transparent, and businesses themselves will be more aware of their rights.

9. Clear definition of arithmetic errors and its percentage, as it may leave room for interpretation:

10. The fee for complaints made to the Procurement Review Body should be decreased: Currently, the deposit for submitting a complaint to PRB is €50,0, and it is refundable only when the complainant wins the case. This can be a heavy burden of businesses, especially on cases when the tender itself is of a low amount. Thus, we recommend that the fee should be lowered to €150 in order to encourage businesses to report irregularities.