

Inconsistency in decision making as a proxy to corruption

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Abstract

This study targets the decision-making process and the politico-administrative relations in the Public Procurement Review System in Albania (PPRS). The inner logic of this study is composed of interrelation between decision making and accountability of actions and inactions, which pose the risk for decision making to face corruption due to the lack of legal and/or social auditing mechanisms.

The study targets decision making in Public Procurement Commission (PPC) in Albania by reviewing decisions to identify stable patterns of flawed, inconsistent interpretation which allow corruptive actions and inactions to take part.

Keywords: accountability, inconsistent interpretation, decisions, Pubic Procurement.

Introduction

Maintaining integrity in public procurement is one of the most important pillars of modern national procurement systems (Arrowsmith, Lineralli & Wallace, 2000; Kelman, 1990). However, research on corruption shows that Public Procurement System (PPS) is one of the most critical policy fields, especially when formal monitoring mechanisms are questionable. According to Bac (1998, p. 101) lack of satisfactory formal models on public bureaucracies and supervision procedures impedes our understanding of the many organizational aspects of corruption. More recent research over the past twenty years has typically (though not always) been more preoccupied with external political forces rather than *what goes on inside the agency* (cf. Brehm and Gates, 1997) however, following theoretical models such as Agent theory and Capture of State, the inside of bureaucracies explains the tendency of the latter to engage into corruptive affairs. In this vein it is important to point out that corruption is more probably when the monopoly of information is high and the accountability within the organization is low. According to 'Klitgaard formula', Corruption = Monopoly + Discretion – Accountability (Klitgaard, 2000) although the Public Procurement Review System in Albania is approximated to the European legal framework, the institutional setting reflect the lack of *monitoring mechanisms*, providing an open space for systematic favouritism, corruption and collusion to arise, and puts into question the overall integrity of the system.

The Public Procurement Commission is the highest body in the field of public procurement. Its decisions are administratively final and PPC acts as a quasi-judicial appeals body which promotes competitions and non-discriminatory treatment for economic operators. In Albania PPC is a collegial body, directly elected by the Prime Minister. This opens the debate for political dependence and staff instability and on the other hand, as a collegial body, PPC officials find it "safer" to commit such a crime

if they are part of a group of allied decision makers (WB, 2014, p.11). Acknowledging that systematic favouritism over a long period drive out of the market companies which were unable to win contracts because they lacked relevant political connections (Munir Podumljak and Elizabeth David-Barrett, 2015), the study tries shed light on silent affairs which are highly important for the economic situation of the country and fair distribution of wealth in the society. In order to do this, the study uses *proxies of corruption*, as indicators of corruption. Inconsistency in decisions of PPC (different decisions for same criteria) is a proxy that indicate bias decisions and corruptive intention, unfair or unequal treatment, failure to follow particular requirements of law or other legal norms/procedures, etc. (PACA, 2010).

Inconsistent interpretation within PPC Decisions

The review system is responsible to establish a foundation for a *uniform application* of the law and thereby serve as guidance for tenderers, increase predictability and thus uphold the rule of law (Lina Carlsson & Karsten Åström, 2008). The evaluation of procurement bids is not based only on prices but also on flexible and nonstandard parameters which imply quality or related issues such as environment or new technologies. This poses the risk for interpretation and selective evaluation from the side of the PPC staff. A procurement officer in charge of assessing proposals can manipulate her/his evaluation to “steer” the contract to a bribing company. It is only gradually now becoming obvious that bribery should be one of the fundamental concerns in ascertaining the effectiveness of procurement regulations (OECD, 2007). However, typical distortions in decision making of Procurement Commission (tailor-made interpretations) are difficult to unfold by assessing the conformity of procurement records against legal provisions, in the first view they seem legal and well elaborated. Thus by comparing DM on similar tendering procedures, one can find *variances in the interpretation of tendering criteria, rules and procedures*. In this sense, this study considers evidence of irregularities and variations, flawed interpretation and weak of clarity in PPC decisions that occurred routinely in complaint review, but legitimately within the procurement rules.

Following a detailed and complex analysis, the study finds out that there is a lack of compliance in the decisions issued by PPC as far as the interpretation of criteria is concerned. In order to support this consideration, this policy paper provide examples which show the inconsistency or variations and flawed interpretation for the same procurement complaints, pointing out the lack of compliance in the decisions issued by PPC as far as the interpretation of criteria is concerned.

The analysis for inconsistency on PPC decisions is conducted following a combined methodology. Firstly, a survey is sent to *security guards* companies, which were asked to indicate cases of inconsistency they are aware of. These cases were furthered analysed by the researcher. *Security guards* category is chosen because it has the highest number of bids (almost 95% of total PPC decisions on tender procedures are on security guards) and it comprises both low and high value contract. Moreover, the net profit assigned by economic operators in biddings is very small (0.000007 euro the average) so that this does not motivate economic operators to appeal the PPC

decision in courts (as mentioned above, when the court upheld the decision of the appealing economic operator, it provides the lost profit only, the value of which is sometimes 0.5 euro). This strengthens the role of PPC to have almost the final say on the award contracts.

Other categories rather than security guard have been selected via random sample and have been analysed in pair to one another to match inconsistent cases.

Moreover, interviews with former employee of PPC are conducted in order to understand the internal functioning of the institution and its decision making. Further interviews were conducted with EU experts (SIGMA, Transparency international, EU Delegation in Albania, etc.). Thus, the study seeks to assess favouritism – i.e., preferential treatment for some bidders over others, in the PPC in Albania, by identifying and illustrating examples of selective decision making of PPC decisions.

Examples of inconsistency of PPC Decisions for similar criteria

Case no.1 - Inconsistency in reviewing claims on tendering criteria

Decision K.P.P 25/2017 dated 26.01.2017 and Decision K.P.P 35/2017 dated 31.01.2017 represent a case of inconsistency. The *tendering criteria* we are reviewing in this case, as set in the tendering documents by the contracting authority, is '*... employment period for the technical engineer ...*'. The economic operator submitting a complaint to the Public Procurement Commission is "Rej" sh.p.k in both cases and both complaints are submitted *within one month*.

As the first review instance, Contracting Authorities (is different in each case) have both rejected the economic operator's claim reasoning that the economic operator has not fulfilled the criteria set for the employment period of the technical engineer, as requested in the tender documents.

Following the rejection of Contracting Authorities, the economic operator has submitted a claim in both cases to the PPC.

Reviewing the decision taken from both contracting authorities for the same criteria applied in two different cases, having the same economic operator submitting the same documents in both cases, PPC decides differently for each case.

For decision K.P.P 25/2017 the PPC decides not to accept the claim of the economic operator, while for decision K.P.P 35/2017 the PPC decided to uphold the claim of the economic operator and reject the decision of the Contracting Authority.

In other words, the PPC has scrutinized within one month two claims submitted from the same economic operator appealing the same tendering criteria, and has provided different interpretation for each decision, leading as such to contradicting outputs.

Case no.2 - Inconsistency in reviewing claims on tendering criteria

Decision K.P.P 557/2015 dated 25.08.2015 and Decision K.P.P 340/2016 dated 17.05.2016 represent a case of inconsistency.

The *tendering criteria* we are reviewing in this case, as set in the tendering documents by the contracting authority, is '*... employment contracts and CVs of engineers...*' (supporting documents). The economic operator submitting a complaint to the Public Procurement Commission in both cases is "Nika" sh.p.k.

As the first review instance, Contracting Authorities (is different in each case) have both rejected the economic operator's claim reasoning that the economic operator has not fulfilled the criteria set for the employment contracts and CVs of engineers, meaning that they have not submitted the supporting documents (such as the CV and work Contract) for engineers who have already left the company in the time of application and are substituted by other engineers.

Following the rejection of the Contracting Authority, the economic operator has submitted a claim in both cases to the PPC.

Reviewing the decision taken from both contracting authorities for the same criteria applied in two different cases, having the same economic operator submitting the same documents in both cases, PPC decides differently for each case. For decision K.P.P. 557/2015 the PPC decides not to accept the claim of the economic operator, while for decision K.P.P 340/2016 the PPC decided to upheld the claim of the economic operator and reject the decision of the Contracting Authority.

In other words, the PPC has scrutinized two claims submitted from the same economic operator, appealing the same tendering criteria, and has provided different interpretation for both decisions, leading as such to contradicting outputs.

Case No.3 - Inconsistency in reviewing claims on formal criteria (submission deadline)

Decision K.P.P 239/2016 dated 19.04.2016 and Decision K.P.P 455/2016 dated 21.06.2016 represent a case of inconsistency.

This case represents a review of the inconsistency in the formal criteria of the claims submitted by economic operators. The interpretation of these two decisions are based upon the DCM no.184, article 23 pint 3/a dated 17.03.2010 "*On the approval of regulation 'On the organization and functioning of Public Procurement Commission'*" which relates to deadlines for submitting claims to review instances.

In this case the economic operator is not the same, for decision K.P.P 239/2016 is "Ales" sh.p.k. and for decision K.P.P 455/2016 is 'Aulona Pol. 1' sh.p.k.

In both cases, for both tendering procedures, the evaluation of the Contracting authority is published on 21.03.2016. With reference to the law on Public Procurement, law no.9643 dated 20.11.2006 "For the Public Procurement amended", point 63, point 1 and 2, stipulates that 'Claims against the decision of contracting authorities is submitted to the latter within 7 days starting from the subsequent day ...'. In both cases scrutinized here, economic Operators have submitted the claim to the Contracting Authority on 29.03.2016. Although these cases represent a similar situation in terms of deadlines to submission of claims, the PPC decision is different for each case.

For decision K.P.P 239/2016 the PPC decides to consider for review the claim of the economic operator reasoning that 'Ales' sh.p.k has not fulfilled the formal criteria (not having respected the claim deadlines), while for decision K.P.P 455/2016 the PPC decides to review the claim and to proceed with a decision.

Thus, the PPC has scrutinized two claims having the same submission date to the Contracting Authorities, challenging decisions of Contracting Authorities published at the same date both claims. PPC has decide differently for each of the claims in terms of approving only one of them for review and calling the other as nullified due to formal criteria violation, leading as such to contradicting outputs.

Implications of the lack of integrity in PPRS in Albania

After having provided the shortcomings of the Public Procurement Review System in terms of the institutional setting and internal problems of decision making in the Public Procurement Commission, there are several implications which derive from it, such as systematic favouritism, perception of corruption, dysfunctional market, etc. *Systematic favouritism* over a long period would drive out of the market companies which were unable to win contracts because they lacked relevant political connections (Munir Podumljak and Elizabeth David-Barrett, 2015). Interviews with economic operators show that *favouritism* disfavours companies in satisfying tendering criteria considering that the lack of similar contracts is necessary criteria for winning the tendering procedure.

The *perception of corruption* in the sector of public procurement will make companies think of getting involved in corruptive affairs because they see the collusion as a zero sum game, if they do not provide bribes to the officials, the competitor would do it instead.

If companies expect a contract to be allocated based on biased decision making they will *add up the price of the bid* in order to compensate the cost of the corruptive act, thus the overall price of the bid will be higher and non-realistic.

Alternatives in order to improve the PP Review system in Albania

Decrease the chances for political control – multi principal approach

Change the institutional setting from a single to a multi principal approach. The Public Procurement Commission should be either an independent body, or at least under the competences of both the Office of Prime Minister and the Parliament. Following the best examples of Croatia or Slovenia, Albania should establish another institutional setting for this highly important field, with integrity, lack of political influence, etc. Members of PPC should be recruited via Civil Servant competition while the head of PPC should be appointed by the Parliament.

In other words the study aims to delineate the grey zone within public procurement legislation as interpreted by PPC and administrative courts. By the grey zone we mean the area of legal uncertainty pertaining to the public procurement legislation, in particular with regard to the legal content of the established principles stipulated in the public procurement legislation which are subject of interpretation by PPC (Lina Carlsson & Karsten Åström, 2008).

Changes in the Legal framework

Public Procurement Review system in Albania need a more detailed and formalized legal framework, which need to specifically regulate competences of institutions and actors within the system, relation with third parties and specifically business sector, as well responsibilities in case of malpractices and violation of laws, where sanctions take part.

Auditing mechanisms

The Public Procurement Commission is one of the institutions which output is not audited, in terms of content of the decisions taken. Following other successful cases (Slovenia), there should be a unit which control and audit the content of the decisions of PPC, on regular and bases and random sampling. A third party outside of the principal-agent (Office of Prime Minister-PPC) should exist as an independent institution/unit within an existing institution. The State Audit Control should get involved, by putting itself in motion on regular bases, to routinely conduct audit of PPC decisions in order to ensure the integrity of this institution.

Role of Justice System

The Administrative Court should not act only as a third instance of the Review System which resolves certain claims, distanced from the other review instances. The court should advance its role in unifying its decisions and PPC Decisions in order to facilitate and formalize the decision making in reviewing tendering procedures. On the other hand, the Prosecutor Office should have a more active role in considering the cases of malpractices and violation of laws submitted in courts or published by third parties.

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