

## Public Procurement in the Security Sector in EU, Montenegro and Kosovo

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### Abstract

Treatment of public procurement and its role in the public administration is a key to addressing numerous dilemmas dealing with procurement procedures in general. Its position in the public administration is extremely disfavorable, because of the role, public procurement stands between public and private sector, therefore such position gives a certain scale of incredulity. Involved parties in the procurement procedures are also parties with diametrically opposite interests and therefore:

Public Administration, which is represented by Contracting Authority in the procurement intercourse as the main objective intends to get value for money through these procedures, so it can use the process to satisfy the last buyer, as a pre-condition to establish the images of a good governance, and also to save political jurisdiction as the main objective of every government.

The Economic Operator, in this respect, entered the clearest objective, which means achieving the highest profit from the contractual relationship, which stems from a procurement procedure. To achieve this goal, companies often reduce the costs of building, service or product quality in order to achieve the highest profit. And this goal only rarely seriously damages the quality of service or labor, and it also creates negative images of public procurement.

**Keywords:** Public procurement, security sector, EU, Montenegro, Kosovo.

### Introduction

Procurement Officer - who in the best case has a single purpose, to carry out procurement procedures in accordance with the law without trying to achieve the performance in this process. Therefore, this goal should also be understood as a normal development, since the public official is ultimately interested in ensuring that his work is in compliance with the legal rules for a quiet life without thinking about the performance of the public procurement activity. This situation aggregates the mistrust and suspicion among the actors, making it increasingly difficult to build a sustainable policy in this sector.

Another component that generates distrust, and complicates the public procurement process is the conflict between the principles inherent in the public procurement process, and the requirements for compliance and performance in public procurement. Therefore, this conflict of requirements in procurement procedures remains a major clash and one of the major dilemmas of legal theory in public procurement. While not often, contracting authorities lose highly favorable bids for the state as a result of the requirement to respect a formal administrative requirement, or a condition that for the purpose of the project does not have any particular weight.

So in the competition between compliance and performance, apparently, the lawyers have been more agile, reaching to prioritize compliance in the procedure with regard to procurement performance. In this situation, the simple citizen is not able to make

the differences, and to put the logic of this development, but will more easily build his story about procurement as a corrupt public administration activity. Therefore, in this situation, the only opportunity to avoid this mistrust between the actors, between the public administration and the citizens remains the increase of transparency in these procedures and the establishment of a sustainable communication between the actors in the procedure and the citizens, the media, NGOs etc. Therefore, to avoid this ambiguity and disregard, however, the prerequisite remains the maximization of transparency in procurement procedures, and this will result in increased competition, and through it will be realized the economy in the public procurement process. However, this whole situation refers to the normal public procurement procedures, which relate to public activities, which do not infringe on higher public and public interests, such as public security and state security. How to approach situations when dealing with state security activities?

When we are in procurement activities related to the security field (in accordance with Article 55.5 of Directive 2009/81 EC), the first issue that poses a dilemma is to define the notion of public security or state security. So we refer to an immeasurable notion correctly. Therefore, on this basis we can conclude that the preservation of state security and its violation are subject to subjective assessment. So, what seems to us to be a threat to security for others can be regarded as a lack of public or state security. Addressing security aspects in public procurement procedures is one of the most complex challenges and issues for consolidated societies and states, especially for transitional states and those with an insecure democratic order. As such the theoretical approach is more attractive, but in practical terms the establishment of balanced and functional rules remains an extremely complex rebus, because this process carries itself in diametrically opposed demands, namely:

- Request for confidentiality in procurement procedures as a prerequisite for safeguarding the country's security;
- PPL requirements for transparency in procurement procedures as a precondition for increasing competition and through it to achieve value for money in spending of public funds.

Given this aspect, procurement procedures carry diametrically opposed requests, and therefore the priority treatment of any of these two criteria poses risks to both the state budget and national and state security.

So for as long as the respect of the first criterion jeopardizes the second budget, however, remains the security issues left to be desired. Therefore, in this situation, anxiety on which side will bear consequences. Therefore setting a balance and the balance between these two demands remains a challenge not only for transition countries but also for states and societies with a consolidated democratic order. But how is this regulated in the EU level?

One of the main aims of the legislation in the field of public procurement within the European Union is to create and maintain a common market where Member States will have equal access, regardless of the ethnic, linguistic or cultural differences of member states. And this goal was achieved with the solutions of the directives of the 70s of the last century. But when we are procurements in the field of defense and security this has not been achieved, perhaps for certain political, legal or historical

reasons. At that time, classical theories of state sovereignty seemed to be exerting influence at the level of member states. This solution was apparently also accepted in the Treaty on the Functioning of the European Union,<sup>1</sup> which allowed Member States to procure procurement-related military equipment, certain services, and EU rules on transparency, competition and free trade.

This situation at the EU level created 28 markets with high protectionism measures in procurements of this nature in the name of state security protection and state sovereignty. Apparently, at this stage of EU development, the EU member states did not regard it as an organizational unit where defense policies could be delegated, or had a major role in the EU as a supra-state entity. In this situation each of the 28 member states created internal regulations to carry out these procurements, and this situation resulted in enormous price hikes in this area, deviant phenomena such as corruption began to appear and this resulted in reflection on member states on this issue. Taking into account that the individual markets of EU member states were usually out of the ordinary, and that the Member States were spending huge sums on armaments, based on the European Data Agency of the EU Member States, Within the year, around 200 billion euros were spent on these procurements,<sup>2</sup> while the defense industry spends around 55 billion euros and employs about half a million people.<sup>3</sup> Therefore, adjusting this sensitive issue was also an imperative for member states. This idea made the member states aware that the integration of this field will bring great savings and benefits, while the growth of competition will also affect the perfection of this industry. Therefore, this situation created the preconditions for the adoption of Directive 2009/81 EC, which was issued on 15 July 2009.

### Directive 2009/81EC

The birth of the directive in these circumstances was able to foster the harmonization of game rules in the field of purchases in the security sector. This Directive was adopted on 15 July 2009 in order to harmonize procurement procedures with a view to the performance of works, services and supplies in the field of defense at the level of member states. In addition to the Directive at this time, other accompanying directives of the so-called "Defense Package".

Since then we have intervened and changed on two occasions, and that in changing the threshold level and the Military List.<sup>4</sup>

The new directive has managed to establish:

- a common market for goods and services (EU internal market) in the defense and security sector;

<sup>1</sup> Treaty on the Functioning of the European Union.

<sup>2</sup> [www.eda.europa.eu/docs/defaultsource/neews/eu-us-defence-data-2011.pdf](http://www.eda.europa.eu/docs/defaultsource/neews/eu-us-defence-data-2011.pdf)

<sup>3</sup> [www.industriall-europe.eu/sector/defance/2012/INFE\\_E3779\\_Final%20Report\\_v03-EN-pdf](http://www.industriall-europe.eu/sector/defance/2012/INFE_E3779_Final%20Report_v03-EN-pdf)

<sup>4</sup> Review of European Commission on the implementation of the Directive from 2014

[https://www.google.com/search?client=safari&rls=en&q=REPORT+FROM+THE+COMMISSION+TO+THE+EUROPEAN+PARLIAMENT+AND+THE+COUNCIL+on+transposition+of+directive+2009/81/EC+on+Defence+and+Security+Procurement&ie=UTF-8&oe=UTF-8#;next review expected to be until 21 August 2016.](https://www.google.com/search?client=safari&rls=en&q=REPORT+FROM+THE+COMMISSION+TO+THE+EUROPEAN+PARLIAMENT+AND+THE+COUNCIL+on+transposition+of+directive+2009/81/EC+on+Defence+and+Security+Procurement&ie=UTF-8&oe=UTF-8#;next+review+expected+to+be+until+21+August+2016)

- and regulate the procurement of weapons and other sensitive equipment;
- services from relevant contracting authorities and other legal entities in the European Union.

Notwithstanding the fact that not all Member States have managed to harmonize their national legislation with the Directive by August 2011, the positive effects of the Directive are apparent. In the period August 2011 - March 2013, 872 contracts worth € 1.77 billion have been concluded, led by the Directive<sup>5</sup>. The Directive is essentially an adaptation of the "Public Sector Procurement Directive" 2004/18 / EU, which takes into account the specific requirements and distinctiveness of the defense sector, complexity and security of goods and information aimed at preventing the use of exemptions for Due to the protection of national public security or the protection of the State's vital security interests or Articles 36, 52 of the TFEU and in particular Article 346 of the TFEU. "Procurement Directive in the Public Sector" has been specifically tailored to the requirements of protection and security in the parts that regulate:

- the scope of application;
- public procurement procedures and conditions for their implementation;
- content and specification of technical specifications;
- terms of contract implementation;
- Tender qualifications to ensure their competence and credibility;
- selection criteria;
- the date of departure;
- subcontracting; and
- legal protection.

### **Scope of regulation in the defense area**

The Directive applies to all contracts concluded by contracting authorities in the field of defense and security:

- For the supply of military equipment, including any parts, components and / or sub-montage thereof, as well as works, supplies and services directly related to the equipment for any and all elements of the life cycle of the device;
- For the supply of sensitive equipment, including any parts, components and / or sub-montage thereof, as well as works, supplies and services directly related to the equipment for any and all elements of the life cycle of the device;
- Works and services for specific military or sensitive work and sensitive services;

The Directive indirectly defines military equipment and products that are considered as weapons, ammunition and war material<sup>6</sup>, as well as products intended primarily

<sup>5</sup> Review of European Commission on the implementation of the Directive from 2014 <https://www.google.com/search?client=safari&rls=en&q=REPORT+FROM+THE+COMMISSION+TO+THE+EU+ROPEAN+PARLIAMENT+AND+THE+COUNCILon+transposition+of+directive+2009/81/EC+on+Defence+and+Security+Procurement&ie=UTF-8&oe=UTF-8#>; next review expected to be until 21 August 2016.

<sup>6</sup> List approved by Council of European Union (Decision 255/58 on 15 april 1958), published as "Extract of Decision of the Council 255/58 of date 15 april 1958" 26.11.2008 (<http://register.consilium>).

for civil use, but later adapted for military purposes in order to be used as ammunition, ammunition or other war material. Purchases made during the so-called "non-military" security (protection of border crossings, police activities and other similar activities).

Exceptions to the application of the Directive in the case where the specific rules for awarding contracts resulting from international agreements or arrangements between Member States and third countries apply; Procurements for all types of intelligence activities, programs managed by international organizations; In cases where operations are conducted beyond the Union's borders, and when imposed by operational requirements; Purchases made between governments; Purchase or lease of immovable property; Arbitration, financial services ... etc. The Directive takes into account the needs of the contracting authority / entity throughout the product life cycle from initial research and development towards production, maintenance, modification, and disposal.

Member States are obliged to regulate the implementation of procurement procedures and the award of public contracts under the thresholds of application to ensure compliance and application of the general principles of the Directive (transparency, competition, non-discrimination ...). Selection of public procurement procedures has been adapted to the distinctiveness of this Directive - the use of open procedures is not regulated, and the procedures established are appropriate: restricted procedure, negotiated procedure (with or without prior publication of a contract notice) or Competitive dialogue can be used for extremely complex contracts. It is important to note that this directive enables the use of a simplified negotiated procedure. The personal or tender status of the tenderer or candidate - any candidate or tenderer who has been the subject of a final judgment on participation in a criminal organization, corruption, terrorist offense or terrorism related activities, money laundering and financing Terrorism, is excluded from participation in the contract. Technical specifications based on performance and functional requirements can refer to European, international and national standards, with the difference that in this type of procurement it is allowed to prove before contracting. The ability to compel a successful bidder to organize a transparent and non-discriminatory contest when outsourcing a sub-contract to third parties during the subcontracting process, while retaining the right of the contracting authority to play an active role in the negotiations, with the possibility of defining the percentage that may represent the subcontractor (maximum 30% of the total contract value), taking into account that it does not jeopardize the proper functioning of the successful supply chain of supply. The protection of national public security or the defense of the essential interests of the state security is one of the fundamental issues to be taken into account in the public procurement procedure in the defense and security sector throughout the public procurement process - in the procurement of weapons and other goods and services Sensitive. This primarily protects the national interests of the member state in the narrow sense, with focus on security of supply and information. Supply security is defined on the basis of guidance from the Commission, where the security of supply in general terms as a guarantee for the supply of goods and services

[europa.eu/pdf/en/08/st14538-re04.en08.pdf](http://europa.eu/pdf/en/08/st14538-re04.en08.pdf)). List was reviewed last on February 2011.

sufficient for a Member State to realize its protection and security in accordance with its requirements External and security. Commission Guidelines - for Information Security - clearly stipulates that the security of information relates to the ability and reliability of economic operators to protect classified information and in this respect affects the rules pertaining to contract terms and to the extent Limited to the criteria for contract award. It is clear that information security should be protected throughout the contract cycle, but in the absence of an EU information security regime, member states independently decide on the information to be considered classified.

### **Harmonisation of legal system with the provisions of Defense Directive 2009/81/ EU by member states**

Harmonisation of national legislation (for EU Member States) with this Directive is of a binding nature. This applies in particular to the mandatory provisions of the Directive which mainly refer to the definition of:

- the contracting authority / entity;
- scope of application;
- exceptions;
- thresholds;
- procurement procedures during the award of contracts;
- deadlines;
- protection of information security; and
- providing security of supply.

Other cases provide for certain flexibility and assessment of the Member State if certain provisions of the Directive are appropriate for the specific legal system. As has been emphasized at the outset, the provisions of this Directive are provisions adapted to the "Public Sector Procurement Directive 2004/18 / EU" in the field of defense and security, taking into account the particular nature of the sector and the relevant provisions of Descriptive character. Moreover, an accompanying document has been drafted for the adopted Directive that explains the exemptions of the application.<sup>7</sup>

### **Procurements in the Defense and Security Area in Montenegro**

Unlike some other countries covered by this special regulation, Republic of Montenegro has decided to put this matter into the Law of Public Procurement, article 116 of this Law. This solution is more rigid, for the Government creates and at the same time creates higher security in purchases of goods, services and constructions to this field. The law on purchases in the field of defense and security in Montenegro sets out in a taxation manner the purchases and activities that begin with the military equipment, including the spare parts, components and subparts, to continue with high-sensitivity equipment, parts and components, to continue with services and work directly related to military needs, as well as sensitive services and

<sup>7</sup> Directive 2009/81/EC on award of contracts in the field of defense and security, specific exceptions-Note for General Directory of Service, Market and Internal Services.

sound security work.

This approach to the essence is quite narrow in terms of areas where the provision apply, however, there is also a question that makes the use of this provision in practical life very complex.

This problematic especially refers to unacceptable terminologies within the provision as sensitive security devices, services and sensitive work in the security field. So the imposition of insignificant expressions puts the discretion of the authority in determining the sensitivity in the field of defense and security. This issue can always raise dilemmas in determining how sensitive it is, what is seriously threatening and seriously threatening the security of the country, and whether there is a unit of measurement in the application of these provisions. So something that an officer can have sensitive security content, for another, the same may be a normal public procurement activity. Given the sensitivity of purchases in this area, this situation can produce permanent conflicts between political groups, and especially during the transition period of power from one political group to another. This situation although in the surface aspect is not of great significance, in the content aspect it is very important because this dualism in their treatment seriously damages this process as well as security in general. The provision excluded from the avoidance of the PPL all activities related to international agreements or international arrangements concluded between Montenegro and one or more States. Thus, the Republic of Montenegro all activities in the field of defense and security that are regulated by special rules stemming from international agreements concluded between Montenegro and another country or EU member country do not use exemptions, but they refer to international agreements concluded between the parties, or the use of one of the procurement procedures established by the LPP in Montenegro.

### **Selection of Procurement Procedure in the Field of Defense and Security**

For the realization of the purchase of goods services or works, the contracting authority may use one of the procurement procedures including the restricted procedure, the negotiated procedure with publication and the negotiated procedure without publication. In the case of using a pre-qualification procedure, the contracting authority is obliged to prove that for reasons of a procurement nature it is obliged to select this type of procedure. Also a priority of the Law on Public Procurement of Montenegro is the term of Framework Contracts, which have a lifetime of up to seven years (with possibility of extension for specific reasons). This in terms of security has an extremely important impact because a company that meets security standards and equipped with security certificates has the potential to establish a long-term partnership with the country's security institutions. Also security measure in contractual relations in the field of security remains, the economic operator's obligation to behave in conformity with the requirements regulating the status of secret data. The same rules apply to the subcontractor if the contract foresees such a thing. The contracting authority may in the tender documentation set special conditions in the performance of the public procurement contract, provided that they are related to the nature of the case and are not discriminatory. These terms refer primarily to:

- Secrecy of data protection;
- Protection of the security of goods, or service;
- Completion of subcontracting terms in terms of security requirements;
- Establishing social and environmental requirements.

If the procurement matter or contract contains secret data, the supplier is obliged to take all necessary measures and activities in order to maintain the data at the appropriate level. To achieve this goal, the supplier may decide on his offer:

Obligation on the part of the stated supplier and subcontractor that will responsibly keep the secret data even after the expiration of the contract in accordance with the law;

Obligation of the supplier to keep the secret data from other subcontractors engaged in the project during the performance of the contract;

To supply the contracting authority with the necessary information for the subcontractors so that bodies can easily identify their adaptability to enter into relationships with security institutions;

Bidder's obligation to provide this information to each subcontractor prior to the conclusion of a subcontracting agreement. For the successful realization of this contractual relationship, the contracting authority may provide the appropriate economic operator with the security certificate in the sense of security,<sup>8</sup> which proves that the economic operator is able to meet the security requirements and is able to fulfill its obligations in relation to export, transfer and transit of the contracted goods, accompanied by documentation Accompanying documents issued by state bodies. Therefore, from the above elaboration we can conclude that the Republic of Montenegro has regulated in detail the issue of purchases through public procurement procedures in the field of security, ranging from the types of procedures and conditions for their use, security issues and Criteria for maintaining public secrecy, to continue with the subcontracting of procurement procedures in the field of security, in which the conditions and criteria are described in detail for both the contract leader and the subcontractor. In addition, Montenegro has dealt with the Public Procurement Law and the issue of security certificates as a standard and facilitating instrument in the conduct of procurement activities in the field of security. Therefore, we can very well say that Montenegro has managed to detail all the requirements and needs for successful implementation of procurement activities in the field of security.

### **Harmonisation of legal system of Kosova with the provisions of Defense Directive 2009/18/EU**

Regarding the handling of security aspects in the legislation on public procurement in Kosovo, we can rightly conclude that by the end of 2015, the PPL, these activities have excluded from the use of procedures foreseen by this law. However, the treatment that has made the PPL to security aspects is inadequate to the importance of the problem for the country and society. The PPL deals with security issues at the same level as employment-related issues or issues related to Socially Owned Enterprises administered by the KPA, or issues related to training and advancements within the

<sup>8</sup> Law on Public Procurement of Montenegro, No. 42/2011 od 15.8.2011.

contracting authorities. On this basis contracting authorities are not obliged to act in accordance with any special procurement procedure or to comply with the provisions of this law. So the contracting authorities had enough to compile a confidentiality statement for the work project, or compile a list of goods and services and send to the Government to approve the exemption from the procedures, and then continue to perform the activity without any rule. This approach has resulted in the approval of content lists of materials that have no security element such as the supply of caps, belts or bulletproof vest for police, purchases, and work of various kinds, and all this has resulted in damage to the integrity of the organs and the purchasing process in this area. Based on this reality, the Government of the Republic of Kosovo has been obliged to undertake legal initiatives to define with clearer provisions in the PPL dealing with activities related to protection and security. Therefore, according to the provisions of the Public Procurement Law<sup>9</sup> of the Republic of Kosovo, all public procurement contracts proclaimed by the Contracting Authorities in the field of defense and security shall apply the PPL. Specific public procurement rules and regulations for the defense and security sector will be approved by the Government of the Republic of Kosovo.

Unfortunately, the same provision of the PPL has not set a deadline for this activity and does not specify the lawmakers' obligations to harmonize new legislation on the defense and security sector with the Directive 2009/81 / EU. However, given the decision of the Government of the Republic of Kosovo for EU membership and further advancement of the PPL, we can understand that this was also the lawmaker's goal. The new special public procurement rules and the regulation on defense and the security sector will apply to contracts awarded in defense and security for:

- supply of military equipment, including any parts, components and/or sub-montage thereof;
- supply of sensitive equipment, including any
- component, component and/or sub-montage thereof;
- works, supplies and services directly related to equipment for each element, and all elements of its life cycle;
- Works and services for specific military purposes;
- sensitive works and sensitive services.

The new special public procurement rules and the regulation on defense and the security sector will not apply to contracts awarded for protection and security for:

- Contracts that are governed by special procurement rules in accordance with an international agreement or agreement concluded between the Republic of Kosovo and one or more third countries;
- Contracts that are regulated by special procurement rules, according to an international agreement regarding the stationing of military troops of the Republic of Kosovo;
- Contracts governed by the special procurement rules of an international organization that buys for its own purposes, or contracts which the Republic of Kosovo must comply with these rules;

<sup>9</sup> Law No 05/L-068 on amendment of Law 04/L-042 on public procurement of Kosovo.

- Contracts for which the application of the provisions of this law or the regulation on procurement for defense and security purposes will oblige the Republic of Kosovo to provide information whose disclosure is contrary to the essential interests of its security;
- Contracts for the purposes of bodies dealing with the intelligence system;
- Contracts awarded within the framework of the research and development cooperation program, jointly undertaken by the Republic of Kosovo, with one or more other countries, for the development of a new product and, where applicable, for the stages of The last of all or part of the life cycle of this product;
- Contracts awarded in a third country, including for civil purposes, where the forces are located outside the territory of the Republic of Kosovo, if operational needs require that the contracts are linked to economic operators located in the operation zone;
- Contracts concluded by state bodies or units of local self-government of the Republic of Kosovo with state bodies or bodies of local authorities of another state, and with respect to the supply of military equipment or sensitive equipment;
- Works and services, directly related to such equipment, or
- Works and services specifically for military purposes, or sensitive works and services.

In special cases, the contracting authority is obliged to initially notify the Prime Minister of the Republic of Kosovo,<sup>10</sup> for such initiatives.

### **Conclusions and Recommendations**

As a basic conclusion we can conclude that the Republic of Kosovo lacks the complete legal framework for public procurement in the field of defense and security. Kosovo institutions should undertake concrete legal initiatives to regulate sensitive purchases. Legal regulations should be harmonized with the aims of the Directive without claiming the harmonization of percent percent with Directive 2009/89 EC. To borrow from component directives that can be implemented in the circumstances of Kosovo, especially the subcontracting aspects, time limits of contracts etc. Security Institutions in Kosovo enhance the focus and activities related to the classification of activities, goods, services, information etc. The legal framework should clearly differentiate the differences between laws, by-laws and procedures, and their mutual harmonization should be clearly defined, minimizing the inconsistencies in their implementation. The regulations should be descriptive, to avoid any possible misinterpretation and to avoid open or unclear questions when enforcing the rules in the field of defense and security. To provide a clear reference to the provisions which provide for the protection of classified data as well as all the measures and requirements necessary to protect the classified data in accordance with the relevant legal provisions. Ensure a clear reference to the list of military equipment and products that are considered as weapons, ammunition and war material. Building the required capacities for different levels of involved parties, such as contracting authorities, suppliers, economic operators, NGOs, etc. so that the curriculum has not only informational

<sup>10</sup> Law No 05/L-068 on amendment of Law 04/L-042 on public procurement of Kosovo.

content. Make the Regulations and Guide available to the public and easily accessible to all contracting parties, suppliers, economic operators, NGOs, etc.

### References

- Directive 2009/81/EC on award of contracts in the field of defense and security.  
Law on Public Procurement of Montenegro, No. 42/2011 od 15.8.2011.article 116.  
Law No 05/L-068 on amendment of Law 04/L-042 on public procurement of Kosovo.  
Treaty on the Functioning of the European Union.  
Review of European Commission on the implementation of the Directive from 2014 <https://www.google.com/rch?client=safari&rls=en&q=REPORT+FROM+THE+COMMISSION+T+O+THE+EUROPEAN+PARLIAMENT+AND+THE+COUNCIL+on+transposition+of+directive+2009/81/EC+on+Defence+and+Security+Procurement&ie=UTF-8&oe=UTF-8>.  
[www.eda.europa.eu/docs/defaultsource/news/eu-us-defence-data-2011.pdf](http://www.eda.europa.eu/docs/defaultsource/news/eu-us-defence-data-2011.pdf).  
[www.industriall-europe.eu/sekto/defance/2012/INFE\\_E3779\\_Final%20Report\\_v03-EN-pdf](http://www.industriall-europe.eu/sekto/defance/2012/INFE_E3779_Final%20Report_v03-EN-pdf).