Public procurement in the EU

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Abstract

Public procurement is a developed field in the countries which had blooming economic development trends. It is a very important field for the governments as every government is a buyer of goods, services and performance of works. During the last years in all the countries public procurement occupied an important weight in the expenses of public money. This trend of development is more emphasized especially in the countries which had a transition from the planned- to free market economy. For Eastern and Central Europe public procurement was a new term for the last 20 years. Main objective of this manuscript is the analysis of public procurement in EU.

Keywords: Public procurement, EU, Albania.

Introduction

Public procurement started to develop in Europe from the beginning of the 19th century, while the biggest developments were after World War I. France has a history of public procurement, completed with the procedures of contract granting, as well as legal review of complaints. For the first time public procurement in France was sanctioned by the Law of 17th February 1800, which had to do with public works. Later during the end of 19th Century and beginning of 20th century many laws were adopted with the purpose of regulation of different aspects of public procurement (Friler & Lager, 2009, 19). Even in Sweden the public procurement was regulated since 1800' even though the first provisions covered the procurement of governmental authorities. In 1920 The Swedish Parliament approved the first law of public procurement which was applied in modified forms, through amendments until 1994 (Sundstrand, 2009). This law was mandatory for the governmental bodies, but it had a lack of sanctioning measures. In Poland the first law on public procurement was approved on 15th February 1933 and was in effect until 1939. In the period of communist regime it was applied the system of centralist planning and from this it derives that there was no need for special rules for supply with goods and services from the state and state institutions. The change of economic conditions and passing of Poland in a system with market economy led to the compilation of a modern law on the public procurement which entered into effect on 1st January 1995 (Lemke, 2003).

The first genesis of the public procurement legislation in the European Union were presented since the Treaty of Rome, which founded the Economic European Community in Rome on 25th March 1957. The treaty was an agreement of free trade which aimed to remove the limits of trade between member states of EEU. Its main purpose was the creation of a mutual market and of an economic and financial union by implementing mutual politics which have to do with free movement of goods

and services, capital and persons, promoting a balanced economic development of member states. This aim was thought to be achieved through mutual politics in internal markets constructed on the basis of free market and concurrence. Even though the purpose of the Treaty of Rome and other treaties of EU was not the regulation of the field of public procurement in the level of member states, it created the main principles on which it was later prepared the legislation of the public procurement areas.

In fact, The EU Treaties do not include any clear provision regarding the public procurement. Anyhow, they create a series of fundamental principles where the European Union is based. This principles are applied in the same manner in the area of public procurement as well. From these fundamental principles one of the most important related to the public procurement is: prohibition of discrimination based on nationality. This principle implies that a bidder from a member state will be treated in the same manner with a bidder from a member state of contracting authorities. This is not the same to the principle of equal treatment, which is not based on the nationality principle. This article is effective only for the citizens of the Community, individuals and legal persons which are residents of any of the member states of the community. The citizens from non-member states are excluded from the protection as they are not within the area of action of Treaties. The free movement of goods and prohibition of quantitative limits on imports and exports and measures which have the same effect aims to stop the member states through their contracting authorities, to buy national products only. The products coming from the third countries are considered to be in free circulation with member states, if it is acted in accordance to the formalities of import and if the taxes or custom obligations to be paid are collected in that member state. Also the right to offer services implies that a bidder which is found in a member state will have the right to submit another offer in another member state without needing the creation of a local entity or representative.

How do the procurements directives in the EU countries impact?

The general principles of directives were difficult to be applied in specific situations and they trend to stop the real estate behavior, but at the same time, they do not give guidance on their application in concrete situations where they are valid. Therefore, it is necessary to put in practice the procedural conformity in order to achieve the non-discriminating access in the markets of public procurement (Sundstrand, 2009). As a consequence the community compiled and approved several Directives on procurement, which indicate the manners how these general principles are applied in the specific context of public procurement. Before 2004, in the public sector there were three main Directives which covered the works, goods and services which have changed several times. These Directives did not include the granted contracts from entities which operated in the sector of services of water, energy, transport and telecommunication which from 1990 were covered from another series of specific directives in the sector of services. These directives cover only procedural rules. There are two other directives applied for the complaints and review (on the application of Directives) which are known as Directives for complaint means/ procedures. The

member states are asked to take all right measures to warranty the accomplishment of obligations deriving from the Treaty or resulting from the measures taken from the institutions of the Community.
The directives for procurement are not automatically applied and in order they give their effect within the member states of European Union they must be implemented or transposed into the national law Therefore, the member states of EU are required to take all the necessary measures to give full power to the provisions of Directives in the national law and to assure that no other national provision does not damage their implementation. The bidders have the possibility to base on the provisions of the directives on procurement even when they are not incorporated in the national law, provided that the legal conditions are met. The first Directive which regulated the supply with goods in specific manner was the Directive No. 70/ 32. This directive was applied on all the supplies with goods from the central, regional or local institutions. The purpose of this directive was to require from the member states to apply rules related to the free movement of gods in all their internal regulative and administrative legislation as well as administrative practices which partially or fully excluded the participation in procurement activities all the imported products; protected or set a preference against national products' and put imported products into disadvantage, except the fact that these products were taxed (Directive 70/32/EC).
The Coordination Directives aimed the approaching of European legislation in the field of procurements and coordination of procedures of granting contracts of procurements in member states. The first directive was known as Directive of Coordination in public procurement from the Council of European Union and was issued in 1971. Directive of Procurements no. 77/62 regulated the manner of granting contracts on performance of works, while the directive of Procurements no. 77/62 regulated the manner of granting contracts of procurement for the supply with goods. In period no special directive to cover the field of services was issued yet. The end of 80' marked steps of progress in the European Community and a new generation of directives on public procurement were approved during this period, attempting a bigger transparency, as well as the expanding of the basis of their application in other sectors as well. Four years after the approval of the new directives of 1988 which substituted the existing directive, a new directive 92/50 was approved which for the first time regulated the procurement at the area of services. All these directives were amended in continuity by being completed with more specific rules. The EC directive No. 2001/78 approved on 13th September 2001 regulates the manner of using the standard forms for all kinds of notification in public procurement.

Directive 17/2004/EC

At the end of 90' and at the beginning of 2000 in the framework of modernization and advancing in the area of public procurement, The European Commission took measures for the issuance of two new directives, respectively Directive No. 17/2004 and Directive No. 18/2004. According to the directive the contracting authorities will behave towards the economic operators equally, without discrimination and will act in a transparent manner.

The directives require the coordination of procedures for granting contracts in the framework of states, submitting the minimum of mutual procedural rules which reflect the fundamental principles of the Treaty, so that the harmonization of all national rules on public procurement is achieved (Friler & Lager, 2009, 19). The Directive of Procurement of EC no. 17/2004 regulates the granting of contracts for work, goods and services and covers the state public companies, as well as private companies if that have special or exclusive rights when performing public services and not financed by the public funds. Some of the trends this directive brought were: inclusion of operators which operate in the sector of postal services; inclusion of the mechanism which permits the exclusion of those entities which may attest that they act in competitive markets etc.

Directive 18/2004/EC

The directive of procurements of public sector no. 18/2004 is known differently as the classical directive which regulates the granting of contracts for goods, work and service in the public sector. This directive not only unites in a sole document all the three prior directives on work, goods and services, but it also simplified and organized in total the provisions of preliminary directives. The most important changes brought by this directive were:

- use of concentrated directives;
- use of frame agreements;
- Review of procurement values.

This directive brought the change of provisions dealing with technical specifications, removing the mandatory use of references related to the European standards. Another innovation which later marked a bigger evolution and achievement in the sector of public procurement was the use of electronic procuration, including electronic auctions and dynamic purchase system.

The role of Member States and European Commission

Member states of EU are obliged to take all the necessary measures to assure the accomplishment of obligations deriving from the Treaties or which result from the actions taken from the EU institutions. They are also required to help in the accomplishment of duties of EU and they must be careful to take any measure which may put in risk the achievement of Treaty goals. Regarding the Directives, the member states are required to take the necessary measures to give full legal power to their provisions in the national law and to assure that no other national provision damages their implementation. This normally gets the trait of incorporation of Directives in the national law and annulment of all legal provisions which are contrary to them. The European Commission has two important roles which derive from the provisions of the Treaty: the role of lawmaking initiative and the role of the surveyor. It has the clear duty to warranty the application of provisions of the Treaty and measures taken from the institutions in its application. Therefore, except its role as primary policy maker in the area of procurement, the Commission is also responsible for the

responsible application and implementation of Directives.

System of complaint review and effective legal means in EU

The largest part of member countries or which adhere to be member in EU have an operative system of review and repayment of public procurement, consisting of specialized review bodies, ordinary courts, civil and administrative courts or a combination of both.
The states which have a clear division between the public and civil law have double review systems of public procurement. Most of member states have double review systems. In the states with double review systems, some categories of indemnities may be required only after the termination of the contract. The termination of the contract is the one which separates the jurisdictions of both review bodies.

Rules of procurement in Germany

Public procurement includes the sector which the governmental agencies act as contracting entities for their works and services. With a volume of 17% of gross product of Germany, the sector of public procurement has a great importance for the economy (Burgi, 2012, 1). Referring to the above information it must be emphasized that in the tender procedures the principles of transparency, concurrence and peer treatment are applied. The Law of procurement in every of its phase aims to assure the application in an economic manner of public resources, to avoid the wrongful application and corruption and to prevent private companies from concentrating public procurements (Fabry, 2007, 13).
The value of contracts in the German public sector is about 300 billion US $ per year. The procurements field summarizes laws, international agreements, sublegal acts, several acts adopted by the European Union institutions. The law of public procurement has its roots in the national system and the European one. During the last years, all the Directives of the EU about Procurement have a significant impact in the procurement sector in Germany. The legal structure of German public procurement is compounded by the Directive 2004/18/EC, Directive 2004/17/EC, Directive 2009/81/EC, the provisions of which were implemented in the Law against limitations of competences. This law paid a great importance to the development of small companies and medium ones, as it is very important for these companies to have access at the public notifications in order to enter into contracts in the field of public procurement. It is foreseen the possibility to form the bidders association. Specific conditions were provided for the companies which perform different inventions. The German lawmaker in accordance to the European directives has set monetary limits to certain sectors in accordance with the European directives (Burgi, 2012, 2). We can mention as examples: works related to water supply, energy starting from 414,000 euro, contracts of services starting from 193,000 euro, contracts in construction starting from 4.850,000 euro. If in the mentioned areas the value of the contract is lower than the amounts reflected above the obligation to perform the notification of the tender will be considered as according to the law only if made in Germany. These

directives set the criteria of the value on public procurement and in a direct manner they set for the applicable law the winner of public contract.
The fundamental rules and basic principles of public procurement are: concurrence, transparency, peer treatment, economic efficiency, competence and ability of the bidder, consideration of medium competences. The different legal acts of procurements are divided from the doctrine in three categories: The first subcategory consists of acts related to the budget and competition, the second category consists of decisions related to the procurements and the last category contains the most important procedural provisions for the contracting body of public works and services. The regulations are not approved by the legislative authorities and therefore there must not be considered as laws pursuant the German legal system.

The evolution of procurement in Kosovo

For the first time in Kosovo the notion of public procurement appeared after the war of 1999. The first document which regulated the field of public procurement in Kosovo was extracted by the Administration of United Nations in Kosovo on 15th December 1999 known as the Instruction of Financial Administration no. 2/1999 on Public procurement. It was based on the procurements rules of WB and Law on International Trade of United Nations known as "UNCITRAL". The law on public procurement in Kosovo entered into effect on 9th June 2004, which was based in the Directives of EU (Duli, 2012, 23). The highest body of public procurement is the Regulative Body of Public Procurement, which prepared and published all documents of procurement procedures. Also another body which acts in this filed is the central unit of procurements which approved the deviations from normal procedures of procurement.
Administrative Financial Guidance UAF was thought to be a temporary legislative frame but it remained in effect for more than four years until 9 June 2004, when Law No. 2003/17 entered into force. This law was prepared based on the Directives of Procurements of EU and it was amended in a considerable manner compared to the changes and modifications of the Law No. 02/L99, until the convention approved a completely new law on 30th September 2010, which entered into force on 1st December 2010Therefore, The government of Kosovo, was engaged to compile the amendment of the law in order to treat gabs which made this law to be different from the directives of procurement of EU. The amendments were approved by the Parliament through the law No. 04/L-042 on 29th August 2011. THE new law was published at the Official Gazette on 19th September 2011 and entered into force after 15 days.
Kosovo's law on Public Procurement was amended eight times until February 2016, since its first approval in 2003. These continuous amendments in the legislation made its application difficult for the officials of procurement and monitors of civil society, media and citizens. The procurements system in Kosovo is highly decentralized what makes the cost bigger due to the high number of contracts between parties (Hapciu & Shita, 2012, 16). The bodies involved at the procurement process are: Regulative Commission of Public Procurement, Review Body of Procurement, Central Agency of Procurement and over 170 contracting authorities.

Procurement procedure in Macedonia

- Macedonia established a body called "The council of Public Procurement" in 2004 which is a unique body in the application of public procurement procedures in Balkan. It is under the competence of government and not under the competence of the Bureau of Public Procurement and Ministry of Finances. The first legal regulation on Public Procurement in Macedonia was made in 1998, when the first law on public procurement was approved. It was in effect until 2004 when the law on public procurement regulating the main types of procedures was approved. Also this law had incorporated widely suggestions and recommendations of WB. In practice it was noticed that due to the administrative bureaucracy it resulted as impossible to perform special procurements. The law of public procurements was approved in 2007 and its implementation started in 2008 and has adjusted the terminology used in the legislation such as "economic operator", "contracting authorities" etc. The law No. 136/2007 on public procurement provides these types of procedures: open procedure;
- limited procedure;
- competitive dialog;
- procedure with negotiation without preliminary announcement of notification;
- procedure with negotiation with preliminary announcement of notification;
- procedure for accumulation of offers with announcement of notification;
- procedure for accumulation of offers without announcement of notification;

Macedonia is still an EU candidate state and does not have any obligation to transpose in its internal legislation the criteria of the value provided the EU Directives. The law on public procurement is applied in every procurement which is over the extent of 500 euro. For the procurement between 5.000 to 20.000 Euros (goods and services) and 5.000 to 50.000 Euros the call for application should be for (14 days). This law foresees the open, limited, procedure with negotiation (Daneva, 2001, 19).

The open procedure is a procedure which gives bigger possibility of participation to the bidders. This procedure has some formal aspects applied (short communication in formal manner for the submission of the bid, opening of the bid in public manner etc.). Starting from 2007 a minimum of two offers is required.

The limited procedure is applied in two phases, it is a regular procedure, and usually it is applied for the procurement of goods, works and services where the object of the contract is completed and specific and where the procedure would be prolonged in order to increase transparency. In 2005 a unique register for the publication of the data was created. This register contains data related to the supplier, bidder, the value of procurements, objects of procurements etc. These data as well as other data are applied in the Official Gazette of the Republic of Macedonia. The procurement procedure has the following stages:

1) Publication or invitation for participation;
2) Documentation of tender or preparation of offers;
3) Opening of offers and assessment of offers;
4) Realization of contract and surveillance of realization of Contract.

In 2005 Macedonia started to use the electronic public procurement with the aid

of a project directed by USAID, while the first electronic public procurement was performed in 2006.

References

Burgi, M. (2012). Public procurement Law in the Federal Republik of Germany, Ius Publicum.
Daneva, A. (2011). Prokurime publike, Skopje.
Duli, I. (2011). Reformat e Prokurimit Publik në Kosovë; Pristina.
Fabry, B. Meininger, F. & Kayser, K. (2007). Vergaberecht in der Unternehmenspraxis, Wiesbaden.
Friler, M. & Lager, F. (2009). International Public Procurement: A Guide to Best Practice; London.
Hapciu, V. & Shita, A. (2012). Public Procurement in Kosovo: Challenges of The Business Community, Pristina.
Lemke, M. (2012). "Public Procurement – The Continuing Revolution", Center Commercial Law Studies London Forum.
Sundstrand, A. (2009). "Procurement outside the EC-directives".