

A POLICY REPORT BY THE GROUP FOR LEGAL AND POLITICAL STUDIES

NO. 03 – FEBRUARY 2012



DISSIMILAR PATTERNS OF (MIS)USING THE PUBLIC MONEY:

— Trends and practices of public
procurement management in
Kosovar municipalities



ABOUT GLPS

Group for Legal and Political Studies is an independent, non-partisan and non-profit public policy organization based in Prishtina, Kosovo. Our mission is to conduct credible policy research in the fields of politics, law and economics and to push forward policy solutions that address the failures and/or tackle the problems in the said policy fields.

Policy Report 03/2012

Dissimilar Patterns of (Mis)Using the Public Money: Trends and Practices of Public Procurement Management in Kosovar Municipalities

February 2012

© Group for Legal and Political Studies, 2012.

Group for Legal and Political Studies
'Rexhep Luci' str. 10/5
Prishtina 10 000, Kosovo
Web-site: www.legalpoliticalstudies.org
E-mail: office@legalpoliticalstudies.org
Tel/fax.: +381 38 227 944



"This project was funded through a U.S. Embassy, Pristina grant. The opinions, findings, and conclusions or recommendations expressed herein are those of the Author(s) and do not necessarily reflect those of the Department of State."

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any mean without the permission. Contact the administrative office of the Group for Legal and Political Studies for such requests. Information on contacts can be found at the web site of the Group. If you wish to further use this paper, please contact GLPS for permission.

DISSIMILAR PATTERNS OF (MIS)USING THE PUBLIC MONEY: TRENDS AND PRACTICES OF PUBLIC PROCUREMENT MANAGEMENT IN KOSOVAR MUNICIPALITIES

BACKGROUND

Good governance, as a modern concept, consists of numerous standards that are aimed at providing for a more democratic, transparent and socially responsive public governance.¹ International organizations have consistently associated the degree of good governance with the capacity of a polity to push forward economic growth and development.² Good governance, therefore, is a notion that seeks responsible governance not only at the central level but also at the local level. Many international reports have repeatedly argued that the local governments – as opposed to the central government – have quite a significant role in promoting the community and local economy development. Local governments, moreover, are naturally more linked to communities and people and thus could play a more vibrant role as to their overall development and progress. In this context, a key issue within the notion of good governance is the standards and behavior of local governments in the public procurement processes.

Local procurement practices therefore constitute the key issue of social responsibility of local governments, as the way local governments behave towards the awarding of public contracts represents the extent of ‘good governance’ that they exercise. The level of transparency and accountability of public tendering at the local level, therefore, exhibits the democratic degree of a local administration and the level of adherence to legitimate governance.

With Kosovo facing numerous challenges as to democratic governance, the local governments represent an important angle wherefrom corruption and bad governance originate. Local governments in Kosovo, therefore, are often left aside from the filter of anticorruption, as they practically have a far lower level of budget compared to the central government. This said, the level of corruption and mismanagement at the local level constitute a very significant portion of the country’s overall corruption index. On the other hand, public procurement corruptive practices at the local level often provide for channels wherein political parties substantiate their partisan directions and support their party ‘militants’.

Generally, therefore, it is argued that the corruptive practices of public tendering at the local level have seriously harmed Kosovo’s democratic path, and have served the political parties aims of monopolizing and using the public offices for partisan purposes. Local governments, as the international reports frequently illustrate, have peculiarly behaved against the principles of transparency and professionalism in carrying out public procurements. With an increased control from the partisan offices, local governments continue to counter human development perspectives for the community, clearly hindering bottom-up approaches of democratic control and progress.

¹ See, for instance: Warsaw Declaration adopted at the Third Summit of Heads of State and Government of the Council of Europe, point 3, available at: [http://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2005\)79&Language=lanEnglish&Ver=final](http://wcd.coe.int/ViewDoc.jsp?Ref=CM(2005)79&Language=lanEnglish&Ver=final).

² See for instance: C. Santiso, Good Governance and Aid Effectiveness: The World Bank and Conditionality, http://www.sti.ch/fileadmin/user_upload/Pdfs/swap/swap108.pdf

With an insufficient administrative capacity and legal frameworks changed recently, the local procurement practice follows the general attitude of the entire public administration's inefficiency and uncertainty. First of all, it is important to note that the public procurement market in Kosovo is about 800 million EUR, representing roughly 14% of the country's GDP.³ This said, it is obvious that the contribution of public procurement in the country's overall market scope is rather high. On the other hand, with a very weak market economy and weak private sector, most of the firms link their survival or development with their capacity to be awarded public tenders. The inefficiency and scarcity of the market machine to provide for an adequate space for the private sector, often turns firms to the governmental tenders as the only way of survival in the market. Therefore, the issue of public tendering is the point that links firms with the government and political parties, offering room for corruption and control from the partisan offices. Public tendering, therefore, represents the key issue wherein firms become vulnerable to the partisan control and accordingly politicized; seriously hindering the market opportunities and the private sector self-regulating growth.

It is important to note that public procurement in Kosovo remains one of the key mechanisms that is most carefully controlled by political parties, as this seems the most reliable way to award partisan firms and supporters. In view of this, the fight against corruption in general, but also the fight against the politicization of the administration, is directly linked with the public procurement abuse and corruption. Public tendering therefore should be the attention of all civic actors working to promote a more accountable system of governance.

LEGAL FRAMEWORK AND PROCUREMENT SYSTEM

Considering the huge criticisms of the society-at-large, and most importantly civil society, there have been numerous initiatives to improve the public procurement system in Kosovo in the last years. It is important to note, however, that the abuse with the procurement procedures should not only be considered in light of the institutional mechanisms and frameworks, but also in light of the behavior of political parties as to their tendencies to control the public expenditures. Regarding the structural aspects, there have appeared numerous changes of the legislation governing the public procurement in general, most of which assisted by the European Commission Office in Kosovo and other international stakeholders. The latest reform was addressed with the enactment of a new law on public procurement, adopted by Kosovo's Assembly in August 2011. The new law introduced some new mechanisms to ensure a more accountable public procurement process, although the behavior of the procurement practice remains yet at the weakest levels.

The procurement system in Kosovo, including the municipal procurement, consists of two key bodies that must assure the integrity of the procurement procedures. In short, according to the Law on Procurement, the decision to grant a public tender is taken by the relevant institution in line with the procedures prescribed in the law. Although the decision is effective, in the sense that it gives the right to the winning operator to acquire the tender, one could file an application against the said decision with the claim of reviewing its lawfulness to the Procurement Review Body (PRB). PRB, therefore, is the last administrative instance that has the authority to review

³ Sigma/OECD (2011) 'Kosovo General Assessment'. May, 2011, available at: <http://www.sigmaproject.org/dataoecd/40/29/48970710.pdf>.

and accordingly dismiss or accept the decision of the tendering authority as lawful or unlawful. Each municipal tender granted by a municipal authority could therefore be appealed to the PRB, and there are procedural guarantees that the latter 'should' check the legal validity of the municipal tenders. Though PRB should in principle serve as the authority that ensures the integrity of the procurement process, in actual fact it appears that this aim has a weak progress. Expect PRB, as the highest administrative review body governing the appeals on every public tender, the Law has set the Regulatory Commission of Public Procurement (RCPP) as the regulator that concretizes the legal prescriptions and issues secondary legislation to ensure the integrity of the application of the Law. RCPP also monitors the procurement system and should intervene by issuing abstract policy measures that substantiate the principles deriving from the Law.

The new law has introduced a new mechanism of the legal responsibility for the lawfulness of the tendering process. In general, the administration of the public tendering process remains a competence of the 'chief procurement officer' of each municipality. However, in order for a public tender with a high value⁴ to be validated, it must be countersigned by the mayor of the municipality awarding that tender.⁵ This said, the Law requests that the mayor accept the legal responsibility for the award of each tender, and accordingly be held responsible for the lawfulness of the procedure jointly with the procurement office. This innovation of the new Law on Public Procurement is aimed at assuring that the corruption practices of public tendering – in cases concerning contracts with high value – be addressed via locating and assigning with legal responsibility the political chief of each municipality (mayor), as a method of addressing in a more appropriate way the 'author' of the assumed abuse with public tendering.

With the new Law, therefore, the chief procurement officers of municipalities will not be the sole authorities to manage, hold responsibility and address the lawfulness of the municipal tenders. In cases of contracts with high values, mayors become directly involved to ensure that the management, the control of lawfulness, and the procedural guarantees of public tendering are addressed in the appropriate manner otherwise they become legally liable for such abuses. This new system of procurement procedure is expected to allow that the public prosecution have a more reliable path of addressing the abuse with public tenders, as mayors exerting partisan influence over the chief procurement officers will personally hold legal and criminal responsibility should such tenders be found as unlawful.

As with the entire public procurement system, it is crucially important that municipalities possess professional and skilled procurement officers. As long as the process of governing with the procurement procedure is directly linked with the procurement officers – which have the status of civil servants – it is very important that the professional degree and accountability of the procurement officers be in a satisfied level. As mentioned in the earlier policy note, Group for Legal and Political Studies has raised the issue of low level of professionalism and the issue of unaccountability of the municipal procurement officers as one of the key problems with the management of public tendering at the local level. Although the Law requests that each

⁴ As by the Law, a high value contract is: "a supply contract or a service contract the estimated value of which is equal to or greater than, or can reasonably be expected to be equal to or greater than one hundred twenty five thousand (125.000) euro; or works contracts the estimated value of which is equal to or greater than, or can be reasonably expected to be equal to or greater than, five hundred thousand (500.000) euro.". Law on Public Procurement of the Republic of Kosovo, Art. 19.1.

⁵ Law on Public Procurement of the Republic of Kosovo, Art. 26.1 & 26.2.

procurement officer be certified by the RCPP and professionally trained by the Kosovo's Institute of Public Administration (KIPA), the level of dedication to make this process credible is rather weak. The training of procurement officers by KIPA is simply too short and lacks continuous promotion and monitoring in professional education. On the other side, as an underpaid sector, procurement officers also at the municipal level find it unattractive to hold the high degree of responsibility as a trade off for the very low salary that they receive. This, in turn, produces a situation wherein skilled persons hesitate to assume positions like this whereas partisan chiefs make every attempt to control the positions of procurement officers. This said, not only the lack of professionalism affects the behavior and weak practice followed with abuses of the municipal procurement officers, but also political parties utilize every means to directly control and substantiate their partisan interests via the procurement offices.

Generally speaking, besides the RCPP which monitors the general performance of public tendering at the local level, a quite high degree of monitoring authority rests with the Office of the Auditor General of Kosovo (OAG). OAG provides annual reviews of municipal public tendering on basis of irregular observance, and comes up with the detected failures in tendering procedures. Having into account the appreciated independence of OAG, its review reports account for well developed assessments over the public procurement practices at the local level, especially as to their financial management. With the RCPP and OAG being as rather external mechanisms of monitoring, the institutional structure to provide for an independent administrative monitoring of the municipal public tenders is in place. However, much more should be done to increase the professional capacities and integrity of these two institutions, and a far more reliable connection between these two institutions and the public prosecution should be established in order to provide for a safer legal control of the procurement authorities' abuses.

METHODOLOGICAL APPROACH

This policy report therefore identifies the main problems related to the application of public procurement rules at municipal level. It should however be noted that the latter is a multidimensional task. It first recognizes the main problems and assesses whether the misapplication of public procurement rules at the local level is having an impact in inducing corruptive behaviours and mismanagement of public money. It also takes into account the preliminary findings of the Policy Note 04/2011 published back in November 2011. To this aim, a list of findings and conclusions from both analytical assessments of the reports, decisions and official documents, and in-depth interviews with municipal procurement officers, business representatives and former procurement officers is provided in the following chapters. Second, through this policy report we addressed a number of policy recommendations that concentrate equally on the failures to apply the public procurement rules and the needs to improve the current public procurement policy framework as regards the municipal procurement system and practice.

To achieve this aim, we have developed a methodological framework that consisted on two levels of input. First, we have assessed the legal framework regulating the procurement activities at the municipal level, and have reviewed the reports, decisions and opinions of the main institutions involved (for example, Public Procurement Regulatory Commission, Procurement Review Body, Auditor General, Anti-Corruption Agency, European Commission and other international organizations). Second, we undertook in-depth interviews with 50 representatives of businesses, (former) municipal procurement officers and officers from central

level institutions. Finally, on the basis of the findings acquired from those sources, we have developed a specific list of findings related to the behaviour of municipal procurement officers/offices and political staff, misapplication and circumvention of public procurement rules and practices of corruptive behaviour of municipal authorities. Therefore, in the following section, we also provide an examination upon the complaints of economic operators against the decisions of municipal authorities; explain the trends and analyse the main outcomes. In the preceding part of the report, we will specifically present a list of examples in relation to the abuse with the rules of public procurement and corruptive-oriented behaviour of municipal authorities. In the last part of the report, we, therefore, provide a list of policy related recommendations directed to both, central level institutions and municipal authorities with regard to necessary changes and policy improvements for the municipal procurement system and practice.

ANALYSIS AND FINDINGS

In 2010, the Public Procurement Regulatory Commission reported that the municipal public procurement market in Kosovo, counting only procurement activities of 34 municipalities, reached an approximate amount of 142 million euro.⁶ That being said, a broad insight is that the municipal public procurement policy is relevant vis-a-vis the index of corruption and the general perception of mismanagement of public money in Kosovo, and, on the other hand, relevant as to the degree of responsibility of local governments towards citizens. Moreover, the estimations of European Commission progress reports acknowledge that the public procurement at the local level remains a serious challenge for Kosovo⁷ that affect the establishment of a free market economy.

According to the annual reports of the Procurement Review Body (henceforth as PRB), the competent mechanism to review and assess whether the activities of contracting authorities are in compliance with public procurement rules, decisions of municipal authorities regarding procurement activities are being challenged more readily by economic operators due to their trust that procurement rules are not properly implemented, applied, and/or are circumvented. Thus, as table 1 explains, from 2008 to 2011 the total number of complaints that challenged the decisions of municipal authorities concerning public procurements is increased by 300%.⁸ Hence, according to these estimations (see table 1), in 2008, only 40 economic operators have submitted complaints against municipal authorities, of those, only 28 complaints have been considered as admissible and consequently reviewed by PPRB.⁹ From those 28 complaints, as by the decisions of PPRB, in 6 occasions the municipal authorities have been required to re-evaluate their decisions concerning procurement activities, and in other 6 cases the decision of municipal authorities have been annulled and the procurement activity has been retendered.¹⁰

⁶ For more see Public Procurement Regulatory Commission, Report on Public Procurement Activities in Kosovo during 2010, February 2011, available at: http://krpp.rks-gov.net/Default.aspx?PID=Home&LID=1&PCID=1&CtlID=HTMLStatic&CID=PPRCannual&PPRCMenu_OpenNode=90.

⁷ See for more Commission Staff Working Document: 'Kosovo 2011 Progress Report'. Commission of the European Communities, SEC(2011) 1207, Brussels; and, Commission Staff Working Document: 'Kosovo 2010 Progress Report'. Commission of the European Communities, SEC(2010)1329, Brussels.

⁸ See Procurement Review Body, Annual Report 2008, 2009, 2010 and 2011, available at: <http://oshp.rks-gov.net/?cid=1,73>.

⁹ Procurement Review Body, Annual Report 2008, available at: <http://oshp.rks-gov.net/?cid=1,73>.

¹⁰ Procurement Review Body, Annual Report 2008, available at: <http://oshp.rks-gov.net/?cid=1,73>.

However, in 2010, the number of economic operators that have submitted complaints to the PRB against the acts of municipal authorities concerning procurement procedures has reached a total of 136 complaints (see table 1).¹¹ This increase is also reflected vis-a-vis the total number of complaints reviewed by PRB (a total of 102 complaints reviewed) and the number of decisions (issued by PRB) that instructed both the initiation of the re-evaluation procedure or that annulled/retendered the procurement activity (see table 1).¹² Therefore, according to our assessment, in 2010, the Procurement Review Body (PPRB) issued 49 decisions that required municipal authorities to re-initiate the procurement procedures and/or re-tender the concerned activity (see table 1) according to the requirements of the law on public procurement.¹³ Moreover, also in 2011, the PPRB has issued a total number of 49 decisions that annulled the tendering procedures and/or instructed the re-evaluation of the procurement process.¹⁴

	CS	CR	DC	DR	DA	R	W
2011	102	96	47	38	11	4	2
2010	136	102	54	29	20	27	6
2009	111	79	52	19	8	28	1
2008	40	28	16	6	6	12	0

Table 1 (explaining the number of complaints received from economic operators and the decisions of PPRB)

Legend	
Complaints submitted by Economic Operators to PPRB (against the decision of municipal authorities)	CS
Complaint accepted to be reviewed by PPRB (from received complaints)	CR
Decisions that confirm (the decision of Municipal Authorities as grounded and legal)	DC
Decisions that require the initiation of reevaluation of the procurement activity and tenders	DR
Decisions to annul the procurement activity and re-tender the procurement activity	DA
Decisions to rejected the complaints of the Economic Operators as legally unfounded	R
Withdrawal of complaints	W

¹¹ Procurement Review Body, Annual Report 2008, 2009, 2010 and 2011, available at: http://oshp.rks.gov.net/?cid=1_73.

¹² Procurement Review Body, Annual Report 2008, 2009, 2010 and 2011, available at: http://oshp.rks.gov.net/?cid=1_73.

¹³ Procurement Review Body, Annual Report 2008, 2009, 2010 and 2011, available at: http://oshp.rks.gov.net/?cid=1_73.

¹⁴ Procurement Review Body, Annual Report 2008, 2009, 2010 and 2011, available at: http://oshp.rks.gov.net/?cid=1_73.

It is therefore argued that the increasing number of decisions of PRB that annul and/or put into retender the procurement activities undertaken by municipal institutions reflects only one dimension of the circumvention of procurement rules. At this point in this argument, the claim however is that several economic operators participating in public tenders face problems, as we explain in the coming section, which *a priori* limit their possibility to submit effective complaints against municipal authorities.

On the other hand, two additional arguments explain the increasing trend of misapplication of public procurement rules by municipal authorities. As figure 1 shows, the general behaviour of municipal authorities to circumvent public procurement rules have increased significantly over the past years. To further explain this standing, we have analysed the number and the content of decisions issued by PRB against municipal authorities (figure 1). The focus was to measure whether the significant increase of complaints submitted to the PRB (from 2008 to 2011) is also reflected in the increase of decisions that annul and/or require to re-evaluate the public procurement process managed by municipal authorities. The results, as shown in the figure 1, explain an association (Linear DR) between the increase of complaints submitted by economic operators against municipal authorities and the decisions of Procurement Review Body (PRB) that require the re-evaluation/re-initiation of procurement activities. In other words, as the number of complaints against is significantly increasing, the mandatory decisions of PRB that instruct municipal authorities to re-evaluate procurement process are also being increased (see figure 1, Linear DR).

Furthermore, as our analysis explains, the increase of complaints of economic operators is as well affecting the increase of the decisions (Linear DA) issued by PRB which annul the procurement process and require the retendering of the procurement activity (see figure 1).

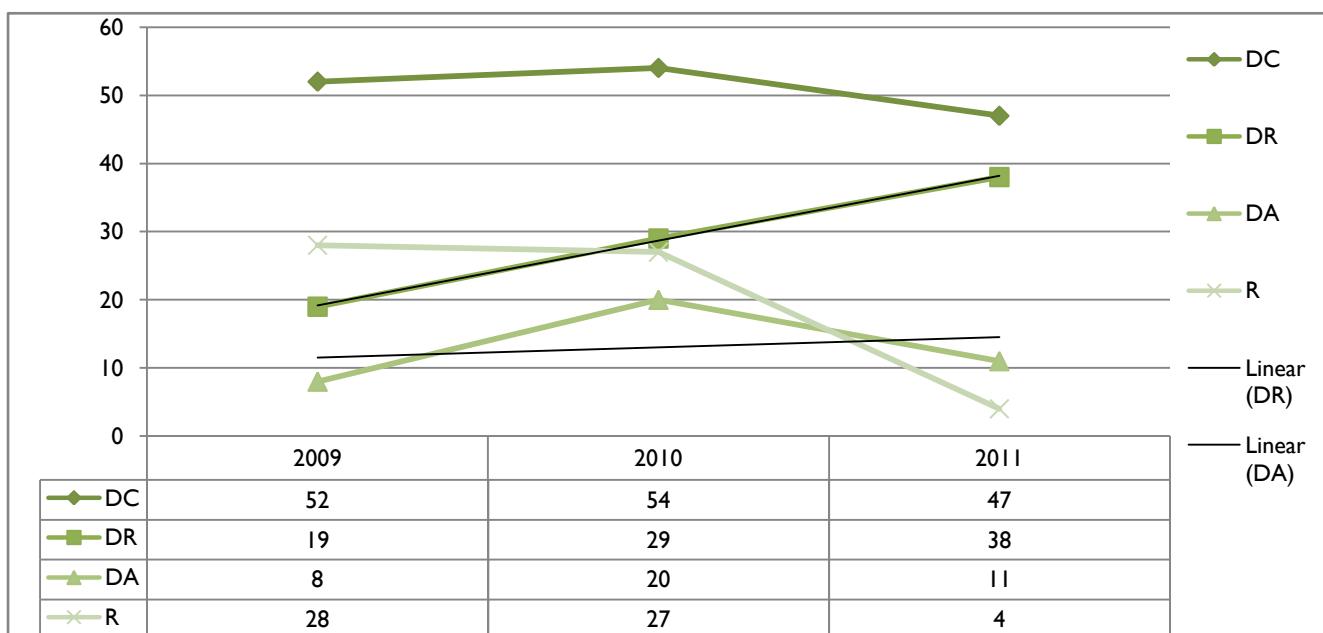


Figure 1 (explaining the relationship between the increase of complaints and the number of negative decisions against municipal authorities)

Municipality		Mayor (Political Party)		RC	CR	DC	DR	DA	R	W
Prishtina		DLK (LDK)		↓	↓	↓	↓	↓	↓	↓
Year(s)	2011	→→→		15	13	7	4	2	1	1
	2010	→→→		5	4	3	0	1	1	0
Peja		AAK								
Year(s)	2011	→→→		3	3	2	0	1	0	0
	2010	→→→		10	4	2	0	2	5	1
Prizren		DPK (PDK)								
Year(s)	2011	→→→		7	7	5	2	0	0	0
	2010	→→→		4	3	2	1	0	1	0
Gjilan		DPK (PDK)								
Year(s)	2011	→→→		11	11	2	9	0	0	0
	2010	→→→		12	11	4	6	1	1	0
Ferizaj		DPK (PDK)								
Year(s)	2011	→→→		6	5	4	0	1	0	1
	2010	→→→		18	15	9	3	3	2	1
Podujeve		DLK (LDK)								
Year(s)	2011	→→→		4	4	3	0	1	0	0
	2010	→→→		14	12	6	5	1	2	0
Suhareke		AAK								
Year(s)	2011	→→→		8	8	4	3	1	0	0
	2010	→→→		7	6	3	1	2	1	0
Lipjan		DPK (PDK)								
Year(s)	2011	→→→		7	7	1	6	0	0	0
	2010	→→→		3	0	0	0	0	2	1
Rahovec		AAK								
Year(s)	2011	→→→		8	7	4	2	1	1	0
	2010	→→→		4	3	3	0	0	1	0

Table 2 (explaining the distribution of decisions among municipalities)

In addition to this analysis, we have further scrutinized the distribution of the decisions issued by PRB among individual municipalities and political parties that lead with those municipalities (table 2, first and second column). Moreover, as table 2 explains, this trend of challenging the procurement process carried out by municipalities is proportionately increasing in most of the municipalities. Furthermore, the increasing number of decisions challenged is simultaneously affecting the increase of decisions that annulled the tendering procedures and/or instructed the

re-evaluation of the procurement process in the concerned municipalities.

It should of course be noted that results delivered above assume that municipal authorities since 2008 have increasingly misapplied if not circumvented the standards of public procurement process. In addition, this negative trend explains that there is a general pattern of misusing public money steamed by different factors. A positive fact in this process is that economic operators are especially using legal complaint mechanisms to challenge the decisions of municipal authorities. This fact is, to some extent, limiting the ability of municipal procurement offices to misuse public money and hinder the establishment of a free competitive public procurement market whereby favouring certain economic operators.

As we developed the argument that the misuse of public money through public procurement process is influenced by dissimilar patterns, in the coming part of the report we will distinguish a number of those patters and explain their impact vis-a-vis corruption.

I. Politicization and Professionalism

The first, and for some the most important development that both preconditions and favours a procurement process that support partisan-related interests is linked to the issue of politicization and lack of professionalism of public procurement officers and offices. It is noteworthy to mention that politicization is a process which refers to 'to the (changing) number of (party) political appointments, (party) political behaviour as well as political sensitivity of civil servants'.¹⁵ In this vein, both the appointment and dismissal of procurement officers through political party influence and the 'use of public services for party purposes' denotes that public procurement officers in Kosovo are 'politicized'.¹⁶ For example, since 2008, it is recognised that the high turnover of the procurement officers as well as provisions which expose public procurement officers to political pressure and interference by economic operators linked with political parties are influencing this general perception.¹⁷ Thus, there are two main reasons that precondition municipal public procurement officers' behaviour in favour of politically linked interests.

The first relates to the provisions of the law on the civil service that permit politicians to influence personnel-related decisions, or put it differently, to have an impact in the process of appointment and dismissal of municipal procurement officers. The high turnover within procurement offices as well as changes of staff after each election best explains the influence and the tendency of political parties to control not only the administration but also the management of public spending. The second argument, of course, speaks about the low level of professionalism among the municipal procurement officers. It is therefore argued that the lack of standardized norms of qualification of procurement officers favour the appointment of individuals linked with or favoured by political parties and their economic interests.¹⁸ As a matter

¹⁵ Van der Meer and Raadschelders in Van der Meer, M., F., (et.al.) (2007) 'Western European Civil Service Systems: A Comparative Analysis' in Raadschelders, C.N. Jos, (et. al.) (eds) (2007) 'The Civil Service in the 21st Century: Comparative Perspectives'. New York: Palgrave Macmillan, p. 41.

¹⁶ Weller in Mulgan, R., (1998) 'Politicisation of the Senior Appointments in the Australian Public Services'. Australian Journal of Public Administration. Vol. 57, No. 3: p. 3.

¹⁷ See for more Commission Staff Working Document: 'Kosovo 2011 Progress Report'. Commission of the European Communities, SEC(2011) 1207, Brussels, p. 38; and, Commission Staff Working Document: 'Kosovo 2010 Progress Report'. Commission of the European Communities, SEC(2010)1329, Brussels, p. 36.

¹⁸ A similar opinion has been expressed by 30 business managers in 6 different municipalities. Interviews with business managers, who choose to remain anonymous, dated 9, 10, 11, 13, 16, and 19 October 2011, in Peja, Prishtina, Skenderaj, Prizren, Gjakova and Ferizaj.

of fact, the law on public procurement in Kosovo has introduced specific provisions related to the qualification and licensing of procurement officers.¹⁹ According to the law, the qualification of public procurement officers can be revoked by the Procurement Review Body if the concerned individual does not perform his/her functions accordingly.²⁰ So far, PRB has issued only one decision of such nature.²¹

On the other hand, the role of public procurement officers becomes more significant when it comes to the signing of contracts on behalf of the municipal authorities. The law on public procurement stipulates that the public procurement officer is authorized to sign the contracts on behalf of the contracting authority.²² Thought this provision of the law is primarily concerned to ensure a professional procurement process, it serves as a spur to extend the influence of politicians vis-a-vis procurement officers.

There are of course certain evidences of malpractices in the procurement procedures that help explain the extent to which politicians use public procurement to support their own/political parties' agendas. For example, during 2010 municipal elections, municipal authorities were conducting procurement procedures and signing contracts for the direct benefit of their electoral campaign without sufficient commitment of funds.²³ By undertaking these actions, mayors were ensuring the financial support of businesses/undertakings for the partisan campaigns, while overburdening the municipal budget abusively. Moreover, in some municipalities mayors were using public money to finance their electoral activities, lunches with party supporters and renting necessary facilities to make public their political party ideas.²⁴ Examples of such nature explain that politicians have a tendency to use public procurement offices for their own political purposes.

It should of course be noted that the role of institutions such as the Anti-Corruption Agency and Public Prosecutor can be seminal in preventing similar tendencies in the near future. For example, Anti-Corruption Agency since 2008 has started actions that are aimed to prevent corruption and supervise public procurement process.²⁵ However, the lack of human resources and capabilities are limiting the role that this Agency can play in preventing the misuse of public money.

¹⁹ See Law on Public Procurement, No. 04/L-042, Official Gazette, No. 18/19, September 2011, art. 25.

²⁰ Law on Public Procurement, No. 04/L-042, Official Gazette, No. 18/19, September 2011, art. 25, para. 6.

²¹ This decision refers to the procurement officers working in the Ministry of Trade and Industry. For more see: Procurement Review Body, Decision to annul the procurement license, dated 29.02.2012, available at: http://oshp.rks-gov.net/repository/docs/vendimet/2012/Sinjal_sanim_Kline-broje.pdf.

²² For contracts above certain amount the law requires that contracts should be signed also from the highest authority of the given institution, that is, Minister, Mayor etc.. See Law on Public Procurement, No. 04/L-042, Official Gazette, No. 18/19, September 2011, art. 26, para. 1 and 2.

²³ See Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Gjakova, December 2011.

²⁴ See Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Gjilan, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Prizren, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011.

²⁵ See Anti-Corruption Agency, Annual Report 2008, available at: <http://www.akk-ks.org/index.php?cid=1,30>; Anti-corruption Agency, Annual Report 2009, available at: <http://www.akk-ks.org/index.php?cid=1,30>; Anti-Corruption Agency, Annual Report 2010, available at: http://www.akk-ks.org/repository/docs/Raporti_Vjetor_2010_janar_dhjetor.pdf; Anti-Corruption Strategy 2012-2016, November 2011, available at: <http://www.akk-ks.org/?cid=1,17,409>.

II. Entering into contracts without sufficient commitment of funds and/or commitments exceeding municipal budget

According to the Law on Public Procurement (henceforth the LPP) public authorities in Kosovo have an obligation to develop annual procurement plans which detail the list of procurement activities.²⁶ This requirement has a two-fold intent. First, it provides an opportunity to economic operators to prepare their offers and orient their annual objectives towards the procurement market supply. Second, it provides an opportunity to authorized institutions to supervise procurement activities and monitor their outcomes. In general, this provision, except aiming to organize the public spending in municipal level it also helps preventing the misapplication of rules of public procurement.

However, the evidence suggests that several municipalities carried out unplanned procurement activities, signed contracts and entered into obligations that were not included in the annual procurement plans of concerned municipalities.²⁷ The behaviour of municipal authorities is both limiting the ability of public authorities to supervise the procurement procedures whereby artificially restricting the number of companies that participate in the process.

Here again, according to the LPP, public authorities are required to assess and verify their needs, and consequently, evidence the availability of funds within the concerned budgetary year.²⁸ According to this requirement, municipalities should, among others, define: the nature and scope of the needs which are to be satisfied, 'the estimated value and ancillary terms of the procurement, the expected benefits from such procurement, and prepare a statement of indication whether or not such a procurement activity has been included in the annual procurement plan and if not the reasons explaining it'.²⁹ It is therefore argued that a preliminary assessment of such needs limits the public authorities to misuse public money and preconditions a fair public procurement process.

That said, a problem evidenced in several municipalities throughout 2010 and 2011 speaks about the fact that they have undertaken procurement activities and entered into contractual obligations with economic operators without sufficient commitment of funds and/or

²⁶ Law on Public Procurement, No. 04/L-042, Official Gazette, No. 18/19, September 2011, art. 25.

²⁷ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Graçanica, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011; and, Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Klina, 20 December 2011. **For the year 2010 see:** See Public Procurement Regulatory Commission (2010) 'Report of the Supervising and Monitoring Department: Municipality of Gjilan'. No. 10/2010, 10 May 2010; Public Procurement Regulatory Commission (2010) 'Report of the Supervising and Monitoring Department: Municipality of Prizren'. No. 26/2010, 11 October 2010; Public Procurement Regulatory Commission (2010) 'Report of the Supervising and Monitoring Department: Municipality of Rahovec'. No. 27/2010, 04 October 2010; Office of the Auditor General (2011) 'Independent Auditor's Report and Financial Statements of Municipality of Shterpce for the year ended December 31, 2010'. Prishtina, June 2011; Public Procurement Regulatory Commission (2009) 'Report of the Supervising and Monitoring Department: Municipality of Ferizaj'. No. 13/2009, 22 June 2009; Public Procurement Regulatory Commission (2009) 'Report of the Supervising and Monitoring Department: Municipality of Gjakova'. No. 34/2009, 10 October 2009; Office of the Auditor General (2010) 'Financial Statements and Independent Auditors' Report Municipality of Mamusha for the year ended December 31, 2009'. Prishtina, June 2010; Office of the Auditor General (2010) 'Independent Auditor's Report and Financial Statements of Municipality of Shterpce for the year ended December 31, 2009'. Prishtina, June 2010.

²⁸ Law on Public Procurement, No. 04/L-042, Official Gazette, No. 18/19, September 2011, art. 9.

²⁹ Law on Public Procurement, No. 04/L-042, Official Gazette, No. 18/19, September 2011, art. 9.

available funds in their annual budgets.³⁰ Several business representatives perceive such behaviour as being mostly used with the aim of acquiring support and/or serving to the political/individual interests of political parties at the municipal level, especially before and during electoral campaigns.³¹ Furthermore, according to public procurement officers these contracts have overburdened municipal budgets and are making municipalities liable towards different economic operators.³²

On the other hand, another dimension of this conduct is expressed via signing contracts which exceed the budget of municipalities dedicated to that category of expense.³³ As evidence suggests, some municipalities have signed contracts that exceed municipal budgets dedicated to that specific category, and have, on an ad-hoc basis, rearranged their budgets accordingly.³⁴ Therefore, a common conduct of municipal authorities is to use funds for purposes other than initially planned. Overall, these practices of signing contracts and entering into obligations without sufficient commitments of funds are practices that explain the misapplication of public procurement rules, misuse of public money whereby exposing municipalities to liabilities that cannot be satisfied.

³⁰ See Anti-Corruption Agency, Opinion, Municipality of Obiliq, dated 04.10.2011, available at: http://www.akk-ks.org/repository/docs/Opinion_Obiliqi.pdf; Anti-Corruption Agency, Opinion, Municipality of Shterpce, dated 08.09.2011, available at: http://www.akk-ks.org/repository/docs/Opinion_Shterpca.pdf; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Skënderaj, 20 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Dragash, 22 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Prizren, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Ferizaj, December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Klina, 20 December 2011; and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Kacanik, 20 December 2011. **For 2010 see:** Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2010'. No. 22.14.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Ferizaj for the Year ended 31 December 2010'. No. 22.17.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2010'. No. 22.0.1-2010-08, Prishtina, July 2011; Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Peja for the Year ended 31 December 2010'. No. 22.6.1-2010-08, Prishtina, June 2011.

³¹ Interview with 30 business managers/representatives in 6 different municipalities, who choose to remain anonymous, dated 9, 10, 11, 13, 16, and 19 October 2011, in Peja, Prishtina, Skënderaj, Prizren, Gjakova and Ferizaj.

³² Interview with municipal procurement officers, who choose to remain anonymous, dated 27 and 26 October.

³³ See Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2010'. No. 22.14.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Ferizaj for the Year ended 31 December 2010'. No. 22.17.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2011) 'Independent Auditor's Report and Financial Statements of Municipality of Shterpce for the year ended December 31, 2010'. Prishtina, June 2011; Office of the Auditor General (2010) "Financial Statements and Independent Auditors' Report

Municipality of Mamusha for the year ended December 31, 2009'. Prishtina, June 2010; and Office of the Auditor General (2010) 'Independent Auditor's Report and Financial Statements of Municipality of Shterpce for the year ended December 31, 2009'. Prishtina, June 2010.

³⁴ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Skënderaj, 20 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Dragash, 22 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Prizren, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Ferizaj, December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Klina, 20 December 2011; and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Kacanik, 20 December 2011.

III. Circumvention of the rules of transparency, equality and non-discrimination

The LPP obliges public authorities to prepare and undertake the procurement process in the light of the principles of transparency, equality and non-discrimination. It specifically prohibits those procurement activities that are designed to reduce or eliminate competition, discriminate or favor a group and/or an individual economic operator, impose an obligation to or not to utilize and/or employ an individual and/or undertaking, and/or prevents undertakings from being supplied from an individual economic operator.³⁵

As the evidence suggests, public procurement offices in many cases make use of rules that limit economic operators to compete freely in the procurement process, and/or apply discriminatory conditions, in favor of individual economic operators.³⁶ This practice of applying measures that are aimed to limit the competition of economic operators raises several concerns as to the degree of favorism and links between businesses and procurement offices in municipalities. Moreover, as public procurement rules tend to establish a culture via which the satisfaction of needs would be done either by identifying the most economically advantageous tender and/or the lowest price tender, the application of discriminatory tendencies and measures may not permit these aims to be applied in practice.

IV. Un-proportionate requirements related to the application of criteria to assess quality

In general, there is no single list of technical and professional criteria that can be applied to assess the quality of all procurements. There is of course an established understanding that quality criteria should be linked to the content of contract only and as long as the criteria are directly related and proportionate. For example, procurement offices can establish rules that intend to assess technical capacity, capability, skills and workforce, quality control and performance standard, and improvement of the economic operators through years, etc.

Accordingly, LPP in Kosovo acknowledges that contracting authorities may require from economic operators sufficient evidence demonstrating technical and professional qualifications as determined in the tender dossier, but to the extent that those requirements are relevant and proportionate.³⁷ Furthermore, the law goes on to specify that selection criteria requirements should be both directly relevant and proportionate to the subject matter of the contract.³⁸ In addition, it also defines that contracting authorities should make a distinction between criteria related to the eligibility and qualification requirements and criteria that are used to determine the winning bidder.³⁹

That being said, municipal authorities in several occasions have required from economic operators to evidence that they are in possession of technical and professional qualifications

³⁵ Law on Public Procurement, No. 04/L-042, Official Gazette, No. 18/19, September 2011, art. 7.

³⁶See Anti-Corruption Agency, Opinion, Municipality of Obiliq, dated 04.10.2011, available at: http://www.akk-ks.org/repository/docs/Opinion_Obiliqi.pdf and Anti-Corruption Agency, Opinion, Municipality of Shterpce, dated 08.09.2011, available at: http://www.akk-ks.org/repository/docs/Opinion_Shterpca.pdf. These concerned have been specifically expressed also by a number of business representatives. Interview with 15 business managers/representatives in 6 different municipalities, who choose to remain anonymous, dated 9, 10, 16, 24, 26, and 27 October 2011, in Peja, Prishtina, Gjakova, Podujeva, Gjilan and Shterpce.

³⁷ Law on Public Procurement, No. 04/L-042, Official Gazette, No. 18/19, September 2011, art. 69.

³⁸ Law on Public Procurement, No. 04/L-042, Official Gazette, No. 18/19, September 2011, art. 51.

³⁹ Law on Public Procurement, No. 04/L-042, Official Gazette, No. 18/19, September 2011, art. 52.

that are considered to be unrelated and disproportionate to the subject matter of the contract.⁴⁰ Installing artificial criteria applicable in the eligibility and qualification process, have barred several economic operators to be qualified as eligible to participate in bidding process. By and large, according to several business representatives, these criteria tend to adjust and/or favor a specific economic operator or group of economic operators.⁴¹ Another example of circumvention of public procurements rules by municipal authorities relates to the cases when the concerned authorities make no distinction between criteria that qualify the economic operator as eligible to submit a bid and criteria that will be applied to determine the winning tender.⁴² In general, as evidence suggests, framing the procurement criteria as to the quality specifications that an individual economic operator may possess, risks the competition and presupposes a pre-arranged and corrupt procurement process.

V. Payments in excess of contractual value/price and/or work carried out

Here and again, it worth mentioning that procurement rules apply also to procedures following the signing of the contract with the winning bidder. In this vein, municipalities have an obligation to specify in the contracts the price of the work and/or service, quality criteria if applicable and the dynamic plan. And, according to contractual specifications, contracting authorities should supervise whether the works are being performed and/or services delivered according to the specified requirements. On the other hand, the winning bidder should ensure that the work will be performed and/or service delivered according to the specificities of quality and price, and according to the dynamic plan.

Regardless of the rules of public procurement, cases when municipal authorities have signed contracts without specifying the price and made payments in excess of the contractual value are unfortunately common.⁴³ A different but a specific finding speaks about the payments made for products that have not been tendered and/or not included in contracts.⁴⁴ Moreover, the findings suggest that municipalities have also circumvented public procurement rules by increasing the contractual price only after the given economic operator has been nominated as the winning bidder.⁴⁵

⁴⁰ See Anti-Corruption Agency, Opinion, Municipality of Shterpce, dated 08.09.2011, available at: http://www.akk-ks.org/repository/docs/Opinion_Shterpca.pdf; Anti-Corruption Agency, Opinion, Municipality of Obiliq, dated 04.10.2011, available at: http://www.akk-ks.org/repository/docs/Opinion_Obiliqi.pdf.

⁴¹ These opinions have been expressed by a number of business representatives. Interview with 25 business managers/representatives in 5 different municipalities, who choose to remain anonymous, dated 28, 10, 16, 24, 26, and 27 October 2011, in Obiliq, Prishtina, Gjakova, Podujeva, Gjilan and Shterpce.

⁴² See Anti-Corruption Agency, Opinion, Municipality of Vitia, dated 06.10.2011, available at: http://www.akk-ks.org/repository/docs/Opinion_Viti.pdf; Anti-Corruption Agency, Opinion, Municipality of Suhareka, dated 31.08.2011, available at: http://www.akk-ks.org/repository/docs/Opinion_Suhareka.pdf, and Anti-Corruption Agency, Opinion, Municipality of Peja, dated 09.02.2012, available at: http://akk-ks.org/repository/docs/opinion_II.pdf.

⁴³ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Skënderaj, 20 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Drenas, December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011. **For 2010 see:** See Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Peja for the Year ended 31 December 2010'. No. 22.6.1-2010-08, Prishtina, June 2011.

⁴⁴ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011.

⁴⁵ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Gjilan, November 2011. For 2010 see Public Procurement Regulatory Commission (2010) 'Report of the Supervising and Monitoring Department: Municipality of Gjilan'. No. 10/2010, 10 May 2010; and, Office of the Auditor General (2010)

A former public procurement officer acknowledged that:

'sometimes the details make the difference, and these cases show that contracts were not awarded to the operators which best satisfied the criteria for the given project'.⁴⁶

There are however a number of evidences related to the cases that municipal authorities have not respected public procurement rules by making payments that did not match with the dynamic plan. For example, a specific economic operator according to the contract was required to complete the works within 45 working days; instead the works were only completed after 451 days.⁴⁷ Similar evidences refer to occasions wherein municipal authorities have paid up to 70% of the contractual value, while the works were only completed by 35%.⁴⁸ Last, some municipalities have automatically extended the contract to the same economic operator without first finishing with the necessary procurement procedures.⁴⁹

In general, incorrect estimations, cases of payments made outside the contractual value and or works performed create a perception that the bid was not fair and open.

VI. Projects financed without proper supervision: internal control mechanisms

LPP asserts that the contracting authorities should supervise the implementation of the projects and appraise whether the latter are being performed in accordance with the technical standards and dynamic plan as stipulated in the contract. These rules permit contracting authorities to appoint supervisory and/or related committees and determine whether or not the municipal institutions should authorize/allot the payments. However, municipal institutions in several cases have failed to appoint supervisory committees and/or control whether projects financed by municipalities are being performed according to contractual stipulations.⁵⁰ In addition, due to weak internal control, municipalities execute payments without having confirmed whether the goods and/or services have been properly delivered or distributed. For example, in several municipalities, there is no evidence that a concerned good has been delivered; cases when the amount of goods paid by contracting municipality exceeds the amount received by it, and

⁴⁶ 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2009'. No. 22.01-2009-08, Prishtina, June 2010.

⁴⁷ Interview with a former procurement officer who choose to remain anonymous, dated 15 October 2011.

⁴⁸ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Gjakova, December 2011.

⁴⁹ Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2010'. No. 22.0.1-2010-08, Prishtina, July 2011.

⁵⁰ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Skënderaj, 20 December 2011.

⁵¹ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Ferizaj, December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Novoberda, December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Hani i Elezit Municipality, 20 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Graçanica, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Junik, 16 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Gjakova, December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Ranillug, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Vushtrise, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Junik, 16 December 2011; and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Skënderaj, 20 December 2011.

occasions of payments made on the basis of the reports that do not belong to the concerned contract.⁵¹

Overall, municipalities are failing to enforce their internal supervisory mechanisms, which result in payments made without appropriate basis that verify the receipt of goods and/or services and that the contractual stipulations have been respected accordingly.

VII. Failure to complete works within the deadline

As argued above, due to ineffective municipal supervisory mechanisms (ad hoc bodies vested with the power to supervise projects financed from the municipal budget), the implementation of many projects are not performed according to the prearranged dynamic plans and deadlines. An exemplifying illustration of this nature is certainly the case with the implementation of the project 451 days after the set deadline.⁵² Particularly, in several municipalities, projects are not performed within and according to the dynamic plan stipulated in the contract.⁵³ As evidence suggests, in one individual case, the contracting authority has neither defined the date of the beginning of the implementation of the project nor has specified the deadline for delivering the expected outcome.⁵⁴

On the other hand, according to the law, for delays in implementing the project according to programmed dynamic plan, the contracting authorities are obliged to issue penalties. Here again, municipalities often fail to apply penalties to economic operators that have not succeeded and/or continuously fail to perform works according to the deadlines.⁵⁵ Notably, the negligence of

⁵¹ See Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Prishtina, November 2011;Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Ferizaj, December 2011;Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Podujeva, December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Hani i Elezit Municipality, 20 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Graçanica, November 2011;Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Junik, 16 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Peja, December 2011;Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Gjilan, November 2011;Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Partesh, December 2011; and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Vushtrise, November 2011. For 2010 see Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Ferizaj for the Year ended 31 December 2010'. No. 22.17.1-2010-08, Prishtina, June 2011; and Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2009'. No. 22.01-2009-08, Prishtina, June 2010.

⁵² Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Gjakova, December 2011.

⁵³ See Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Kacanik, 20 December 2011;Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Junik, 16 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Ferizaj, December 2011;Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Skënderaj, 20 December 2011. For 2010 see Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2010'. No. 22.0.1-2010-08, Prishtina, July 2011; Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2010'. No. 22.14.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2009'. No. 22.14.1-2009-08, Prishtina, June 2010.

⁵⁴ See Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Gjilan, November 2011.

⁵⁵ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Kacanik, 20 December 2011;Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Junik, 16 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary

both the economic operators and the municipal authorities is resulting in delays and continuous failures to execute in particular capital projects according to the deadlines and prearranged dynamic plan.

VIII. Selection and evaluation of tenders

In general, there are two approaches with which contracting authorities use to evaluate the tenders in procurement. Contracting authorities can evaluate the tenders by either the lowest price approach and/or by assessing the most economically advantageous tender. However, as evidence suggests, many municipal authorities, during the tender evaluation procedure, have changed the evaluation criteria. For example, despite the fact that municipal authorities have determined that the most economically advantageous tender approach should be used as an evaluation set for the concerned procurement, the winning tender was selected on the basis of the lowest price approach and vice-versa.⁵⁶

Furthermore, given the provisions of the law, the contracting authority should terminate and reinitiate the procurement if less than two responsive bidders have participated in the procurement process. Yet, this mandatory provision of the law has not been respected in several procurements carried out by municipalities.⁵⁷ Moreover, according to the evidence, in some cases the winning operators were selected among those that have not even qualified as responsive bidders.⁵⁸ In addition, there are also cases when economic operators were permitted to participate in procurement process despite the fact that they were participating jointly in a single different bid.⁵⁹ Last, the evidence also speak about the two facts related to missing declarations that evidence the approval of the winning tender by all members of the evaluation committee, and participation of the same persons in both pre-selection committee and evaluation committee.⁶⁰ In general, these findings direct to the arguments that the procurement process in some cases has been manipulated and oriented in favor of individual economic operators.

IX. Performance and tender guarantees

One of the most common misapplications of the public procurement rules certainly relates to the tender and performance guarantees. According to LPP the contracting authority should demand

Year of 2011, Municipality of Ferizaj, December 2011; and, Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Skënderaj, 20 December 2011. **For 2010 see:** Office of the Auditor General (2011) 'Audit Report on the Financial Statements of the Municipality of Prishtina for the Year ended 31 December 2010'. No. 22.0.1-2010-08, Prishtina, July 2011.

⁵⁶ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Junik, 16 December 2011 and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Skënderaj, 20 December 2011.

⁵⁷ See Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Prizren, November 2011.

⁵⁸ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Podujeva, December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Drenas, December 2011; and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Vushtrise, November 2011.

⁵⁹ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Dragash, 22 December 2011.

⁶⁰ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Skënderaj, 20 December 2011, and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Kacanik, 20 December 2011.

from the economic operators participating in the procurement process a precise amount of money and/or equivalent of money to serve as a tender guarantee. The rationale behind this choice is related to the fact that this amount will ensure the contracting authority that the economic operators have in good faith prepared and/or presented their bids. On the other hand, the contacting authorities hold the right, in cases when the economic operators have violated the rules of procurement and/or contract, to apply the tender security as a penalty. The evidence therefore suggests that municipal authorities have continuously circumvented the application of tender guarantees, or not requested from economic operators a tender guarantee.⁶¹ Moreover, the law determines that contracting authorities should also set other forms of guarantees, that is, the performance guarantee applied to economic operators that have signed contracts. The performance guarantee is intended to serve as a pledge that the economic operator shall perform its contractual obligations. Hence, the evidence suggests that several municipalities have not applied/requested performance guarantee from the economic operators.⁶²

X. Initiation of procurement procedures and execution of payments and extension of contracts without authorization

According to LPP, the Mayor of the municipality is the authority for whom the law reserves the right to authorize the procurement office to initiate the procurement procedures. That being said, in several municipalities public procurement officers have initiated and authorized procurement without having the authorization of the Mayor.⁶³ Moreover, in several cases municipalities have executed payments without having signed the contracts and/or based on contracts which have been already performed/rewarded.⁶⁴ In addition, there were also cases when the mayors of the municipalities have ordered execution of payments without initiating the procurement procedures.⁶⁵

⁶¹ See Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Klina, 20 December 2011; Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Kacanik, 20 December 2011; and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Skënderaj, 20 December 2011. **For 2010 see:** Office of the Auditor General (2010) "Independent Auditor's Report and Financial Statements of Municipality of Peja for the year ended December 31, 2009", Prishtina, June 2010; Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2009'. No. 22.14.1-2009-08, Prishtina, June 2010.

⁶² See Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Klina, 20 December 2011, Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Kacanik, 20 December 2011, Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Prishtina, November 2011, and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Skënderaj, 20 December 2011. **For 2010 see:** Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Prizren for the Year ended 31 December 2009'. No. 22.14.1-2009-08, Prishtina, June 2010; Office of the Auditor General (2010) 'Audit Report on the Financial Statements of the Municipality of Ferizaj for the Year ended 31 December 2010'. No. 22.17.1-2010-08, Prishtina, June 2011; Office of the Auditor General (2011) "Financial Statements and Independent Auditors' Report Municipality of Mamusha for the year ended December 31, 2010". Prishtina, June 2011.

⁶³ See for example Office of the Auditor General (2011) 'Independent Auditor's Report and Financial Statements of Municipality of Shtërpce for the year ended December 31, 2010'. Prishtina, June, 2011.

⁶⁴ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011.

⁶⁵ See Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Kollokot, December 2011, and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Decan, 22 December 2011.

XI. Missing documentation and other irregularities in procurement folders

According to LPP, for each procurement activity, municipal procurement units should maintain a tender dossier, which will contain necessary documents, proofs and authorizations related to the procurement. This dossier therefore becomes an especially important source of information in cases of investigation or alleged misapplication of public procurement rules. It is therefore argued that a considerable number of municipalities fail to perform according to this rule. For example, in several occasions, the tender file does not contain documents that certify the expenses made or the reports of supervisory committees.⁶⁶ Moreover, in some other cases, both the document for appointing the supervisory committee and the decision for the appointment of the technical acceptance committee, ‘photocopies of the newspapers for publishing the tender and announcement of winning company...’, ‘the signature of committee members are missing from tender evaluation forms and opening bid committees decisions as well as reports of evaluation commissions...’, and ‘contracts signed with the suppliers there are no clear specifications of prices as well as of items that will be provided according to those contracts’, were all missing.⁶⁷ Here again, in several cases, the date in which the contract was signed ‘coincided’ with the date of the technical acceptance report.⁶⁸

Overall, the practice of the ‘missing’ of documents in tender dossiers as well as other irregularities in tender-related documents suggest that procurement practice has been implemented in opposition to the rules of procurement.

XII. Informing unsuccessful bidders

For a procurement process to be fair and just, necessary protection mechanisms are applied. The right of economic operators to be informed in due course about the outcome of the tender and the other ancillary but important decision of the contracting authority is guaranteed by LPP. This guarantee therefore assures unsuccessful bidders with the right to challenge the decisions of contracting authorities to PRB in due time. The right of course is materialized once an economic operator becomes informed about the result of a tendering process where it participated. As the evidence suggests, this right is being continuously violated by municipal institutions. Municipalities have hardly ever informed economic operators about the decision of the evaluation committees and other rearrangements within the tendering process and the reasons after their decisions.⁶⁹ As a result of this behaviour, unsuccessful operators become

⁶⁶ Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Gjilan, November 2011, Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011, and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Kollokot, December 2011.

⁶⁷ See Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Mitrovica, November 2011, and Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Kollokot, December 2011. For 2010 Office of the Auditor General (2010) “Independent Auditor’s Report and Financial Statements of Municipality of Peja for the year ended December 31, 2009”, Prishtina, June 2010, p. 16.

⁶⁸ See Office of the Auditor General (2010) ‘Independent Auditor’s Report and Financial Statements of Municipality of Shterpce for the year ended December 31, 2009’, Prishtina, June 2010, p. 52.

⁶⁹ See Office of the Auditor General, Memo on Interim Procedures for Budgetary Year of 2011, Municipality of Dragash, 22 December 2011. For 2010 see: Public Procurement Regulatory Commission (2010) ‘Report of the Supervising and Monitoring Department: Municipality of Prizren’. No. 26/2010, 11 October 2010; Public Procurement Regulatory Commission (2010) ‘Report of the Supervising and Monitoring Department: Municipality of Rahovec’. No. 27/2010, 04 October 2010; and Public Procurement Regulatory Commission (2010) ‘Report of the Supervising and Monitoring Department: Municipality of Gjilan’. No. 10/2010, 10 May 2010.

frequently unable to challenge the decisions of the given municipality to PRB within the deadline defined by law.

POLICY RECOMMENDATIONS TO IMPROVE THE MUNICIPAL PROCUREMENT PRACTICE AND SYSTEM

Having observed numerous problems and legal implications in the municipal practice of tendering, Group for Legal and Political Studies proposes a set of policy recommendations that need be substantiated promptly by the respective institutions in order to increase the transparency, accountability, integrity and merit of the municipal procurement practice and system.

1) The crucial need to increase the vibrancy of the public prosecution:

A key observation in the public procurement process at the municipal level is that the malpractices observed and voiced by the respective auditing bodies (such as OAG, RCPP or PRB) receive little or no attention at all by the public prosecution. Certainly, most of the abuses with municipal tendering fall into the filter of criminal violations, therefore a key role for investigating and indicting the abusers rests with the public prosecution. With municipal tendering practices involving partisan control and corruption, the public prosecution remains the key authority to have the competence to address this issue in the most appropriate, effective and legally inclusive dimension. Therefore, the public prosecution must be far more vibrant and accountable to the malpractices identified at the municipal procurement, and address this through self-initiated investigations also, thus playing its role more responsibly.

2) Increasing external monitoring and control over municipal procurements:

Although OAG and RCPP provide a rather competent external auditing to the practice and regularity of the municipal procurement procedures, a much higher level of external auditing is needed. It is proposed that both OAG and RCPP increase their capacities of auditing especially the performance of awarded tenders, except the procedural regularities of the awarding procedure, and provide a more comprehensive and continual monitoring and assessment. Both institutions should specialize and tackle more thoroughly the execution of awarded tenders and the quality of work/service provided thereof, in order to assess the abuses of economic operators with tenders after the award of the tender. In addition, both OAG and RCPP need to institute a more credible line of cooperation and informing with the State Prosecutor Office, the Assembly of Kosovo and the Ministry of Finances, in order to address their findings to the institutions with authority to discipline and penalize the municipal abusers with public tenders.

3) The need to establish internal municipal auditing mechanisms:

Although there are external monitoring mechanisms such as OAG and RCPP, municipalities need to establish internal auditing mechanisms for monitoring and controlling the public tendering lawfulness and performance. It is observed that most of the municipalities in Kosovo have very weak and totally ineffective internal auditing mechanism or lack at all such mechanisms. Therefore, it is proposed that such internal auditing mechanisms be established by the municipal assemblies with a qualified majority of votes – in order to enable that such mechanisms be politically consensual and impartial – and that the internal auditing mechanisms monitor the

local governments as to the public tendering process, while finally reporting to the municipal assemblies. The findings of such professional and impartial mechanisms would make the local governments more responsible also to their municipal assemblies, and would enable that malpractices identified from such mechanism be transformed into political tools of the local assemblies for better controlling and calling into accountability the local governments.

4) Professionalization of municipal procurement staff:

Because of the very complex legislation and framework on public procurement, the procurement procedures need highly qualified civil servants as to be able to address the procedures in the appropriate and professional way. It is observed that municipal procurement officers face rather huge professional challenges when governing the procurement procedures, as most of this is a consequence of the lack of professional education and promotion that they should receive. Therefore, we propose that RCPP and KIPA develop a more systematic, long-term and merit-based professional development programme for constantly educating, monitoring the professional level and career of procurement officers. This said, the need to increase the professional capacities of the municipal procurement officers is indispensable.

5) Digitalize the procurement process:

As with the central level procurement process, it appears that there is an indispensable need to digitalize the procurement process. Although quite a few efforts have been made to allow that public tenders be opened to public via a structured website, it seems highly abusive that public tenders and the way decisions are made remain totally covert for the public-at-large. Therefore, the digitalization of procurement process should include the right of contenders in each tendering process, upon the award of the contract, to have access on the method the procurement decision was made and every other detail of the procedure. In addition, the digitalization of the procurement process should also allow that the public have access to most of the details of the public tendering process, including the summary notes of the implementation monitoring procedure. This would allow that the level of transparency regarding municipal tenders be hugely increased, whereas fair procurement decisions would increase the public confidence on the process as such.

6) Establish the ‘Black List’:

It is very obvious that although the external auditing mechanisms, but also municipalities themselves, often find and voice up certain procurement malpractices by economic operators, the latter continue to have the same authority of applying for future tenders. Therefore, it is indispensable for the integrity of the procurement performance process that a ‘Black List’ of economic operators that have abused with public tenders be established. In order to protect the impartiality of the ‘Black List’, a number of independent institutions should altogether, by means of majority, have the authority to mark certain abusive economic operators in the ‘Black List’, whereas the said economic operators should also be given the right to access the court in an appropriate time to attack such an administrative decision as to its legality in the court. The ‘Black List’ would then serve as a prohibition for granting the right to apply for public tenders to certain economic operators who have abused in the past with public tenders, although this should be regulated strictly by law and should have a time limit.

7) Municipalities should plan their annual procurement activities rigorously and properly: It is observed that most of the municipalities violate a basic duty, namely to plan the procurement activities each year in the appropriate and rigorous manner. This, in turn, allows that municipalities act with a more ‘partisan’ discretion when deciding what to procure and what not on basis of occasion rather than on basis of structured and transparent annual planning. Therefore, municipalities should responsibly plan the procurement activities in each year, and, as a rule, act solely on basis of the procurement annual plan. The annual plan of procurement activities should be discussed in municipal assemblies and also with citizens, in order that the decision-making as to the procurement agenda be made transparent and accessible to all.

8) More rigorous setting of procurement criteria:

It is observed that the setting of criteria for the awarding procedure of public tenders is often unreliable and uncertain. In order to be left with a high margin of discretion for manipulating the assessment of the merit of the bidders, municipal governments often apply unspecific and immeasurable criteria for awarding the public tenders. This allows that municipal governments misuse the authority and award certain tenders to their preferred partisan firms, clearly violating the rules of merit. Therefore, we propose that municipal governments take it essentially serious that the setting of public tendering criteria be measurable, certain and able to be gauged. A rigorous mechanism to observe the municipalities’ credibility as regards this issue should be set up by RCPP, whereby the latter constantly issues legal directions and regulations to fight the abuse of municipal governments on basis of it.

9) Some smaller policy interventions:

In the observation conducted by us, it is found that a number of smaller policy interventions be addressed promptly by municipalities as to procurement procedures. First, the municipalities should tackle the issue of monitoring the implementation of tenders with a far more reliable procedure and seriousness, thus confirming that each point of an awarded tender has been implemented with the contracted quality and quantity. Second, that municipal government omit from paying for contracts without verifying the implementation and the quality/quantity of the contracted work/service. Third, that municipal governments refrain from misusing the Law’s limits on asymmetric payment after the tender has been awarded, and that this be done strictly and only exceptionally. Fourth, that municipal governments strictly omit from opening public tenders and entering into contracts without having sufficient amounts of committed funds, as to the annual budgetary planning. Fifth, PRB should play a far more vibrant role to penalizing and removing from office repetitive procurement officers at the municipal level which breach the rules of public procurement, as this remains a key mechanism to ensure that procurement officers are held administratively responsible to the LPP. And finally, that municipal governments fully utilize their right to confiscate the contract guarantee should the implementation of the awarded tender be under the limits of the contracted standards/quantity.

POLICY REPORTS

Policy Reports are lengthy papers which provide a tool/forum for the thorough and systematic analysis of important policy issues, designed to offer well informed scientific and policy-based solutions for significant public policy problems. In general, Policy Reports aim to present value-oriented arguments, propose specific solutions in public policy – whereby influencing the policy debate on a particular issue – through the use of evidence as a means to push forward the comprehensive and consistent arguments of our organization. In particular, they identify key policy issues through reliable methodology which helps explore the implications on the design/structure of a policy. Policy Reports are very analytical in nature; hence, they not only offer facts or provide a description of events but also evaluate policies to develop questions for analysis, to provide arguments in response to certain policy implications and to offer policy choices/solutions in a more comprehensive perspective. Policy Reports serve as a tool for influencing decision-making and calling to action the concerned groups/stakeholders.

Group for Legal and Political Studies
'Rexhep Luci' str. 10/5
Prishtina 10 000, Kosovo
Web-site: www.legalpoliticalstudies.org
E-mail: office@legalpoliticalstudies.org
Tel/fax.: +381 38 227 944