

The International Comparative Legal Guide to:

Public Procurement 2009

A practical insight to cross-border Public Procurement



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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

Public procurement procedures in Albania are mainly governed by:

- Law no. 9643 dated 20.1.2006 “On public procurement” (hereinafter referred to as “PPL”), as amended; and
- Decision of Council of Ministers no. 1 dated 10.01.2007 “On public procurement regulations” as amended (hereinafter referred to as “PPR”) and by other bylaws issued for purposes of regulating specific areas in relation to public procurement.

Both the PPL and PPR are indicated as “Legislation on Public Procurement”.

The legislation on public procurement applies to procedures for procurement of goods, public works and services, and is applicable to both Economic Operators (“EOs”) and Contracting Authorities (“CAs”).

The purpose of the PPL is to determine the rights and obligations of the parties involved in a public procurement procedure. The procedures set forth with regard to the supervising of the public procurement aim to:

- (i) ensure a fair use of public funds and to decrease procedural costs;
- (ii) encourage EOs to participate in public procurement procedures;
- (iii) promote competition between EOs;
- (iv) warrant an equal and non discriminatory treatment for all EOs involved in the public procurement procedures; and
- (v) warrant integrity, public confidence and transparency in public procurement procedures.

1.2 How does the regime relate to supra-national regimes including the GPA and/or EC rules?

Although Albania is not a Member State of the European Union, the legal framework applicable in the area of the public procurement is inspired to a model which complies with the “*Acquis Communautaire*” and the international standards. To this end the legal framework aims to consolidate the position of the state authorities in the public procurement procedures and harmonise the applicable legislation with EU Directives.

In this context, should any provisions of the domestic legislation not comply with any of the obligations undertaken by the Republic of Albania in virtue of any international agreements entered into with

other countries or international organisations, such agreements shall prevail to the domestic legislation. Otherwise the domestic legislation shall apply with regard to public procurement procedures.

1.3 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The basic principles governing public procurement procedures and constituting the key to the interpretation of such legislation are:

- Equal treatment and non discrimination.
- Transparency.
- Confidentiality.

1.4 Are there special rules in relation to military equipment?

The PPL applies to all public procurement procedures, including procurements in the field of national defence.

Exemptions are made in the following cases:

- when the application of the provisions of PPL would cause disclosure of information which might harm the national safety interests;
- the purchase of military hardware and services related thereto. However this exemption should not affect the competition with regard to goods not used for exclusive military purposes; and
- the occurrence of natural disasters, hostilities, armed operations, military trainings and participation in military missions outside the country.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law and is it possible to obtain a ruling on this issue?

The PPL provides for the definition of Contracting Authorities, which are the following:

- constitutional institutions and other central institutions, independent central institutions and local government units;
- any entity (i) pursuing a public interest and being not for profit in character, (ii) incorporated as a legal entity, or (iii) obtaining mainly financings from state authorities, either local or central authorities, or by other public entities which are controlled by the state;

- organisations which are established by the above-mentioned authorities or public administration bodies; or
- any other public entity.

2.2 Which private entities are covered by the law and is it possible to obtain a ruling on this issue?

It is not possible to create a ruling on this issue. The PPL applies to private entities to the extent they are involved in a public procurement procedure as an EO. In this view the EO may be classified as:

- a candidate, when the EO is willing to participate in the public procurement; or
- a bidder, when the EO submits its bid.

2.3 Which types of contracts are covered?

The Legislation on Public Procurement classifies the public contracts into three main groups:

1. Public Supply Contracts are those contracts the object of which is the purchase in parts or instalments, or the lease, with or without option to purchase the goods that are the object of the contract. In case a Public Supply Contract includes in its object the installation as well, it is classified as a Public Supply Contract when the supply value exceeds the value of the installation.
2. Public Works Contracts are those contracts the object of which is the performance or both the projecting and performance of works, by means of any equipment in accordance with the requirements of the CA.
3. Public Service Contracts are those contracts the object of which is the supply of services. The public contract the object of which is the supply of both services and goods, shall be classified as a service contract where the value of the service performed exceeds the value of the supply of goods. Contracts having per object the supply of services but including also the supply of goods for necessities related to the contract execution, shall be considered as a public service contract.

2.4 Are there threshold values for determining individual contract coverage?

The Legislation on Public Procurement applies the maximum and the minimum threshold value with regard to public procurement contracts. Pursuant to the PPR the threshold values are as below:

- The maximum threshold value is:
 - (i) 600,000,000 ALL (approx. 4,958,677.67 EUR (where the exchange rate is 1 EUR = 121 ALL)) for public work contracts; and
 - (ii) 100,000,000 ALL (approx. 826,446.28 EUR) for public supply contracts of both services and goods.
- The minimum threshold value is:
 - (i) 3,000,000 ALL (approx. 24,793.38 EUR) for public works contracts; and
 - (ii) 2,000,000 ALL (approx. 16,528.92 EUR) for public supply contracts of both services and goods.

2.5 Are there aggregation and/or anti-avoidance rules?

The PPL explicitly forbids the splitting up of the public contract value when occurring for purposes of avoiding application of the provisions on public procurement procedures.

The Legislation on Public Procurement sets forth the methods for the calculation of the value regarding public contracts. The value

of a public contract is determined based on the whole payable amount (VAT currently at 20% is not included), as calculated by the CA upon publication of the contract in the Official Publications Bulletin. The total amount of the contract should also include the amount to be paid in case of renewal of the contract (if applicable).

2.6 Are there special rules for concession contracts?

Concession contracts in Albania are governed by Law no. 9663 dated 18.12.2006 “On Concessions” (“Concession Law”) and relevant regulations approved upon the Decision of Council of Ministers no. 27 dated 19.12.2007 “On the approval of regulations on assessment and granting of concessions” as amended.

In accordance with the Concession Law, the concession is an agreement entered into between the CA and the concessionaire by which means the *concessionaire* has the following rights and obligations:

- to perform a business activity which otherwise would be performed by the CA regarding a concession project, administration contract or other public services;
- to undertake the risks or part of them in relation to the performance of the business activity; and
- to receive a profit through direct payments by the CA or through applications of fees collected by customers.

3 Procedures

3.1 What procedures can be followed, how do they operate and is there a free choice amongst them?

The PPL provides for the following public procurement procedures:

- opened procedure;
- restricted procedure;
- negotiated procedure with previous notification of the contract;
- negotiated procedure without previous notification of the contract;
- request for proposals procedure, which includes (i) low value purchases procedure and (ii) consultancy services procedure; and
- competitive contest procedure.

The most preferred procedure for public procurements is the opened procedure. It is applicable to all types of public contracts. Other public procurement procedures shall apply only when provided and permitted by the PPL and when requirements set forth in this respect by the PPL are met.

3.2 What are the rules on specifications?

Technical specifications indicate the characteristics of the goods, services or works subject to public procurement. The technical specifications should:

- provide an accurate and correct description of the object of procurement in order to ensure a fair and opened competition between the EOs participating in the procurement procedure;
- ensure an equal treatment for all candidates and bidders and in no way should constitute an obstacle for competition during the public procurement procedure; and
- refer to national standards which rely on international standards, international technical approvals, general technical specifications, international standards or other technical reference system as approved by the international authorities of standardisation.

Technical specifications should never refer to a specific brand, patent, design, specific origin, manufacturer or entrepreneur, unless it is the only way to identify the object of procurement and provided that the wording “or equivalent” shall be included in the specifications.

3.3 What are the rules on excluding tenderers?

According to the PPL the CA excludes from participation in public procurement procedures candidates or bidders, when a final court decision is pronounced in the name of the tenderers with regard to the following criminal offences:

- association in a criminal organisation;
- corruption;
- fraud;
- money laundering; or
- falsification.

The CA may decide to exclude from the tender procedure tenderers when: (i) its capital are administered by the bailiff office due to bankruptcy; (ii) it is in process of declaring bankruptcy; (iii) its capital has been confiscated; (iv) its activity is suspended due to a prosecution in course; (v) the tenderer is convicted for offences related to the professional area; (vi) it is in default with the social insurance authorities or tax authorities; or (vii) it has provided false information required in virtue of public procurement procedures.

3.4 What are the rules on short-listing tenderers?

The CA grounds its evaluation for short listing tenderers based in the fulfilment of the following qualification criteria:

- professional qualification- the EO should submit to the CA the relevant professional licence for conducting the activity object of the public procurement contract;
- technical capabilities- the EO should possess all required technical, professional and organisational qualifications, as well as equipments and other assets necessary for the implementation of the public contract;
- financial capabilities- the EO should ensure the necessary economic and financial means necessary for the implementation of the public contract; and
- legal capabilities- this means that the EO is able to enter into the procurement contract, or in case of consortiums the EOs give evidences to possess the required ability.

3.5 What are the rules on awarding the contract?

The CA awards the public contract to the EO which fulfils the qualification requirements and offered the lowest value. The evaluation of the qualification requirements refers only to requirements indicated in the bidding documents. Reference to qualification requirements not indicated in the bidding documents is not permitted.

The winning bidder is defined based on the assessment of various requirements such as quality, price, technical advantages, esthetical and functional characteristics, environmental characteristics, functioning costs, economic efficiency, and maintenance after sale. In any case the abovementioned requirements are considered in relation to the object of the public procurement contract, and should be objective, proportional and non discriminatory, as well as clearly defined in the public notification of the contract and the bidding documents.

3.6 What methods are available for joint procurements?

Joint procurements in Albania are undertaken when more than one

CA intends to procure the same goods, services or works. In such case the CAs may perform the procurement by engaging one of the CAs to follow the procurement procedures or by instructing a Central Purchasing Body (CPB), established in accordance with public procurement provisions, to perform all necessary procedures for the selection of the winner bid. The CAs may require to the CPB adoption of a given procedure for the required procurement.

The recent amendments to the PPL have introduced the concept of the framework agreement, which is an agreement entered into between the CA and one or more EOs. The framework agreement applies only to procurement of energy and hydrocarbons. The purpose of this agreement is to establish the general framework for stipulation of specific contracts with regard to procurement of goods within a given time limit. In this context the framework agreement provides the general terms and conditions with regard to procurement of energy and hydrocarbons, such as time limits which should not exceed 24 months, the quantity of goods to be procured and the terms related to the price applicable.

3.7 What are the rules on alternative bids?

Alternative bids are permitted under the Albanian PPL when the CA has foreseen in the bidding documents application of alternative bids and it is notified through the notification of the contract.

Alternative bids are permitted in cases when the requirement for qualification is the offer having the major economic convenience.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

The PPL does not apply to selection procedures with regard to public contracts which should be executed by ensuring special safety measures, in accordance with applicable legislation or when it is required in virtue of the safeguard of essential country interests.

The PPL does not apply to public services contracts with regard to: (i) the purchase or lease through any financial means of immovable assets or rights related thereto; (ii) the purchase, development, production, co-production of programmes or sports subject to transmission from broadcasting operators or the publishing in the written media and for contracts with regard to the transmission terms; (iii) arbitration or conciliation services; (iv) financial services for the purchase, sale, transfer of titles or other financial instruments especially the actions undertaken by the CA for the revocation of monetary values or capitals, and the services rendered by the central bank; (v) the services of research and development, which results are of wide range utilisation; or (vi) the purchase of energy produced in Albania.

The public service contracts entered into between the CA and one or more other CAs are also exempted from the application of the PPL, in virtue of exclusive rights granted and recognised by the Albanian applicable legislation.

4.2 How does the law apply to “in-house” arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The Albanian legislation on public procurement does not provide for the “in-house” arrangements.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to *locus standi*?

Any person having or that has had an interest in obtaining a public contract and has been or risks being harmed by a decision taken by the CA which infringes the PPL, may challenge such decision.

The Public Procurement Agency (PPA) is the authority entitled to undertake measures in case of breach of the law either by the EOs or the CAs.

Where the PPA deems that a CA's officer committed a deliberate and intentional breach of the PPL, it may report the offence to the competent authority and in cases of infringement of the PPL and PPR, the PPA is entitled to apply fines from 50,000 to 100,000 ALL and to propose disciplinary measures to be applied to the officer by the CA.

The PPA may exclude an EO from participating in tender procedures - without prejudice to any criminal proceedings which may have started - for a period of 1 to 3 years in the cases of: (a) serious misrepresentation and submission of documents containing false information for purposes of qualification; (b) corruptive actions towards any officer or the EO being in circumstances of conflict of interest; (c) conviction for any of the crimes as provided in the exclusion requirements by the PPL; or (d) failure to fulfil contractual obligations accrued in virtue of public contracts during the last 3 years.

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

Any parties interested in obtaining a public contract, which have suffered damages, can file an action with the court. The PPL does not provide for procedures to be followed prior to filing an action with the court in case of contractual damages incurred by the winning EO or the CA.

5.3 Before which body or bodies can remedies/enforcement be sought?

Enforcement can be sought before the CA, PPA and the Public Procurement Advocate (PP Advocate). These bodies follow the administrative enforcement procedures and once these procedures are exhausted, court actions may initiate in accordance to the terms provided in the law.

5.4 What are the legal and practical timing issues raised if a party wishes to make an application for remedies/enforcement?

Objections shall be filed in writing with the CA within 5 days from the day the complainant became aware or should have become aware of the alleged breach of the PPL.

Upon receiving the complainant's objection, the CA suspends the tender procedure until the objection is fully examined and a decision is taken. Such decision is taken within 5 days from the objection receipt and its decision is notified to the complainant no later than the next working day.

If the CA fails to examine the objection within the time-limit specified above or rejects the objection, the complainant is entitled to file a written appeal with the PPA within 5 days from the first working day after the expiry of the time-limit specified above (i.e. five days) or, in

case the objection from the day the complainant was informed.

Upon receiving the complainant's written appeal, the PPA shall respond within 5 days. When the CA requires additional information for purposes to review the objection, the PPA shall respond in writing in not later than 20 days.

5.5 What remedies are available after contract signature?

According to the PPL, following the contract signature, the complainant who suffered loss or damage, as a result of a breach of the PPL may claim damages in front of the Court.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

After having completed the administrative enforcement procedures as above, the complainant is entitled to file actions with the first instance court. The court must terminate the judicial examination within 30 days from the day the action is filed. Taking in consideration the appeal process (Appeal Court and Supreme Court) the timescale for the remedies execution might vary to 2 years.

5.7 Is there a culture of enforcement either by public or private bodies?

There is no culture of enforcement by private bodies. The public bodies responsible for the enforcement of the PPL and PPR are the PPA and the PP Advocate.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

To the best of our knowledge there are no leading examples of cases related to remedies/enforcement measures obtained.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?

The PPL and PPR do not provide any regulations for possible changes post-signature. The underlying principle governing this issue is that the terms upon which the contract was awarded are mandatory for both parties and prevail.

Notwithstanding the above, the PPL provides for the possibility of changes in quantity, with the condition that such changes shall not exceed the value of 20% of the original contract price. In this case the PPL provisions shall apply again in the form of a negotiated procedure without prior publication of a contract notice.

6.2 In practice, how do purchasers and providers deal with these issues?

The provider and the purchaser deal with these issues based on the general contracting terms, an integral part of the approved Standard Tender Documents that provide for the possibility of amendments and changes in the time table, specifications and quantity. The

amendments can be carried out only if they do not cause changes of the terms upon which the winning contractor selection was based.

For example, the standard contract terms on goods and public works provide for the possibility of extending the time tables upon contractor's request, when such request falls within public interest. The CA shall give its approval on such extension, while the changes in quantity shall not exceed the limit of 20% of the original contract price and the PPL provisions apply again to the procedure.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

The PPL and the PPR do not contain rules related to privatisations. Privatisations and especially those pertaining to the strategic sector are governed by special laws and regulation.



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7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The PPL and PPR do not contain specific rules for PPPs. When a PPP contract gives rise to the procurement of services and falls within the thresholds provided in the PPL, the PPL rules on service contract procurements shall become applicable.

8 Other Relevant Rules of Law

8.1 Are there any related bodies of law of relevance to procurement by public and other bodies?

The national legal framework is composed of Public Procurement Law and Public Procurement Regulations.

9 The Future

9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

To the best of our knowledge there are discussions related to a future change of the legislation aiming to better clarify the powers of the PPA and PP Advocate. No formal proposals have been announced so far.



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