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# The International Comparative Legal Guide to: Public Procurement 2012

A practical cross-border insight into  
public procurement

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# Albania

Sabina Lalaj



Boga & Associates

Besa Velaj (Tauzi)



### 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.
- 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 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 set out the rights and obligations of the parties involved in a public procurement procedure. The rules and procedures applying with regard to public procurement aim to:

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

#### 1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Transparency is one of the key principles underlying the public procurement legislation. Areas of national law that would also relate to public procurement are *inter alia* those of freedom and access to information, declaration and control of personal assets of public officers, prevention of conflict of interest, avoidance of discriminator behaviour, etc.

#### 1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

Although Albania is not a Member State of the European Union, the legal framework applicable in the area of public procurement is inspired by a model which complies with the “*Acquis Communautaire*” and 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 over the domestic legislation. Otherwise the domestic legislation shall apply with regard to public procurement procedures.

#### 1.4 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.
- Proportionality of requirements and obligations imposed on actual and potential bidders.

#### 1.5 Are there special rules in relation to defence procurement or any other area?

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

Exemptions are made in the following cases:

- when application of the provisions of the PPL would cause disclosure of information which might harm 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; or
- when nature disasters, hostilities, armed operations, military trainings and participation in military missions outside the country occur.

The purchase of military equipment is regulated by specific bylaws. Provisions governing the procurement of water, energy, transport and postal services are included in the PPL under article 58/1, 'Sector Contracts'.

## 2 Application of the Law to Entities and Contracts

### 2.1 Which public entities are covered by the law (as purchasers)?

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 having not-for-profit 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;
- any of the contracting authorities defined above when it is conducting the activities listed in article 58/1 of the PPL in the field of water, energy, transport or postal services;
- any public entrepreneurship, if the contract is awarded to the winner for the purposes of conducting the activities provided in article 58/1 of the PPL. For the purposes of the PPL, 'public entrepreneurship' is classified as any enterprise upon which the contracting authorities listed above may exercise, directly or indirectly, a dominant influence due to the ownership, financial participation or governing rules. The contracting authority exercises a dominant influence when such authority owns the majority of the share capital of the enterprise, controls the majority of the votes or is entitled to appoint more than half of the managerial or supervising body of the entrepreneurship; and
- any other entity not mentioned above, when it conducts one of the activities provided by article 58/1 of the PPL or a combination of such activities based on the special or exclusive rights granted by a competent authority.

### 2.2 Which private entities are covered by the law (as purchasers)?

As a general rule, the PPL does not apply to private entities unless the majority of the voting shares into the share capital is owned by the State or are administered by the State, or the State controls/appoints more than half of the administration/supervising body.

### 2.3 Which types of contracts are covered?

The PPL classifies public contracts into three main groups:

1. Public Supply Contracts - the object of which is the purchase in parts or instalments, or the lease, with or without the 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 - 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 - 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 which have as their object the supply of services, but also including the supply of goods for necessities related to the contract execution, shall be considered a public service contract.

### 2.4 Are there financial thresholds for determining individual contract coverage?

The PPL applies a maximum and minimum financial threshold with regard to public procurement contracts.

Subject to the PPR, the financial thresholds are as below:

- The maximum financial threshold is:
  - (i) 1,200,000,000 ALL (approx. EUR 8,547,008 (where the official exchange rate as per the Bank of Albania is 1 EUR = 140.4 ALL)) for public work contracts; and
  - (ii) 200,000,000 ALL (approx. EUR 1,424,501) for public supply contracts of both services and goods.
- The minimum financial threshold is:
  - (i) 12,000,000 ALL (approx. EUR 85,470) for public works contracts; and
  - (ii) 8,000,000 ALL (approx. EUR 56,980) for public supply contracts of both services and goods.

Same values apply also with regards to Sector Contracts.

Contracts not exceeding the value of 400,000 ALL during the year are qualified as low value purchases and are subject to simplified procurement procedures (as described in the PPR).

### 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 out the methods for the calculation of the value regarding public contracts. The value of a public contract is determined based on the entire payable amount (VAT currently at 20% is not included), as calculated by the CA upon publication of the contract in the Official Publications Bulletin or when such publication is not applicable, upon starting of the public procurement procedure. 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 and, if so, how are such contracts defined?

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 Award Procedures

#### 3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The PPL provides for the following public procurement procedures:

- open 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 preferred procedure for public procurements is the open procedure. It is applicable to all types of public contracts due to its simplicity since there is only one stage.

The restricted procedure applies only when, due to particularities of the goods/services/public works to be procured, it is necessary to distinguish between the pre-qualification and the qualification phase in order to ensure that only economic operators satisfying the requirements needed for the execution of the public contract submit their bid during the qualification phase.

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. The restrictions regarding the adoption of certain public procurement procedures aim to avoid any behaviour that would lead to unfair competition or discrimination between EOs participating in the bid procedure.

#### 3.2 What are the minimum timescales?

According to the PPL, the applicable timescales vary subject to the public procurement procedure adopted by the CA. Accordingly, the minimum timescale for the submission of bids during the open procedure contemplating the award of public contracts exceeding the maximum financial threshold is at least 52 days from the publication of the contract notice on the official website of the Public Procurement Agency ("PPA").

In case of the restricted procedure or negotiated procedure with previous notification of the contract exceeding the maximum financial threshold, the minimum timescale for submission of the expression of interest is at least 20 days from publication of the contract notice on the official website of the PPA; meanwhile, the minimum timescale for submission of the bid in the restricted procedure is 20 days from the dispatch of the invitation for bids to the interested candidates.

When one of the objective reasons set out in the PPL occurs, in order to allow all EOs to collect the required information to draft the relevant bids, the timescales applicable for the submission of the bids shall be extended with an additional term of 10 days.

The minimum timescale for submission of the bid in open procedures, contemplating the award of public contracts with a

value between the maximum and the minimum financial thresholds, is 30 days from publication of the contract notice on the official website of the PPA.

In case of restricted procedures or negotiated procedures with previous notification of the contract for the award of public contracts which have a value between the maximum and the minimum financial thresholds, the minimum applicable timescale for the submission of the expression of interest is 15 days from publication of the contract notice on the official website of the PPA; meanwhile the minimum timescale for submission of the bid by selected candidates is 15 days from the invitation for bids.

The minimum timescale for public procurement procedures that are under the minimum financial threshold is 10 days from publication of the contract notice on the official website of the PPA.

In case the public procurement procedures shall be performed through electronic means in accordance with the PPR, the applicable timescales indicated herein above may be reduced to 7 days in case of open procedure and to 5 days in case of restricted and negotiated procedure.

#### 3.3 What are the rules on excluding/short-listing tenderers?

Pursuant to the PPL, the CA excludes from the participation in the public procurement procedures candidates or bidders when a final court decision has ruled in their respect with regard to one of the following criminal offences:

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

Any candidate or bidder shall be excluded from the participation in the public procurement procedure when they (i) are bankrupt and their capital is subject to an enforcement procedure undertaken by the bailiff office, (ii) are subject to bankruptcy procedures and a liquidation or administration order has been issued by the court, an agreement with the creditors is in place or is subject to other similar procedures, (iii) are convicted for offences related to the professional area, (iv) are in default with the payment of social insurance contributions and tax obligations as required under the Albanian legislation or under the applicable law in the country of origin, or (v) have provided false information or have refused to provide either totally or partially information or documents required by the CA in the framework of the public procurement procedure.

Candidates shall be short-listed based on the evaluation by the CA of the fulfilment of the following qualification criteria, which should be non-discriminatory and proportional to the type and amount of the public contract to be procured:

- Professional qualification: EOs should be in possession of the professional licence required for conducting the activity which is the object of the public procurement contract.
- Technical capacity: EOs should possess all required technical, professional and organisation capacities, machineries, equipments and all assets required, good reputation and reliability, required expertise and professional staff necessary for the execution of the public contract.
- Financial capacities: EOs should demonstrate to the CA that they are in possession of the required financial and economic capacities necessary for the execution of the public contract. To this end, the EOs should submit to the CA bank statements, professional liability insurance policies, financial statements or part of financial statements, a general turnover statement and if necessary a statement on the partial turnover

realised during the last three years (when feasible) from activities similar to the one to be carried out under the public contract to be procured.

- Legal capacities: EOs should demonstrate that they are entitled to enter into the procurement contract, or in case of consortiums, the EOs give evidence that they are in possession of the required ability.

The CA may ask candidates to also submit certificates issued by independent institutions, evidencing compliance with the required quality standards, including environmental management standards.

### 3.4 What are the rules on evaluation of tenders?

According to the PPL, the bids evaluated by the CA shall be considered as valid subject to the fulfilment of the requirements and specifications indicated in the contract notice and the tender documents published by the CA. The CA may only perform arithmetical corrections for errors contained in the bid, provided that such errors were not fraudulent and the bidder is promptly notified with regard to these corrections. However, according to the PPR, arithmetical corrections may not exceed 2% of the financial bid value. Should the bidder refuse such corrections, its offer will not be accepted and the bid guarantee would be confiscated.

The CA may consider as valid offers which contain minor deviations, provided that such deviations do not materially differ or vary from the specifications, terms and requirements contained in the tender documents or errors which can be remedied without affecting the bid content. In order to conduct an accurate evaluation of the bids, the CA may ask for additional information with respect to the bids being evaluated.

### 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 offers the lowest value. Evaluation of the bids is performed on technical and economic grounds. 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 operational 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 are the rules on debriefing unsuccessful bidders?

The PPL provides for the obligation of the CA to inform promptly, and in any case, not later than 5 days after short-listing candidates or identification of the winning bidder, any unsuccessful candidate on the reasons that have led to the decline from the tender procedure and any unsuccessful bidder on the reasons of decline of their bid.

Any interested party is entitled to ask for and be provided with the information contained in the minutes kept by the CA during the tender procedure. The request for information is submitted to the CA who has the obligation to make it available to the interested party within 5 days from submission of the request.

### 3.7 What methods are available for joint procurements?

Joint procurements are carried out in case 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 the CPB to adopt a given procedure for the required procurement.

### 3.8 What are the rules on alternative bids?

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

Alternative bids are permitted under the Albanian PPL in case the CA provides for such bids in the bidding documents.

## 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 a public contract 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 or co-production of programmes or sports subject to transmission from broadcasting operators or the publication 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; and (vi) services that are procured under the Sector Contracts.

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 "in-house" arrangements.

## 5 Remedies and Enforcement

### 5.1 Does the legislation provide for remedies/enforcement measures and if so what is the general outline of this?

Any person who has or has had an interest in obtaining a public contract and who has been or risks being harmed by a decision

taken by the CA which infringes the PPL, may challenge such decision.

The 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 the PPR, the PPA is entitled to apply fines from 50,000 ALL 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 and Public Procurement Commission (“PPC”). These bodies follow the administrative enforcement procedures and once these procedures are exhausted, court actions may initiate in accordance with the terms provided in the law.

## 5.4 What are the limitation periods for applying for remedies/enforcement?

Claims are filed in writing with the CA within 7 days from the day the complainant became aware or should have become aware of the alleged breach of the PPL. The interested applicant should use the standard form attached to the tender documentation, and should indicate its name and address, the reference of the contested tender procedure, legal basis and a description of the claims. In case the above mentioned information is missing, the CA asks the applicant to complete the application within 48 hours, otherwise the claims are not accepted for examination.

Upon receiving the claims, the CA suspends the tender procedure until the claim is fully examined and a decision is taken. Such decision is taken within 7 days from receiving the objection and its decision is notified to the complainant no later than the next working day. Should the CA fail to examine the claim within the timeframe above or if it rejects the claim, the complainant is entitled to file a written appeal with the PPC within seven days from the first working day after the expiry of the time limit (7 days) or, if objecting to a decision, 7 days from the day the complainant was informed of the decision. The admissibility requirements for the appeals filed with the PPC, in addition to those applied for filings

with the CA, also include the payment of the relevant fee defined upon the Decision of the Council of Ministers.

Upon receiving the complainant's written appeal meeting the above admissibility criteria, the PPC shall respond within 7 days. When the CA requires additional information for the purposes of reviewing the objection, the PPC shall respond in writing within 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?

Within five days after the receipt of the decision of the PPC or completion of the administrative terms for issuing a decision as defined in question 5.4, the complainant is entitled to file an action for the examination of the administrative dispute by the competent court. The court must terminate the judicial examination within 30 days from the day the action is filed. Taking into consideration the appeal process (Appeal Court and Supreme Court), the timescale for the remedies execution might vary up to 2 years. However in practice the procedure may take longer.

## 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 PPC.

## 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.

## 5.9 What mitigation measures, if any, are available to contracting authorities?

The CA, upon receiving the complainant's objection, suspends the tender procedure until the objection is fully examined and a decision is taken. However, while the objection is subject to examination by the PPC, the latter may allow by interim order, and pending its final decision on the case, the CA to continue the contract award procedure when, from the information available to the PPC, it appears likely that the complainant will not succeed in the complaint, and/or the suspension would cause disproportionate damage to the public interest, the CA or the bidders.

Further, any actions filed with the court against the decision of the PPC does not constitute grounds for suspension of procurement procedures, for the conclusion of public contracts for goods, services or works by the CA or execution of obligations, according to procurement contracts between the respective parties.

## 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) pre-contract signature? If not, what are the underlying principles governing these issues?

At any time prior to the deadline for submission of tenders, the CA may, for any reason, whether on its own initiative or as a result of a request for clarification by an EO, modify the tender document by issuing an *addendum*. The *addendum* shall be communicated promptly to all EOs to which the CA has provided the tender documents and shall be binding on those EOs. The *addendum* shall be made available also by electronic means. In any case, when tender documents are modified, the CA shall extend the time limit for the submission of bids by 5 days, whereas for procurements above the high monetary thresholds, it will extend it by 10 days.

Following the announcement of the winning bid, the terms and conditions of the contract may not alter from those contained in the tender documents and the offer of the winning bidder.

### 6.2 To what extent are changes permitted post-contract signature?

The PPL and PPR do not provide for possible changes post-contract signature. The underlying principle governing this issue is that the terms upon which the contract was awarded are mandatory for both parties. If the amendment to an existing contract would substantially alter the terms and conditions that constituted the basis for the award of the contract, such amendment would be subject to a new procurement procedure. Notwithstanding the above, the PPL provides for the possibility of changes in quantity, provided 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.

## 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 the privatisation. Privatisations, especially those pertaining to the strategic sector, are governed by special laws and regulation.

### 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 The Future

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

The legislation, regulations and administrative practice are prone to frequent change. However, to the best of our knowledge, currently there are no proposals concerning any changes to the public procurement legislation.



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Sabina joined the firm in 2008. She is a senior associate with extensive background in public procurement achieved during her working experience with the Procurement Sector at the Bank of Albania. Sabina was in charge of a large number of procurements involving national and international procedures related to public works, services and goods.

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Besa has also performed a number of due diligence assignments for international clients who considered investing in Albania or currently operating in Albania in the industrial, mining, energy and banking sector. Besa has also been involved in privatisation processes where the firm has assisted international clients (DSO privatisation) or the Albanian State acting as the vendor ("INSIG" Sh.a., privatisation) and has assisted EBRD in several project financing in Albania.

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