



SPI Albania Project on Revising Public Procurement Law

Project Objective

To improve Government debt contracting process by reviewing the current law on Public Procurement in order to cover the acquisition of financial and other supporting services.

Project Management Team

Project Owner (PO): Sheferedin Shehu, Deputy Minister, Ministry of Finance

Project Manager (PM): Xhentil Demiraj, General Director, Debt Department, Ministry of Finance (MoF)

Co- Project Manger (CPM): Anilda Sefgjini, Deputy Director, Public Procurement Agency (PPA)

Co- Project Manger (CPM): Elona Koci, Head of Public Corporate Section, Raiffeisen Bank

Minutes

First meeting

Mary 21, 2009—AAB premises

Attendees: Xhentil Demiraj, MoF (PM)
Anilda Sefgjini, PPA, (DPM)
Elona Koci, RB (DPM)
Jola Gjuzi, Kalo & Associates (member)
Milbana Treska, MoF (member)
Artiola Agalliu, AB (member)
Adrian Ceco, ISPB, (member)
Anuela Ristani, SPI Albania, Director of Operations
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AGENDA

- I. Welcome Note and Introduction of Participants
- II. SPI Albania Presentation
- III. Project Terms of References (Discussion and approval)
- IV. Scoping of the Problem Document (Discussion and approval)
- V. International Experiences (Discussion)
- VI. Draft TAIEX application form (Discussion and approval)
- VII. Conclusions and Distribution of Tasks
- VIII. Closing Remarks

I. Welcome Note and Introduction of the Participants

SPI Secretariat welcomed all the PWG members and introduced the PMT and the SPI Albania Secretariat. All members introduced themselves and the institutions they were representing.

II. Presentation of SPI Albania

In order for the PWG members to have a better understanding on the SPI work process and methodologies, SPI Secretariat held a short presentation focusing on the SPI Albania project management and methodologies.

SPI Albania is a partnership lead by a high level public private Committee with representatives from BoA (First Deputy Governor), AAB (Chairman) and the Head of Convergence Program (World Bank) as well as MoF, AMF, Market Surveillance Department-METE. European University of Tirana and Italian Banking Association are Permanent Observers to the SPI Committee. SPI Secretariat orchestrates different working groups for each SPI Project.

SPI Secretariat presented the role and responsibilities of the PMT and PWG members as well as the role of the Secretariat throughout the entire project process from the start to enactment.

SPI Secretariat presented the methodology followed for every SPI Albania project. After the Terms of Reference are endorsed by the SPI Committee and reviewed / approved by the PMT, the PWG first target is identifying the problem and its causes (a market or a regulatory failure) in order to understand if it creates the case for a regulatory intervention or for self-regulatory

actions. PWG defines the policy objectives to be achieved with this project and considers if ‘do nothing option’ could be a solution and its costs. PWG identifies then the possible regulatory/self-regulatory policy options that could be envisaged for solving the problem.

Once the Scoping of the Problem is concluded as described above, the PWG is focused on the Analysis of the impact that is: to identify and state the costs borne and benefits yielded by consumers, by the regulator and regulated firms, and to collect market structure data to perform a quantitative cost and benefit analysis. While SPI Albania has performed six different bank questionnaires, it has also delivered two comprehensive impact assessments for the Projects on Civil Procedure Code and Reducing Cash Transactions.

With the conclusion of the analytical work, the policy document is drafted and consultations are run with various stakeholders. PWG has to agree on the final PWG Recommendations document. The actual work of the PWG is concluded with the SPI Committee approval of the final PWG recommendation. However the PWG members, representing the professional experts for each respective project, will stand ready to participate in further consultations with the regulators or other authorities during the enactment process.

PWG members should evaluate, at the end of the project, SPI Secretariat’s performance based on a questionnaire that is presented at the first meeting in order to get acquainted with the criteria to follow for this evaluation.

III. Project Terms of Reference presentation (Discussion and approval)

SPI Secretariat presented the Project Terms of Reference as the outlining document that will guide the PWG through all the project steps.

Public procurement is the process of using public funds by certain public body, for acquiring external resources, generally from commercial bidders. In order to regulate this process, as the part of public sector reform and in relation to future EU membership, Albania has adopted a modern public procurement Law no. 9643 dated 20.11.2006 in line with the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

The public procurement law regulates all main aspects of government and public bodies purchasing activities and provides them with the tools to be able to achieve “value for money” when procuring goods, services and works. It defines the main methods of public procurement, and steps to be followed.

In Albania, foreign and domestic borrowing is governed by the Law no. 9665 dated 18.12.2006 on “State borrowing, state debt and state guarantee loans in the Republic of Albania”. According to article 26 of this law, in cases when Ministry of Finance obtains loans from private banks for financing public investments projects, creditor’s selection is made through public procurement procedures.

Recently foreign borrowing has gained momentum due to the access the country has to borrowing on the international financial markets, based on an improvement in 2007 of the country rating by Moody's. It is also the Government strategy to reduce domestic borrowing and increase foreign borrowing for financing investment projects and fiscal deficit, as outlined in the Public Debt Strategy for 2008-2010.

When contracting complex international loans, Ministry of Finance would need financial and other supporting services (e.g. legal services) in order to better assess costs, risks and to increase its negotiating capabilities. The acquisition of such services should be treated as public procurement.

Article 7 of the Law no. 9643 dated 20.11.2006 excludes from the jurisdiction of the law financial services related to purchase, sale or title transfer or other financial instruments. This provision restrains Ministry of Finance's possibility to improve the contracting skills and power and it hampers banks to offering the necessary financial services.

This situation may have negative consequences for the Ministry of Finance in contracting international loans such as:

- Delays in contracting foreign loans, as the analysis is to be handled with internal limited resources, with results on liquidity and costs;
- Increase in the transaction cost risk due to limited analytics capabilities.

In this context, there is a need to revise the public procurement law to include clear provisions on financial services.

PPA representative stressed that while they understand the particular challenges encountered by the Debt Department in the Ministry of Finance, the PWG should consider the possibility of not treating it as a PPL problem. The PPL provides for the general framework of procurement process and doesn't specify the requirements of individual products and services.

There has been a precedent of specific reference to one product (energy) and it has been highly criticized since it leaves space for other industries, products to claim the same specifications by the PPL thus weakening its principle - oriented power.

While acknowledging this concern, MoF raised also the issue of the right terminology, as 'financial services' is a generic one that doesn't cover entirely the debt related services, such as consultancy which may be also of legal nature especially during the contracting processes of foreign debt (e.g. for Eurobonds).

While the correct definition of 'financial services' is a pre-requisite for finding a solution to the MoF problem, PWG members representing banks observed that the array of financial services is too wide to be covered by the scope of this project. Therefore, they suggest that in the definition of financial services the PWG concentrates only on those related to debt contracting and management.

While the PWG members agree on the assertions made in the Terms of References, they agree that the correct definition of the terminology used in the PPL might lead to the conclusion that

changing the latter may not be necessary. Under these circumstances, SPI Secretariat proposes that the objective of the projects should be reformulated in order to leave space for any regulatory changes that will be deemed necessary after PWG will agree on the definition of ‘financial services related to public debt management’. These regulatory changes may or may not include changing PPL. The newly proposed objective for the project will be: “To improve Government debt contracting process by reviewing the relevant regulatory framework in order to cover the acquisition of financial and other supporting services”.

Therefore PWG approved the terms of references containing the abovementioned revision.

IV. Scoping of the Problem Document

SPI Secretariat presented the Drafted Scoping of the Problem Document. The objective of this document is to help the PWG better understand if the cause of the problem is related to a market/regulatory failure and if this is the case for regulatory intervention.

As a principle, the public procurement law regulates all main aspects of government and public bodies purchasing activities and provides them with the tools to be able to achieve “value for money” when procuring goods, services and works. The current regulatory framework excludes from the jurisdiction of the law financial services related to purchase, sale of title transfer. Such provision makes it difficult for the Ministry of Finance to acquire financial and other supporting services that are associated to the process of contracting international loans. This regulatory failure might determine delays, higher risks and costs in contracting foreign loans. There is no evidence of the occurrence of these effects, but the potential difficulties and risks are recognized by the authorities

SPI Secretariat has outlined three possible options to consider while tackling this issue:

- To amend the current Public Procurement Law to include clear provisions on financial services and treat the acquisition of such services as public procurement
- To amend the current foreign and domestic borrowing law to include clear provisions on financial services.
- To issue another legal act that would regulate the issue of financial services and other supporting services associated to foreign loans.

While MoF supports the first alternative as the most comprehensive and viable option that would answer the problem, PWG members consider the other two options as equally feasible and, referring to the discussion on the terms of references, they should not be excluded at least before having a clear understanding on the peculiar terminology used in the actual PPL.

PWG considers the scoping of the problem document as very accurate and important for a deeper understanding of the issue and welcomes the many alternatives outlined by SPI Secretariat by approving the document. However, the PWG may not decide on the best solution to the identified problem until the “Financial Services’ term is defined and clarified in a separate note. The Scoping the Problem document will be then amended accordingly.

V. International Experiences

SPI Albania projects have typically emphasized on the importance of international experience as an important benchmark for the adequate solution to the problems tackled. International or regional best practices often provide for a very useful benchmark in building up PWG recommendations. However, this project is particularly challenging as there is no EU legislation covering the issue.

This project requires the clarification of the terminology in order to identify the regulatory change needed. Therefore based on the discussions and by having identified the specific item in the PPL that hinders the debt-process for Ministry of Finance, PWG members suggested that the research on the international experience should be focused on the clear and concise definition of ‘financial services’ related to public debt management.

SPI Secretariat, in close cooperation with the PWG individual members, will research and draft a note on international experience for the definition of ‘financial services’ related to public debt. SPI Secretariat and PMT will simultaneously search for assistance from other donor institutions.

VI. Draft TAIEX application form

SPI Secretariat presented the PWG with the draft application form that MoF will submit to TAIEX for technical assistance on the project. TAIEX (Technical Assistance and Information Exchange) has been designed to assist countries with regards to the approximation, application and enforcement of EU legislation. It is a demand driven program that channels requests for assistance and contributes to the delivery of appropriate tailor-made expertise to address problems at short notice- perfectly compatible with SPI Albania project needs.

In the application form, the most substantial information is related to the specific reference made towards EU legislation and to the concrete problem on which EU Law experts’ assistance is required. Based on the Terms of References, SPI Secretariat has outlined the problem and identified the interpretation needed for the terminology used in Directive 2004/18/EC which is precisely transposed to the current PPL. In addition, SPI Secretariat has specified the areas where the expert’s assistance would be most useful (such as the correct definition of ‘financial services’ as well as other countries’ experiences in transposing this directive while still having a public procurement law that does not hinder debt processes for the respective institutions).

The PWG welcomed the possibility of obtaining such assistance and approved the TAIEX application, enabling thus MoF to commit in transmitting the application to the TAIEX center in Brussels.

VII. Conclusions and Distribution of Tasks

For the next PWG meeting:

- SPI Secretariat will send the meeting minutes and the revised drafts of the documents for final approval to the PWG;

- PWG members will provide SPI Secretariat with information on financial services related to public debt management from their mother-companies' countries and from their research;
- Based on its research and on information received, SPI Secretariat will draft a note on international experience for the definition of 'financial services' in the public procurement context;
- SPI Secretariat will search for expertise with other donors (EURALIUS, World Bank);
- SPI Secretariat will finalize the TAIEX application and send it to Ministry of Finance;
- Ministry of Finance will send the signed copy of TAIEX application to the respective office in Brussels.

VII. Closing Remarks

The second PWG meeting is preliminarily scheduled to take place in mid June 2009.