

## Chapter 6. Public procurement (Dimension 5b) in the Western Balkans and Turkey

*This chapter assesses the systems and procedures required in the Western Balkans and Turkey to facilitate SMEs' access to the public procurement market. It starts by outlining the assessment framework, then presents an analysis of Dimension 5b's three thematic blocks: 1) policy and regulatory framework, which assesses the policy and regulatory framework for public procurement, especially activities and legal provisions that are most relevant to SMEs; 2) implementation, which assesses how public procurement provisions are implemented in practice; and 3) monitoring and evaluation, which assesses whether access to public procurement markets by economic operators is monitored and evaluated, especially for SMEs. The chapter makes specific recommendations for improving SMEs' access to public procurement procedures in the Western Balkans and Turkey.*

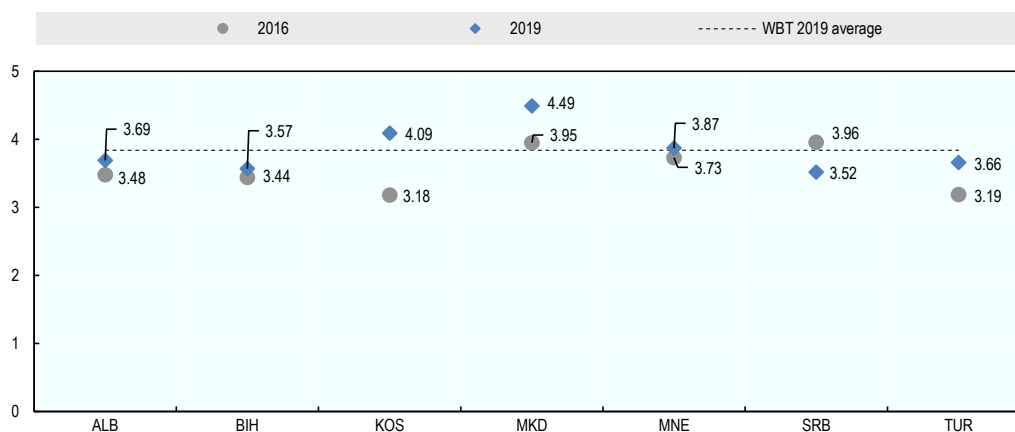
## Key findings

- **The assessed economies have made progress, particularly in improving public procurement policy and regulatory frameworks**, but also in implementation, monitoring and evaluation.
- **Some economies have improved their public procurement legislation**, especially provisions relevant to SMEs. They have simplified public procurement procedures by easing documentary evidence requirements and thereby reducing the administrative burden on SMEs, or allowed for the use of non-price criteria for awarding contracts.
- **A few economies still use domestic preferences**, which do not comply with the principle of equal treatment of economic operators.
- **There are still limitations in the areas of subcontracting and joint bidding**, such as requirements that groups of economic operators adopt specific organisational forms.
- **The procurement regulatory framework will be further improved** once new laws are adopted to implement the 2014 EU Directives on public procurement.
- **Not all economies provide sufficient advice, support and training to help SMEs access to public contracts.**
- **None of the economies collect, analyse or publish** enough information on SME participation in public procurement markets.

### Comparison with the 2016 assessment scores

While almost all seven assessed economies could improve their scores since the 2016 assessment, Kosovo, North Macedonia and Turkey witnessed the strongest increases (Figure 6.1). With a score above four, North Macedonia and Kosovo performed best in the 2019 assessment.

Figure 6.1. Overall scores for Dimension 5b (2016 and 2019)



Note: Scores for 2019 are not directly comparable to the 2016 scores due to a methodological change increasing the focus on implementation. Therefore, changes in the scores may reflect the change in methodology more than actual changes to policy. The reader should focus on the narrative parts of the report to compare performance over time. See the Policy Framework and Assessment Process chapter and Annex A for information on the assessment methodology.

### *Implementation of the SME Policy Index 2016 recommendations*

All the recommendations in the SME Policy Index 2016 have either been implemented, or are being implemented, by all the assessed economies (Table 6.1).

**Table 6.1. Implementation of the SME Policy Index 2016 recommendations for Dimension 5b**

| Overall 2016 recommendations  | SME Policy Index 2019  |                          |
|---|--|--------------------------|
|   | Main developments during the assessment period   | Regional progress status |
| Further align national legislation with EU rules and international best practice                          | - All economies regulate public procurement in accordance with the basic standards of EU directives and international best practice. Further alignment is needed with the requirements of the 2014 EU procurement directives.  | Moderate                 |
| Encourage the division of contracts into lots wherever possible   | - All economies already make provisions in their public procurement legislation for contracting authorities to divide public procurement into lots; however, this is not obligatory in any of them, and those contracting authorities who decide not to use lots do not have to justify their decision. Implementing the provisions of the 2014 EU procurement directives will introduce an obligation to substantiate a decision on non-division into lots. | Moderate                 |
| Reduce the administrative burden of participating in public procurements                                  | - Economies have diminished the administrative burden of participating in public procurements.   | Moderate                 |
| Establish an impartial and independent review body where not yet established                              | - Economies have already established impartial and independent review bodies in accordance with standards required by the EU Remedies Directives.  | Moderate                 |
| Increase the use of non-price criteria for awarding contracts, to give public buyers best value for money | - Across the region there is a general trend away from applying non-price criteria. However, adopting the new public procurement provisions based on the 2014 EU procurement directives should lead to some progress, as they establish the principle of awarding contracts on the basis of the most economically advantageous offer and encourage the application of non-price criteria.  | Moderate                 |
| Tackle the problem of late payments to contractors  | - All the economies have regulations directly tackling this issue.   | Advanced                 |

## Introduction

Easy access to public procurement markets can help small and medium-sized enterprises (SMEs) to unlock their potential for job creation, growth and innovation, while having a positive impact on the economy. Greater SME involvement in public procurement also allows contracting authorities to broaden their potential supplier base, securing the positive effects of greater competition for public contracts as a counterbalance to dominant market players (SIGMA/OECD, 2016<sup>[1]</sup>).

In order to make public procurement of all sizes as accessible as possible to SMEs, in 2008 the European Commission (EC) published the *European Code of Best Practices: Facilitating Access by SMEs to Public Procurement Contracts* (EC, 2008<sup>[2]</sup>). The code highlights and details a number of practices for tendering within the EU regulatory framework that optimise SME participation and ensure equality of opportunity. It also describes good practices and provides guidance to EU Member States and their contracting authorities in order to fully exploit the potential of the EU public procurement directives<sup>1</sup>. The code aims to provide a level playing field for all economic operators who wish to participate in public tenders.

Public procurement is an area where SMEs face particular difficulties. Procedural rules are often complex and the effort needed to take part seems too great, given the uncertain outcome. While this is a matter of concern for all companies, SMEs are particularly affected. They often lack the resources and know-how to deal with burdensome administrative requirements and cannot afford to spend money and time on a potentially fruitless exercise. As a result, SMEs often shy away from participating in calls for tenders. Even where SMEs are prepared to tender, they are often prevented from doing so by unfavourable conditions. In many cases, the size of the contract is simply too large for a small company to implement, even though SMEs would be capable of offering good value for money otherwise. In other cases, SMEs are excluded by disproportionate qualification or financial requirements which are not justified by the nature and size of the contract in question. Last but not least, where SMEs do manage to get a contract and implement it successfully, late payments – a widespread problem in the public sector – are particularly harmful to them.

Increasing the generally low participation rate of SMEs in public procurement would boost competition and could result in lower prices. SMEs are often particularly innovative and may offer solutions that larger companies cannot provide. The obstacles to participation are not insurmountable; in fact, a few relatively simple legislative changes can greatly improve the situation for SMEs, if they are supported by a favourable mindset. Governments can increase SME participation through a number of measures. In many cases, very large contracts are not justified for goods, services or works, and purchases could take place through a number of smaller contracts or by encouraging subcontracting instead. Legislation may prescribe the division of contracts into lots by default, putting the burden of proof onto the contracting authorities to provide good reasons for any deviation from that rule. Likewise, it would be reasonable and proportionate in most cases to limit tests for the financial ability of tenderers to the minimum necessary and tenderers should be allowed to submit joint bids to meet the requirements together. The administrative burden of submitting a tender can also be reduced, for instance by not requiring supporting documents during the tendering process. SMEs would benefit from electronic procurement, as this would make information more easily available at a lower cost and facilitate the submission of bids. Legislation setting

strict deadlines and penalties for late payment by the public sector is a first step towards avoiding late payments to contractors, though not sufficient on its own.

## Assessment framework

### Structure

This chapter analyses the policies and tools in place to improve SMEs' access to the public procurement market across the six Western Balkan economies and Turkey. The dimension focuses on the 20 indicators listed in Annex 6.A at the end of this chapter, divided into three thematic blocks: 1) policy and regulatory framework; 2) implementation; and 3) monitoring and evaluation (Figure 6.2).

The indicators assess, among others, the extent to which public authorities take into account SMEs' needs in the procurement process, including division of public procurement into lots, participation of groups of economic operators in public procurement procedures, and qualifications requirements related to and proportionate to the object and value of procurement.

Other indicators measure whether:

- relevant institutions have a specific strategy for supporting SMEs in public procurement
- public procurement is open to foreign enterprises (either SMEs or large enterprises) to ensure a fair level of competition
- information on public procurement is available centrally and free of charge for all participants
- public institutions offer training and a help desk to interested firms
- public institutions use electronic procurement, from providing information on procurement opportunities online, to the electronic submission of tenders
- there is legislation in place imposing strict deadlines for payments from public authorities, and penalties for non-compliance.

Additionally, outcome indicators (see Figure 6.2) were applied in order to check the extent to which the policies implemented by the government are having the intended results. However, these have not been taken into consideration in the scoring because the required information was, in most cases, not provided or not available.

**Figure 6.2. Assessment framework for Dimension 5b: Public procurement**

| Public procurement  |   |  |
|---|---|--|
| <b>Outcome indicators</b><br>Share of SMEs in the total value of public contracts awarded<br>Share of SMEs participating in public tenders<br>Average delay in payments from public authorities (in days)<br>Share of SMEs submitting proposals in a public electronic tender system (e-procurement)<br>Share of contracts awarded to foreign economic operators<br>Value of contracts awarded to foreign companies as a share of the total value of procurement in the country |   |  |
| <b>Thematic block 1:</b> Policy and regulatory framework  | <b>Thematic block 2:</b> Implementation | <b>Thematic block 3:</b> Monitoring and evaluation |

*Note:* The outcome indicators serve to demonstrate the extent to which the policies implemented by the government bring about the intended results, and they have not been taken into consideration in the scoring.

This assessment, like the one conducted in 2016, is not a comprehensive assessment of public procurement systems in the Western Balkan economies and Turkey (WBT). It only focuses on those elements in the legislative framework and practice in the field of public procurement that are relevant to SMEs. Issues such as the integrity and fairness of public procurement procedures, detecting and combating corruption practices, favouritism, and conflicts of interest are outside its scope. For more information on the methodology see the Policy Framework and Assessment Process chapter and Annex A at the end of this report.

Other questions in the questionnaire also sought the following statistical data:

- the share of public procurement divided into lots
- the share of public procurement for which economic operators submitted joint offers (as groups of economic operators or consortia).

The questionnaire asked also whether the economies' relevant institutions collect and analyse the following statistical data:

- the share of public contracts awarded to SMEs
- average payment delays in public procurement
- the share of public contracts awarded to foreign economic operators.

Face-to-face interviews with SMEs and chambers of commerce were part of the assessment framework. The purpose of those interviews was to compare the responses received from governments with the information provided by independent consultants and to get additional information (see Annex C).

### ***Key methodological changes to the assessment framework***

Since the questionnaire in 2016, the 2019 assessment has evolved to capture more information on various issues related to SMEs' participation in public procurement procedures (Table 6.2). For example, it includes new questions on the strategy and policy framework for supporting SMEs in public procurement. A few general questions have been broken down to obtain more meaningful information on rules and practices, such as for dividing public procurement into lots; requirements for documentary evidence provided by third parties and self-declarations of economic operators; participation by groups of economic operators (consortia) and potential limitations; requirements for tender securities/guarantees, such as their maximum amounts, forms in which they may or must be submitted and conditions of their return or forfeit; and subcontracting and its potential limitations. Finally, questions about the limitations on foreign companies' participation in public procurement procedures (such as domestic preferences) have been reformulated and/or removed. The total number of indicators has been increased from 7 to 20.

This assessment also put more emphasis on implementing legal provisions and monitoring and evaluating their application. The emphasis on weighting scores has also changed: the weight of implementation was increased from 45 to 50%, while the weight of the policy and regulatory framework was reduced from 35 to 30% (see Annex 6.A).

**Table 6.2. Key changes in the composition of Dimension 5b**

|          | Key changes since 2016 assessment  |
|----------|--|
| Change 1 | This assessment requests more information on general issues of SME participation in public procurement procedures, in particular strategic and policy framework to support SMEs' participation in public procurement |
| Change 2 | Questions on limitations to foreign companies' participation in public procurement procedures were reformulated or removed   |
| Change 3 | The number of indicators was increased from 7 to 20  |
| Change 4 | The weights of the thematic blocks in the overall scores have been altered. Greater focus has been placed on implementation (5% increase in the allocated weight).   |

## Analysis

### *Performance in public procurement*

Outcome indicators play a key role in examining the effects of policies and they provide crucial information for policy makers to judge the effectiveness of existing policies and the need for new ones. Put differently, they help policy makers track whether policies are achieving the desired outcome. The outcome indicators chosen for this dimension (see Figure 6.2) are designed to assess the Western Balkan economies and Turkey's performance in public procurement and particularly in enabling SMEs to participate in this key market. This analysis section starts by drawing on these indicators to describe the economies' performance.

In OECD countries, public entities and bodies spend large sums of money purchasing goods, services and works. Public procurement represents, on average, 12.0% of the GDP of OECD countries and almost one-third of government expenditure. This share is lower in the WBT economies, according to the data provided by respective central procurement offices in their annual reports. It is estimated that the value of contracts awarded in the Republic of North Macedonia amounted to 10.0% of gross domestic product (GDP) in 2016 (EC, 2008<sup>[3]</sup>). In Montenegro, public procurement represented 12.33% of GDP (in 2017); but the figures are much lower in Bosnia and Herzegovina (7.84% in 2016, although in 2012 it was 12.95%), Serbia (7.68% in 2017), Kosovo\* (7.35% in 2017) and Albania (7.0% in 2017) (Public Procurement Administration of Montenegro, 2018<sup>[4]</sup>; Public Procurement Agency of Bosnia and Herzegovina, 2017<sup>[5]</sup>; Public Procurement Office of Serbia, 2017<sup>[6]</sup>; Public Procurement Regulatory Commission of Kosovo, 2018<sup>[7]</sup>; Public Procurement Agency of Albania, 2018<sup>[8]</sup>).

Despite the potential benefits SMEs could gain from public procurement markets, their participation is lower than their overall weight in the economy. In other words, the SME success rate (expressed as the share of contracts won in procurement procedures) is lower than it should be, given the share of SMEs in the economy. For example, in North Macedonia in 2016 there were 6 902 companies registered in the Electronic System of Public Procurement (ESPP, an electronic public procurement portal), of which 2 265 were micro companies and 4 027 SMEs (Public Procurement Bureau, 2017<sup>[9]</sup>).

\* This designation is without prejudice to positions on status, and is in line with United Nations Security Council Resolution 1244/99 and the Advisory Opinion of the International Court of Justice on Kosovo's declaration of independence.

Micro companies and SMEs therefore together represented more than 91% of all economic operators using the ESPP. Micro, small and medium-sized enterprises combined won the vast majority of contracts (83% of those awarded in 2016), but in terms of the value of contracts won their share of the procurement market was smaller, at 64% (Public Procurement Bureau, 2017<sup>[9]</sup>).

The assessment results show that all seven economies guarantee a review for aggrieved economic operators by independent procurement review bodies. This is available to economic operators whose interests in specific public procurement contracts were breached by contracting authorities' omissions or actions that were not consistent with the law. Access to those bodies is not hindered by unrealistic time periods for submitting complaints or excessively high costs. Relevant public procurement rules also require review body decisions to be made as quickly and smoothly as possible, and to be enforceable. Table 6.3 presents the scores for the WBT economies for public procurement.

**Table 6.3. Scores for Dimension 5b: Public procurement**

|                                 | ALB         | BIH         | KOS         | MKD         | MNE         | SRB         | TUR         | WBT average |
|---------------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Policy and regulatory framework | 3.51        | 2.89        | 4.76        | 4.29        | 4.53        | 3.59        | 3.90        | <b>3.92</b> |
| Implementation                  | 4.28        | 4.28        | 4.28        | 5.00        | 3.39        | 3.57        | 3.57        | <b>4.05</b> |
| Monitoring and evaluation       | 2.50        | 2.85        | 2.67        | 3.57        | 4.16        | 3.39        | 3.57        | <b>3.24</b> |
| <b>Weighted average</b>         | <b>3.69</b> | <b>3.57</b> | <b>4.09</b> | <b>4.49</b> | <b>3.87</b> | <b>3.52</b> | <b>3.66</b> | <b>3.84</b> |

*Note:* For more information on the methodology see the Policy Framework and Assessment Process chapter and Annex A.

### *Policy and regulatory framework (Thematic block 1)*

In order to attract SMEs to the public procurement market, the WBT economies need to establish stable and solid legal frameworks for public procurement. Transparent, fair and competitive rules, consistently applied, are essential. Potential bidders need to know what rules to respect, where to find relevant information, what requirements and conditions to fulfil and so on. The purpose of this section is to assess the policy and regulatory framework for public procurement, especially those activities and legal provisions that are most relevant to SMEs. It asks whether the WBT economies have adopted strategic documents on activities specifically for SMEs and whether their public procurement regulations provide solutions relevant to SMEs.

#### *There are multi-year public procurement strategies in all the economies*

One key element of the public procurement policy framework is a multi-year strategic document setting out which activities should be undertaken by relevant institutions in order to improve how the system works.

All the assessed economies have adopted multi-year national strategies for developing their public procurement systems. Although none of the economies has a strategy dedicated exclusively to the needs of SMEs in public procurement, most dedicate some of the activities envisaged in their public procurement strategies to SMEs, such as



simplifying (streamlining) contract award procedures, reducing administrative red tape, and providing training and consultation.

For example, in Bosnia and Herzegovina the Public Procurement Strategy states that amendments to the Public Procurement Law (PPL) should pay particular attention to SMEs' situation in the public procurement market. They should also define elements which would improve SMEs' participation in public procurement procedures. In particular, according to the strategy, training on public procurement and developing electronic procurement should take SMEs' specific needs into account.

*Foreign bidders do not always have the same access as domestic ones*

One of the cornerstones of a public procurement system is the principle of equal treatment for all economic operators which have the capacity and resources to provide goods or perform services for the public administration, regardless of their origin or organisational form.

Most WBT economies provide for equal treatment of foreign companies in public procurement: economic operators enjoy free access to public procurement procedures regardless of the country of their origin, while domestic suppliers are not given privileged treatment. However, Bosnia and Herzegovina, Serbia, and Turkey outline “domestic preferences” in their public procurement provisions, i.e. preferential treatment for offers submitted by domestic economic operators.

In Bosnia and Herzegovina, the PPL makes it mandatory to apply preferences to domestic bidders via a special implementing regulation adopted by the Council of Ministers.<sup>2</sup> Accordingly, prices given in bids submitted by domestic bidders are calculated with an added preference factor: 10% for procurement procedures in the period 2017-18 and 5% until the end of 2019. Only domestic bidders – understood as natural or legal persons resident in Bosnia and Herzegovina, and established in accordance with the economy's binding regulations – have access to this preferential treatment. However, according to the 2013 Stabilisation and Association Agreement (SAA) between Bosnia and Herzegovina and the European Union (EU), companies from the EU not established in Bosnia and Herzegovina should have equal access to the domestic public procurement market no later than five years after the entry into force of the agreement (Article 74, No. 4) (EC, 2015<sub>[10]</sub>).

Serbia's Public Procurement Law also provides for mandatory domestic preferences. If a contract award is based on the criterion of the most advantageous tender, and tenders were submitted by both domestic and foreign bidders to provide services or perform works, the contracting authority should choose the most advantageous domestic bid. However, the difference in the final sum of weighted points between the most advantageous bids of a foreign and a domestic bidder should not be more than five points in favour of the foreign bidder. If the contracting authority applies the criterion of the lowest offered price, the contracting authority must select the domestic bidder, provided that the price offered is not more than 5% higher than the lowest price offered by a foreign bidder. The new PPL, a draft of which is being processed at the time of writing, will not provide for domestic preferences, ensuring equal treatment of all foreign suppliers. However, until the new PPL is adopted, the current preferences must be applied, in accordance with Serbia's international obligations. Since the 1 September 2018, when the transitional period provided in the SAA between Serbia and the EU expired, tenders submitted by companies from EU countries benefit from the same preferential treatment as Serbian companies, against companies from non-EU countries.

As for Turkey, the PPL stipulates two types of domestic preference: 1) the right to exclude foreign suppliers from public procurement procedures; and 2) a margin of preference in favour of domestic suppliers when evaluating tenders. First, the contracting authorities may decide that foreign economic operators are not allowed to participate in a given procurement procedure (an option left to the discretion of contracting authorities). Second, a price advantage of up to 15% should be given in favour of Turkish bidders in services and works, and to bidders (both domestic and foreign) offering Turkish products in procedures involving the supply of goods. Foreign bidders can also benefit from the price advantage if they obtain a domestic goods certificate for the products they produce in Turkey, or offer products with a domestic goods certificate. For tenders with the same value at the evaluation stage, a preference may be given to the supplier whose offer has more Turkish content. The compulsory domestic preference margin (a price advantage of up to 15%) is applied to goods procurement procedures for medium- and high-technology products. In 2015, the Ministry of Industry and Technology produced a list of these products. The list is updated in January of each year following consultations with enterprises in the sector and is reported to the public procurement authority.

#### *Large procurement contracts can be divided into lots*

One of the instruments contracting authorities can use to improve SMEs' chances in public procurement is to divide large but heterogeneous contracts into smaller chunks, or lots, which are better suited to SMEs' capacities (SIGMA/OECD, 2016<sup>[11]</sup>). This instrument is now explicitly provided for in the 2014 EU procurement directives.

All the assessed economies allow procurement contracts to be divided into smaller lots that are more accessible to SMEs. In Albania, the legislation encourages division into lots in order to increase SME participation in procurement procedures;<sup>3</sup> however, this is not obligatory. In Bosnia and Herzegovina, the PPL allows contracting authorities to divide public procurement contracts into lots, but there is no obligation to do so. When procurement is divided, then all the lots must be marked in the bidding documentation in a way that allows bidders to submit bids for one lot, several lots or all lots. The contracting authority needs to clearly and precisely define in the bidding documentation the conditions and manner for submitting bids for lots. Public procurement contracts should be concluded separately for each lot. If one bidder is successful for two or more lots, a single contract may be concluded. Contracting authorities may also limit the number of lots for which bidders may apply. In this case they must reject tenders from bidders who submitted tenders for more lots than they were allowed to. In practice, according to national authorities, division into lots is applied to 25-40% of procurement procedures. The Serbian Public Procurement Office annual report for 2017 concluded that this tool improves SMEs' access to the public procurement market (Public Procurement Office of Serbia, 2017<sup>[6]</sup>). It also reported that the number of concluded procurement contracts that were divided into lots rose from 51% in 2013 to 64% in 2017.

#### *Late payments to contractors are regulated*

One of the problems economic operators face in public procurement are late payments by public institutions for services performed or supplies delivered. Payments which are not made promptly pose an additional risk for SMEs, and affect them more than larger enterprises; it can severely affect their liquidity and in extreme cases force them out of the public procurement market.

All economies set maximum time periods for payments in public procurement and impose penalties for late payments. In Albania, contracting authorities are required by law to pay their contractors within certain time limits:<sup>4</sup> a maximum of 30 days for public authorities provided that the contract or other legal provisions do not state a different time period. The law gives the creditor the right to interest if payment is delayed.

In Bosnia and Herzegovina, legal provisions in both entities (the Federation of Bosnia and Herzegovina and the Republika Srpska) also require contracting authorities to pay their contractors within certain time limits. The deadline for paying economic operators is 60 days. If this period is not respected, economic operators can claim financial penalties or other comparable sanctions.

In Montenegro, the time period for payment is 30 days from the day that goods are delivered or services performed. A contract may allow longer, but no more than 60 days. Economic operators who have fulfilled their obligations to the contracting authority are entitled to statutory interest rates in the event of late payment.

Advance payments by contracting authorities – i.e. payments made while the contract is being executed – are especially beneficial to economic operators, particularly SMEs. Some economies explicitly allow for this. For example, in North Macedonia the contracting authority may provide an advance payment, but this cannot exceed 20% of the public contract value for the contracting authorities. Prior to the advance payment, the contracting authority requires a bank guarantee from the contractor for the amount agreed. In Montenegro, public procurement provisions also allow for advance payments to contractors (suppliers). However, advance payments are also subject to the contractors submitting a special guarantee.

#### *Participation conditions in all economies are non-discriminatory and proportionate*

In accordance with EU procurement rules and good international practice, any requirements imposed by contracting authorities on economic operators who would like to apply for public contracts should be non-discriminatory, transparent and related to the object of the public procurement in question. Excessive requirements on economic operators, especially if not justified by the complexity of the object of procurement, would deprive SMEs of a chance to participate in the public procurement market.

All the assessed economies require procuring entities to set participation requirements that are non-discriminatory, related to and proportionate to the object and value of procurement. In Albania, economic operators participating in a procurement procedure should fulfil the criteria deemed necessary by the contracting authority, provided that those criteria are proportionate to the nature and size of the contract, and non-discriminatory. In Bosnia and Herzegovina, the bidding documentation should define the minimum criteria required for candidates/bidders to qualify, in terms of personal capacities, economic and financial standing, and technical and/or professional ability. These minimum requirements, and the documents required to prove them, must be proportionate and relevant to the procurement subject matter. The requirements must not have a restrictive effect on competition and must be clear and precise. The contracting authority may only request from the candidates/bidders the evidence necessary to establish whether or not they meet the qualification requirements. In North Macedonia, contracting authorities are not allowed to apply requirements related to suppliers' economic and financial standing, or their professional or technical ability, that are not proportionate to the contract's subject matter.

In Kosovo, a contracting authority may require economic operators to submit evidence demonstrating that they meet the minimum economic and financial requirements specified in the tender dossier and the contract notice. The minimum annual turnover required from the economic operators should not exceed two times the estimated contract value. Requirements for the suppliers' economic situation must be expressed in figures and refer to no more than the last three financial years. Where bidders are required to show their specific minimum turnover in a field covered by the contract, this turnover should not be required to exceed 1.5 times the anticipated contract value. Economic operators should, as a general rule, be permitted to satisfy this requirement by submitting, as relevant and appropriate, one or more of the references listed in the PPL. However, if for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, they can demonstrate their economic and financial standing by any other document that the contracting authority, using reasonable discretion, considers appropriate. In Montenegro, a contracting authority calling for competition may add optional as well as mandatory requirements. Optional requirements may refer to candidates or bidders' financial and economic standing as well as professional and technical capability, including human resources. In this case the contracting authority should indicate in the procurement notices which documents and certificates should be submitted by candidates or bidders together with their requests for participation or bids. The PPL lists the proof that economic operators can supply to fulfil contracting authorities' requirements.

In Turkey, the PPL specifies that economic operators must submit their economic, financial, professional and technical qualifications in order to prove they are able to perform the contract in question. The PPL also defines the conditions under which economic operators are deemed ineligible and should be excluded from public procurement procedures. The contracting authorities' tender documents and notices in invitations for procurement or pre-qualification should specify documents required for evaluating economic operators' qualifications, in accordance with the procurement subject matter. Serbia has adopted some good practices for simplifying the way that economic operators must prove that they satisfy the contracting authorities' requirements (Box 6.1).

#### **Box 6.1. Good practice in simplifying evidence requirements in Serbia**

In Serbia, the Public Procurement Law (PPL) offers a number of solutions that help SMEs participate in public procurement procedures. For instance, the contracting authority may stipulate in the tender documents that instead of submitting documents or certificates to fulfil all or some individual requirements, the bidder may make a statement confirming that it fulfils the requirements, under full criminal and material liability for false statements (except for when proving that the bidder has valid permission to conduct a given activity, if required). Only the bidder whose bid is evaluated as the most advantageous is asked to substantiate the statement by supplying the originals or certified copies of all or some of the proof, before the contracting authority decides on awarding the contract. The contracting authority cannot ask a bidder to supply this proof again when it already has adequate evidence from the same bidder from previous public procurement procedures.

The contracting authority also cannot refuse a bid on the grounds that it does not

contain evidence defined by the PPL or by tender documents if the bidder included in their bid the address of a publicly available website containing the requested data. Finally, in order to enhance SME participation, the PPL allows enterprises to use the Register of Economic Operators, held by the Agency for Economic Registers ([www.apr.gov.rs](http://www.apr.gov.rs)). Economic operators which appear in the register do not have to provide the relevant evidence but merely prove that they are in the register, or supply the Internet address where the relevant information is publicly available. Since registration requires the same type of documents from economic operators as those participating in public procurement procedures, proof of registration is sufficient.

*Source:* Public procurement law, Official Gazette of the Republic of Serbia, No. 124 of 29 December 2012, No. 14 of 4 February 2015, No. 68 of 4 August 2015, [www.ujn.gov.rs/en/propisi/zakon](http://www.ujn.gov.rs/en/propisi/zakon).

### *Tender and performance securities are all regulated*

Another barrier to public procurement opportunities are instruments which are supposed to ensure that a tender is “serious” (tender securities), or to protect contracting authorities from a contract being implemented in a way that is untimely or inappropriate (performance guarantees). If their amounts are excessively high and not proportionate to the value of the contract such instruments may represent unsurmountable obstacles to SMEs for accessing public procurement.

All the assessed economies have rules regulating the amounts of tender and performance securities, the form they take, and the cases in which they should be either returned or retained. For example, in Albania the PPL allows the contracting authorities to request bidders to submit a tender security with their tenders for public procurement procedures with an estimated value above the high-value threshold. The decision as to request a tender security or not is left to the discretion of contracting authorities. The security amount should be proportionate to the estimated value of the procurement contract. The contracting authority requiring the tender security should specify in the tender documents all the requirements on the nature, form, amount and other essential conditions of the bid security. Some actions or omissions by bidders will result in forfeiting the security: withdrawing or modifying the bid after the submission deadline, or before the deadline, if this is prohibited in the tender documents; refusing to sign the procurement contract; failing to provide the performance bond when the contract has been awarded; or failing to comply with any other condition specified in the tender documents prior to signing the contract. Further details on tender security are given in the implementing rules. The tender security requested may not exceed 2% of the estimated value of the limit fund.

In Bosnia and Herzegovina, contracting authorities may request appropriate bid securities to guarantee bids but only if the procurement value is more than BAM 100 000 (Bosnia and Herzegovina convertible mark; around EUR 51 000). The PPL specifies the forms in which tender securities may be submitted. When the procurement value is equal to or more than this value, the bid security may not exceed 1.5% of the estimated contract value. For group bids, security must be submitted that corresponds to the requested amount, regardless of whether it is submitted by one member, several members or all members of the group of bidders. Requested performance securities may not exceed 10% of the contract value.

In North Macedonia, the contracting authority can require tenderers to provide a tender guarantee in the form of a bank guarantee or deposited funds and must state this in the tender documentation. The amount must not exceed 3% of the tender value. The tender

guarantee should be submitted together with the tender in original form. The contracting authority can retain the tender guarantee if the tenderer:

- withdraws its tender before the expiry of the validity period of the tender guarantee
- fails to accept correction of arithmetical errors made by the commission
- fails to sign the public contract after being selected as winner
- fails to provide the performance guarantee, if required by the contracting authority in the tender documentation.

The contracting authority may require the winning tenderer to provide a performance guarantee (of proper execution of a contract) in the form of a bank guarantee which can range from 5% to 15% of the public contract value. However, this cannot be requested in design contests or procurement procedures for consultant services. Where the economic operator fails to submit a tender or performance guarantee, the contracting authority will issue a negative reference. This is published on the Electronic System of Public Procurement (ESPP) website and results in the automatic exclusion of an economic operator from participating in procurement procedures for one year from the date of publication.

In Kosovo, a contracting authority can require a tenderer to submit a tender security for a large- or medium-value contract. The tender security should be forfeited if:

- the contracting authority determines, on the basis of objectively verifiable evidence, that the tenderer has provided materially false or misleading information to the contracting authority
- the tenderer withdraws its tender after the deadline for tender submission, but before the tender validity period expires as specified in the tender dossier
- the tenderer is awarded a contract on the basis of its tender, and then refuses or fails 1) to submit any required performance security specified in the tender dossier; 2) to comply with any other condition specified in the tender dossier for signing the contract; or 3) to execute a contract that conforms to the terms and conditions specified in the tender dossier.

Where a tender security is requested, it should be no less than 1% and no greater than 3% of the estimated value of the public contract or design contest, but in any case should be at least EUR 1 000.

In Montenegro's public procurement procedures, the contracting authority can require economic operators to submit tender securities, good performance guarantees, guarantees of advance payment and other types of guarantees. These are obligatory if the estimated value of the contract exceeds EUR 30 000. The tender security may not exceed 2% of the estimated value of public procurement, while the good performance guarantee requested by the contracting authority may not be higher than 5% of the contract price.

In Serbia, contracting authorities can specify in tender documents how bidders should guarantee good performance in a public procurement procedure. They can also stipulate bidders' contractual obligations, or in which cases an advance payment should be refunded. The contracting authority cannot request a tender security or performance guarantee exceeding 10% of the offered price – excluding value-added tax (VAT) – or of the contract value, except for advance payments. A performance guarantee should be issued by the bank and should not exceed 10% of the contract value. The bidder should

provide a performance guarantee to the contracting authority at the time the contract is concluded, or within the period determined by the contracting authority, but not later than the first delivery. The performance bank guarantee will be valid for at least five days after the deadline for final completion.

In Turkey, bidders can determine the amount of tender security they submit with their bids, but it cannot be less than 3% of the proposed price. Tender securities are not mandatory for consultancy service procurements. They may be submitted in whatever form the bidder chooses, so long as payment is in Turkish lira and they include letters of guarantee from banks and special financing institutions, or Domestic Borrowing Bills issued by the Under Secretariat of the Treasury, and documents arranged for replacing these bills. In order to ensure that the commitment is carried out in accordance with the provisions of the contract and tender documents, the successful tenderer is required to submit, as a condition for signing a contract, a performance bond of 6% of the contract value. For consultancy services, a performance bond is not required, but a deduction of 6% from each subsequent payment is retained as a guarantee instead.

*Joint bidding is allowed, with some economies stipulating how bidder groups are organised*

Participants in public procurement procedures may be both legal and natural persons. Legal provisions for public procurement should not discriminate between the different organisational forms that economic operators may decide to adopt, and the contracting authorities should not insist that suppliers should take a specific form in order to participate in public procurement procedures. One instrument that increases SMEs' chances in public procurement is joint bidding. This allows a number of suppliers who do not individually meet contracting authorities' requirements to combine their resources and capacities to fulfil them.

All the assessed economies allow groups of economic operators to submit tenders or applications in public procurement, and hardly any require them to take a special form in order to participate. In a few cases, however, economic operators who want to submit joint tenders do need to adopt a special organisational form, according to the implementing rules. In Albania, for instance, these rules stipulate that a consortium should be officially established by means of a notarised declaration between the participating economic operators, each stating the size and nature of their contribution. In Turkey, access to public procurement is open to natural or legal persons, as well as groups of economic operators (joint ventures) formed by natural or legal persons. The PPL gives more detailed requirements that must be satisfied by these groups, however. Joint participation can take the form of either a business partnership or a consortium; the distinction being that members of a business partnership carry out the whole business jointly, having equal rights and responsibilities, while members of a consortium separate out their rights and responsibilities according to their expertise, in order to carry out relevant parts of the business. Business partnerships may participate in any kind of procurement. However, where different types of expertise are needed, the contracting authorities should indicate in tender documents whether or not a consortium is allowed to submit tenders. The contracting authority should state whether or not groups of economic operators are allowed to participate in the tender documents at the outset of the procurement procedure.

*Subcontracting is permitted, although the share may be limited*

Another instrument that favours SMEs is subcontracting: the winning bidder who signs the contract allows a part or parts of it to be performed by third parties (subcontractors) (SIGMA/OECD, 2016<sub>[12]</sub>). In this way SMEs who would not be able to carry out the whole contract get the chance to provide their services for smaller parts better adjusted to their capacities.

All the economies provide for the general possibility of subcontracting a part or parts of a contract to third parties. Some economies underline that subcontracting should be allowed in order to make it easier for small and medium-sized economic operators to participate. Therefore in principle economic operators are allowed to subcontract a part of the contract they were awarded. Most of the economies, however, limit the share of the contract that may be subcontracted to between 30 and 50%. In Albania, the share of the contract that is subcontracted must be proportionate to the value of the contract and should not exceed 40% of the overall contract value. In Kosovo, while the PPL does not set limits on the share of subcontracting, the operational guidelines set a limit of 40% of the contract value. In Montenegro, subcontracted parts cannot exceed 30% of the total value of the tender. In Serbia, the limit is 50% of the contract value.

*Implementation (Thematic block 2)*

Even the best-conceived legal provisions will not be enough to ensure that SMEs have access to public procurement if they are not implemented and (correctly) applied. The purpose of this thematic block is to assess how public procurement provisions are implemented in practice, focusing especially on disseminating information, the support and training provided by public institutions, and the use of electronic procurement.

*Procurement opportunities are publicised free of charge*

Access to public procurement by economic operators, particularly SMEs, would be extremely difficult – if not impossible – if they were not informed in advance by contracting authorities about prospective procurement opportunities. Providing information about plans to award contracts is therefore vital.

All the WBT economies provide information free of charge to economic operators about procurement opportunities (procurement notices, procurement documents) and almost all disseminate this information centrally. Only Kosovo declared in its questionnaire that dissemination of this information is not centralised. Information on procurement opportunities (contracts to be awarded) is available on the websites or portals of the central institutions responsible for public procurement.

In Serbia, the Public Procurement Office (PPO) is responsible, among other things, for maintaining its public procurement portal. This portal publishes all the relevant information about public procurement in Serbia: contracting authorities' public procurement plans, procurement notices and tender documents on concrete public procurement procedures. Access to the portal is free of charge and does not require previous registration. The portal provides information not only on high-value procurements but also lower-value contracts, which may be of more interest to SMEs. It was improved in 2015 with new search tools and the option of searching in English. Further improvements are planned in the form of fully electronic public procurement. In Montenegro, the PPO maintains a public procurement portal that publishes information about public procurement procedures such as public procurement plans and their



amendments, procurement notices, tender documentation, decisions on the qualification of economic operators, decisions on the selection of the most favourable bid, decisions on the termination of the public procurement procedure or annulment of the public procurement procedure, the public procurement contracts, and other information required by law.

*Training in public procurement, including for SMEs, is available in most economies*

Economic operators do not just need information about where and when to apply for public contracts, but also how to do so. They need to know that participation in public procurement procedures requires them to respect certain formal procedural rules. Economic operators, in particular SMEs, could benefit from practical training in applying those rules, adjusted to their needs and capacities.

Most of the economies provide training to economic operators on public procurement issues, including to SMEs specifically. Only Albania and Montenegro declared that no public procurement training is offered to SMEs by central institutions. Turkey stated that the Public Procurement Authority provides training to all types of economic operators, but offers no special treatment for SMEs.

Box 6.2 has some good examples of how this is done in other countries.

#### **Box 6.2. Good practice in public procurement training**

A number of OECD countries organise training sessions and briefings to discuss changes to public procurement rules or the introduction of a new public procurement framework.

- In Poland, after every significant change in the public procurement regulations, the Public Procurement Office organises regional conferences and seminars at various locations across the country both for contracting authorities and economic operators. The most recent training events were organised following the 2017 implementation of the 2014 EU procurement directives ([www.uzp.gov.pl](http://www.uzp.gov.pl)).
- Denmark organised training for government employees on implementing the 2016 Public Procurement Act.
- Slovenia carried out a roadshow and theme-based education of contracting authorities and economic operators in several regions of the country following the adoption of a new public procurement law in 2016 (Law ZJN-3) ([www.djn.mju.gov.si](http://www.djn.mju.gov.si)).
- In Ireland, the Office of Government Procurement organises annual conferences covering all the latest policy developments that are relevant for suppliers ([ogp.gov.ie](http://ogp.gov.ie)).

Source: OECD (2018<sup>[13]</sup>) *SMEs in Public Procurement: Practices and Strategies for Shared Benefits*, <https://doi.org/10.1787/9789264307476-en>.

*Public procurement offices all offer some support to SMEs*

Support offered by public procurement offices in the assessed economies takes the form of telephone help desks organised by central procurement institutions; providing advice in

response to questions raised by economic operators; publishing guidance or manuals for contracting authorities, and advising them how to enhance SME participation in public procurement procedures; and direct support dedicated to economic operators. For example, in 2017 Montenegro's Public Procurement Office (PPO) published the *Guide to Promoting the Participation of Small and Medium Sized Enterprises at the Public Procurement Market in Montenegro*, which will be part of its training programme. The PPO also organised four roundtable meetings in 2016 dedicated specifically to SMEs participating in public procurement procedures. In 2016 Serbia's PPO published the *Guidelines for Increasing Participation of Small and Medium Enterprises in Public Procurement Procedures*. The guidelines present an analysis of the obstacles faced by SMEs when trying to access public procurement and propose a number of actions and solutions to improve the situation.

*Electronic procurement is allowed or required, but e-procurement levels vary*

Electronic procurement makes it easier for economic operators to participate. Using digital communication between contracting authorities and suppliers, particularly to submit requests and tenders, is faster and cheaper for both parties (OECD, 2011<sub>[14]</sub>). All the assessed economies allow or oblige the use of electronic tools in public procurement.

In Albania, all procurement procedures should be conducted electronically, with the exception of negotiations without prior publication, procurement procedures with a value lower than ALL 100 000 (Albanian lek; about EUR 800), during the second phase of a design contest, contracts for consultancy services and contracts for purchasing electricity. In Bosnia and Herzegovina, the following tendering procedures are conducted in electronic form: competitive requests, open procedures, restricted procedures, and negotiation procedures with publication of notice and e-auctions.

North Macedonia is one of the most advanced economies in the use of e-procurement and has a comprehensive e-procurement system, the ESPP. Managed by the Public Procurement Bureau, the system provides the basic framework for ensuring transparency in procurement opportunities and equal access for economic operators to public procurement that falls under the PPL. Contracting authorities publish contract notices and tender documents on the ESPP for all contracts covered by the PPL, other than cases where exceptions or exclusions apply. In 2016, almost half of all procedures were conducted by e-procurement. Registration fees for the ESPP are higher for foreign economic operators than for national ones; there are reduced fees for domestic SMEs. The ESPP uses modern procurement techniques and methods to award contracts both above and below the relevant EU financial thresholds. These include e-notices, publishing and downloading procurement documents, e-submission, e-evaluation and e-auctions.

In Turkey the e-procurement system Elektronik Kamu Alımları Platformu (EKAP), established in September 2010 and managed by the Public Procurement Authority (PPA), covers all stages of the procurement cycle. All contracting authorities and a large number of economic operators are registered on the system and are using it. Registration is now compulsory for any party wishing to participate in tenders.

Most of the economies collect and store information submitted by economic operators in databases in order to reuse it in forthcoming public procurement procedures. Only Montenegro and Turkey declared they did not do this.

Examples of how SMEs' access to public procurement procedures can be facilitated by reusing previously submitted information are provided in Box 6.3.

**Box 6.3. Good practice in reusing stored information on economic operators:  
France and Serbia**

French public procurement provisions follow the “only tell me once” principle. Economic operators who take part in procurement procedures do not have to resubmit documents to prove their qualifications, if 1) they have already taken part in a procedure with the same contracting authority; 2) the contracting authority has those documents; 3) the documents remain valid and up date.

At present this solution is not obligatory for contracting authorities, and may be used if the contracting authority informs potential bidders of this possibility in procurement documents. It will become obligatory, however, where mandatory provisions for electronic procurement start to apply.

Likewise in Serbia, the contracting authority does not have to ask a bidder to supply proof if it has already acquired adequate evidence for that same bidder from previous public procurement procedures.

*Sources:* Article 53-II, Décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics du décret n° 2016-361; Ministry of Economy (2017<sup>[15]</sup>), *Présentation des Candidatures*, [www.economie.gouv.fr/daj/presentation-candidatures-2017](http://www.economie.gouv.fr/daj/presentation-candidatures-2017); Public Procurement Law: Official Gazette of the Republic of Serbia, No. 124 of 29 December 2012, No. 14 of 4 February 2015, No. 68 of 4 August 2015, Article 79 (2) Public Procurement Law.

***Monitoring and evaluation (Thematic block 3)***

Public procurement rules and practices should be constantly monitored and regularly evaluated so that the relevant institutions can intervene and adjust them if necessary (SIGMA/OECD, 2016<sup>[16]</sup>).

This section assesses whether – in practice – access to public procurement markets by economic operators, especially SMEs, is monitored and evaluated.

***Most economies collect data on participation in public procurement, but not enough on SMEs specifically***

Collecting information on SMEs in public procurement enables procurement offices and other relevant institutions to remove any hindrances to their participation. Montenegro (see Box 6.4), Kosovo and Turkey collect and analyse information on such obstacles. Kosovo and North Macedonia also collect information about delays to payments in public procurement.

Some of the economies also collect and publish information specifically about SME participation in public procurement procedures. The Public Procurement Bureau in North Macedonia publishes annual reports on the functioning of the public procurement system, which include some statistical information on SMEs.

All the economies collect information on the share of contracts awarded to foreign economic operators. For example, in Bosnia and Herzegovina, according to the annual report published in 2017 by the Public Procurement Agency, in 2016 domestic suppliers obtained 98.6% of all concluded contracts (1.41% contracts went to foreign companies).

In Serbia, the share of contracts awarded to foreign companies amounted to 3.0% in 2017 and in Montenegro to 5.8%.

Both Montenegro and Belgium have published good practice documents which deal with the issue of obstacles to SMEs participating in public procurement (Box 6.4).

**Box 6.4. Good practice in assessing and addressing public procurement obstacles faced by SMEs: Montenegro and Belgium**

**Montenegro**

Supporting SMEs is one of the aspects of the public procurement system dealt with in the Montenegrin multi-year public procurement strategy. The document identifies problems and obstacles faced by SMEs that want to participate in public procurement procedures, both on their own and together with other bidders, covering the issues of responsibility, qualifications, and cumulative proving of eligibility. The strategy proposes several actions related to public procurement, including “levelling the playing field” to ensure that SMEs are not unduly disadvantaged in relation to larger competitors, and training SMEs and contracting authorities.

To strengthen SME access to public procurement systems, the strategy envisages the following measures:

- harmonising public procurement legislation with the new EU directives in this area
- initiating and promoting the use of green, social and innovative public procurement
- exchanging good practice among contracting authorities by establishing a platform for sharing experience, information and knowledge
- developing specific advice, criteria and indicators to be used in public tenders
- stimulating the integration of this criteria at the public procurement planning stage
- training SMEs to improve their capacity in public procurement
- developing guidelines and organising seminars for SMEs
- encouraging greater SME employment and development through more use of the most economically advantageous tender criterion
- training contracting authorities in creating public procurement subjects that enable better access by SMEs
- analysing the possibility of abolishing or substantially reducing the fee for reviewing contracting authorities’ decisions
- waiving fees to obtain various certificates
- encouraging contracting authorities to implement public procurements by lots.

**Belgium**

Belgian’s Federal Public Service Economy, SMEs, Middle Classes and Energy has published guidelines for contracting authorities on SME access to public procurement. They contain 12 implementation principles which should improve SMEs’ chances of obtaining public contracts, including: dividing procurement into lots; publishing

adequate information on public procurement opportunities; awarding contracts on the basis of an economically advantageous offer criterion; optimising electronic means of communication; ensuring adequate protection of intellectual property rights; providing feedback for bidders whose offers were not accepted; and creating proportionate minimum requirements, selection criteria, financial guarantees and methods of payment.

Sources: The Montenegrin Public Procurement Directorate (2015<sup>[17]</sup>), *Strategy for the Development of the Public Procurement System in Montenegro in 2016–2020*, [www.ujn.gov.me/strategija-razvoja-sistema-javnih-nabavki-u-crnoj-gori-za-period-2016-2020-godine/](http://www.ujn.gov.me/strategija-razvoja-sistema-javnih-nabavki-u-crnoj-gori-za-period-2016-2020-godine/); “Charte Accès des PME aux marchés publics”, SPF Economie, P.M.E., Classes moyennes et Energie, February 7, 2018, <https://economie.fgov.be/fr/publicaties/charte-acces-des-pme-aux>.

### *Independent procurement review bodies exist in all the economies*

Even the most transparent, competitive and fair public procurement rules and procedures would be toothless without instruments to enforce them. To trust the public procurement process, suppliers need to know that when rules are not respected by public institutions, there are special mechanisms in place to force contracting authorities to respect them. This is why access to review procedures and bodies is so important for aggrieved suppliers. In accordance with the respective EU rules and good international practices, the appeals of economic operators whose rights have been breached by public bodies’ illegal actions and omissions should be reviewed by independent institutions.

All the assessed economies enable economic operators to have their complaints reviewed by procurement review bodies (PRBs) which are independent both from procuring entities and economic operators. In Albania,<sup>5</sup> Bosnia and Herzegovina,<sup>6</sup> Kosovo,<sup>7</sup> Montenegro,<sup>8</sup> North Macedonia,<sup>9</sup> and Serbia<sup>10</sup> economic operators’ appeals are heard by review bodies whose members are appointed for a given term by parliament.

In Turkey, a separate department in the Public Procurement Authority (PPA)<sup>11</sup> deals with “appeal applications”. In order to secure the independence and integrity of the PPA as the review body and to avoid conflicts with other functions of the PPA (regulatory, monitoring and advisory), there are elaborate administrative routines in place. Decisions on appeal applications are adopted by the nine members of the PPA’s board, supported by public procurement experts and assistants.

### *Time limits for submitting complaints are mostly in line with EU requirements*

Most economies regulate minimum time periods for submitting complaints that are in accordance with the relevant EU directives (Remedies Directives)<sup>12</sup> – although in a few cases the time periods are shorter than those required by EU law.

In Albania anyone may challenge a decision who has or has had an interest in a procurement procedure and who has been, or risks being, harmed by the decision made by a contracting authority that infringes the PPL. Appeals must be submitted first to the relevant contracting authorities. The time limit for submitting an appeal is seven days. In the second stage of the review procedure, the contracting authority’s final decision can be appealed to the Public Procurement Commission (PPC).

In Serbia, a request for the protection of rights has to be filed with the contracting authority and a copy submitted to the Republic Commission. After a decision is made to award a contract, conclude a framework agreement, recognise a qualification, or to cancel

the procedure, the time limit for filing a request for the protection of rights is ten days from the day of posting the decision on the Public Procurement Portal, or five days for low-value public procurement. An economic operator may submit to the Republic Commission a complaint against a contracting authority's decision within three days of receiving the decision. Since the Republic Commission is the first-instance independent procurement review body dealing with the economic operators' appeals, a three-day time period is not in line with the Remedies Directive's requirements.

*All the economies have time-efficient review procedures*

All the assessed economies regulate the maximum time period in which procurement review bodies should reach decisions on complaints submitted by economic operators. In most of the economies the maximum time period is slightly over two weeks: in Albania, the public procurement review body should make decisions within 15 days of receiving the complaint. This period may be extended by another 15 days if a decision cannot be finalised for objective reasons which should be stated clearly by the PPC. In Montenegro, the rulings of the procurement review body should be adopted within the statutory time limit of 15 days of receipt of the complete documentation. This time period may be extended for no more than 10 days in the event that there is a need to engage experts or obtain opinions from the competent institutions, or if the procurement documentation is complex. In North Macedonia, the State Appeals Commission should make its decision within 15 days of completing the documentation for the appeal. The same time period is applied in Kosovo. Three other economies use a longer time period. In Turkey, the review body has to conclude the review in 20 days. In Serbia, the Republic Commission should decide within 20 days from the day of receiving the complete documentation needed to establish the facts and make a decision on any request for rights protection. Finally, in Bosnia and Herzegovina, the maximum time for the Procurement Review Body to make a decision on an appeal is 30 days.

*Submitting appeals is subject to fees, but they are not excessively high*

All the economies require fees for submitting appeals to review bodies, but they are low enough to not hinder economic operators' access to legal protection.

Albania has no fees for submitting appeals to contracting authorities, but submitting an appeal to the Public Procurement Commission requires a fee amounting to 0.5% of the estimated procurement value. In Bosnia and Herzegovina, entry fees are also defined according to the entire public procurement value. Fees range from BAM 500 to BAM 25 000 (about EUR 256 to EUR 12 780). In North Macedonia, fees for an economic operator filing an appeal vary between the equivalent of EUR 100 and EUR 400, in addition to an administrative fee.

In Kosovo, economic operators are obliged to submit a complaint to the contracting authority before initiating a review process by the PRB. They are only entitled to seek a review from the PRB if the contracting authority has rejected the complaint. The 2016 amendments to the PPL increased these fees to 1% of the value of the estimated contract value, or in some cases of the bid, but to not less than EUR 100 and not more than EUR 5 000.

In Montenegro, fees are 1% of the estimated value of the public procurement, but cannot exceed EUR 20 000. In Serbia, complaint submission is subject to a sliding-scale fee, the amount depending on the value of the procurement and the stage of the procurement procedure at which the review was launched. Currently, the lowest fee is RDS 60 000

(Serbian dinars; about EUR 510) while the highest is 0.1% of the estimated value of public procurement or of the price offered by the winning bidder.

### *The way forward for public procurement*

Better access to public procurement, reduced bureaucracy, more quality-oriented public purchasers and impartial review and oversight processes are all particularly beneficial to SMEs.

To achieve this, economies in the region should:

- **Further align their national legislation with EU rules and international good practices.** In particular, they should:
  - ensure that all economic operators have access to public procurement on an equal footing regardless of their origin
  - further encourage the division of procurement into lots, by requiring the contracting authorities which do not do so to justify their decision (Box 6.5)
  - remove limitations on subcontracting, such as the maximum share of the procurement contract that may be subject to subcontracting
  - lengthen the time periods for applying legal protection measures in public procurement to align with the EU Remedies Directive
  - remove obstacles to joint bidding, such as the requirement that suppliers should adopt a specific legal form to submit a joint tender
  - reduce the maximum value of economic operators' minimum yearly turnover requirement to twice the contract value, except for justified cases.
- **Reduce the administrative burden of participating in public procurement.** Bidders should only be required to submit a declaration that they satisfy the requirements of the contracting authority, and that they will provide documentary evidence as required. Supporting documents should only be required from those bidders whose offers were evaluated as the most advantageous. The mandatory introduction of e-procurement, in accordance with the requirements of 2014 EU Directives, in particular to submit tenders and requests to participate in electronic form, would also reduce bidding costs, facilitating SMEs' access to public contracts.
- **Increase the use of non-price criteria for awarding contracts** to enable public buyers to receive the best value for money. In particular, contracts must always be awarded based on the most economically advantageous tender and non-price criteria should be applied more often. Public procurement institutions should make it easier for contracting authorities to apply non-price criteria by providing them with guidelines and examples of good practice.
- **Focus on correctly implementing amended public procurement provisions** by providing consultations, assistance and training, both to contracting authorities and economic operators, especially those representing SMEs. Contracting authorities in particular should be trained in how to take SMEs' specific needs into consideration. Belgium's example (Box 6.4) could offer a template to the WBT economies for developing training materials and tailored training courses.
- **Constantly monitor and analyse the obstacles** hindering SMEs from accessing public procurement markets, including the costs of access to legal protection (i.e.

the fees paid to independent review bodies to challenge contracting authorities' decisions).

#### **Box 6.5. Good practice in dividing procurement into lots: Portugal and France**

In Portugal, the Public Contracts Code allows for public procurement to be awarded in lots. However, where contracts for supplies or services are valued at more than EUR 135 000, or works are valued at more than EUR 500 000, a contracting authority which decides not to divide the contract into lots should justify its decision. This decision may be justified when:

- the object of public procurement is technically or functionally indivisible or the division into lots would lead to major inconvenience for the contracting authority
- urgency, or technical or functional imperatives, mean that managing a single contract would be more efficient for the contracting authority.

In France, contracting authorities have been obliged to award public procurement in lots since 2006. According to the provisions currently in force, public contracts – other than for security and defence – are awarded in separate lots, except where the object of public procurement does not allow separate lots to be identified. In order to satisfy this obligation a contracting authority should define, in its description of the public procurement, the number, size (scope) and object of the lots.

*Sources:* Article 46A Decree-Law No. 18/2008, of 29 January, amended and republished by Decree-Law No. 111-B/2017, of 31 August; Article 32; Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics,  
[www.base.gov.pt/mediaRep/inci/files/ccp2018/CCP\\_consolidado\\_com\\_LEO\\_DL\\_33\\_2018.pdf](http://www.base.gov.pt/mediaRep/inci/files/ccp2018/CCP_consolidado_com_LEO_DL_33_2018.pdf).

## **Conclusions**

Overall, the relevant public institutions in all the WBT economies have made progress in the area of public procurement, both in improvements to the policy and the regulatory framework, and to monitoring and evaluation. Some of the assessed economies have simplified their public procurement legislation to take SMEs' needs into account. By easing documentary evidence requirements, or allowing non-price criteria to be applied when awarding contracts, the WBT economies have reduced the administrative burden for SMEs.

On the other hand, awarding public contracts is based predominantly on price-only criteria, while non-price factors are still sparingly applied across the WBT region. This is detrimental to SMEs' chances of succeeding in public procurement procedures. Moreover, domestic preferences remain a problem in some economies. The WBT economies should also address the limitations on subcontracting, as well as barriers to joint bidding.

Implementing the recommendations put forward in this chapter will help the relevant stakeholders in the WBT economies to further reduce obstacles faced by SMEs in accessing public contracts.



## Notes

- <sup>1</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.
- <sup>2</sup> Decision of Council of Ministers on mandatory application of domestic preferential treatment, 4 October 2016.
- <sup>3</sup> Albanian Rules on Public Procurement, adopted by DCM No. 914, 29 December 2014.
- <sup>4</sup> Albanian Law No. 48/2014, “On delayed payments regarding contractual and trade obligations”.
- <sup>5</sup> The Public Procurement Commission, [www.kpp.gov.al](http://www.kpp.gov.al).
- <sup>6</sup> The Procurement Review Body, [www.javnenabavke.gov.ba](http://www.javnenabavke.gov.ba).
- <sup>7</sup> The Procurement Review Body, <https://oshp.rks-gov.net>.
- <sup>8</sup> The State Commission for the Control of Public Procurement Procedures, [www.kontrola-nabavki.me](http://www.kontrola-nabavki.me).
- <sup>9</sup> The State Appeals Commission, <http://dkzjin.gov.mk>.
- <sup>10</sup> The Republic Commission for the protection of rights in public procurement procedures, [www.kjn.gov.rs](http://www.kjn.gov.rs).
- <sup>11</sup> [www.ihale.gov.tr](http://www.ihale.gov.tr).
- <sup>12</sup> Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

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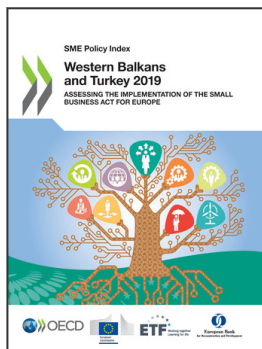
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## Annex 6.A. Indicators for assessing public procurement policies for SMEs

This assessment of public procurement policies for SMEs was based on a questionnaire containing 20 indicators:

- Existence of a multi-year strategy that defines objective of support of SMEs in public procurement
- Access of foreign companies to public procurement procedures on equal terms with domestic bidders
- Division of public procurement into lots
- Ensuring that payments to economic operators are made on time
- Related to and proportionate to the object and value of procurement requirements
- Provisions on tender securities required from bidders
- Participation of groups of economic operators in public procurement procedures
- Subcontracting
- The share of public procurement divided into lots
- Availability of public procurement documents free of charge
- Training for SMEs offered by central institutions
- Support to SMEs offered by central procurement institutions
- Use of electronic procurement tools
- Reuse of information collected from economic operators in subsequent procurement procedures
- Share of public procurement procedure with participation of groups of economic operators
- Collection and analysis of information about obstacles faced by SMEs in access to public procurement procedures
- Collection of information on the participation of SMEs in public procurement procedures
- Collection of information on average payment delay
- Collection of information on the share of foreign companies awarded public contracts
- Access of economic operators to appeals against decisions of contracting authorities to an independent review body.



**From:**

## **SME Policy Index: Western Balkans and Turkey 2019**

Assessing the Implementation of the Small Business Act for Europe

**Access the complete publication at:**

<https://doi.org/10.1787/g2g9fa9a-en>

### **Please cite this chapter as:**

OECD, *et al.* (2019), “Public procurement (Dimension 5b) in the Western Balkans and Turkey”, in *SME Policy Index: Western Balkans and Turkey 2019: Assessing the Implementation of the Small Business Act for Europe*, OECD Publishing, Paris.

DOI: <https://doi.org/10.1787/2570c626-en>

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