

# Comments on the Draft Proposal of the Act on Amendments to the Public Procurement Act

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American Chamber of Commerce in Croatia *Američka gospodarska komora u Hrvatskoj*

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## Contested provisions of the Act

With this document, the American Chamber of Commerce in Croatia (AmCham) presents its position on the Draft Proposal of the Act on Amendments to the Public Procurement Act.

AmCham contests the following provisions of the Act:

### *Comments on specific provisions of the Act*

#### *Fees for filing an appeal, Article 430*

*1) The appellant is obliged to pay a fee for the filing of an appeal in the following amounts:*

- 1. HRK 5000.00 for the maximum estimated value of procurement of HRK 750,000.00*
- 2. HRK 10,000.00 for the estimated value of procurement from HRK 750,000.01 to HRK 1,500,000.00*
- 3. HRK 25,000.00 for the estimated value of procurement from HRK 1,500,000.01 to HRK 7,500,000.00*
- 4. HRK 45,000.00 for the estimated value of procurement from HRK 7,500,000.01 to HRK 25,000,000.00*
- 5. HRK 70,000.00 for the estimated value of procurement from HRK 25,000,000.01 to HRK 60,000,000.00*
- 6. HRK 100,000.00 for the estimated value of procurement of over HRK 60,000,000.00*

*(2) By way of derogation from paragraph 1 of this Article, when filing an appeal against a procurement document, the appellant shall pay an appeal fee of HRK 5000.00.*

*(3) If the estimated value is not known at the moment of filing the appeal to the State Commission, the appeal fee to be paid shall amount to HRK 5000.00.*

*(4) If the appeal is filed against a decision on selection or annulment for one or more groups of the subject matter of procurement, the fee shall be one-fifth of the amount from paragraph 1 of this Article for every group of the subject matter of procurement, the total not exceeding the amounts given in paragraph 1 of this Article.*

*(5) The State Commission shall check the execution of the payment of an appeal fee to the account of the state budget of the Republic of Croatia.*

*(6) The appeal fee shall be paid to the account of the state budget of the Republic of Croatia.*

*(7) The bodies from Article 401(2) of this Act are exempt from the obligation to pay the appeal fee.*

*(8) The appellant is exempt from the obligation to pay the administration fee.*

*(9) If the appellant has paid the appeal fee in an amount higher than the one prescribed in this Article, they have the right to a refund of the excess amount paid from the state budget of the Republic of Croatia through the Ministry of Finance.*

#### **AmCham's comment on Article 430:**

AmCham considers the proposed amendments to appeal fees to have a significant negative impact on the ability to realize legal protection before the State Commission for Public Procurement Procedures, but also on the preparation and execution of public procurement procedures by contracting authorities.

We especially contest the multiple increases of the appeal fee in the part regarding procurement documentation appeals. The interest of economic operators is not yet significant in this phase of the procedure, however, they will be greatly discouraged from filing appeals with regard to the great cost of the appeal and the uncertainty of the outcome. In this way, the market will lose an important control mechanism for the legality of the public procurement procedures. At the same time, the contracting authorities will be subject to extremely high costs, even in the case of less significant errors in preparing documentation. For fear of making an error of such a financial impact, the process of preparing procurement documentation will be substantially slowed down.

Following all of the above, we propose a new paragraph 2 to be added to Article 430 with the following aim:

- to limit the appeal fee in the phase of the appeal against the procurement documentation to a maximum of HRK 20,000, and
- to limit the appeal fee in all proceedings to a maximum of HRK 200,000.

### ***Subparagraph 5 – Relying on the abilities of other operators, Article 273***

Current provisions of the Public Procurement Act 2016:

*(1) During a public procurement procedure, an economic operator may rely on the abilities of other operators in order to prove the fulfillment of the criteria for the selection of an economic operator from Articles 258 and 259, regardless of the legal nature of their mutual relationship.*

*(2) During a public procurement procedure, an economic operator may rely on the abilities of other operators in order to prove the fulfillment of the criteria related to educational and professional qualifications from Article 268, paragraph 1, item 8 of this Act, or to relevant professional experience, only in the case of those operators performing works or providing services for which that ability is required.*

### **Explanation and AmCham's proposed amendments:**

As is apparent from the article in question, the Public Procurement Act of 2016 does not prescribe a minimum financial participation share in the performance of the agreement by the economic operators the tenderer relies on regarding technical abilities; however, despite this, the practice of the State Commission for Public Procurement Procedures and the High Administrative Court has shown that the participation share of such economic operators should not be lower than 1% of the tender amount. Besides, there is room for different interpretations in the case of relying on another party's resources when it comes to professional abilities, in the sense that it is not clear whether only an expert can participate in the performance

of the contract, or an economic operator must participate as well, whether the appropriate minimal financial share applicable here in relation to the tender amount, etc.

Furthermore, following the aforementioned practice of the State Commission and the High Administrative Court, the economic operator the tenderer relies on should also participate financially in the performance of the contract, so it is not clear what differentiates reliance and sub-contracting. This issue should therefore be defined more clearly by the law since the current provisions and practice are to some extent contradictory; if the economic operator the tenderer relies on must participate in the performance of the contract, it is implied that it then belongs to the category sub-contractors, i.e, these categories should be more clearly separated and defined in the legal sense.

Following all of the above, it is proposed that the existing paragraphs of Article 273 of the Public Procurement Act of 2016 be either amended, or that additional paragraphs be added in order to encompass the previously highlighted items.

#### **SECTION D ABNORMALLY LOW TENDERS, Article 289**

Current provisions of the Public Procurement Act 2016

*(1) The public contracting authority is obliged to request the economic operator to explain a price or cost stated in the tender within an appropriate deadline no shorter than five days if the tender appears to be abnormally low when taking into consideration the work, goods, or services.*

*(2) The explanations of the economic operator from paragraph 1 of this Article may include in particular:*

- 1. the cost-effectiveness of the production process, provision of services, or the construction method*
- 2. selected technical solutions or exceptionally favorable conditions at the tenderer's disposal for product delivery, the provision of services, or the execution of works*
- 3. the originality of works, goods or services offered by the tenderer*
- 4. compliance with applicable obligations regarding environmental law, social and labor law, including collective agreements, and especially the obligation to pay the agreed salary, or provision of international environmental law, social and labor law mentioned in Annex XI of this Act*
- 5. compliance with the obligations from Section G, Chapter 2, Title III of this part of the Act*
- 6. the tenderer's ability to receive state aid.*

*(3) If any ambiguities arise during the evaluation of the provided data, the public contracting authority may ask the tenderer to provide an additional explanation.*

*(4) The public contracting authority may refuse the tender only if the explanation or provided evidence does not explain the proposed low price or cost in a satisfactory manner, taking into consideration the elements from paragraph 2 of this Article.*

*(5) The public contracting authority is obliged to refuse the tender if it is established that the tender is abnormally low because it does not comply with applicable obligations regarding environmental law, social and labor law, including collective agreements, and especially the obligation to pay the agreed salary, or*

*provision of international environmental law, social and labor law mentioned in Annex XI of this Act.*

*(6) if the public contracting authority determines that the tender is abnormally low because the tenderer has received state aid, they may refuse the tender on this basis only after requesting an explanation from the tenderer, and the tenderer is not able to prove that the aid was lawfully granted within an appropriate deadline given by the public contracting authority.*

*(7) If the public contracting authority in the procedure of high-value public procurement refuses the tender in accordance with paragraph 6 of this Article, it is obliged to inform the European Commission.*

### **Ordinance on procurement and tender documentation in public procurement procedures (OG 65/17, 75/20):**

Explanation of an abnormally low tender

#### *Article 22*

*(1) The public contracting authority may request a tender explanation from the tenderer if the following conditions are fulfilled:*

- 1. at least three valid tenders were received*
- 2. the price or the cost of the tender is more than 20% lower than the price or the cost of the second-ranked valid tender; and*
- 3. the price or the cost of the tender is more than 50 % lower than the average price or cost of the other valid tenders.*

*(2) The public contracting authority may also request an explanation of the tender from the tenderer if it appears to be abnormally low for reasons other than those specified in paragraph 1 of this Article.*

*(3) The request of the contracting authority and the explanation of the tenderer are integral parts of the inspection and evaluation report.*

### **Explanation and AmCham's proposed amendments:**

Since the trend of abnormally low bid prices has been present in public procurement procedures for a long time, especially in the procurement of services, we believe that it is necessary to urgently introduce appropriate changes in the legislative framework, which would give contracting authorities, as well as other stakeholders in public procurement procedures, greater authority in proving and determining that a bid is abnormally low. Therefore, we believe that when making an appeal, the Appellant should be able to present evidence on the Decision on selection or the Decision on annulment on whether the bid is abnormally low or not, and the State Commission for the Control of Public Procurement Procedures should be authorized to determine whether the appeal allegation is founded, i.e. whether the specific bid is abnormally low, and therefore the right to decide on an abnormally low bid will not be within the exclusive authority of the Contracting Authority.

The current legislative framework provides for the questioning of abnormally low tenders by contracting authorities, and only "if the tender appears to be abnormally low", which means that there is no mechanism to oblige contracting authorities to request an explanation for the abnormally low tender. It is within reason to expect

that the contracting authorities are also aiming to spend public funds economically and that they do not necessarily have to question abnormally low bids, but the above provisions regarding the abnormally low bid price should be made stricter. For example, the provision from Article 289, paragraph 2 of the Public Procurement Act 2016 should be reframed as an obligation for tenderers to also include the elements from this paragraph when providing their explanation for an abnormally low bid. Furthermore, in order to meet the principle of transparency, Contracting Authorities should be obliged to clearly and unambiguously explain their reasons for accepting the explanation given when accepting the explanation of an abnormally low tender in the Tender Inspection and Evaluation Report, taking into account all elements of Article 289(2). of the Public Procurement Act of 2016.

### **Subparagraph 2 – Methods of proof, Article 265**

Current provisions of the Public Procurement Act 2016:

*(1) The public contracting authority is under obligation to accept the following as sufficient evidence that there are no grounds for exclusion:*

*1. an extract from the criminal record or other appropriate register or, if that is not possible, an equivalent document of the competent judicial or administrative authority in the country of establishment of the economic operator, or the country where the person has citizenship, proving that there are no grounds for exclusion from Article 251 paragraph 1 of this Act*

*2. a certificate from the tax administration or other competent body in the country of establishment of the economic operator proving that there are no grounds for exclusion from Article 252, paragraph 1 of this Act*

*3. a certificate from the court register, the commercial court, or other competent body in the country of establishment of the economic operator proving that there are no grounds for exclusion from Article 254, paragraph 1, item 2 of this Act*

*(2) If the country of establishment of the economic operator, or country where the person has citizenship, does not issue documents from paragraph 2 of this Article, or does not encompass all the circumstances from Article 1, paragraph 251, Article 1, paragraph 252 and Article 1, paragraph 254, point 1 of this Act, they may be replaced with an affidavit or, if the affidavit does not exist under the legislation of the mentioned country, they may be replaced by the provider's statement certified by a competent judicial or administrative authority, public notary, or a professional or trade body in the country of establishment of the economic operator, or the country where the person has citizenship.*

### **Explanation and AmCham's proposed amendments:**

For the public contracting authority to be able to accept an affidavit as evidence of the above, they must first determine whether the documents referred to in paragraph 1 of this Article are issued in the country of establishment of the economic operator or the country of which the person is a citizen, or whether they cover all circumstances referred to in Article 251. paragraph 1, Article 252, paragraph 1, and Article 254, paragraph 1, item 2 of the Public Procurement Act of 2016. Only if this is not the case, they can be proved by an affidavit or, if an affidavit does not exist under the law of the country concerned, by the provider's

statement certified by the competent judicial or administrative authority, notary, or a professional or trade body in the country of establishment of the economic operator, or the country where the person has citizenship.

In the case of an economic operator that is not established in the Republic of Croatia, or a person who is not a citizen of the Republic of Croatia, according to Art. 269 of the Public Procurement Act of 2016, the contracting authority shall use the e-Certis system to obtain information on the types and forms of evidence and the competent authorities issuing them in the Member States and is obliged to request primarily those types and forms of evidence covered by the e-Certis system, if the data in the e-Certis system are up-to-date. In practice, it is very challenging for public contracting authorities to identify the relevant evidence using e-Certis, especially in a clear and unambiguous way, while many countries are not covered by e-Certis at all, so the public contracting authorities are often forced to write to State Embassies, which sometimes do not respond at all to these types of inquiries, and when they do provide answers, they are often not precise, or those Embassies declare that they do not know the answer to the question, etc. In this case, the public contracting authority is in a very unfavorable position, and the Public Procurement Act of 2016 does not offer a way out from this situation, for which the public contracting authority is not at fault; they have taken all the steps they are able to, but they are still under the threat of an appeal or a financial correction if the public procurement procedure in question is co-funded by the EU.

Furthermore, it is necessary to include a provision in the Public Procurement Act of 2016 that will protect the public contracting authorities in the previously described situations, so it is proposed to add paragraph 3 to Art. 265, which will stipulate that, if for justified reasons, after taking all available options, the public contracting authority is not able to clearly and unequivocally determine which evidence is appropriate in each country, it may accept an affidavit as appropriate evidence or, if the affidavit does not exist under the law of the country in question, a statement from the issuer certified by the competent judicial or administrative authority, notary, or a professional or trade body in the country of establishment of the economic operator or the country where the person has citizenship.

### **SECTION C CONTRACT TERMINATION, Article 322**

Current provisions of the Public Procurement Act 2016:

*The contracting authority is obliged to terminate the public procurement contract during its duration if:*

- 1. the contract was significantly amended, which would require a new procurement procedure under Article 321 of this Act*
- 2. the contractor had to be excluded from the public procurement procedure due to the existence of grounds for exclusion referred to in Article 251, paragraph 1 of this Act*
- 3. the contract should not have been awarded to the contractor due to a serious breach of the obligations under the Founding Treaties and Directive 2014/24/EU, as*



*established by the judgment of the Court of Justice of the European Union in the Article 258 procedure of the Treaty on the Functioning of the European Union*

*4. the contract should not have been awarded to the contractor due to a serious violation of the provisions of this Act, which was determined by a final judgment of the competent administrative court.*

#### **Explanation and AmCham's proposed amendments:**

If the public contracting authority sought an explanation of a tenderer's abnormally low price during a review and evaluation and they accepted the tenderer's explanation, given that they are obliged to control whether the performance of the public procurement contract is in accordance with the conditions specified in the Procurement Documentation and the selected bid pursuant to Art. 313 of the Public Procurement Act of 2016, if during the performance of the contract it appears that the selected tenderer is not fulfilling the contract properly because they offered an abnormally low tender, and in their explanation, they presented untrue allegations, the untruthfulness of which has been determined by the contracting authority only during the performance of the contract, it is proposed to legally allow the contracting authority to terminate the contract for this reason.

In addition to the above, it is proposed to add item 5 to Article 322, which will stipulate that the contracting authority is obliged to terminate the contract during its duration if during the performance of the contract it is proven that the selected tenderer offered an abnormally low price, i.e. that untrue allegations were presented in the explanation.

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