

Improving the Authority of the Institutions in the Public Procurement System

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

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Introduction

The Public Procurement Act (Official Gazette 120/2016 "ZJN 2016") determines the essential distinction between the competences of the public procurement procedures: the central state administration body responsible for public procurement policy, the State Commission for the Supervision of Public Procurement Procedures, and the High Administrative Court.

Apart from the aforementioned "main" distinction between the competences of public procurement procedure which is in its entirety financed by the State Budget of the Republic of Croatia, the processes carried out under the projects co-financed or financed by the EU funds include numerous specificities, firstly because the contracting authority is subject to double checks; through the main public procurement institutions, the State Commission for the Supervision of Public Procurement Procedures and the High Administrative Court, as well as through the ex-ante and ex-post controls of the competent intermediate bodies, managing authorities and various audits, which was also confirmed by the practices of the State Commission for Supervision of Public Procurement Procedures, as described below.

In this position paper, the American Chamber of Commerce in Croatia would like to draw attention to the problems related to the competence of the institutions faced by the contracting authorities and tenderers and suggest ways to improve and modify the system.

Relevant Institutions in the Public Procurement System

As stated in the introduction, public procurement procedures which are entirely financed by the State Budget of the Republic of Croatia are related to three main institutions:

- Directorate for Trade and Public Procurement Policy, under the Ministry of Economy and Sustainable Development
- State Commission for Supervision of Public Procurement Procedures (hereinafter: State Commission)
- High Administrative Court (hereinafter: HAC)

Directorate for Trade and Public Procurement Policy, among other things, deals with drafting laws and regulations, implementing development measures and improving the public procurement system, delivers opinions on the means of prevention or elimination of irregularities, and collects, records, processes, and analyzes the observed irregularities in order to take measures to implement the

public procurement regulations properly and consistently, provides professional assistance regarding the implementation of the regulations, supervises the implementation of the Public Procurement Act and is responsible for preparing and conducting training in public procurement.

State Commission for Supervision of Public Procurement Procedures is an independent and autonomous state authority competent for addressing claims in public procurement procedures, concession grants, and selection of private partners in Public-Private Partnership projects.

High Administrative Court is competent for decision-making in administrative disputes against the decisions of the State Commission.

Additionally competent institutions for public procurement procedures as part of projects co-financed by the EU

In the public procurement procedures that are conducted within projects which are co-financed or financed by the European Union, the contracting authorities are “subject” to double competence; the State Commission makes decisions in appeal proceedings, and the **Bodies in the system of management and control of the ESI funds** (MRDEUF, CFCA, HAMAG-BICRO... etc.) control the implementation of the EU projects in which the management and responsibility are transferred to the Republic of Croatia through ex-ante and ex-post supervision carried out by authorities. Ex-ante (prior) control is a check of the Procurement Documentation prior to initiating the public procurement procedure, whereas ex-post (posterior) control is a check of the Procurement Documentation, the conducting of the public procurement procedure, the contracting procedure, and the potential appendices to the contracts.

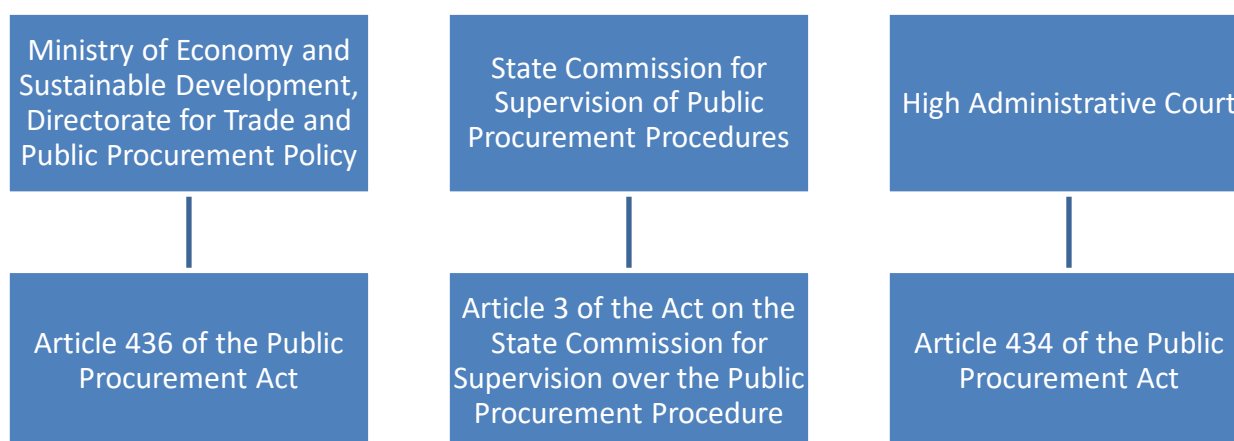
That double-checking causes problems for the contracting authorities as, although intermediate bodies execute the ex-ante control of Procurement Documentation, it is never an official position; they serve as non-binding recommendations and the contracting authority may still incur a financial correction for items in the Procurement Documentation. Furthermore, the fact that the Procurement Documentation has gone through an ex-ante control executed by the intermediate body does not guarantee that the State Commission will not find faults in the Procurement Documentation, and vice versa.

Alongside the abovementioned, after the ex-post control, certain projects are subject to additional control performed by an Audit Authority or various audit missions conducted by the European Commission. The legal framework of these controls is described below.

Current Legal Framework

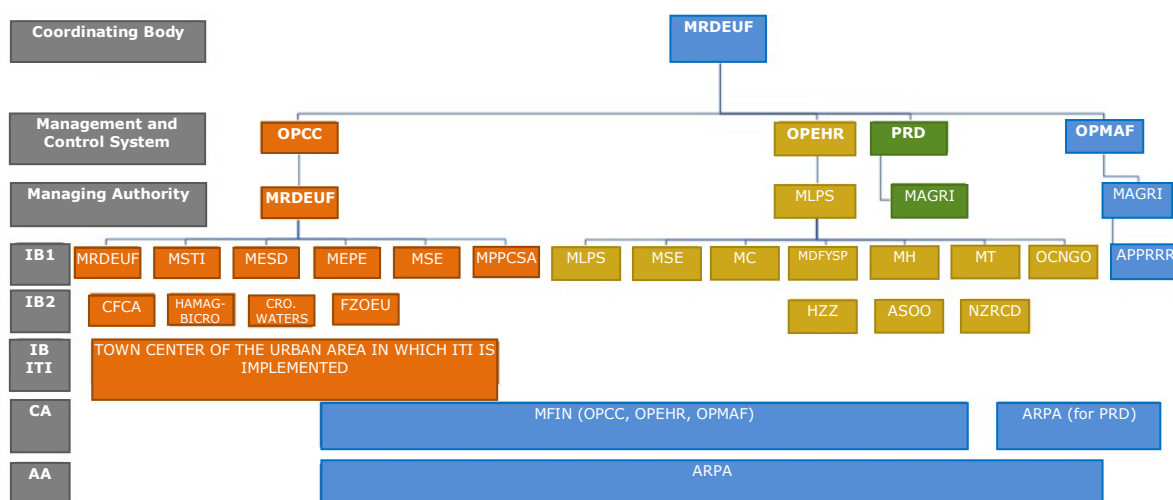
Administration, State Commission for Public Procurement Procedures, High Administrative Court

The competences of the central state administration body responsible for public procurement policy (Administration) and the High Administrative Court are defined in the Public Procurement Act (ZJN 2016), whereas the competence of the State Commission is described in the Act on the State Commission for Supervision over the Public Procurement Procedure.



The Managing Authority, Intermediate Bodies, Audit Authority

Institutional Framework for (operational) programs in the financial period 2014-2020



IB1 - Intermediate Body Level 1
IB2 - Intermediate Body Level 2
IB ITI - Intermediate Body for ITI

CA - Certifying Authority
AA - Audit Authority
ARPA - Agency for the Audit of European Union Programmes Implementation System

ASOO - Agency for Vocational Education and Training
NZRCD - National Foundation for Civil Society Development
APPRRR - Agency for Payments in Agriculture, Fisheries and Rural Development

Source: <https://strukturnifondovi.hr/wp-content/uploads/2019/01/Organigram.jpg>

Competence of the bodies in the system is not defined in the Public Procurement Act, but in Article 5(1) of the **Regulation on the bodies in the system** of management and control of utilizing the European Social Fund, European Regional Development Fund, and the Cohesion Fund, related to the objective "Investment for Growth and Jobs" (OG 107/14, 129/15, 15/17, 18/17; hereinafter: Regulation)¹ The **Ministry of Regional Development and European Union Funds** performs the function of the Managing Authority (MA) for the Operational Program Competitiveness and Cohesion, financed by the ERDF and the Cohesion Fund.

The above Regulation was adopted based on the **Act on the Establishment of the Institutional Framework** for the Implementation of Structural and Investment Funds in the Republic of Croatia in the financial period 2014-2020 (OG 92/14)²; Article 5(3)(3) of the Regulation sets out that the MA adopts the guidelines on, among other things, the management of irregularities, while Article 5(3)(10) of the Regulation prescribes that the Managing Authority instructs the Level 1 Intermediate Body (IB1) and Level 2 Intermediate Body (IB2) on implementing the delegated functions which ensure that the operations contribute to reaching specific aims and

¹ <http://www.propisi.hr/print.php?id=13248>

² <https://www.zakon.hr/z/734/Zakon-o-uspostavi-institucionalnog-okvira-za-provedbu-europskih-strukturnih-i-investicijskih-fondova-u-Republici-Hrvatskoj-u-razdoblju-2014-2020>

results of the relevant priority axes, as well as supervises the implementation of these functions.

Pursuant to the Regulation, the legal entity with public authority competent for auditing the system of implementation of the European Union programs is the Audit Authority. The role of the Audit Authority in the Republic of Croatia is performed by the **Agency for the Audit of European Union Programmes Implementation System (ARPA)**, founded by the Republic of Croatia. The founding rights and duties are exercised by the Ministry of Finance. ARPA produces and delivers annual audit reports and audit opinions to the services of the European Commission, reporting on the effectiveness and efficiency of the EU funds management and control system in the Republic of Croatia, as well as on the validity, accuracy, and legality of all accounting records and executed transactions. That makes ARPA, as the Croatian Audit Authority, directly accountable to the European Commission, while protecting the financial interests of the Republic of Croatia and the European Union.

In addition, public procurement procedures performed as part of projects co-financed by the EU are subject to other audits, for example, those performed by **the auditors from the European Commission** and in compliance with the provisions of the Regulation EU No 1303/2013³ of the European Parliament and of the Council of 13 December 2013, which, among other things, prescribes that the Commission is authorized to perform field audits and checks, focused on the matters of good financial management, in order to make conclusions on the performance of the ESI funds, as well as that the Commission should be able to review the audit trail of an Audit Authority, or participate in the audits performed by the Audit Authority on the spot. Alongside the aforementioned, to that effect, the Regulation (EU, Euratom) 2018/1046⁴ of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union is also applicable.

Therefore, in the process of determining the irregularities, the intermediate bodies must act in compliance with the instructions, opinions, and directions of the MA. In that respect, the MA has, among other things, adopted instructions which are binding for the bodies in the system in their adoption. Their latest version is:

- Instructions of the Managing Authority for the management of the irregularities in the Operational Program "Competitiveness and Cohesion 2014-2020", version 1.0. of March 25, 2021⁵

prior to which, the version of the instructions below was in effect:

³ <https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32013R1303&from=et>

⁴ <https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32018R1046&from=HR>

⁵ <https://strukturnifondovi.hr/wp-content/uploads/2021/03/Upute-upravljackog-tijela-za-upravljanje-nepravilnostima-u-Operativnom-programu-Konkurentnost-i-kohezija-2014-2020-ver-1.0.pdf>

- Summary of the Instructions of the Managing Authority for the management of the irregularities in the Operational Program “Competitiveness and Cohesion 2014-2020”, version 2.0., of June 2019⁶

The numerous regulations that describe the competence of the bodies in the system, their complexity, and inconsistency of practices put the Beneficiaries of the Grant Agreements at a disadvantage and create legal uncertainty.

⁶ <https://strukturnifondovi.hr/wp-content/uploads/2017/05/Sa%C5%BEEti-pregled-uputa-Upravlja%C4%8Dkog-tijela-za-upravljanje-nepravilnostima-u-Operativnom-programu-Konkurentnost-i-kohezija-2014.-2020.-verzija-2.0.pdf>

Implementation and Procedural Issues and Examples of the Inconsistent Practice of the Competent Institutions

Participants in public procurement procedures face various challenges in distinguishing competences of all the institutions on a daily basis, with the inconsistency of practice, multiple checks of the legality of the procedures, while the instructions received by different participants in the system are not consistent. The Beneficiaries of the Grant Agreements face further issues regarding additional controls and inconsistent instructions by competent authorities.

Directorate-State Commission

One of the first notable specificities is the division of competence between the Directorate for Trade and Public Procurement Policy (hereinafter: Directorate) and the State Commission in providing opinions.

The Directorate provides professional assistance to the contracting authorities and tenderers related to implementing the regulations through giving opinions. The practice of giving opinions is a significant help to both tenderers and contracting authorities, as the on-call advisors respond within a very short period of time (usually within 24 hours), so participants in public procurement have professional and high-quality advisors at their disposal, provided by the institution that has written the law. In most cases, the responses that the tenderers and contracting authorities receive serve as good guidelines for further conduct. The problem arises because these opinions are non-binding and can serve only as auxiliary materials in clarifying certain questions which arise during the public procurement procedures.

Unfortunately, the Directorate's opinions are non-binding for the State Commission. The Directorate's website contains a disclaimer, stating that: *"the interpretations that they [opinions] contain cannot prejudge the course and outcome of certain procedures, such as the legal protection procedure in the public procurement system."*

In this way, participants of the public procurement procedures can never know whether the State Commission will interpret the Act in the same way the Directorate does.

On the other hand, it is impossible to request a binding opinion from the State Commission. Because of this, the contracting authorities and the tenderers can only appeal or search for similar cases in the practices of the State Commission, HAC, or the European Court of Justice.

To that end, numerous agencies and service providers have appeared in the market, which provide search capabilities for decisions of the State Commission and the HAC in a systematic and user-friendly way. Also, the State Commission is working on improving access to information on its website. This facilitates the work of public procurement participants to a great extent, but the fact remains that the opinion received from the makers of the law is non-binding, while the opinion of those who decide on the implementation of the law cannot be obtained in any other way but via appeals.

This problem has occurred due to the fact that the Directorate currently lacks the capacity to implement everything that has been allocated to it under the public procurement regulations. The lack of practice regarding the administrative supervision in the implementation of public procurement procedures and the institution of infringement proceedings for breaches of the ZJN also force both contracting authorities and tenderers to comply with the practice of the State Commission and the HAC, when it comes to addressing the issues.

Namely, the published annual statistical reports on public procurement and case registers of the State Commission show that the Directorate, alongside these functions, has no capacity to implement administrative supervision, to institute infringement proceedings for breaches of provisions of the Public Procurement Act, and to appeal in those public procurement procedures where that would be necessary for the protection of public interest. The annual statistical report on public procurement 2020 states that the Directorate has, over the course of the year, conducted 112 controls by reviewing Electronic Public Procurement Advertisement of the Republic of Croatia and pressed only 8 charges to the competent misdemeanor courts. The case registers of the State Commission show that the Directorate has taken only two appeals in 2012. Alongside the existing duties, the Directorate is active in the meetings of the bodies in the system of management and control of the utilization of ESI funds, as the majority of resources from the ESI funds is spent either through public procurement procedures or according to the applicable rules for the non-purchasing organizations (NPO), which follow the public procurement principles. The potential matters from the public procurement domain should be addressed by the Directorate as the institution that makes the ZJN.

However, the division of competence between the State Commission and the Directorate represents a significantly smaller problem compared to the division of competence between the State Commission and the HAC and the inconsistency of their practices.

State Commission – HAC – Bodies in the system of management and control of the EU funds

There are two types of problems in the relation State Commission – HAC – Bodies in the system of management and control of the EU funds:

1. PRACTICAL PROBLEMS (Non-suspensive appeals)

Non-suspensive appeals to the decision of the State Commission and the real possibility of the (illegally) selected tenderer executing the agreement. When the HAC adopts a claim against a decision of the State Commission and annuls the decision with a judgment, then decides on the appeal in the public procurement process, it can result in the annulment of the Procurement Documentation or the Decision on the selection. That should take the procedure back a stage, but in reality, the agreement has probably already been concluded with the previously selected tenderer and there is a strong possibility that the agreement has been partially, if not completely, performed. In the case of a successful appeal, the contracting authority will always be able to annul the tender, as the offers no longer meet the needs of their contracting authority (especially regarding works and services contracts). Although the appellant has a theoretical opportunity of claiming compensation, such procedures will always be uncertain and long.

2. PROBLEMS ARISING FROM THE INCONSISTENCY OF PRACTICE

In the procedures that are co-financed or financed by the EU, frequent problems are amending the practice of the State Commission based on the judgments of the HAC and the real possibility for the Beneficiaries of the Grant Agreement of receiving financial corrections, even though they have acted fully in accordance with the practice of the State Commission and the HAC, which was valid at the time of the execution of the single public procurement procedure.

As previously highlighted, there are certain inconsistencies in the practices of the authorities for the interpretation and control of public procurement procedures in the Republic of Croatia. This is especially disadvantageous for public contracting authorities that are Beneficiaries of Grant Agreements, given that the public procurement procedures that they conduct are prone not only to potential appeals on which the State Commission or the HAC decides, but also subject to potential financial corrections following the ex-post control performed by the bodies in the system of management and control, which are mostly Level 2 Intermediate Bodies (shown in the figure above). Namely, in the Decision of September 15, 2020, briefly described under **Example 1** in Annex 1 of this document, the State Commission clearly stated that the practice of the intermediate bodies, i.e. bodies in the system of management and control, is more strict than the Public Procurement Act itself.

Consequently, the unavoidable question is whether the Beneficiaries of Grant Agreements will be penalized with a financial correction, mostly determined in the amount of 25% of the value of the agreement, even though they acted fully in

accordance with the practice of the State Commission and the HAC, which was valid at the time of the execution of individual public procurement procedures and was later amended?

Example 2 from Annex 1 shows a concrete example of the worrying disbalance in the recent practice of the State Commission and the HAC, reflecting on the ways in which this and similar situations will affect the contracting authorities which are also Beneficiaries of Grant Agreements.

Article 293 of the ZJN 2016 prescribes that if the information or documentation that was to be delivered by an economic operator is incomplete or faulty or seems to be so, or if certain documents are missing, the public contracting authority may, in compliance with the principles of equal treatment and transparency, request from the economic operators concerned that they complement, clarify, complete or deliver the necessary information or documentation within an appropriate term not shorter than five days, whereby such action should not lead to negotiations regarding the criterium for the selection of the offer or the offered subject of procurement.

In a Judgment of **July 16, 2020**, described in detail under Example 2, the HAC determined that completing the references on the basis of Article 293 of the Public Procurement Act 2016 which had not been stated in the offer is not permitted and the State Commission issued several Decisions to that effect. Then, in a Judgment of **December 10, 2020**, which was delivered to the State Commission as late as March 3, 2021, the HAC stated that completing the references that had not been stated in the offer was permitted after all, which implies that the State Commission wrongly interpreted the Judgment of July 16, 2020, and in its practice applied the aspect of reviewing and rating the offers, as well as numerous public contract authorities and tenderers who keep up-to-date with the practices of the HAC and the State Commission.

The practices of the State Commission after the Judgment of the HAC of July 16, 2020

In light of the abovementioned Judgment that annulled the Decision of the State Commission, the latter adapted its practices and, in numerous further decisions, referring to the Judgment of July 16, 2020, did not accept the completion of references that had not been stated in the offer, which was the case with the decisions from **Examples 3, 4, 5, and 6**, described in detail in Annex 1 to this document.

However, as highlighted above, in its Judgment of December 10, 2020, delivered to the State Commission over 3 months overdue since the date it was adopted, the HAC determined that completing the references that had not been stated in the offer was permitted after all, based on Article 293 of the ZJN 2016, and the Judgment concerned is described in **Example 7** in Annex 1 to this document.

The demonstrated examples of the State Commission's decisions show that there are numerous cases where the State Commission adopted a decision, basing it on,

among other things, the HAC's judgment of July 16, 2020. It brings the question of what happens with the agreements concluded following such a decision, which have perhaps even been fully performed, while there is a possibility that an entirely different tenderer was supposed to be selected?

Another important question that arises is whether the contracting authorities will receive a financial correction from the system bodies following their choice of tenderer based on the practice of the State Commission, or the HAC, which was valid at the time of the implementation of the single public procurement procedure, but which was later amended, considering that they are obliged to take into account the practice of the State Commission and HAC, but on the other hand, the Rules on financial corrections are undoubtedly more strict than the ZJN 2016.

It is evident that this should not be the case and that legal uncertainty is at a worryingly high level regarding public procurement procedures in the Republic of Croatia, especially those conducted as part of the projects co-financed by the EU funds, so it is necessary to promptly take appropriate measures and action in order to unify the practices of the competent authorities and the interpretation of the ZJN 2016 at the state level, as well as to prevent the Rules on financial corrections, adopted by the Ministry of Regional Development and European Union Funds of the Republic of Croatia, from being more strict than the Public Procurement Act. Also, the findings of the State Commission, the HAC, and the bodies in the system should be consistent, which is not always the case.

The State Commission – Bodies in the management and control system of the EU funds

The main issue in distinguishing the State Commission and the Bodies in the management and control system of the EU funds lies in the aim of their activity. The State Commission's task is the protection of the legal interests of the contracting authority and the tenderer, whereas the main task of the bodies in the management and control system is the protection of financial resources of the European Union.

The problems are notable in all stages of the procedure, both during the prior control (ex-ante control) and during the posterior control (ex-ante control) of the entire procedure.

EX-ANTE (prior) CONTROL

An ex-ante control of the documentation is prescribed by the Decision of the Government of the Republic of Croatia on the obligation to conduct a prior (ex-ante) control of public procurement as part of the projects intended to be co-financed and co-financed from European Structural Investment Funds in the financial period 2014-2020⁷

⁷ https://narodne-novine.nn.hr/clanci/sluzbeni/2018_09_87_1709.html

Even though the intermediate bodies execute the ex-ante (prior) control of the Procurement Documentation, they never assume an official position, but rather issue non-binding recommendations meaning that the contracting authority may still incur a financial correction for the Procurement Documentation. Also, the fact that the Procurement Documentation has gone through an ex-ante control performed by the intermediate body does not guarantee that the State Commission will not find fault with the Procurement Documentation. In that respect, there are also the State Commission's Decisions that show the disbalance between the opinions of the CFCA and the State Commission, for example:

- CLASS: UP/II-034-02/17-01/746, REG. NO.: 354-01/17-8 of December 4, 2017⁸ (*the appeal is founded and a part of the Procurement Documentation is annulled, while the contracting authority states in the response to the appeal that the Procurement Documentation had, prior to publication, been subject to an ex-ante control performed by a Level 2 Intermediate Body for the control of these procedures, and that no irregularities were found*);
- CLASS: UP/II-034-02/20-01/403, REG. NO.: 354-01/20-11 of July 17, 2020⁹ (*the appeal is founded and a part of the Procurement Documentation is annulled, while the contracting authority states in the response to the appeal that during the preparation of the Procurement Documentation, the rules prescribed by the Central Finance and Contracting Agency (CFCA) were followed*).

EX-POST (posterior) CONTROL

According to the ZJN 2016, a public procurement procedure should end in the enforceability of the Decision on the selection/annulment and, in case of no appeals, it should be finished. However, if the public procurement procedure is being conducted as part of an EU project, then the contracting authorities are exposed to potential financial corrections following the provisions of the annex to the Grant Agreement, relating to determining financial corrections. Contracting authorities may during the ex-post control be penalized, among else, for the aspects which the tenderers and/or the State Commission did not find problematic, for example:

- Prescribing the conditions of ability which the IB2 evaluates as excessive, such as requesting more than 5 years of specific experience in a certain area, etc. (the maximum adequate number of years varies from one case to another, according to the evaluation of the IB2);
- Evaluating the use of organization and methodology from the ENP as problematic and always overly subjective, even though the ZJN 2016 clearly allows the application of such a criterium;

⁸ <http://pdf.dkom.hr/17401.pdf>

⁹ <http://pdf.dkom.hr/dokumentit/202007231418578264.pdf>

- Not extending the deadline for delivery of the offers / not publishing amendments to the Notice on competition when the amendment is not significant, when the IB2 evaluates that it was significant, i.e. that the deadline should have been extended even when there is a Decision by the State Commission according to which the State Commission confirms that there were no such breaches;
- Proving that there are no grounds for the exclusion of foreign nationals – evaluating the fact that the contracting authority had not requested a certificate prior to the availability of eCertis, but accepted a statement in respect of proving that there are no grounds for exclusion from Article 251 and 252 of the ZJN 2016, when the IB2, years after the finalization of the public procurement procedure based on the insight into eCertis, determines that the certificate of the competent authority was necessary, even though there is the State Commission’s Decision for the concrete public procurement procedure in which essential breaches have not been found;
- Including brands in the technical specifications of a product alongside the statement “or equivalent” and a description of the equivalence assessment criteria – based on the reasoning that the criteria for equivalence being described proved that it was not necessary to state the brand;
- Lateness in delivering the guarantee for a duly completed agreement (instruction from the MA: *In respect of the abovementioned, it is instructed that the implementation of the following is necessary to reach a decision on irregularities: for late delivery of up to 8 days, the Managing Authority deems that it is not necessary to establish a financial correction; for a late delivery of 9 to 20 working days, it is necessary to establish a financial correction as high as 5% of the amount of the agreement; for a late delivery over 20 working days, it is necessary to establish a financial correction as high as 10% of the amount of the agreement*);
- The use of the negotiation process / project tender, even when the ZJN 2016 allows it, is evaluated as problematic, as it is believed that the market is being restricted in the process;
- Evaluating the request for a certified translation of the documents that have been delivered in a foreign language in the offer with both purchasing entities and non-purchasing organizations of the ZJN (NPOs) as contrary to the ZJN 2016; *INSTRUCTION FROM THE MA: the point concerned applies to the NPOs, as well. Despite the fact that the Rules of the NPOs do not standardize expressly the matter of the language of the offer, as well as the matter of the acceptability of requesting a court certified translation, the NPOs are obliged to respect the basic principles of public procurement, therefore, there are no obstacles for this point to apply to the NPOs, as well.*

The MRDEUF acting as the Managing Authority and the CFCA together with other Intermediate Bodies (IB2) publish their instructions and guidelines on the correct procedure.

The most detailed are CFCA's instructions¹⁰ are those that change periodically and show the CFCA's attitudes on certain matters of public procurement procedures. These instructions are informal and non-binding and the CFCA publishes them for informative purposes and is still able to determine a correction for something that has previously been suggested in their instruction if it changes in their practice later.

A further problem are the Rules on financial corrections¹¹ adopted based on the COCOF Guidelines on the Irregularities at the EU level, which are more strict than the instructions in some aspects. The previous version of the COCOF *Guidelines*¹² for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement is applicable for certain older Grant Agreements, while currently, the only valid version of the COCOF Guidelines¹³ is the one (available only in English) from May 2019.

Recommended Solutions for Identified Problems

The final aim is the harmonized and complementary functioning of the institutions competent for public procurement procedures in the Republic of Croatia. The State Commission, the HAC, and the bodies in the system must be harmonized, as the contracting authorities are currently facing significant legal uncertainty, especially those who are the Beneficiaries of Grant Agreements, which often leads to significant financial consequences for the contracting authorities required to apply the ZJN, as well as the contracting authorities not required to do so (private entities).

Regarding the bodies in the system, AmCham deems it necessary:

- to regulate by means of the law that the bodies in the system cannot be more stringent than the Public Procurement Act itself and that the ex-ante and the ex-post controls must comply with the relevant practices of the State Commission and the HAC;
- to harmonize the practice of the bodies in the system so that it complies with the decisions of the State Commission and the HAC, and that it is not more strict than these, and, in that respect, to improve the direct communication between the bodies in the system with the State Commission and the HAC;

¹⁰ <https://www.safu.hr/datastore/filestore/10/Najcesce-pogreske-JN-05.11.2021.pdf>

¹¹ https://strukturnifondovi.hr/dokumenti/?doc_id=549&fondovi=esi_fondovi

¹² https://ec.europa.eu/regional_policy/sources/docoffic/cocof/2013/cocof_13_9527_annexe_hr.pdf

¹³

https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/GL_corrections_pp_irregularities_annex_EN.pdf

- to update the Rules on financial corrections making sure that they are not in any sense more strict than the Public Procurement Act or the COCOF Guidelines;
- to publish the results of the ex-ante controls in the form of a document with an overview of the determined facts, which will be binding for the bodies in the system, since the current manner of ex-ante control, in which the Beneficiaries receive Procurement Documentation with very many comments, many of which relate to the implementation stage, is not efficient for any stakeholder in the process of the ex-ante control;
- to ensure that the contracting authorities cannot receive financial correction for the provision of the Procurement Documentation that has been evaluated as acceptable during the ex-ante control;
- to not determine financial corrections for the contracting authorities following later changes in the practice of the State Commission or the HAC in those cases when the contracting authorities complied with the practice valid at the time.

Regarding the Directorate for Trade and Public Procurement Policy and the State Commission for Supervision of Public Procurement Procedures, it is suggested that:

- the State Commission introduce the option of giving legal positions at the request of the party, which will ensure predictability in the acting of the State Commission;
- the capacities of the Directorate for Trade and Public Procurement Policy are strengthened by including the Directorate or a part of its employees into the System of management and control in the announced amendments to the institutional framework for the use of EU funds under shared management starting from the financial period 2021-2027 based on the fact that the EU funds are used whether in public procurement procedures or according to the Rules for the non-purchasing organizations in public procurement, which would provide stimulative work conditions to existing and future employees of the Directorate.

Regarding the State Commission and the HAC of the Republic of Croatia, AmCham suggests the following:

- the publication of the Decisions of the State Commission and the Judgments of the HAC in the form that can be searched digitally;
- strict compliance with the deadline of 30 days in the giving of judgments, as in practice it is often the case that when the HAC gives a judgment, the agreement is already being implemented, which results in the inability to execute the agreement according to the conditions already agreed;
- writing more clear statements in the judgments and improved communication with the State Commission, in order to avoid the State Commission misinterpreting judgments and cases in which judgments are not received for three months since they were given, etc.

Annex – Overview of the Relevant Practices

Example 1

From the Decision of the State Commission of September 15, 2020¹⁴ (CLASS: UP/II-034-02/20-01/619, REG. NO.: 354-01/20-5), the appellant disputes the legality of the criteria for the selection of the offer from the Procurement Documentation in which the contracting authority evaluates the experience of the experts in performing the services of preparing and conducting the public procurement procedures of works, services or supplies **co-financed or financed by the EU funds**, conducted in compliance with the Public Procurement Act, which, according to the interpretation of the appellant, puts at a disadvantage all experts that conducted public procurement procedures according to the ZJN 2016, but which are not (co-)financed by the EU funds. In their response to the appeal, the contracting authority states that the preparation and the conducting of the public procurement procedures as part of the implementation of the projects (co-)financed by the EU funds are performed in accordance with the ZJN 2016, but that there are certain specificities, **mostly due to the ex-ante and the ex-post controls** by the competent intermediate authorities and **due to being subject to financial corrections**. The contracting authority also points out that **the Rules on financial corrections are an integral part of any Grant Agreement**, applied in the implementation of the project, which is why the **contracting authority** in the public procurement procedures conducted as part of the EU projects **is subject to double checks**. **The State Commission** evaluates this appeal as **unfounded** and determines that **the appellant's interpretation that there are no differences between public procurement procedures conducted as part of the EU projects and those unrelated to the EU projects is unacceptable**, given that the public procurement projects that are conducted as part of projects (co-)financed by the EU funds **are subject to the rules which do not apply** in the public procurement procedures that are fully financed by the State Budget of the Republic of Croatia, first and foremost **due to the participation of the Intermediate Bodies and susceptibility to financial corrections**.

Example 2

The HAC's Judgment of July 16, 2020 – references may not be completed during review and evaluation of the offer

In the Judgment of the HAC of July 16, 2020¹⁵, case number: UsII-200/20-6 (received on July 28, 2020 by the State Commission) the Decision of the State Commission is annulled CLASS: UP/II-034-02/20-01/181, REG. NO.: 354-

¹⁴ <http://pdf.dkom.hr/dokumentit/202009301240381189.pdf>

¹⁵ <http://pdf.dkom.hr/dokumentit/202007291317328901.pdf>

01/20-7 of April 21, 2020 Decision on selection for Group 3. The appellant deems that requesting from the selected tenderer to deliver a newly filled in ESPD form is contrary to that permitted under Article 293 of the ZJN, as it must not lead to a new offer. The defendant (the State Commission) in the response to the appeal points out that in the concrete case, by applying the procedure from Article 293 of the ZJN, the offer has been amended by introducing new elements. The HAC determines that the appeal is founded, as, in order for the amending of information from the initial offer to be permitted, the information must be incomplete or incorrect, or seem to be so, or it must be the case that some documents are missing, **therefore, introducing new elements into the offer, which lead to a different offer than the initial, crosses the line of the permitted conduct on the contracting authority's part, that is, with regard to Article 293 of the ZJN.**

Example 3

From the Decision of the State Commission of September 18, 2020¹⁶ (CLASS: UP/II-034-02/20-01/615, REG. NO.: 354-01/20-8), which was annulled following the Judgment of the HAC of December 10, 2020 described below, the appellant states that the contracting authority did not accept the subsequently delivered list of contracts containing eight additional contracts, delivered based on the request for clarification. The State Commission determines that, after the request from the contracting authority based on Article 293 of the ZJN 2016, the appellant delivered a new ESPD form, which, as evidence of technical and professional ability requested according to point 23 of the Procurement Documentation, **alongside nine** contracts/services stated in the offer, they **added eight new** contracts/services. Regarding the explained circumstances, the State Commission evaluates that the appellant's **addition of new contracts/services to the offer**, which contained nine contracts/deliveries according to Article 293 of the ZJN 2016, **was not permitted**, as the information in the offer in this concrete case was not incomplete or incorrect, according to Article 293 of the ZJN 2016, but that they represented the expression of the appellant's will to submit that exact offer. In such circumstances, it was evaluated that the contracting authority acted **properly in not accepting** the newly delivered contracts/services, therefore, the appeal was **unfounded**.

Example 4

From the Decision by the State Commission of November 13, 2020¹⁷ (CLASS: UP/II-034-02/20-01/827, REG. NO.: 354-01/20-9), the appellant states that the selected tenderer did not deliver evidence of meeting the requirements of technical ability and that it was supposed to be clear to the contracting authority from the ESPD form and the clarification of the selected tenderer that the selected tenderer does not meet the requirements of technical and professional ability. The appellant deems that by applying Article 293 of the ZJN 2016, the contracting authority unlawfully permitted the selected tenderer to modify the factual statements in the offer. The State Commission determines that the

¹⁶ <http://pdf.dkom.hr/dokumentit/202009291415509918.pdf>

¹⁷ <http://pdf.dkom.hr/dokumentit/202011271218107948.pdf>

appeal is **founded** and that the introduction of new elements into the offer, which leads to a different offer than the initial one, crosses the line of permitted conduct under Article 293 of the ZJN 2016. The State Commission points out that the legal position is **compliant with the legal position of the High Administrative Court of the Republic of Croatia, expressed in the Judgment, Case Number: UsII-200/20-6 of July 16, 2020.**

Example 5

From the Decision of the State Commission of November 17, 2020¹⁸ (CLASS: UP/II-034-02/20-01/749, REG. NO.: 354-01/20-13), the appellant states that the selected group of tenderers, at the request of the contracting authority, delivered a clarification of the list of main supplies shipments, under which an updated list of main shipments was delivered. The appellant deems that the contracting authority applied the provisions of Article 293 unlawfully, as the new list of references contains a list of contracts, which does not resemble the list from the initial request, since **the list of contracts was extended by means of clarifications and relates to other contracts besides those which were initially presented. The State Commission** evaluates this appeal as **founded** and **refers to the Judgment of the HAC, No UsII-200/20-6 of July 16, 2020.**

Example 6

From the Decision of the State Commission of November 26, 2020¹⁹ (CLASS:UP/II-034-02/20-01/883, REG. NO.: 354-01/20-10), the appellant deems that the technical and professional ability has been proved and that the evaluation of its offer as unacceptable by the contracting authority is unfounded, as the appellant's services provided and stated in **the subsequently delivered**, corrected ESPD forms were not taken into account by the contracting authority. The contracting authority states that they could not be accepted due to the new elements that the appellant had added into the offer, which led to an amended offer, significantly different from the initially delivered one, and whose acceptance would in this concrete case result in crossing the line of the competent authority's authorization, under Article 293 of the ZJN 2016, and **refers to the Judgment by the HAC, case number: UsII-200/20-6 of July 16, 2020.** The State Commission determines that **the appeal is unfounded** and that the contracting authority **acted properly** in rejecting the appellant's offer, deeming it unacceptable.

¹⁸ <http://pdf.dkom.hr/dokumentit/202012011436356908.pdf>

¹⁹ <http://pdf.dkom.hr/dokumentit/202012041134216760.pdf>

Example 7

Judgment of the HAC of December 10, 2020²⁰ – completing references during review and evaluation of the offers is permitted, the State Commission misinterpreted the Judgment of July 16, 2020.

Judgment of the HAC, case number: UsII-396/20-10 of December 10, 2021 (received by the State Commission on March 3, 2021) annuls the Decision of the State Commission, previously described above in Example 1; the HAC determines that the appeal is founded. The appellant states that, during the process of review and evaluation of the offer, they delivered a corrected ESPD form featuring a **new** list of contracts, where **an additional eight contracts had been added** to the previous list. All the newly delivered contracts from the complemented list **had been executed prior to the submission of the offer**. The defendant (the State Commission) in their response to the appeal deems that **the appellant's conduct crosses the line of the provision of Article 293 of the Public Procurement Act and that it represents an unlawful amendment to the offer**. According to the evaluation by the HAC, contrary to the interpretation of the contracting authority and the defendant, by delivering a new ESPD form and a new list of executed services/contracts there was no negotiation in the respect of Article 293(2) of the ZJN or any breaches of the provisions of the ZJN 2016. The HAC **does not accept the referring of the defendant (the State Commission) to the HAC's position, expressed in Judgment No. UsII-200/20 of July 16, 2020**, given that the HAC deems that this case does not involve an identical or similar factual or legal situation.

²⁰ <http://pdf.dkom.hr/dokumentit/202103031054544690.pdf>

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