The Supplier's Obligation to Report on the Performance of the Framework Agreement in Joint Procurement Procedures in Healthcare

Zagreb, November 2023

AmCham

American Chamber of Commerce in Croatia Američka gospodarska komora u Hrvatskoj

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Introduction

During the implementation of joint public procurement procedures in healthcare, in mid-2023, suppliers began to notice in the procurement documentation a provision on the supplier's obligation to deliver to the contracting authority a report on the performance of the framework agreement.

At the same time, the reporting obligation is not specified in the PD section that prescribes the conditions that the supplier must fulfill, only in the forms attached to the PD or in the section on the definition of prices.

Example:

The selected bidder shall submit to the Contracting Authority a semi-annual report on the performance of the Framework Agreement, in electronic form, for each individual User.

The report that the selected bidder shall submit must at least contain information about the User, the type and name of the delivered goods, the quantity, the unit and total prices, and must be in the form of a bill of quantities. The reports must be submitted in an electronically editable form (Excel table).

In addition to the delivery of semi-annual reports, the Selected Bidder shall also notify the Contracting Authority in writing when the total contractual obligations of all Users under the Framework Agreement reach 75% of the Framework Agreement value and after they reach the Framework Agreement value.

Given that framework agreements are concluded for a term of 2 years, such a provision creates additional obligations for an economic entity that are in no way included in the bid price.

The economic entity must:

- submit 4 semi-annual reports during the term of the framework agreement;

- control the performance of all individual contracts and when the total value of individual contracts reaches 75% or 100% of the framework agreement value;

- submit a report on the fulfillment of 75% of the framework agreement value;

- submit a report on 100% fulfillment of the framework agreement.

Pursuant to Article 313, paragraph 2 of the Public Procurement Act, the **public contracting authority** is 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.

Therefore, the obligation to control the performance of the contract/framework agreement is a legal obligation of the contracting authority, not of the bidder.

Furthermore, the Instructions for the implementation of the joint public procurement procedure issued by the Ministry of Health in May 2022 explicitly state:

"The joint contracting authority/central body is responsible for controlling the performance of the Framework Agreements concluded, the need for possible changes during their term, the receipt and control of performance guarantees, and the timely planning and initiation of a new joint procedure in order to ensure the continuity of contracts without time gaps from the expiration of the valid until the conclusion of new framework agreements for the same procurement categories."

It is unclear why, after a year of joint public procurement, the Ministry gave up its own recommendations to the central authorities and started to impose reporting obligations in joint procurement procedures in which it is the principal body[1]. In addition to its own procedures, it also began to demand the same from other central bodies in charge of joint procurement in healthcare, which is contrary to the recommendations of May 2022.

The actions the central bodies have undertaken are also inconsistent in relation to:

- bidder's requests to change procurement documentation in the part that refers to the reporting obligation;
- the Ministry of Health's instructions on the inclusion of the supplier's reporting obligation in the procurement documentation.

A number of bidders warned the contracting authorities that according to the Public Procurement Act, Article 313, it is the contracting authority's obligation to control that the performance of the contract/framework agreement is in accordance with the conditions prescribed in the documentation and, accordingly, requested the deletion of this obligation from the PD; however, the majority of the contracting authorities did not accept the request and explained that both the bidder and the contracting authority are obliged to control the performance of the contract.

Some contracting authorities saw the foundation of such an obligation in Article 11 of the Regulation on internal organization of the State Office for Central Public Procurement, which mentions the scope of work of the Department for the Management of Contracts and Framework Agreements[2]. That article states that the contracting authority is obliged to control the performance of contracts and framework agreements, but since it does not clearly define the mode of control, the contracting authorities and the State Office for Central Public Procurement believe that the

[1]Implantation material and consumables for interventional neuroradiology for healthcare institutions in the Republic of Croatia, publication number in EPPC – 2023/S 0F2-0013906;
Implantation material and consumables for invasive and interventional cardiology for healthcare institutions in the Republic of Croatia, publication number in EPPC – 2023/S 0F2-0013913;
Pacemakers with associated electrodes and additional accessories for pacemaker implantation and testing, publication number in EPPC – 2023/S 0F2-0013936

[2]Ministry of Health Implantation material and consumables for interventional neuroradiology for healthcare institutions in the Republic of Croatia, publication number in EPPC – 2023/S 0F2-0013906;
UHC Zagreb Medications in the CHIF lists with generic parallels for healthcare institutions in the Republic of Croatia I-XII, publication number in EPPC – 2023/S 0F2-0032745;
CHIF Procurement of special groups of medications, publication number in EPPC – 2023/S 0F2-0022606

mentioned provision of the Act does not exclude the possibility of imposing additional control obligations upon the bidder.

Some contracting authorities nevertheless accepted the economic entity's request[3] and removed the disputed provision from the joint procurement documentation, while some did not even include it in their documentation[4].

Although it is logical to standardize the basic provisions of procurement documentation (which are not specific to the subject of procurement) in all joint public procurement procedures, this is not the case even when the same contracting authority carries out two or more joint procurement procedures. That is, the same central authority is further inconsistent in its actions as it imposes reporting obligations in some procedures but not in others[5]. Control over the performance of the contract/framework agreement is, in fact, the responsibility of the contracting authority. It is also a fact that most contracting authorities' IT systems do not allow for the control of contract performance, so they transfer their own legal obligation to economic entities.

The fulfillment of such a reporting obligation will impose additional adaptive technical and organizational requirements on economic entities associated with significant additional unplanned operating costs.

Although the specific report template (number of rows, number of columns) is not defined, it can be assumed that drafting such a report is a very complex, time-consuming, and technically demanding job that requires data control and processing in each contract, each item of the bill of quantities, and each item of which there are dozens/hundreds. The fulfillment of this provision requires a complex IT infrastructure and significant human resources.

[3] CHC Rijeka – Reagents, tests and other consumables for laboratory diagnostics for healthcare institutions in the Republic of Croatia, publication number in EPPC – 2023/S 0F2-0029799
[4] E.g., Dubrava UH – Implantation material and consumables for neurosurgery for healthcare institutions in the Republic of Croatia, publication number in EPPC – 2023/S 0F2-0020639
[5] E.g., Sestre milosrdnice UHC – Ear implants (including artificial cochlea) for healthcare institutions in the Republic of Croatia 2023/S 0F2-0010636 – no reporting required
Sestre milosrdnice UHC – Implantation material and consumables for endoscopy and endoscopic devices for healthcare institutions in the Republic of Croatia, publication number in EPPC – 2023/S 0F2-0027112 – reporting is required

Recommendations

AmCham believes that the provisions obliging suppliers to submit reports are not in accordance with the provisions of the Public Procurement Act for the following reasons.

First of all, such provisions are contrary to the provisions of Article 313, paragraph 2 of the Act, which clearly prescribes control of the performance of contracts awarded in public procurement procedures as an obligation of public contracting authorities. Contracting authorities are not authorized to transfer such an obligation to bidders, especially not in the way that has been seen in recent public procurement practice. AmCham believes that the aforementioned clear provision of the Public Procurement Act cannot be derogated by the provision of the Regulation on the internal organization of the State Office for Central Public Procurement, a subordinate legal act.

Additionally, and as already stated, the bidders observed that reporting obligations are often not clearly stated in the PD as one of the conditions of participation but, for example, as a form attached to the PD. Such actions of the contracting authority could be considered contrary to the rules under Article 200 of the Public Procurement Act on the way of structuring procurement documentation, and at the same time, they ignore the fact that the inclusion of the reporting obligation in a particular procedure is de facto a condition for participation. That is, complying with the requirements of the reporting obligation in practice represents a significant financial, organizational, and time burden for the bidders, which they cannot adequately reflect in the pricing segment of their bids due to the aforementioned practice of PD structuring.

The inclusion of such obligations is particularly difficult for small and medium-sized enterprises. Due to the impossibility of complying with the reporting obligation and the financial and organizational burden it implies, such businesses could effectively be prevented from participating in (joint) public procurement procedures. This would violate the fundamental principles of public procurement prescribed in Article 4, paragraph 1 of the Public Procurement Act, especially the principle of equal treatment and the principle of prohibition of discrimination.

In view of all the above, AmCham proposes that provisions obliging suppliers to submit reports not be included in the procurement documentation in the future.

Annex 1:

Contracting authority	Subject of procurement	EPPC publication number	Deadline for delivery	Clause on delivery of reports	Request to delete clause accepted
Ministry of Health	Implantation material and consumables for interventional neuroradiology	2023/S 0F2-0013906	5/10/2023	Yes	No
Ministry of Health	Implantation material and consumables for invasive and interventional cardiology	2023/S 0F2-0013913	5/10/2023	Yes	/
Ministry of Health	Pacemakers with associated electrodes and additional accessories for pacemaker implantation and testing	2023/S 0F2-0013936	5/10/2023	Yes	
Ministry of Health	Consumables for medically assisted fertilization, gynecology and human reproduction	2023/S 0F2-0035583	10/9/2023	No	
Ministry of Health	Consumables for nuclear medicine	2022/S 0F2-0023686	11/22/2022	No	
Ministry of Health	Laundry procurement, rental, washing and ironing	Not published			
UHC ZAGREB	Medications in the CHIF lists that have generic parallels	2023/S 0F2-0032745	9/18/2023-9/25/2023	Yes	No
UHC ZAGREB	Other medications that are not included in the categories under numbers 1 and 17.	2023/S 0F2-0031090	9/6/2023-9/20/2023	Yes	No
UHC ZAGREB	Implantation material and consumables for cardiac surgery and extracorporeal blood flow	2023/S 0F2-0013804	5/12/2023	No	
UHC ZAGREB	Implantation material for vascular surgery	2023/S 0F2-0013630	5/10/2023	No	
UHC ZAGREB	Implantation material and consumables for electrophysiology	2023/S 0F2-0013309	5/15/2023	No	
UHC ZAGREB	Implantation material and consumables for electrophysiology – repeated	2023/S 0F2-0040893	11/6/2023	No	

UHC ZAGREB	Ophthalmic implantation material and consumables	2023/S 0F2-0012569	5/3/2023	No	
UHC ZAGREB	Ophthalmic implantation material and consumables – repeated	2023/S 0F2-0040887	11/6/2023	No	
UHC ZAGREB	Implantation material and consumables for interventional radiology	2023/S 0F2-0013590	5/16/2023	No	
UHC ZAGREB	Implantation material and consumables for interventional radiology – repeated procedure part I	2023/S 0F2-0040472	11/2/2023	No	
UHC ZAGREB	Implantation material and consumables for interventional radiology – repeated procedure part II	2023/S 0F2-0040887	11/7/2023	No	
UHC ZAGREB	Medical/infectious waste disposal services	Not published			
Sestre milosrdnice UHC	Implantation material and consumables for endoscopy and endoscopic devices	2023/S 0F2-0027112	8/8/2023	Yes	/
Sestre milosrdnice UHC	Ear implants (including artificial cochleae)	2023/S 0F2-0010636	4/24/2023	No	/
Sestre milosrdnice UHC	Gastroenterological implantation material and consumables	2023/S 0F2-0027404	8/17/2023	Yes	/
Sestre milosrdnice UHC	Consumables for oncology and radiotherapy for healthcare institutions in the Republic of Croatia	2023/S 0F2-0024282	7/18/2023	Yes	/
Sestre milosrdnice UHC	Implantation material for traumatology (fracture devices, screws, plates for fixation, systems for installing plates and screws and others)	2023/S 0F2-0026087	7/31/2023	Yes	/
UHC Osijek	Catheters, drains, probes and cannulas	2023/S 0F2-0023003	7/6/2023	Yes	/
UHC Osijek	Consumables for ENT	2023/S 0F2-0018054	6/5/2023	Yes	/
UHC Osijek	Surgical suture material	2023/S 0F2-0018982	6/7/2023	Yes	/
UH Split	Laparoscopic instruments and consumables for electrosurgery	2023/S 0F2-0012650	5/8/2023	Yes	/

UH Split	Material for existing ECG monitors and defibrillators and other accessories for monitoring cardiac function	2023/S 0F2-0036786	10/11/2023	Yes	
UH Split	Material for closing and suturing wounds (splitters, cutters – staplers)	2023/S 0F2-0012506	5/3/2023	Yes	/
CHC Rijeka	Reagents, tests and other consumables for laboratory diagnostics	2023/S 0F2-0029799	9/15/2023	**Yes – in the consultation phase**	**Accepted**
CHC Rijeka	Devices and instruments for infusion, biopsy, puncture and administration of cytostatics	2023/S 0F2-0013162	5/22/2023	Yes	/
CHC Rijeka	Tests and consumables for pathology and cytology	2023/S 0F2-0042782	10/16/2023	No	
CHC Rijeka	Surgical instruments	2023/S 0F2-0041906	11/6/2023	No	
Dubrava UH	Implantation material for plastic surgery	2023/S 0F2-0018256	6/7/2023	No	
Dubrava UH	Neurosurgical implantation material and consumables	2023/S 0F2-0020639	6/26/2023	No	
Dubrava UH	Consumables, devices and instruments for anesthesiology and intensive care medicine	2023/S 0F2-0033380	9/22/2023	No	
Dubrava UH	Consumables for dentistry	Not published			
Dubrava UH	Consumables for neurology	2023/S 0F2-0039611	10/27/2023	No	
Merkur UH	Consumables for hemodialysis	2023/S 0F2-0040163	11/3/2023	Yes	
Merkur UH	Medical consumables – plaster	2023/S 0F2-0015071	5/17/2023	Yes	
Merkur UH	Medical gases	2023/S 0F2-0040226	10/27/2023	No	
Fran Mihaljević UHID	Material for hygienic needs and care (including antiseptics and disinfectants)	2023/S 0F2-0027325	9/29/2023	No	
Clinic for Orthopedic Surgery Lovran	Procurement and delivery of medications for a one-year period	2023/S 0F2-0020387	9/14/2023	No	
Children's Hospital	PRODUCTS FOR PARENTERAL NUTRITION	2023/S 0F2-0035903	9/14/2023	No	

Croatian Institute for Transfusion Medicine	Consumables for transfusiology	2023/S 0F2-0021366	5/24/2023	No	
Croatian Institute of Public Health	Reagents, tests and other consumables for microbiology for healthcare institutions in the Republic of Croatia	2023/S 0F2-0034252	9/26/2023	No	
Croatian Institute of Public Health	Cleaning and maintenance equipment and agents	2023/S 0F2-0023829	7/17/2023	No	
Croatian Institute of Public Health	Rapid antigen tests	2023/S 0F2-0023028	7/4/2023	No	
Croatian Health Insurance Fund	Procurement of special groups of medications	2023/S 0F2-0022606	7/5/2023	Yes	No

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