

Implementation of public procurement regulations in the proposal for the Act on the Reconstruction of Earthquake-Damaged Buildings in the City of Zagreb, Krapina-Zagorje County and Zagreb County

On May 15, 2020, the Ministry of Construction and Physical Planning referred the proposal for the Act on the Reconstruction of Earthquake-Damaged Buildings in the City of Zagreb, Krapina-Zagorje County and Zagreb County (Act proposal) for public consultation. The American Chamber of Commerce in Croatia (AmCham) hereby sets out its position regarding the proposed legal solutions relating to the implementation of public procurement regulations.

Facts

The Act proposal calls for a number of measures aimed at minimizing the consequences of the earthquake that struck the City of Zagreb, Krapina-Zagorje County and Zagreb County on March 22, 2020. The proposed measures include the manner and procedure of the reconstruction, i.e. the removal of buildings that were damaged or destroyed in the earthquake as well as the construction of replacement family homes, and housing solutions for persons affected by the earthquake. The proposed measures include in particular the repairing of the damage to family homes and commercial buildings, but also public buildings such as cultural institutions (museums, theaters etc.), educational institutions (schools, faculties, institutes, etc.) as well as health institutions (primarily hospitals and clinical hospital centers). According to the published estimates by experts from the Faculty of Civil Engineering, the price of a full reconstruction of all buildings damaged by the earthquake would amount to EUR 13.3 billion.

The implementation of the Act will be funded through, among others, resources from the state budget of the Republic of Croatia, resources from the budget of the City of Zagreb, and resources from the counties and the local self-government units. It is envisaged that the reconstruction and other measures will be implemented in accordance and in compliance with the programs of measures and reconstruction activities, which the Government shall adopt at the proposal of the Ministry of Construction and Physical Planning (Programs of Measures).

The Act proposal provides for the selection of construction participants and other participants in the reconstruction of buildings, the removal of buildings and the construction of replacement family homes to be based on a public call according to the criteria specified by the Program of Measures. One such criterium would also be the determination of the maximum price of services, works, and construction products that could eligible when choosing the contractor. Additionally, for the purpose of protection of funds from the state budget, a technical financial control during the production of project documentation has also been provided for, and, with the aim of procedural transparency, the public would be regularly informed of all the activities and the expenditure of funds.



The proposal for the Act contains neither the provisions on the implementation of regulations pertaining to public procurement procedures nor the relationship of the proposed Act with the provisions of the Public Procurement Act and sub-legislation.

The implementation of public procurement regulations

The Public Procurement Act prescribes a clear and comprehensive legislative framework of public procurement in the Republic of Croatia. The Act introduced the European directives on public procurement into the Croatian legal system, whereby the Republic of Croatia fulfilled one of its fundamental obligations arising from being a Member State of the European Union.

The Republic of Croatia and its bodies, local and regional self-government units, as well as public sector bodies (contracting authorities) are required to apply the provisions of the Public Procurement Act in a way that allows for efficient public procurement and the economical and purposeful expenditure of public funds. Furthermore, said contracting authorities procuring goods, works and services are bound in their implementation of the Public Procurement Act to respect the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services, and the principles deriving therefrom, such as the principle of market competition, the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. The purpose of all the aforementioned principles is to ensure the respect for the highest values of the free market as well as the clear and transparent expenditure of budget funds.

AmCham has already stressed that public procurement represents an extremely important mechanism in ensuring the proper and fair treatment of all market participants. Both the Croatian and the European legislative framework guarantee in the same way the free and transparent access to the market for economic operators and effective ways of protecting their rights. As already pointed out, AmCham believes that extraordinary circumstances cannot serve as justification for the adoption of legislative or practical solutions which are not aligned with the aforementioned principles, nor can such circumstances lead to the denial of operators' rights to obtain prompt and effective legal protection before impartial and independent authorities.

For these reasons, AmCham has analyzed with special care the provisions of the Act proposal in the parts relating to compliance with the fundamental principles of the free market and the guarantee of a clear, purposeful, economical and transparent expenditure of budget funds. In this respect, AmCham establishes with great concern that the Act proposal provides for an exclusion of public procurement regulations (although not explicitly, which introduces an additional level of legal uncertainty to the market).

Article 40 of the Act proposal provides that:

"The selection of construction participants and other participants in the reconstruction of buildings, the removal of buildings and the construction of replacement family homes will be based on a public call according to the criteria specified by the Program of Measures.



For the purposes of implementing this Act, the Program of Measures determines the maximum price of services, works and construction products that could be eligible when choosing the contractor referred to in paragraph 1."

Furthermore, in their explanation of the consequences resulting from the adoption of the Act, the proposer points out that the Act will:

"allow for emergency reconstruction procedures and measures, i.e. the removal of damaged and/or destroyed buildings, it will allow for the construction of replacement family homes and housing solutions for persons affected by this catastrophe"

It follows from the above that the Act proposal aims to establish a system of procurement of goods, works and services for reconstruction purposes after the earthquake, parallel to the existing system of public procurement in the Republic of Croatia. Additionally, the Act proposal does not clearly define the key elements of such a parallel system, including the issue of the conditions of the execution of the public call, the eligibility criteria for construction participants and the evaluation criteria for construction participants' tenders. The Act proposal also does not regulate the basic issues of legal protection of construction participants, such as the possibility to appeal against the selection criteria and tender evaluations, the appeal procedure, the legal effects of the appeal as well as the determination of a judicial body to hear such appeals. Finally, the Act proposal does not regulate the relationship of the proposed act with the Public Procurement Act. Without a clear regulation of each of the aforementioned issues, the possibility opens up for arbitrary and non-transparent decision-making on issues of extremely high economic value, which has no place in a democratic society established on the foundations of a free market economy. Because of the significance of the subject matter, it is the obligation of the public authority to make sure such issues are regulated by law, and not by executive decisions.

AmCham has already stressed its concern about the possible abuse of non-transparent public procurement procedures, and would like to also stress an additional and particular concern over the possibility of a complete abolition of public procurement procedures in the post-earthquake reconstruction procedure. Although the Act proposal provides for the facilitation of emergency reconstruction procedures, AmCham points out that the existing legislative framework also allows for urgent action in objective circumstances justifying the urgency. Furthermore, the Public Procurement Act and the established practice arising from it guarantee transparency, objectivity, legal certainty and legal protection of the participants to the proceedings to a much greater extent than is provided for in the Act proposal. It is therefore necessary to ensure that public procurement regulations be applied to the greatest extent to all post-earthquake reconstruction procedures.

Conclusion

AmCham applauds all efforts aimed towards minimizing the consequences of the earthquake that affected the residents of the City of Zagreb, Krapina-Zagorje County and Zagreb County. However, AmCham also believes that exceptional circumstances and efforts of the public authority to help citizens of the Republic of Croatia cannot serve as justification for the adoption of legal solutions preventing the free functioning of the





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market and the rule of law. It is also necessary, in particular, to take into account the public interest for control over the expenditure of budget funds from the substantial forecast amount of EUR 13.3 billion.

Therefore, AmCham proposes that:

- The Act proposal explicitly prescribes that the Public Procurement Act be applied to the greatest possible extent to the implementation of reconstruction measures;
- The circumstances in which public procurement procedures should exceptionally not be carried out be clearly and precisely prescribed, in the case of which a clear, transparent and publicly available mechanism for controlling the expenditure of budget funds should be prescribed;
- When adopting amendments to the Act proposal, legal and economic experts in the field of public procurement should be consulted in order to ensure the enacting of the best possible regulation aligned with the legal and economic determinants of public procurement regulations.

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