

Improvement of the Legal Protection System in Public Procurement

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Introduction

The public sector spends amounts that exceed tens of billions HRK on acquiring goods, works and services from private sector participants through public procurement procedures, which in 2019 amounted to over 16% of total GDP in Croatia. Since it is a significant amount of money spent from the national budget, it is important to establish effective mechanisms to correct defects in the public procurement procedures, with the purpose of establishing a transparent and foreseeable legal framework, which will promote the interest of the private sector in cooperation with the public sector, and therefore improve the competitiveness of the Croatian economy.

Since improving the competitiveness of the economy is one of Croatia's strategic goals, reaching this goal should not be left to the private sector only. The public sector stakeholders must play an active role in improving the public procurement system, primarily through raising awareness of the problems pointed out by the private sector stakeholders, and then also through strengthening their own capacities in order to successfully deal with the challenges of the increasingly more competitive market.

AmCham and its members put in significant efforts to identify problems which occur during public procurement procedures. In relation to this, certain shortcomings have been observed in the public procurement system, including, but not limited to, the lack of consistency between the bodies responsible for making decisions on the rights and the obligations of the participants in public procurement procedures, the lack of capacity of the supervisory bodies in the public sector responsible for legality control regarding public procurement procedures, as well as a significant lack in conducting supervision over legal execution of the contracts allocated through public procurement procedures.

In the following text, AmCham analyzes the observed changes in detail and gives recommendations on the improvement of the legal and the institutional framework.

Reinforcement of the roles of the Directorate for Trade and Public Procurement policy and the State Attorney's office in the supervision of the legality of the public procurement procedures

The total value of public procurement in 2019 was over 54 billion HRK. According to the Directorate for the Public Procurement Policy, in 2019 the Amount of funds spent in public procurement without VAT was 16,46% of Croatia's GDP. Taking into account a significant impact of public procurement on the expenses in the state budget, as well as a limited ability of the market to realize the best effectiveness for purchasers through self-regulation, it is necessary to work systemically towards reinforcing the institutions legally obliged to implement supervision over the legality of the public procurement procedures. Additionally, special attention should be paid to the roles of the Ministry of Economy and Sustainable Development and the State Attorney's Office in implementing such supervision.

According to statistical reports, the Ministry of Economy and Sustainable Development (acting through the Directorate for Trade and Public Procurement Policy) and the State Attorney's Office normally do not conduct supervision over the legality of the public procurement procedures, i.e. such supervision is conducted to a small extent. Likewise, the tools available to the State Audit Office and the Sector for Financial and Budgetary Supervision (Ministry of Finance) do not enable efficient and transparent supervision of budget spending. In this way the role of the state in controlling the legality of public procurement procedures is substantially weakened, and the public procurement procedures are almost completely left to the discretion of the participants in the market.

AmCham therefore believes it is necessary to strengthen the capacities of the Ministry of Economy and Sustainable Development with regards to conducting administrative supervision procedures over the legality of public procurement procedures through employing and educating competent personnel for supervision implementation. It is also necessary to better define and reinforce the role of the State Attorney's Office as a body responsible for appeals in public procurement procedures (especially in large-scale infrastructure projects). Likewise, it is necessary to ensure enhanced transparency of procedures and identified irregularities in the spending of budget funds by the State Audit Office and the Sector for Financial and

Budgetary Supervision (Ministry of Finance), with emphasis on activities undertaken to eliminate identified irregularities.

Finally, the existing sanctions system for identified omissions does not provide for real responsibility of the participants making such omissions, and therefore it does not fulfill its protective purpose. Taking this into consideration, it is necessary to create a more efficient sanctions system for natural and legal persons in a case of identified illegalities in public procurement procedures.

Reinforcement of the administrative and legal protection by establishing a specialized judicial council within the High Administrative Court of the Republic of Croatia, which will deal with public procurement

The High Administrative Court of the Republic of Croatia is divided into distinct specialized departments according to case numbers and their significance for the socio-economical life in the Republic of Croatia (Department for Retirement, Disability and Health; Department for Finance and Labor Law; Department for Proprietary and Legal Affairs). Taking this into consideration, the cases regarding public procurement are allocated to all of the existing departments, which is a situation where it makes no sense for the judges specializing for certain cases. The Public Procurement Act of 2016 provides the High Administrative Court with the responsibility to decide on administrative lawsuits against decisions of the DKOM regarding appeals in cases related to public procurement, which was until then allocated to administrative courts. Such legislative change has led to a larger influx of cases related to public procurement to the High Administrative Court, which also has the obligation to make decisions in a significantly shorter period of time than administrative courts.

Because of the great significance of public procurement in Croatian economy, AmCham believes it is crucial to constantly improve the High Administrative Court's capacities in order to improve the quality of legal protection in judicial proceedings. Therefore, AmCham proposes establishing a new judicial department specialized only for judicial proceedings related to public procurement, and additional appointment of special judicial councils responsible for making decisions in such proceedings.

Publishing the contents of the Contract and the Annex to the Contract

The public procurement procedure itself is very formal and subject to control in all phases of the procedure. However, after the contract is assigned, unacceptable changes often appear to the contract, including changes to the duration of the contract, the description of the subject matter of procurement and technical specifications of the procured works, products and services, increase in price and quantity of products, works and services.

In the Croatian system of public procurement the system of supervising negotiated contracts is not clear or transparent enough, which includes supervision of the performance of the contract and changes made to it from the professional or general public. Furthermore, transparent reporting by the contracting authority regarding changes to the contract, the procedure to determine unlawfulness, as well as the accountability of the contracting authority for determined unlawful activity is not set up sufficiently well.

In practice, it is evident there is an insignificant number of cases where an appeal was made which would lead to the invalidation of a public procurement contract or framework agreement, although tenderers and the public have pointed to a far larger number of illegalities.

The initiative to submit an appeal certainly falls to the tenderer, but practical assumptions have not been made which would allow for a more efficient supervision of the carrying out of a contract. The existing EPPS form foresees the publication of the total amount, the place of execution, the additional products procurement, the additional items description and the generic response input when stating the reasons why the contract was changed.

Alongside increases in the value of contracts, which is the most common reason to add annexes to public procurement contracts, changes in the subject's description and technical specifications of the procured works, products and services, as well as dates of delivery, should definitely be reported to the EPPS when publishing the notice on signing an annex to a contract.

AmCham believes that, when publishing the data on the changes made to a contract, a public contracting authority should include the data on the following circumstances:

- the changes in technical specifications in the procurement documentation,
- the changes in the circumstances assessed as criteria for the selection of an economic operator in a public procurement procedure (changing the experts or subcontractors the economic operator relied on in order to fulfill the selection criteria, etc.),
- the changes regarding any circumstances assessed as contract award criteria.

AmCham's proposal:

A provision should be added into the Regulations on the Procurement Plan, Register of Contracts, Prior Consultation and Market Analysis in Public Procurement (hereafter referred to as: the Regulations), providing that the Registry of Procurement Contracts and Framework Agreements should also contain data on the annexes to the public procurement contracts and framework agreements. Therefore, contracting authorities from Article 5 of the Regulations should include the data on the changes in technical specifications (if any) which occurred during the execution of the public procurement contract / framework agreement, and changes in the conditions earlier assessed as MEAT criteria in the Registry of Procurement Contracts and Framework Agreements. Except for transparency, the aim of the proposed alteration is to discourage contracting authorities to make such changes to the conditions which would, had they been present during the initial procurement procedure, allow competitors other than those already chosen to be selected, or offers other than those already accepted to be accepted, or attracting other participants in the public procurement procedure. The prohibition of such alterations is provided in the article 321 of the Public Procurement Act of 2016, but economic operators do not appeal to the changes and annexes to contracts because they simply do not have the information on the changes, and the contracting authorities simplify the rules on annexes by only paying attention to the allowed price increase, since other data is not even visible to the participants of the previous public procurement procedure.

It is necessary to change the annex form published in the EPPS to include the filed “the value of added quality criteria” for all criteria provided by the Contracting Authority within the framework of their Procurement documentation and EPPS publication.

Although it is not yet put into practice, the proposed alterations should be linked to the liability for administrative offences of legal persons – contracting authorities and persons responsible for individual procedures of public procurement. In that respect, we suggest an amendment of the article 433, paragraph 2, item 2, which proposes administrative liability for not publishing the registry of contracts in a way to extend this liability to publishing incorrect and incomplete data in the registry of contracts, as well as an amendment of the article 433, paragraph 1, item 9, which proposes administrative liability for not publishing the notice about an annex to a contract in a way to extend this liability to publishing incorrect and incomplete notices about an annex to a contract; formal errors and unintentional omissions in writing are not considered incorrect or incomplete information.

Legal interest – the possibility of making appeals through professional associations

The legal protection system in public procurement procedures does not enable all cases to have timely and efficient way of controlling the expenditure of the budget funds. For this reason, AmCham believes that expanding the circle of people authorized to make appeals to the State Commission for Supervision of Public Procurement Procedures (**DKOM**) would substantially improve the legal protection system in that regard.

In practice, some of the tenderers have noticed changes in the way the contracting authorities treat those tenderers which utilized their legal rights to deaccelerate or prevent the conduct of the procedures of public procurement not in accordance with applicable regulations. Such behavior is first of all realized through forming unofficial “blacklists”, and tenderers included in such lists are exposed to discriminatory behavior of contracting authorities which, although it is within legal framework, often results in unequal treatment of tenderers in public procurement procedures. Such behavior has a discouraging effect on tenderers, and the consequent avoidance of making appeals reduces the quality of public procurement procedures. AmCham

believes that in such instances it is crucial to enable tenderers to realize their rights to protection anonymously, i.e. that the legal interest to make appeals is allowed to professional associations and organizations of tenderers.

Furthermore, it has been observed in practice that participants in the market function in coordination, especially in cases when there is a smaller number of tenderers on the market able to fulfill the contract which is the subject of procurement. In such cases, the tenderers utilize informal agreements to divide contracts among themselves in different ways, including, but not limited to, not making offers, purposefully making unacceptable offers and avoiding using means of legal protection (even in cases when omissions are obvious). In the cases when the State Commission for Supervision of Public Procurement Procedures is not under an obligation to act ex officio, as well as in the cases when effective supervision conducted by the national governing bodies is not present, procurement procedures are conducted without adequate control over budget funds expenditure. Therefore, AmCham believes that the public with a common interest of protecting transparency and controlling budget funds expenditure should be ensured legal interest to make appeals in public procurement procedures. With great respect for the interest of the efficacy and the speed of procurement procedures, AmCham suggests to open a discussion on the allowed forms of public associations for the purposes of such realization of legal protection on one side, and value thresholds to determine when such legal protection should be allowed (for example, in cases of large-scale infrastructure projects and other procurement of significant economical or social value).

Reasoned opinions of the State Commission for Supervision of Public Procurement Procedures

Within the public procurement procedures, the remarks of tenderers and contractive authorities regarding a lack of consistency between the opinions of the Directorate for Trade and Public Procurement policy, the State Attorney's Office and the body in the management and control system of the EU funds on one side, and the State Commission for Supervision of Public Procurement Procedures on the other are very common. In a certain number of cases, the tenderers and the contractive authorities have also pointed out the lack of consistency among the opinions within some

decisions made by the State Commission for Supervision of Public Procurement Procedures, which, in their opinion, showcases the lack of consistency regarding their actions.

Legal security, as one of the highest standards of a democratic society, and a basic precondition of economic growth, is realized primarily through the predictability of the operation of courts and national authorities. The institution of reasoned opinion has significantly increased the predictability of the operation of the Tax Administration in specific cases. Introducing a similar concept into the operation of the State Commission for Supervision of Public Procurement Procedures would eliminate inconsistent practices and ambivalence in law implementation, as well as remove the responsibility of decision making regarding crucial problems from the domain of the Directorate for Trade and Public Procurement Policy. AmCham strongly supports this. To ensure that the State Commission for Supervision of Public Procurement Procedures has sufficient capacities to take over such duty, AmCham suggests that giving opinions is subject to paying an administration fee (like the Tax Administration), which could be considered their revenue.

Conclusion

AmCham believes that proposed alterations would significantly improve the existing legal and institutional framework, especially by the means of:

- Reinforcing the capacities of the public sector stakeholders (including executive and judicial authorities) in eliminating illegalities observed in the public procurement procedures;
- Increased transparency in fulfilling contracts made in public procurement procedures, and
- Improving the predictability of operation through publishing binding opinions of the State Commission for Supervision of Public Procurement Procedures

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