Proposals for the improvement of the implementation of the Public Procurement Act

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American Chamber of Commerce in Croatia Američka gospodarska komora u Hrvatskoj

Contents

Introduction

To see how important public procurement is for the Croatian economy one need only look at the data for the last published Public Procurement Statistics Report in the Republic of Croatia for 2018. The total value of public procurement in 2018 was 46,633,118.036 HRK without VAT. Accordingly, the share of the total value of public procurement without VAT in Croatia's GDP in 2018 was 14.88%, which is an increase of 1.96% compared to 2017, whose share of the total value of public procurement without VAT in Croatia's GDP was 13.41%.[1]

The current Public Procurement Act (ZJN 2016) entered into force on January 1, 2017. The Act prescribes mandatory application of the criterion of the most economically advantageous tender from July 1, 2017.

The most significant amendments to the Public Procurement Act pertained to the harmonization of the Act with the EU Directive on public procurement, with the lawmaker attempting to correct some shortcomings made evident in practice by applying the previous Act. The three most significant features of the new Act include: primarily the most economically advantageous tender as the only criterion for selection in public procurement processes, followed by efforts to achieve greater efficiency through automatization and connecting of systems to simplify the process for both the contracting authority and the tenderer, and finally prior consultation (for open and closed procurement) for the purpose of more efficient documentation preparation by the tenderer. The goal of the Public Procurement Act of 2016 is to achieve the best value for bought items.

The American Chamber of Commerce in Croatia has actively taken part, as a representative of the business community, in proposing provisions which helped define the Public Procurement Act of 2016 and would like to welcome attempts made by the lawmaker to improve upon the system of public procurement in Croatia. AmCham members have been monitoring the implementation of the Act for two and a half years and have noticed practices that are neither in the spirit of public procurement nor the original intention of the lawmaker. With this position paper, AmCham would like to point out such practices and propose changes to them.

[1] Ministry of Economy, Entrepreneurship and Crafts, Zagreb, Public Procurement Statistics Report in the Republic of Croatia for 2018, June 2019.

Areas for improvement of the Public Procurement Act of 2016

Problems in implementing the most economically advantageous tender (MEAT)

Legal basis

Based on the Public Procurement Act of 2016, from July 1, 2017, the most economically advantageous tender became the only criterion for choosing a tender.

Article 284, paragraph 4 of the Public Procurement Act of 2016 stipulates that the contracting authority cannot declare that either price or expenditure is the only criterion for choosing a tender and in that case the relative weight price or cost cannot exceed 90%.

By way of derogation from paragraph 4 of this Article, in the negotiation procedure without prior publication of a call for competition, the award procedure under a framework agreement, the award procedure for social and other special services, and in the case of public procurement for defense and security or for diplomatic missions and consular offices of the Republic of Croatia abroad, the relative weighting of the price or cost may exceed 90%.

The most economically advantageous tender is determined on the basis of price and cost, using the cost-effectiveness approach, such as the life-cycle cost and may include the best price-quality ratio.

This method of choosing a tender existed in the previous Public Procurement Act of 2011, in which the contracting authorities could choose between the lowest price and the most economically advantageous tender.

According to the annual Public Procurement Statistics Report for 2016, before the enactment of the Public Procurement Act of 2016, the percentage of use of the criterion of the most economically advantageous tender was 2.16% according to the published numbers.

Since the application of the criterion of the most economically advantageous tender became mandatory in mid 2017, statistical data from 2017 still shows a relatively large percentage of the lowest price criterion (36.41%).

According to the Public Procurement Statistics Report in the Republic of Croatia for 2018, the percentage of the most economically advantageous tender criterion based on the published numbers and value of concluded contracts was 95.52% (83.48% for contracting authorities + 12.04% for contracting entities).

Contracting authorities have the right and obligation to adjust the criterion to the subject matter of procurement, the scope of the contract and the aims of procurement, using the list of criteria provided in Article 248, paragraph 2 of the Public Procurement Act of 2016:

1. quality, including technical merit, aesthetic and functional features, accessibility, design for all users, social, environmental and innovative features, including trade and trading conditions
2. organization, qualifications and experience of staff hired to carry out a specific contract, if the quality of the hired staff can significantly influence the level of success of the carried out contract, or
3. services after sale and technical support, delivery terms such as the delivery date, the delivery process and delivery deadline or the deadline for carrying out the contract.

Example in practice

Contracting authorities are free to formulate and choose criteria for choosing a tender, but the primary rule is that they must be connected to the subject matter of procurement.

In previous practice the most utilized non-price criterion for choosing a tender was the delivery deadline in a 90% to 10% ratio (price 90% - delivery deadline 10%) or 85% to 15%. Although the delivery deadline is one of the proposed criteria for choosing a tender, it should only be used if the delivery date, delivery deadline or the deadline for carrying out a contract are crucial for performing a contract. Additionally, AmCham believes that in most public procurement procedures there is not enough basis for the delivery deadline to be used as one of the key non-price criteria, i.e., that it be given great importance.

AmCham believes that most contracting authorities use the delivery deadline as the only non-price criterion so as to only formally meet the requirement for the use of the most economically advantageous tender, while in reality they continue with previous practices in choosing tenders based solely on price and based on (too) specific technical specifications.

The main purpose of the Public Procurement Act of 2016 was to change the aforementioned practices and that the concept of the most economically advantageous tender be adopted in the fullest sense, whose purpose is the procurement of goods, works and services with the best price-quality ratio. This formalistic approach to using delivery deadlines as the main "qualitative" factor is not in the spirit of the new Public Procurement Act of 2016.

Practical examples also show that individual contracting authorities carry out procurement procedures for the purpose of concluding framework agreements, making frequent use of the exception referred to in Article 284, paragraph 5, which allows them to carry out procedures in which the relative weighting of the price or cost ratio is greater than 90% regardless to the total value of the procurement and justified reasons for not applying the quality criteria.

AmCham believes that at the core of the aforementioned issue still lies a lack of education among contracting authorities and an insecurity when it comes to documentation preparation based on the most economically advantageous tender, which leads to the use of these simplified solutions, which do not lead to the fulfillment of the purpose of the legislation.

AmCham's proposal

AmCham proposes to the competent ministries to comply with Article 284, paragraph 8 and to determine the relative weight for specific types of subject matter of procurement. In addition, AmCham believes that the Ministry of Economy, Entrepreneurship and Crafts should prepare more detailed proposals and instructions for the use of the most economically advantageous tender criterion in the sense determined in the Public Procurement Act of 2016 and Directive 2014/24/EU with emphasis on the following:

- Significantly increase the ratio of non-price criterion to the price criterion for certain activities (healthcare procurement, procurement of IT services, procurement of advisory services, etc.).
- Introduce a lower threshold for the estimated procurement value and / or specific criteria to be fulfilled for the purpose of concluding framework agreements based on a price or cost ratio greater than 90% as a condition for justifying procedures for price or cost over 90%.
- To work out examples of criteria for the most economically advantageous tender criterion by industry, so as to better educate the contracting authorities and make documentation preparation based on the MEAT criterion easier, with AmCham proposing a greater emphasis be placed on real qualitative criteria and not just the delivery deadline. AmCham proposes that examples of criteria go through public consultation with the public concerned prior to adoption.

Collecting proof of no convictions

Example in practice

Proof of no convictions is a document with which a tenderer ranked as the most economically competitive proves that they do not fall under the criteria for expulsion from the public procurement procedure prescribed by the Public Procurement Act of 2016. Considering that the aforementioned proof is submitted to all members of the board, supervisory boards, directors and other persons authorized to represent companies and other tenderer organizations with residence outside of the Republic of Croatia, contracting authorities face a number of problems when collecting such supporting documents.

The Public Procurement Act of 2016 exhaustively lists which criminal activities lead to the expulsion of tenderers from the procedure, so it is of utmost importance to the contracting authority to receive a valid document, issued by a competent authority and for all authorized persons.

Individual contracting authorities as Proof of Criminal Clearance of members of the board, supervisory boards, directors and other persons authorized to represent companies which are not residents of the Republic of Croatia and in whose countries of domicile they do not have a criminal record must exclusively accept statements of no convictions with a signature authenticated by a competent judicial or administrative authority, public notary or professional or trade bodies in the country where a person has citizenship.

Existing solutions undermine the principle of freedom of establishment and the principle of freedom to provide services as members of the board, supervisory boards and directors of companies often do not have residence in their country of domicile and must travel to their country of domicile just to authenticate their signature to avoid appeals in proceedings where their companies are evidently the most competitive tenderers.

A statement of no convictions is a unilateral statement of a person issuing it and has equal value as evidence in potential legal proceedings if the signature on the statement is authenticated before a judicial or administrative authority, public notary or trade body in the country of origin or any other country that is a member of the European Union.

Provision of Article 20, paragraph 9 of the Regulations on documentation for procurement and tenders in public procurement procedures, which rebuttably considers that the evidence in Article 265, paragraph 1 of the Public Procurement Act of 2016 has been updated if the evidence is not older than the due date for the delivery of tenders and requests to participation, in practice causes a variety of difficulties as economic operators must procure criminal record certificates for their board members, members of supervisory bodies and directors who do not have citizenship in the Republic of Croatia for almost every public procurement procedure for which they have made a request. A request to issue such proof is regularly made in person, and the proof itself is almost regularly collected in person or is sent via the postal service which leads to deadline extensions when making a decision regarding procurement.

The existing decision forces economic operators to procure criminal record certificates for almost every public procurement proceeding for which the economic operator has submitted a tender which again leads to the need for numerous trips to their country of domicile and to additional expenses.

Pursuant to Article 20, paragraph 10 of the Regulations on documentation for procurement and tenders in public procurement procedures the Statement from Article 265, paragraph 2 in relation to Article 251, paragraph 1 of the Public Procurement Act of 2016 can be given by a person who is legally authorized to represent an economic operator for an economic operator and for all persons who are members of a governing, administrative or supervisory body or have legal authority to represent, make decisions or supervise economic operators. Therefore, based on the aforementioned provision a legal representative may submit a statement for themselves, as well as the economic operator and all other members of the board or supervisory board. However, in practice, the problem of not recognizing declarations as sufficient evidence for proving that

there is no reason to exclude an economic operator has arisen from the reason prescribed in the provision from Article 251, paragraph 1 of the Public Procurement Act of 2016.

In practice, the following problems often appear:

- difficulties in ascertaining which bodies in individual countries have jurisdiction to issue documentation in spite of the data being available on eCertis;
- certain countries do not recognize the criminal offences which represent the criteria for expulsion, but rather some other form of offence or they do not recognize them at all;
- the minimum deadlines for delivery are very short and oftentimes it is not possible to attain the proof by the aforementioned deadline;
- difficulties when determining what government body has jurisdiction to issue documentation in cases with countries outside of the European Union to whom eCertis does not apply to at all;
- difficulties when determining the relevant law for the catalogue of criminal offences which are determined by the proof;
- the unsystematic approach of contracting authorities when accepting proof or certificates from non-EU citizens.

Legal basis

It is necessary to align the provisions of Article 251, paragraph 2 of the Public Procurement Act with Article 60, paragraphs 1 and 2, point (b) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014. Both standards regulate the ways to prove a clean criminal record for foreign citizens whose countries of domicile do not have an established criminal record. According to Croatian regulation, an extract from the criminal record can be replaced with a statement under oath or if a statement under oath does not exist according to regulations of relevant states, a statement from the provider with a signature authenticated by a competent judicial or administrative authority, public notary or professional or trade bodies in the country where a person has citizenship, while the Directive provides for the possibility of issuing a statement under oath or an authenticated signature in front of a competent judicial or administrative authority, public notary or competent professional or trade bodies in a member state or country of origin.

The contested provision of Article 20, paragraph 9 of the Regulations on documentation for procurement and tenders in public procurement procedures contradicts the provision of Article 20, paragraph 2 of the aforementioned regulation by which an updated additional document is any document which contains the relevant data which corresponds to the real facts at the moment of delivery to the contracting authority and proves what the economic operator provided in the ESPD form. AmCham proposes that economic operators be given approval to deliver criminal record certificates which would be older than the day of tender opening in such a way that the Regulations stipulate the acceptable age of such documents.

The proposed solution by which regulations which regulate the area of public procurement also stipulate the period of validity of criminal record certificates

has been applied in the Czech Republic, Slovakia, Poland and Greece, while in Germany and Austria the lawmaker left this to the discretion of the contracting authority which can determine the validity of proof of criminal clearance.

In the Republic of Poland, a criminal record certificate is deemed to be valid if the document was issued six months after the deadline to submit a tender, this decision is provided for through a bylaw which regulates the area of public procurement.

In the Slovak Republic, a qualification system is provided for economic operators who participate in public procurement procedures. When an economic operator qualifies, their documentation is valid for the next three years. If an economic operator submits a tender without previously having entered the qualification system, their extracts from the criminal record are deemed valid if they are not older than three months since the day of the tender opening. This solution is prescribed in the Public Procurement Act number 343/2015.

In public procurement procedures in the Federal Republic of Germany proof of no convictions is only needed if there are doubts raised regarding the validity of previous statements of no convictions. The age of this proof is determined by the documentation for procurement itself and the contracting authorities usually ask that the proof of no convictions is not older than three months since the opening of the tender.

In public procurement procedures in the Republic of Greece, a criminal record certificate is valid if not older than three months since the opening of the tender, this solution is prescribed in Article 80, paragraph 12 of Law 4412/2016 on public procurement.

In the Czech Republic, a qualification system is provided for economic operators which participate in public procurement procedures. If an economic operator submits a tender without previously having entered the qualification system, their extracts from the criminal record are deemed valid if they are not older than ninety days since the day of the opening of the tender. This solution is prescribed by the Public Procurement Act number 137/2006 — or the Act which regulates the area of public procurement.

Certain EU Member States have made conducting business easier for their economic operators by prescribing the validity of criminal record certificates through laws which prescribe the area, the criminal record and legal consequences of a conviction.

For example, in Hungary it is not necessary to submit criminal record certificates in public procurement procedures, as a clear criminal record is proven with a statement made with an authenticated signature at a public notary, however, for all other use, an extract from the criminal record is considered valid 90 days from the day it was issued.

In Romania, a criminal record certificate is valid six months since the day it was issued and can be used for any purpose, including public procurement procedures.

AmCham's proposal

A 5 day deadline to submit proof of no convictions for foreign citizens is not reasonable since it is necessary to translate, apostille and deliver it. AmCham proposes this deadline be extended to a minimum of 15 days.

Croatia should accept proof of no convictions from competent bodies and states and in the content as issued by another state. An additional statement may be requested in case a certain state lacks a competent body which could issue such proof.

AmCham's proposal is that in Article 265, paragraph 2 of the Public Procurement Act the words "in a member state or" be added in such a way: "If in the country of establishment of the economic operator, or country in the country where the person has citizenship does not issue documents from paragraph 1 of this Article or does not encompass all the circumstances from Article 251, paragraph 1, Article 252, paragraph 1 and Article 254, paragraph 1, point 2 of this Act, they can be replaced with a statement under oath or, if the statement under oath according to the legislations of the mentioned country does not exist, they can be replaced by the provider's statement authenticated by a competent judicial or administrative authority, public notary or professional or trade bodies in a member state or country of establishment of the economic operator, or country where the person has citizenship."

It is necessary to change the provision of Article 20, paragraph 9 of the Regulations on documentation for procurement and tenders in public procurement procedures which rebuttably considers that the evidence in Article 265, paragraph 1 of the Public Procurement Act of 2016 is updated, if the evidence is not older that the day the deadline expires for the delivery of tenders or requests for participation so that it states:
9) It is rebuttably considered that the proof in Article 265, paragraph 1, point 1 of the Public Procurement Act of 2016 is updated, if the proof is not older than six months since the day the deadline expires for the delivery of tenders or requests for participation.
10) It is rebuttably considered that the proof in Article 265, paragraph 1, point 2 and 3 of the Public Procurement Act of 2016 is updated, if the evidence is not older that the day the deadline expires for the delivery of tenders or requests for participation.
11) An economic operator which submits updated additional documentation is responsible for the documents to be updated in accordance with paragraph 2 of this Article.
The former paragraph 10 is to become paragraph 13.

Lastly, it should be noted that the existing solution from Article 20, paragraph 9 of the Regulations represents an obstacle for Croatian companies to merge, cooperate or rely on resources from foreign economic subjects which must issue

a newer documentation than the one they use in their country of domicile to participate in such a procedure.

The alignment of the Public Procurement Act with special regulations relating to listing standards in procurement documentation (DON)

Example in practice

The basic rule when determining the criterion for choosing a tender is that the criterion be related to the subject matter of procurement. In recent practice, contracting authorities from various industries have started to use an implemented environmental management system according to the ISO 14001 standard as the criterion for choosing a tender. The search for such a criterion was justified with the purchase of "green products and services" which contribute to reducing resource, energy and chemical consumption, as well as emissions of pollutants, greenhouse gases and contribute to waste prevention. Although the justification for seeking an implemented environmental management system according to the ISO 14001 standard was the procurement of "green products and services", contracting authorities asked that tenderers have a certificate as proof that the tenderer has an implemented environmental management system according to the ISO 14001 standard. Such proof in no way confirms that procured products are made satisfying environmental demands and the proof is not related to the subject matter of procurement, but rather to the tenderer themselves (who may or may not be the producer of the offered subject matter of procurement).

Legal basis

Quality assurance standards and environmental management standards are set out in Articles 270-272. of the Public Procurement Act of 2016 and are included in a separate subsection within the criteria for the qualitative selection of economic operators and not the criteria for choosing a tender. Examples of non-price criteria for choosing a tender in Article 284, paragraph 2 do not mention environmental management standards or quality assurance standards. It is evident from where the standard provisions in the section which determines criteria for the qualitative selection of economic operators are located that this is proof related to the tenderer and not the subject matter of procurement.

AmCham's proposal

AmCham proposes that the implemented environmental management system according to the ISO 14001 standard not be used as one of the criteria for choosing a tender as it cannot be related to the subject matter of procurement.

Conflict of interest

Example in practice

The Public Procurement Act of 2016 stipulates the possibility that a contracting authority can ask for advice from independent experts, competent bodies and participants on the market in the preparation of public procurement procedures,

which primarily relates to the preparation of procurement documentation. In practice, the services of experts are usually used in the preparation of technical documentation (technical specifications and cost statements) and other parts of the Procurement documentation. The Public Procurement Act of 2016 obligates contracting authorities which use these services to enact measures which ensure compliance with the principle of public procurement, especially in ensuring that other potential tenderers have a level playing field and have the same information, i.e. to remove any potential advantages that an expert which participated in the preparation of procurement documentation might have. Certain contracting authorities, as well as bodies in the system of management and control of the European Structural and Investment Funds during the ex-ante and ex-post checks of public procurement procedures demand that such experts automatically be named as persons who are in conflict of interest with regards to the process of public procurement, without leaving the contracting authority with the option of equalizing the terms for all tenderers as prescribed by the Public Procurement Act of 2016.

In this specific example the user of EU grants for the implementation of the public procurement procedure uses an expert for the needs of the preparation of the procurement documentation. Bodies in the management and control system require that this expert automatically be named an expert that is in conflict of interest for that particular subject matter of procurement.

Legal basis

A conflict of interest is defined in Article 199 of the Public Procurement Act of 2016 Previous participation of candidates or tenderers.

AmCham's proposal

There is no need to change the provisions of the Public Procurement Act of 2016 in the part relating to a conflict of interest, but what is required is the interpretation of these provisions based on a specific example.

The problems in starting the process of opening a tender in the case of the most economically advantageous tender (MEAT)

Example in practice

When it comes to the Report on the opening of a tender, the Regulations on documentation for procurement and tenders in public procurement procedures state that there is only one factor that is considered: the price of the tender, which is not in the spirit of the Public Procurement Act of 2016 and does not contribute to the principal of transparency in the public procurement procedure. According to the Public Procurement Act of 2016, all criteria of the most economically advantageous tender should be included in the Report, and not just the price. In accordance with this, the contents of the tender sheet should be changed.

Legal basis

- Regulations on documentation for procurement and tenders in public procurement procedures define the contents of the Report on the opening of a tender in Article 27.
- Article 290, paragraph 2 of the Public Procurement Act — the process of viewing and evaluating a tender is secret until the contracting authority makes its decision.
- Regulations on documentation for procurement and tenders in public procurement procedures define the contents of the tender sheet in Article 7, paragraph 2.

AmCham's proposal

Changing the "Regulations on documentation for procurement and tenders in public procurement procedures (NN 65/2017)" so that Articles 7 and 27 prescribe the publication of all required criteria of the most economically advantageous tender.

With the publication of all prescribed criteria of the most economically advantageous tender in the Report on the opening of a tender the following would occur:

- the level of transparency in public procurement would increase
- potential manipulation would be averted
- tenderers would be allowed to better plan their activities,
  instead of waiting on the Report on the overview and evaluation of the tender and the Decision of the contracting authority.

Changes to the contract on public procurement and supervision of the carrying out of the contract on public procurement

Example in practice

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, 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.

Examples of changes to the contract that are prohibited include:

- prohibited changes to the members of the consortium;
- prohibited changes to the terms of the contract, including the duration of the contract, the deadline to carry out the contract and the risk allocation between contracting parties.

Legal basis

The procedure to change the contract on public procurement is regulated from Articles 314 to 321 of the Public Procurement Act of 2016.

Article 314, paragraph 2 of the Public Procurement Act prescribes how a public contracting authority is obligated to conduct a new public procurement procedure in accordance with the provisions of the Public Procurement Act in case of significant changes to the public procurement contract throughout the duration of the contract. Additionally, Article 321 defines significant changes, such as changes that make the nature of the contract significantly different from the one that was originally concluded.

If the contract went through significant changes, the public contracting authority is obligated to terminate the contract in accordance with Article 322. The Public Procurement Act or rather the contracting authority is not authorized to accept the described changes to the contract if proposed by the contractor, but rather conduct a new public procurement procedure.

In cases where the contract was concluded without a previously concluded public procurement procedure, persons with a legitimate interest may appeal the contract in 60 days since learning about it, or within a six month timeframe from the day the contract was concluded (Article 411 of the Public Procurement Act). The State Commission for Supervision of Public Procurement Procedures (DKOM) is obligated to invalidate the public procurement contract or framework agreement in their entirety or partially in the appeal proceedings if the contracting authority concluded the public procurement contract or framework agreement without first conducting a public procurement procedure if that runs counter to the provisions of the Public Procurement Act (Article 428).

AmCham's proposal

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 (in 2018, there was no decision made to invalidate a contract or framework agreement) although tenderers and the public have pointed to a far larger number of illegalities.

Although it falls to the tenderer to submit an appeal, there is an impression that practical assumptions have not been made which would allow for a more efficient supervision of the carrying out of a contract. First and foremost, this is in regard to publicly publishing all changes to a contract and duly explaining the reasons for the changes to the contract and the legal basis for said changes. Because of this, it is necessary to create regulations in cooperation with stakeholders of the public procurement procedure which would obligate the contracting party to publish data on the carrying out of a contract more concretely and more transparently, including the reasons for changing a contract and the legal basis

for the changes, in a way that allows for more effective legal protection and a real overview of the legal carrying out of a contract.

Furthermore, additional efforts need to be made in educating tenderers regarding the legal options of appealing an illegally won contract and its changes.

Finally, a more efficient system of administrative supervision needs to be put in place regarding the carrying out of a contract taking into consideration the reported irregularities made by stakeholders in the system itself (including ministry and State Audit Office representatives), as well as a system of responsibility for confirmed irregularities (the State Commission for Supervision of Public Procurement Procedures from 2018 did not file a single charge for confirmed misconduct in public procurement procedures in spite of the significant number of appeals).

Relationship between tenderers in the VAT system and those who are released from the obligation to pay

Example in practice

The Public Procurement Act prescribes how a contracting authority who can exercise their right to tax prepayments compares prices of tenders without value added tax while a contracting authority who may not exercise their right to tax prepayments compares prices of tenders with value added tax included. Economic operators who participate in public procurement procedures as tenderers, and who, based on the provisions in the Value Added Tax Act, are not small taxable persons (the value of delivered goods and carried out services in the last year or current year was not higher than 300,000.00 HRK) because of comparing prices with VAT included compared to prices without VAT included oftentimes are not competitive enough in the procurement procedure, in spite of the fact that the price they list in their tender that is given without VAT is more affordable than the price offered by economic operators — small taxable persons. In practice, these price comparisons are misused at the expense of economic operators who are not small taxable persons by participating in procurement procedures of newly formed companies, small taxable persons.

In practice, two cases appear which misuse the previously mentioned standard:

- participating on the side of tenderers who are limited liability companies whose total yearly earnings for delivered goods or carried out services are lower than 300,000.00 HRK while relying on economic operators who have to pay VAT as stipulated in the provisions of the Value Added Tax Act (hereinafter: "Tenderers exempt from VAT"). This allows Tenderers exempt from VAT to compete in public procurement procedures, which makes their tender lower in relation to economic operators who have to pay VAT, however, economic operators who have to pay VAT participate in the realization of the Supply contract, considering that economic operators who participate in the procedure as

tenderers rely on the ability of economic operators who have to pay VAT.

- participating on the side of Tenderers exempt from VAT who become liable to pay VAT during the carrying out of the Supply contract due to having earnings exceeding 300,000.00 HRK for delivered goods or carried out services. In that case, price is corrected considering that it has to be increased due to VAT. Oftentimes the final price (after being increased due to VAT) is larger than the next lowest price in the procedure, i.e., its price would not make it competitive in the procurement procedure and that the VAT was initially included, which would make this tender not achieve the maximum amount of points in the grading procedure and overview of the tender in relation to parts of the criteria that deal with price.

Legal basis

Under the provision in Article 294 of the Public Procurement Act:
(1) A contracting authority who may use their right to tax prepayments compares prices of tenders without value added tax.
(2) A contracting authority who may not use their right to tax prepayments compares prices of tenders with value added tax.

AmCham's proposal

To change provisions of the Public Procurement Act in such a way that price without value added tax is considered for the comparison price for evaluating a tender, regardless of whether the tenderer is in the VAT system or not and regardless of whether the contracting authority can or cannot use their right to tax prepayments.

An alternative proposition is the banning of price changes (concluding an annex in relation to price) if a price change happens during the carrying out of the procedure due to a price increase because of VAT being expressed (in case that, during the procedure, the chosen tenderer enters the VAT system).

Automatic withdrawal of required (repeating) data during application to the public procurement tender

Example in practice

1. During preparation of the ESPD form, economic operators must enter data on legal representatives of the economic operator and fill out the following data: name and surname, date of birth, place of birth, phone number, email, street name and number, postal code, country, their role and detailed data on their representation. Everything listed is filled out in separate, designated fields. A problem arises when the economic operator has more than one person empowered to represent them (which is often the case) and they have to fill out this data for each of their representatives.

2. While filling out the procurement sheet in part "1. General information on procurement procedure", the tenderer must fill out: email address and tenderer

contact person (which is filled out in My Data — Personal Data), phone number and fax number (which is filled out in My Data — Organization Data) and the tenderer's IBAN.

Some public procurement procedures are divided into a large number of groups and from 1 January 2018 each group is submitted as a separate tender. In case a tender is sent for more than one group, the tenderer for each group has to fill out the same data again, which in the case of a large number of groups/tenders, significantly hampers and prolongs the procedure of submitting a tender. As an example, one member of the American Chamber of Commerce participated in a public procurement procedure which encompassed as many as 150 groups.

AmCham's proposal

The goal of the new European Union directives and the new Public Procurement Act is to increase flexibility and transparency of the public procurement procedure, reduce formalism, reduce the administrative burden of contracting authorities and economic operators and to reduce costs of the public procurement procedure through the use of electronic public procurement.

In large part through e-delivery of tenders and ESPD forms, an increase of flexibility and a reduced administrative burden has been achieved, but there is still room for improvement and automatization of the Electronic Public Procurement System (EPPS).

This is why we propose the automatic retrieval of repeated data from the EPPS while filling out the ESPD form and while handing in a tender:

1. Considering that the Electronic Public Procurement System recognizes some data of an economic operator anyway while filling out the ESPD form and then it automatically retrieves it from the "Organization data" (tenderer name, PID, address), AmCham proposes that new data be added regarding legal representatives of economic operators into the "Organization data" and then that it is automatically retrieved by the ESPD form.
2. AmCham proposes that while filling out the tender sheet when handing in the tender, "Basic tender data" is retrieved from Personal data and Organization data.

Simple procurement

Example in practice

The Public Procurement Statistics Report in the Republic of Croatia for 2017, published by the Authority for Public Procurement Policy of the Ministry of Economy, Entrepreneurship and Crafts, states that the total value of public procurement for 2017 was 40,451,227,766 HRK without VAT, while the total value of published contracts and framework agreements for 2017 was 31,039,517,156 HRK without VAT and the value of all simple procurement based on the additional data in the EPPS provided by simple procurement taxpayers was 9,411,012,494 HRK without VAT. Of those, 42% of simple procurements

were for the procurement of services, 39% were for the procurement of goods and 19% were for the procurement of works.

Furthermore, based on the data from the Public Procurement Statistics Report in the Republic of Croatia for 2018, the total value of public procurement for 2018 was 46,633,118,036 HRK without VAT, while the total value of published contracts and framework agreements for 2018 was 36,596,439,175 HRK without VAT and the value of all simple procurement based on the additional data in the EPPS provided by simple procurement taxpayers was 10,014,188,860 HRK without VAT. Of those, 41% of simple procurements were for the procurement of services, 38% were for the procurement of goods and 21% were for the procurement of works.

Therefore, it can be concluded that simple procurements make up a sizeable share of the total value of public procurement in the Republic of Croatia, 23.26% in 2017 and 21.47% in 2018.

The Public Procurement Act in Article 12 defines how not to use simple procurement, where the evaluated value of simple procurement is equal to or less than 200,000.00 HRK (without VAT) for goods and services, or 500,000.00 HRK (without VAT) for works. In addition, Article 15 of the Public Procurement Act of 2016 prescribes how rules, terms and procedures of simple procurement are defined by the contracting party through the general act, while taking into account the principles of public procurement and the possibility of using electronic means of communication, where the contracting authority is obligated by the general act to conduct simple procurement and to publish all later changes on the internet.
There are numerous examples of general acts for simple procurement available on websites of contracting authorities and one can clearly conclude when comparing them that there are significant variations in their provisions.

Another problem is searching for published simple procurement procedures on the websites of contracting authorities.
A minority of contracting authorities publishes their simple procurement procedures on the Electronic Public Procurement System, which means that these procedures are available only in one place from the time of publishing.

A majority of contracting authorities publishes their simple procurement procedures on their websites, which means that it takes a lot of time for tenderers to search numerous websites of different contracting authorities for new simple procurement procedures. Because of this, a significant number of tenderers pays for additional search engines for simple procurement or for prior consultation.
Considering that simple procurement procedures have very short deadlines for delivery (sometimes only 5 days), that these tenders still need to be delivered in paper form, that tenderers find out about the procedure two to three days after publishing, tenderers usually have little time to prepare and deliver their tender.

AmCham's proposal

Considering that the Public Procurement Act of 2016 does not prescribe in detail the mandatory minimal content and structure of the general act for simple procurement procedures, this makes the work of economic operators in the role of tenderers more difficult, in the sense that every contracting authority has their own general act with varying structures and forms, which means that it is necessary to spend more time and resources to familiarize the tenderers with them in simple procurement procedures, which can result in tenders being rejected because of oversights made by the tenderer which are the result of the use of various forms for varying contracting authorities. Additionally, tenderers spend time searching for general acts for simple procurement procedures on websites of various contracting authorities, which often are not intuitively available and are often published in a format which does not allow for the document to be searched.

Consequently, we propose prescribing the minimal content, structure and form of the general act, or form for simple procurement by modifying the Public Procurement Act of 2016 or separate regulations, to achieve an added level of transparency and efficiency in conducting simple procurement procedures, which account for more than a fifth of the value of public procurement in the Republic of Croatia and we propose the requirement to publish general acts on simple procurement and simple procurement procedures themselves on the Croatian EPPS website, so that they may be searched and downloaded in one place, as well as be used in a more efficient manner.

Prior consultation

Example in practice

Prior consultation is a well-conceived mechanism, whose aim is to correct any potential future irregularities in the procurement documentation and the description of the subject matter of procurement and for the creation of quality documentation.

The preparation of the public procurement procedure through market research and prior consultation allows contracting authorities to attain all relevant information regarding the market and subject matter of procurement (potential tenderers, strength of the competition, possibility of appeal).

Furthermore, this way of preparing the procedure allows economic operators to have insight into the contracting authority's plans in giving feedback on the subject matter of procurement and procurement documentation.

This opens up dialogue between the contracting authorities and economic operators, as well as potential tenderers, during which they can discuss all the details and points relevant to the planned public procurement procedure.

Unfortunately, this mechanism was not well received by contracting authorities as it is looked upon as just another administrative obstacle, an additional task which prolongs the procedure.

Prior consultation is published on the EPPS portal, but a subscription in the Official Gazette to a search engine for prior consultation is not available, which means it has to be searched for "by hand", or it is required to pay for an additional search engine by another party.
When taking into account that prior consultation is published with a very short window for a statement (usually the minimum legal period of 5 days), more often than not at the end of the work week or before bank holidays, tenderers do not have time to research the documentation and specifications and often do not have time for a statement.

An additional problem is the lack of efficient sanctions in case the procedure of prior consultation is not conducted at all or is conducted in an incorrect manner. This is relevant for the contracting authorities and economic operators, as after incorrectly conducting the procedure of prior consultation certain errors and ambiguities "appear" only after the fact. Considering that in those cases the public procurement procedure is, more often than not, already in motion, errors and ambiguities have to be resolved either through clarification or through an appeal. However, both of these options spend time and other resources of both the contracting authorities and the economic operators and should thus be avoided. We consider that, based on what was written previously, effective use of sanctions should be considered — both for the contracting authority who does not conduct or erroneously conducts the prior consultation procedure (in the sense of not being able to continue the public procurement procedure) and the tenderer who did not send their suggestions and objections during the consultation period (in the sense of not being able to make an additional appeal for those points which could have been resolved by asking questions and receiving clarifications during the prior consultation period).

Legal basis

Prior consultation is regulated by Article 198 of the Public Procurement Act and Articles 9 through 11 of the Regulations on the Procurement Plan, Register of Contracts, Prior Consultation and Market Analysis in Public Procurement.

Article 198 of the Public Procurement Plan of 2016 and Article 9 of the Regulations prescribe that contracting authorities are, prior to an open or restricted public procurement procedure to procure works or for a public procurement procedure of high value for the procurement of goods or services, obligated to conduct prior consultation with the interested economic operators for a period of at least five days for the description of the subject matter of procurement, technical specifications, criteria for qualitative selection of the economic operator, criteria for tender selection, and special conditions for the execution of the contract.

During prior consultation, interested economic operators can use electronic means of communication through the Croatian EPPS portal to deliver their objections and suggestions to the contracting authority that relate to the information and documentation that is published, while the contracting authority is obligated to consider the received objections and suggestion after completing prior consultation and can create a report on it.

In case the objections or suggestions are not accepted, the contracting authority is obligated to explain why this is the case in their report.

AmCham's proposal

AmCham considers this a good legal solution which is not applied well in practice. We propose that:

- the institution of prior consultation is improved by allowing appeals to the State Commission for Supervision of Public Procurement Procedures for that part of the procedure
- the deadline is extended for delivering objections and suggestions to a minimum of 10 work days
- sending objections/requests for changes to documentation is a prerequisite for appealing the documentation
- the Official Gazette introduces a search engine for prior consultation to its subscription

Framework agreement for public procurement

Example in practice

Example 1

The contracting authority after conducting the public procurement procedure concluded a framework agreement with an economic operator. Based on the discretionary decision of the contracting authority, the framework agreement does not obligate the contracting parties to carry out the contract. During the framework agreement, the contracting authority does not conduct subject matter orders, or they conduct them in disproportionately small quantities, which nullifies the economic purpose of concluding a framework agreement for the selected tenderer. Furthermore, the selected tenderer is obligated to have sufficient stocks on hand of the subject matter to promptly (usually in a very short timeframe) carry out the contract, which causes additional expenses for tenderers (for example, for warehousing) without any guarantee that the contracting authority will request the carrying out of the contract.

Example 2

While ordering consumables, the contracting authority decides the approximate quantities of the subject matter of procurement, with a relatively wide range of quantities. After conducting an open public procurement procedure, the contracting authority concludes a contract with the selected tenderer to procure these approximate quantities. Although the contract obligates the parties to carry it out, the fact that we are dealing with approximate quantities *de facto* turns the contract into a framework agreement.

Example 3

While ordering services after conducting a public procurement procedure and concluding a framework agreement, the contracting authority after concluding the framework agreement did not order a single service that was part of the

concluded framework agreement, but afterwards, for the duration of the framework agreement for which they did not order a single service, launched a new call for the same service.

Legal basis

The Public Procurement Act regulates the question of framework agreements mainly through Articles 146 and 153 of the Act, the most significant part for this question being a provision from Article 148, paragraph 2:

A framework agreement with multiple economic operators does not obligate the parties to conclude an agreement based on that framework agreement, while the framework agreement with one economic operator obligates the parties to carry out the framework agreement if the contracting authority stipulated this in the procurement documentation.

AmCham's proposal

In accordance with the Public Procurement Act, contracting authorities have unlimited discretion when deciding on whether they are bound to the framework agreement. AmCham considers this discretion should be more limited by the obligation of considerate treatment of economic operators on the market who have legitimate expectation towards the contracting authority that the concluded framework agreement will be carried out at least in part. Based on this, AmCham proposes that the Public Procurement Act prescribes:

- the possibility of concluding a non-binding framework agreement exclusively as an exception to the rule, in cases where conscientious contracting authorities are objectively incapable of carrying out planning when the necessary quantities of goods, works and services are concerned. The contracting authority must list the reasons why they are allowed to use said exception in the procurement documentation and in this way inform market participants beforehand of the risks involved in carrying out the contract, as well as allow them to dispute said use of the exception by the contracting authority;

- the lower limit on quantities or the value of quantities that cannot be reduced, or the value negotiated in the framework agreement (for example, a positive example is Romania). Specifically, for the duration or validity of the framework agreement, based on the conditions set out by the framework agreement, the contracting authority must order goods, services or works in value no less than 80% of the total amount set out by the framework agreement during the duration of the framework agreement; additionally,

- the obligation of the contracting authority to deliver an explanation and proof regarding their reduction of the quantities, changing the quantities and value of the agreed upon framework agreement no later than 6 months prior to the predicted delivery deadline of the goods and services, or the beginning of works under an individual contract, all in the interest

of improving the transparency of communication in the public procurement procedure.

Although concluding a framework agreement ensures the security of the contracting authority in the sense of securely ensuring procurement during a long period, AmCham considers that this puts the selected tenderer at a disadvantage in cases where the ordered quantity or value of goods, services and works in individual contracts is far smaller than the estimated yearly quantity of value of the selected tender. Additionally, in most cases in practice, the executors of a contract are not informed in time regarding the reduction in quantities, or have not received an explanation from the contracting authority for the significant reduction of the framework agreement.

The quantity of goods, services and/or works is an important element which a tenderer considers while applying to a particular public procurement procedure and it dictates possible discounts which would form the final offered price at the moment of submission of the tender, which in cases when a significant reduction in the order of goods, services or works might harm the tenderer, which instills tenderers with distrust when considering a contracting authority with regards to conscientious planning of needs and puts future applications of the tenderer in question for public procurement procedures for the same contracting authority.

Furthermore, potential tenderers must meet demands from the technical specifications during preparations for realizing the framework agreement, which in practice also includes a range of preparatory actions, such as ensuring necessary materials and resources which will guarantee a delivery of goods, services and works in accordance with the required guaranteed deadlines. For this purpose, tenderers invest their own financial resources which in the end they are unable to replace by realizing the contract for which the contracting authority significantly reduced the quantities ordered, or the total value in relation to the one predicted by the framework agreement.

Additionally, for the tender to be legitimate, tenderers are obligated to deliver guarantee of the realization of the framework agreement, which leads to the guarantee made for a specific contract being charged at the expense of the tenderer when withdrawing from a contract, which is not negligible when considering that in high value framework agreements the required guarantee can be as high as 10% of the estimated value of the framework agreement.

Based on this, it is necessary to change the legal framework in such a way that contracting authorities are made to conscientiously plan the procurement of goods, works and services, so that contracting parties can adequately react to the dynamic changes in the demands of the contracting party, which includes possible changes in price and the possibility that tenderers withdraw from the framework agreement in cases where the initial terms are changed.

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