

PUBLIC PROCUREMENT

CURRENT SITUATION

On December 23rd 2019, the Serbian Parliament adopted the new Public Procurement Law (RS Official Gazette No 91/2019), hereinafter: the New Law). The New Law entered into force on January 1, 2020 and started to be applied as of July 1 2020. The idea of the law maker was to harmonise Serbian Public Procurement Law with Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport, and postal services sectors and repealing Directive 2004/17/EC.

Due to short period of application of the New Law, FIC is not in the position to comment possible effects of the New Law on wellbeing of commerce and citizens. However, the New Law is expected to bring more transparency in public procurement procedures and create more favourable framework for competition and accordingly provision of improved quality of goods to citizens. FIC has many times insofar urged for better coordination of stakeholders to implement relevant provisions of the Law on Public Procurement and other applicable laws to combat corruption in public procurements efficiently. Unfortunately, there was no progress since the first Public Procurement Law in 2002 was enacted. The same applies to providing effective mechanisms to control fulfilment of public contracts, reduction of percentage of intergovernmental agreements with third countries in public procurement sector and more active role of stakeholders to promote application of the Public Procurement Law by annulling awarded public contracts which have not been subject to relevant public procurement procedure.

As the New Law creates more favourable conditions to promote competition in public sector, FIC expresses optimism that condition in public procurement sector will move in positive direction.

COVID-19

FIC expresses concern that spread of COVID-19 produced negative effects on application of the New Law. This is particularly related to public procurements in health sector to combat spread of COVID-19, where the contracting authorities, contrary to the New Law classified data on quantities

of procured medicines and tests and medical equipment as secret data.

POSITIVE DEVELOPMENTS

The main novelties provided in the New Law are as follows:

1. Exceptions in the application of the New Law can be challenged before the Republic Commission for Protection of Bidders' Right in Public Procurements ("the Commission"). The request for annulment of the awarded contract shall be submitted along with a request for protection of the right. In case the Commission annuls the contract, it shall sentence the contracting authority to fine in the amount up to 30% of the awarded contract;
2. Financing procurements under donation is not provided as an exception in the application of the New Law;
3. New thresholds for application of the Law are prescribed:
 - a) Above estimated value of RSD 1.000.000, 00 for procurement of goods and services;
 - b) Above estimated value of RSD 3.000.000, 00 for procurement of works;
 - c) Above estimated value of RSD 15.000.000, 00 for procurement of goods and services and above the estimated value of RSD 650.000, 00 for procurement of works for diplomatic missions and diplomatic and consular office abroad;
 - d) The above-estimated value RSD 15.000.000, 00 for procurement of social and other special services conducted by the public contracting authority and above estimated value RSD 15.000.000, 00 for public procurements conducted by the sectorial contracting authority.
4. The contracting authorities shall publish amendments of public procurement plan on Public Procurement Portal and their website within ten days since its amendment;
5. Contracting authority can limit the number of lots to be awarded by one bidder even in the case when the bid-

- der can submit offers for several or all lots, under the condition that maximal number of lots is determined in the public invitation;
6. The general rule that all communication and exchange of documents in public procurement procedures shall be performed electronically on Public Procurement Portal is established;
 7. The new public procurement procedure is prescribed – partnership for innovation, in case when the contracting authority needs innovative products, services, or works which are available on the market;
 8. There are differences in the procedure - negotiation procedure without publishing the public invitation concerning grounds for initiation (new repetitive services and works awarded to the prior bidder with whom the basic contract is concluded and procurement of goods for research purposes, experimenting, examination or development) and manner to conduct this procedure;
 9. Negotiation procedure with a public invitation can be conducted only by sectorial contracting authorities;
 10. Framework agreement cannot last more than four years (this period does not apply to contracts concluded on the ground of framework agreement);
 11. Sectorial contractual authorities may establish and maintain a system of qualification for companies;
 12. The New Law introduces new services subject to public procurements – social and other special services for which less formal regime is established (certain health services, social services, education services, etc.);
 13. Collateral for seriousness of bids in public procurement procedures is reduced to 3% of the value of offer (VAT excluded);
 14. Terms for contracting authorities to provide clarifications to bidders in regard tender documents are extended;
 15. Contracting authorities may publish on their profile prior informative notification to inform companies its intention to execute certain public procurement procedure to reduce terms for submission of offers while sectorial contracting authorities may publish on their profile periodical indicative notification for the same purposes;
 16. Bidders are not obliged to provide documents to prove fulfilment of conditions to participate in tender procedure; they can provide statement on fulfilment defined tender requirements; contracting authority is obliged to request from selected bidder to submit documents proving fulfilment of conditions to participate in tender procedures for which estimated value is above RSD 5.000.000, 00 (non-certified copies);
 17. Bidder may prove tender conditions by capacities of subcontractors (financial, economic, HR, references and technical requirements) - not only as single or joint bidders, while, on the other side, technical requirements (technical equipment) can be proved by capacities of other companies which do not joint bidder or subcontractors);
 18. Criteria for awarding the contract must be most economically favourable offer;
 19. Awarded contract may be amended/value of contract increased for not more that 50% of the contract for the following reasons:
 - a) change of the awarded bidder is not possible due economical or technical reasons (compatibility requirements with existing equipment, services or works procured in the prior public procurement;
 - b) change of awarded bidder may cause significant difficulties or costs for the contacting authority
 20. Awarded contract may be changed due to unpredicted circumstances and contractual party may be changed as well to status changes on side of the contractual party;
 21. Scope of the awarded contract may be changed for less than 10% for goods and services and 15% for works and the value of change must be lesser than RSD 15.000.000, 00 for goods and services and RSD 50.000.000, 00 for works;
 22. Subcontractors can be replaced under certain conditions;
 23. Terms for submission of request for protection of right (“request”) are amended;

24. Foreign applicants must appoint proxy for receipt of documents;
25. The applicant must submit the proof on paid fee along with the request, otherwise, the request shall be rejected;
26. The contracting authority must deliver the request to selected bidder which can provide its opinion on the request.

PPO enacted by laws necessary for application of the New Law, conducted two webinars for usage of new Public Procurement Portal and issued guidelines for preparation of tender documents and submission of bids through new Public Procurement Portal.

REMAINING ISSUES

In the previous year, no progress was made in the field of fight against corruption in public procurement or in the sanctioning of criminal offences in the field of public procurement. There is no evidence of the implementation of the numerous information-sharing agreements concluded between anti-corruption state bodies, with the aim of prosecuting the perpetrators in cases of corruption, bid rigging, restrictive agreements and unusually low bids.

A remaining issue is the application of the rules on an “unusually low bid.” Despite FIC’s effort to draw attention of inadequate provisions with regard to “unusually low bid” and proposal to set limits i.e. percentage in the New Law defining what exactly “unusually low bid” and obligation of the contracting authorities to reject “unusually low bids”, FIC proposal was rejected. The point is, that the official position of the Commission is that the contracting authority has the discretionary right to assess whether a bid is unusually low, i.e. whether a bid differs from the comparable market prices and raises doubts as to the ability of the bidder to execute the procurement in accordance with the offered terms. The lack of clear criteria that would oblige the contracting authority to demand a detailed explanation of all the elements of the bid brings uncertainty in public procurement procedures. Bidders who suspect that a contract has been awarded to an unusually low bid have an opportunity to protect their rights before the Commission, however, the Commission has regularly refused such requests so far.

The mechanisms for the enforcement of the New Law in cases when the public procurement eligibility criteria in a particular procedure are changed with respect to the previous year’s criteria are also at issue. This particularly relates to the amendment of criteria with respect to financial indicators in cases of awarding framework agreements of significant importance for the state. In this particular case, filing a request for the protection of rights due to the criteria set in the tender documentation is not an efficient legal remedy.

In 2019, there was an increased share of exemptions from the application of the Law on exemption grounds under Article 1, paragraph 1, items 2) of the New Law, i.e., in the case of procurements paid for with foreign loans received from international organizations and international financial institutions, or under international agreements. The share was 14% in 2019 in comparison to 10% in 2018. FIC proposal that the international organisations exempted from application of the new Law shall be defined in the New Law to avoid possible misunderstandings in interpretation of this notion was rejected. Intergovernmental agreements with third countries continue to violate the principle of equal treatment of bidders, the prohibition of discrimination, transparency and the protection of competition. Also, the implementation of these agreements is often inconsistent with the adopted solutions in both domestic and EU law.

The monitoring of the execution of contracts awarded in public procurement procedures is completely neglected. The Foreign Investors Council is not aware of any cases where the Commission has exercised the power envisaged in Article 163 of the previous Law, to file a lawsuit for the annulment of the contract on grounds set forth in this article.

Bearing in mind the limited capacities of the PPO, it is questionable whether it will be able to control public procurement plans and amendments to such plans. In accordance with the New Law, the contracting authority may initiate a public procurement procedure if procurement is foreseen in the annual plan of public procurement. However, in accordance with New Law, the possibility of misuse, in the event that exceptional cases where public procurement cannot be planned in advance or for urgent reasons, the contracting authority may initiate the public procurement procedure and if the procurement is not foreseen in the public procurement plan.

FIC RECOMMENDATIONS

- Urgent adoption of the new Law, harmonized with the EU Directive 2014/24. (3)
- Active cooperation between the PPO, the Ministry of Finance, the Ministry of Economy, the Anti-Corruption Agency, the budget inspectorate, the State Audit Institution and the Government of Serbia in the implementation of the Public Procurement Law and the Memorandum on Cooperation of 15 April 2014. (3)
- Expansion of the administrative and expert capacities of the Public Procurement Office and State Audit Institution to effectively oversee the planning and execution of public procurements by contracting authorities and combat corruption. (3)
- Strengthening the Law in relation to the Public Procurement Office's and the Commissions' authorities in cases of suspected "bid rigging," (the ability to implement special procedures to control the implementation of awarded contracts and submit proposals for the annulment of a public procurement contract). (3)