

## BULGARIAN PUBLIC PROCUREMENT LAW CHANGES – WILL THE PROCUREMENT PROCEDURES BE FASTFORWARDED?

A new approach to speed-up appealing procedures and prevent bad faith appeals has been proposed by the Bulgarian government and adopted by the Bulgarian Parliament. The new Bill for amendments of the Public Procurement Act ("Bill") has been published in State Gazette No. 49/12.06.2018, entering into force on 15 June 2018. Both the contracting authorities and the bidders will be affected by the legal novelties.

### BACKGROUND

In Bulgaria most of the European Union funds under operational and other programs are streamlined and utilized through public procurements and tenders accounting for a substantial part of the financings of the Bulgarian economy - 9% of the national GDP on average between 2009 and 2013, thus making it a key public resource for allocation of funds.

In the last couple of years following the implementation into the national legislation of the new European Public Procurement Directives<sup>1</sup>, both the Public Procurement Agency and the public procurement reviewing body - the Commission for Protection of Competition (CPC) reported a high increase in the number of appeals against various phases of all kinds of the tendering procedures. This led to many delayed, dropped and/or failed public procurement tenders, most of them with a significant public interest (e.g. large public infrastructure constructions procurement tenders, e.g. highways, railroads, natural gas pipelines). As a result of the systematic appeals against co-financed projects a slower utilization of the EU funds was established. This had adverse consequences on the proper utilization of the EU Funds by the Bulgarian contracting authorities and the economy as a whole.

Such extensive increase of the complaints reported by the government was due to both (i) the low thresholds of statutory fees for appeal and (ii) the possibility for appellants to temporarily suspend the procedure and/or delay the assignment of the selected contractor until the appealing is completed with a final judicial act. Allegedly, such suspension is used by bad faith bidders to 'twist the arm' of public procurement contracting authorities.

### THE AMENDMENTS IN BRIEF

- 1) Safeguard measures** - It is a common practice for some bidders or potential bidders to bring before a reviewing body the so called 'blanket complaints' aiming merely to stop the public procurement procedure in their favor. To address such unduly behavior, new requirements as to the minimum content of the public procurement procedure complaints

<sup>1</sup> Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

are introduced. The appealing party is now also required to ground and prove its capacity and legal interest to appeal. Now judges are granted extended powers to decide whether there is a legal interest of the appellant to challenge the respective act of the contracting authority before opening the case file. This aims to avoid unnecessary protraction of the reviewing procedure and the procurement procedure.

- 2) **Bidders to be held accountable for the appeals** - Under the new provisions the contracting authorities may hold any bidder liable to civil action for acting in bad faith while appealing contracting authorities' acts. It is considered that a threat of direct financial responsibility may discipline the bidders' behavior in public procurements.
- 3) **Procedure suspension subject to CPC prior regularity check** - Until recently, it was possible for a tender participant to file an irregular appeal and the tender to be suspended despite the irregularity of the appeal. To address this, the Bill amendments provide that a tender would be considered as suspended as of the date CPC notifies the contracting authority on the initiated appealing procedure, i.e. upon the preliminary check of the regularity of an appeal rather than beforehand – i.e. on the filing date of the appeal.
- 4) **New rules on notifications and summoning** - The serving of notices and/or summons via email becomes the preferable method of service for the CPC to serve papers under the Public Procurement Act.

## COMMENTS

The adopted amendments have been welcomed by the parties regularly dealing with public procurements. Still, one could question whether they are aligned with some other legal principles and if not – whether the novelties in well established procedures could serve as 'panacea' for malpractices in public procurement.

As an example, in contrast to the general principle that the appeal of an administrative act having preliminary execution does not lead to the suspension of its preliminary execution<sup>2</sup>, the newly amended Article 205 (7) of the Public Procurement Act envisages the opposite – any preliminary execution of a decision for selecting a contractor admitted by the CPC would be suspended in case it has been appealed before the courts.

The new notification and summoning provision via emails contradicts the general civil law principles of formal serving of papers, thus raising questions as to the procedural rights of the concerned parties - generally, important documents relating to proceedings should be served in a special manner, e.g. with documentary proof of service or within certain deadline or to a particular person ("acknowledgement of serving").

Also, by law serving using electronic means is possible only provided that the addressee to whom the document is to be served has explicitly agreed to this way of communication. However, as per the amendments to the Article 210 of the PPA, the necessity for the recipient's consent for usage of electronic format as opposed to paper is not considered as relevant, and emailing shall be considered a standard serving method from now on.

<sup>2</sup> Art. 60 of the Administrative Procedural Code.

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