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In focus: Law on Amendments and Supplements to the Law on Public Procurement

On July 31st 2015, the National Assembly of the Republic of Serbia adopted the Law on Amendments and Supplements to the Law on Public Procurement which entered into force on August 12th 2015, with the exception of provisions pertaining to the obligation of the purchaser to approve the annual procurement plan, which shall be applicable as of January 1st 2016 (hereinafter: “**Amendments to the Law**”).

By these Amendments to the Law, the public procurement system has been adjusted so as to comply with EU directives governing this matter which were passed in 2014.. The basic aim of the Amendments to the Law is the improvement, i.e. development of an integrated system of public procurement, strengthening competition on the public procurement market, with a reduction of irregularities and unnecessary administrative burdens and an increase in cost-effectiveness, the efficiency and transparency of public procurement procedures.

On the one hand, Amendments to the Law specify the meaning of certain basic concepts and terms such as the concept of purchaser, public procurement contract and framework agreement. On the other hand, new concepts such as the uniformity of public procurement and mixed procurement are introduced. Procurements to which the provisions of the Law do not

apply are defined more specifically, and additional exemptions to the application of the Law on public procurement are introduced, as well as novelties in certain types of public procurement procedure, the procedure on the request for the protection of rights, centralized public procurement, and shortening of the deadlines for specific actions in the procedure. Finally, the Amendments to the Law bring about changes regarding public procurement in the field of water management, energetics, transport and postal services in terms of introducing limiting values for low-value public procurement. For the first time, the Amendments to the Law regulate public procurement in the field of defense and protection for the purpose of eliminating the consequences of natural disasters and technological accidents.

Below are some of the most significant novelties adopted by the Amendments to the Law:

1. Public procurement to which the provisions of the law do not apply

By these Amendments to the Law, new exemptions to the application of the Law on public procurement are introduced, thus the provisions of the Law do not apply to loan services, the acquisition or lease of real-estate and the rights associated with them, certain types of legal services such as representation by attorney in arbitration proceedings in the country and abroad, before national and international courts

and legal advisory services in connection with the aforementioned procedures, legal services provided by legal representatives or guardians, and legal services related to the exercise of official authority. The provisions of the Law on public procurement also do not apply to any procurement of goods and services of a certain value for the needs of diplomatic and consular missions and international missions and financing the performance of certain activities, particularly through grants. In addition, the Amendments to the Law prescribe the possibility for non-application of public procurement procedures in the case of procurement between related parties, as well as the conditions for such purchases.

2. Low-value public procurement

In terms of the Amendments to the Law, the limit for low-value public procurement now amounts to 5.000.000,00 dinars, wherein the total estimated value of equivalent procurement must not exceed 5.000.000,00 dinars on an annual level. Low-value public procurement can also be conducted, regardless of the estimated value, when it pertains to the purchase of health and social services, legal services (other than those to which the law does not apply), hotel and restaurant services, educational and vocational training and services in the field of sports, culture and recreation.

Application of the provisions of the Law on Public Procurement is not mandatory for public procurement whose value is less than 500.000,00 dinars, provided that the total estimated value of equivalent procurement cannot exceed 500.000,00 dinars on an annual level.

3. Publication of decisions and documents as a means of communication

Amendments to the Law place particular importance on the transparency of public procurement procedures, all with the aim of reducing irregularities and potential misuse. Thus, as an official means of communication, publication on the Public Procurement Portal (hereinafter: the Portal) is foreseen for numerous documents such as: the public procurement plan, decision on the recognition of qualifications, decision on the exclusion of a candidate, decision on awarding a contract, decision to discontinue the procedure, internal plan to prevent corruption for purchasers whose procurements are above one billion dinars on an annual level, data related to the request for the protection of rights, etc. For documents whose publication on the Portal is compulsory, without the obligation to deliver the same to bidders, the deadlines for their contesting and disputing commence from the moment of their publication on the Portal.

4. Tender documentation and proving the fulfillment of conditions

Amendments to the Law specify that the prohibition of performing activities must not exist at the time of filing the bid, rather than at the moment of publishing the invitation to tender, and in this sense the bidders are obliged to explicitly state in the bid that the measure of prohibition of performing activities has not been imposed on them. Through tender documentation, it can be prescribed that the fulfillment of conditions can be proved by submitting a statement in which the bidders, under full

material and criminal responsibility, confirm that they meet the conditions, wherein the purchaser is obligated to, before rendering the decision on awarding the contract, request from the bidder who was assessed as the most favorable to provide copies of proofs on the fulfillment of conditions.

The minimum annual income which, depending on the subject of public procurement, may be required from the bidders as proof that they meet the additional requirement regarding financial capacity, cannot be higher than twice the estimated value of public procurement, except in cases where this is necessary due to special risks related to the subject of public procurement.

According to the Amendments to the Law, the purchaser is no longer obliged, but rather has the possibility to refuse a bid on the grounds of the existence of negative references.

5. Estimated value of public procurement

The contract may be awarded if the bid contains a price higher than the estimated value of public procurement, but on condition that such price does not exceed the comparable market price and that prices in all acceptable bids are higher than the estimated value. On the other hand, provisions relating to the estimated value do not apply in a situation where the purchaser is unable to determine the economic structure of the procurement.

6. Changes to the public procurement contract

The subject of procurement cannot be amended after conclusion of the public procurement contract. However, its volume can be changed, provided that the contract value can be increased for a maximum of 5% of the total value of the originally concluded contract, but for a maximum of 5.000.000,00 dinars. The possibility of change must be stated in the tender documents and public procurement contract.

7. Request for the protection of rights

In order to increase the efficiency of the entire public procurement procedure and prevent the misuse that existed in terms of the request for the protection of rights (hereinafter: the Request), changes have been made concerning active legitimation for filing the Request and the manner of submitting the same, an increase in the amounts of taxes, consequences of the filed Request and conduct in case of deficiencies contained in the Request.

According to the Amendments to the Law, the Request is filed to the purchaser, with delivery of a copy to the Republic Commission for the Protection of Rights (hereinafter: the Republic Commission). Active legitimation is limited only to the person who has an interest in awarding the contract or framework agreement in the specific public procurement procedure and which has suffered or could suffer damage due to the purchaser's conduct contrary to law.

Since the interested person has an obligation to point out any deficiencies and irregularities at the moment when he seeks clarifications from the purchaser, the

Request for disputing the type of procedure, as well as the contents of the invitation to tender or tender documentation, may be submitted only if the applicant has indicated such deficiencies to the purchaser and the purchaser has failed to remedy the same.

According to the Amendments to the Law, the filed Request does not have automatic suspensive effect, i.e. it is specified that the purchaser cannot make a decision on awarding the contract, concluding a framework agreement, recognizing qualifications and suspending proceedings, nor can the purchaser conclude a public procurement contract before making a decision on the filed Request, but he may undertake other activities (e.g. open bids, make a professional evaluation of bids, etc.). However, despite the filed Request, the purchaser may award and execute the contract if the delay of activity could cause great difficulties in the work or business of the purchaser which are disproportionate to the value of the public procurement, with publication of a justified decision on the Portal and delivery to the Republic Commission. The Republic Commission can do the same at the proposal of the purchaser if the delay significantly endangers the interests of the Republic of Serbia.

If the Request does not contain all the required elements, the same is rejected in accordance with the Amendments to the Law, i.e. it is no longer prescribed that the purchaser has the obligation to invite the bidder to rectify the identified deficiencies.

If the Request is granted but all petitions from the Request have not been adopted by the decision on adoption, the applicant

has the right to submit a written statement to the Republic Commission within 3 days of receipt of the decision, and request that the procedure continues before the Republic Commission in respect of the petitions which have not been adopted.

8. Transitional and final provisions

Public procurement procedures commenced before entry into force of the Amendments to the Law shall be conducted in accordance with regulations under which they commenced. Procedures for the protection of rights shall be conducted according to regulations in force when the public procurement procedures to which those rights apply have commenced, whereas deadlines for the adoption of bylaws shall be 60 days from the date of entry into force of the Amendments to the Law.

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