04_The New Public Procurement Act – Its Main New Features Compared to the Existing Legal Framework_KGr[english]

The new Public Procurement Act which was adopted earlier this year entered into force on 15 April 201. It transposed two recent Directives of 2014, i.e. 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 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.

The objective of the law is to establish a consolidated legal framework of the national public procurement rules, incorporating public procurement by sectoral contracting authorities and public procurement of works, supplies and services by contracting authorities or contracting entities in the defence and security sector.

This article gives an overview of the main differences between the new rules and the previous arrangements, as well as the most substantial novelties in the new legislation.

Unlike the existing Public Procurement Act (PPA), the new law builds on a new approach to the definition of contracting authorities, giving an exhaustive list by groups. They are divided into two main groups: sectoral contracting entities and public contracting authorities. Depending on this categorization, the two groups have different powers to apply procurement procedures in accordance with the threshold amounts of the relevant procurement contract.

The new PPA provides for 13 different procedures, depending on the type of procurement entity, object of procurement and estimated value.

It retains the existing open and restricted procedures, the competitive dialogue, design contests and procedures with negotiation. It is worth noting the new procedure of innovation partnership in which the contracting authority negotiated with pre-selected candidates for the purpose of setting up partnership with one or more partners conducting research and development activities.

In the negotiated procedure without a prior contract notice, the negotiated procedure without a prior invitation to participate, the negotiated procedure without publication of a contract notice and the direct negotiations, the contracting authority conducts negotiations on the contractual clauses with one or more strictly specified persons. These procedures do not differ substantially from each other in terms of the procedural rules governing the award of contracts or in terms of their applicability. The law reads that public contracting authorities apply the negotiated procedure without a prior contract notice, whereas sectoral contracting entities apply the negotiated procedure without a prior invitation to participate. Public procurement contracts in the defence and security sector are awarded on the basis of the negotiated procedure without publication of a contract notice. Direct negotiations are applicable by both types of contracting authorities but they are not applicable to public procurement contracts in the defence and security sector and the conditions for their applicability depend on the type of service and its threshold amount as determined in accordance with the estimated value.

The same approach is applied to the competitive procedure with negotiation, the negotiated procedure with a prior invitation to participate and the negotiated procedure with publication of a contract notice, in which the contracting authority conducts negotiations with candidates invited on the basis of pre-selection. The candidates submit initial tenders to start negotiations. Public contracting authorities may apply the competitive procedure with negotiation under certain conditions (Article 73(2) PPA) and sectoral contracting entities conduct negotiations with a prior invitation to participate, while the negotiated procedure with publication of a contract is applicable to public procurement contracts in the defence and security sector.

The public competitive procedure and direct negotiations are not applicable to the defence and security sector and they may be used only in cases of lower estimated values of the contract.

The equivalent of the public invitation under the repealed PPA is the option to conclude contracts through collecting tenders with a notice and an invitation to certain persons. As ws the case with the previous arrangements, this is not considered to be a public procurement procedure and the contracts resulting from these contracting methods will remain outside the

scope of the legality control over the decisions of contracting authorities in accordance with the PPA.

Next, the new legal framework allows for a part of the whole procurement (not more than 20 % of the total value) to be excluded from the total estimated value of the procedure at the discretion of the contracting authority. In these cases, it would be possible for the contract to be awarded only on the basis of the lot value and the procedure would be typically easier. This option is applicable only to cases in which the value of the lot does not exceed BGN 156 464 for supply and services and BGN 1 000 000 for works. The residual value will be subject to the procedure applicable to the whole amount of the procurement. It is pointed out in the reasons put forward by the presenter of the bill that this approach should ensure possibilities for more flexible management of the contracting process, especially when some results are needed urgently, whereas the others could be postponed in time.

Furthermore, a major novelty which is to enter into force on 1 July is the use of an integrated national electronic web-based platform by contracting authorities in the award of public procurement contracts. This is in line with the principles of openness and transparency and it ensures full electronic management of the contracting process through the centralized electronic platform to be administered by the Public Procurement Agency. It will be instrumental in the stage-by-stage automation of the processes relating to the submission of tenders and their evaluation and ranking, the conclusion of contracts, invoicing and payments.

Contracting authorities may use electronic auctions to award public procurement contracts in a fully electronic manner. The electronic auction is a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented. It is a method to conduct a procedure in which tenders can be evaluated on the basis of formal/objective mathematical indicators (e.g. price, time limits, etc.).

In accordance with the lawmaker’s reasons, the electronic auction makes it possible for real competition to take place in the procedure, enabling the tenderers to improve their tenders

repeatedly as they observe the actions of the other competitors (without knowing who exactly they are) and thus ensuring maximum safeguards for objectivity in the selection process.

Another novelty is the possibility for conducting market consultations (Article 44). Contracting authorities may conduct them to study the market or the nature of the activities that are to be procured by seeking the advice of independent experts. Certain conditions are set out with regard to the consultations so that to prevent abuse and to prepare an appropriate contracting process. This is a way to ensure that the persons who have provided the market consultation or their related parties would not derive any undue advantage thereof. For this purpose, contracting authorities have to publish all the information related to the market consultations in the buyer profile and to set appropriate time limits for preparation and participation in the procedure with a view to avoiding a privileged position of those who could benefit from the prior information.

It is worth noting that the new legal framework contains certain provisions on the requirements to candidates and tenderers. Alongside with the existing requirements to tenderers and candidates, there are some new grounds for mandatory exclusion where they are found to be in breach of their obligations relating to the environmental, labour or social legislation in the implementation of a public procurement contract. The reasons of the presenters of the bill point out that the whole set of new grounds for excluding certain persons from participation in the procedures is intended to introduce the principle that persons who have committed a criminal offence or misconduct or have failed to perform certain obligations, affecting public order and financial security, will not be able to benefit from public resources in their capacity of public procurement contractors. Contracting authorities may also apply mandatory exclusion of tenderers who are found guilty of misrepresentation in their documents relating to the verification of the absence of grounds for exclusion or to the fulfillment of the selection criteria or to the submission of the relevant information on the absence of grounds for exclusion or the fulfillment of the selection criteria.

Contracting authorities may also provide for non-compulsory exclusion of candidates and tenderers in the notice in some specific cases relating to non-performance under a public procurement contract or a concession agreement or a works or services contract and also in

the cases where a person representing the tenderer, the members of managing or supervisory bodies or other persons authorized to exercise control over the decisions of these bodies has undertaken to unduly influence the decision-making process of the contracting authority concerning exclusion, selection or award, including the provision of false or misleading information, or to obtain information that may confer upon him undue advantages in the procurement procedure. It is envisages that a list of these persons will be compiled for information purposes but it is not clear yet who will prepare the list, what criteria will be applied to its contents and whether the inclusion of an economic operator on the list will be subject to appeal or not.

Candidates and tenderers who are found to meet any requirement for mandatory or non-compulsory exclusion may provide evidence to the effect that they have taken measures which are sufficient to demonstrate their reliability despite the existence of a relevant ground for exclusion. For this purpose, the candidates or tenderers may prove that they have paid their taxes or mandatory social security contributions, including the interest accrued and/or any penalties thereof, or that these outstanding taxes and contributions have been reschedules, deferred or secured or that they have paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the competent authorities and taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offences or misconduct. The final judgment on the availability of sufficient “reliability measures” is made by the contracting authority that is to give a statement of the reasons for the decision to accept or reject the measures and for the decision to exclude the candidate or tenderer on these grounds or not. In my opinion, these powers vested with contracting authorities will give them even greater discretion in deciding which candidates and tenderers will be allowed to reach the evaluation phase and these discretionary powers might be used for undue exclusion of certain candidates and tenderers. It should be noted that the judgment by the contracting authority should be subject to legality control by the Commission for the Protection of Competition (CPC) but then a situation might occur in which the CPC would have the powers to verify whether the relevant economic operator “has clarified the facts and circumstances in a comprehensive manner by actively collaborating with the competent authorities and taken concrete technical,

organizational and personnel measures that are appropriate to prevent further criminal offences or misconduct", insofar as such findings and recommendations are not envisaged to be set out in an official document that could be used as valid evidence by the judicial authorities.

Another substantial section of Chapter Seven contains provisions on the selection criteria. To prove the economic and financial standing of candidates or tenderers, contracting authorities may require a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract, which may not exceed two times the estimated contract value, an appropriate level of professional risk indemnity insurance depending on the volume and nature of the contract and/or positive ratios between certain assets and liabilities.

With regard to the possibility for candidates and tenderers to rely on the capacity and resources of third parties, notwithstanding their legal relationship, concerning the criteria relating to the economic and financial standing, the technical and professional ability and the suitability to purse the professional activity, the new law allows the contracting authorities to impose a requirement for the economic operators and the third party whose capacity is relied on with regard to the criteria relating to economic and financial standing to be jointly liable for the execution of the contract.

Subcontractors are required to meet the same conditions that are imposed on the main contractor in proportion to the volume of activity they are to perform and the relevant requirements to their personal standing. The share to be carried out by these persons and the relevant evidence to prove their consent with this share continues to be required in the tender. However, the obligation of contracting authorities to transfer due payments directly to the subcontractor for such shares of the contract that are separate lots is a new feature of the legislation.

Another important element is the European Single Procurement Document. It is a self-declaration as preliminary evidence in replacement of certificates drawn up in a standard EU form and confirming that the relevant economic operator fulfills the personal standing conditions and the selection criteria as set out by the contracting authority, while these circumstances are subject to proof when the public procurement contract is awarded. Once

drawn up, the single document may be reused in other procurement procedures provided that there are similar requirements therein.

The next substantial element of the new legislation relates to the contract award criteria. First and foremost, the law is based on a new approach that the contract is awarded to the most economically advantageous tender and even when the sole criterion is the price, the objective is the most economically advantageous result.

In this connection, the award is based on the most economically advantageous tender which is identified on the basis of the price or cost, using a cost-effectiveness approach, including life-cycle costing or best price-quality ratio, which is assessed on the basis of price or cost and criteria covering qualitative, environmental and/or social aspects, linked to the subject-matter of the public procurement contract.

A noteworthy novelty is the possibility for contracting authorities to use the professional competence of the staff as a contract award criterion. Currently, it cannot be assessed in the course of the tender assessment and it can be included only as a minimum requirement.

The possibility for the guarantee to be given in the form of a professional risk indemnity insurance is another new feature of the legislation.

A positive development is the new provision on the transformation of some of the existing grounds for conducting a negotiated procedure without a contract notice into grounds for modifying public procurement contracts during their term. These are the cases when the procedure, already negotiated, should be optimized and the objective is to avoid the opening of another procedure that would actually bring about the same result. However, for the sake of transparency, a notice to that effect is to be published in the Public Procurement Register and, in the case of high-value contracts, also in the Official Journal of the European Union.

Finally, it should be noted that with regard to the system of appeal, the new arrangements are not different in principle from the existing ones and the new features relate to their optimization so that to speed up the proceedings and to prevent abuses of the right to appeal.

Furthermore, the new Fee Rates applicable to proceedings under the Public Procurement Act before the CPC and the Supreme Administrative Court (SAC) entered into force on 15 April 2016. The amount of the fees depends on the estimated value of the public procurement contract as follows: the fee is BGN 850 for contracts with an estimated value of up to BGN 1 000 000; it is BGN 1 700 for contracts with an estimated value ranging from BGN 1 000 000 to BGN 5 000 000, and BGN 4 500 for contracts with an estimated value exceeding BGN 5 000 000. The fees for cassation proceedings before the SAC are equal to a half of the fee collected by the CPC for the relevant file, while the fee for a private complaint lodged with the SAC under the PPA is equal to 10 percent of the fees paid or due for the proceedings before the CPC or the SAC but not less than BGN 100.

It is yet to be seen whether the implementation of the new law will achieve the objectives set out in the PPA and the underlying fundamental principles will be upheld. More often than not, this has not been the case so far either because of the operational independence of contracting authorities which has been abused or because of the case law of the judicial authorities to allow prior implementation of the decisions of contracting authorities on the choice of a contractor or to suspend the procedure which has led to many situations in which the appeal against the decision of the contracting authority and the ruling on the merits of the case are rendered senseless. It is in the common interest of all market participants to ensure that the new law prevents such negative outcomes of public procurement procedures by providing for a more efficient use of resources and for more competition among the participants in public procurement procedures.