PUBLIC PROCUREMENT REVIEW PROCEDURE - INCONSISTENCY OF THE PUBLIC PROCUREMENT ACT WITH COUNCIL DIRECTIVE 89/665/EEC AND ECJ CASE LAW

Irena Tušek*

Public procurement law specifically regulates the process of procurement in the public sector. Procurement, as the process leading to a contract, is generally divided into three categories: supplies (acquisition of products), services, and works. It consists of legal rules that impose limits in pursuit of the main goal - the best value for money. The main difference between procurement in the public and in the private sector is that the aim of public procurement is to pursue the best value for taxpayers' money. Since public procurement is about spending taxpayers' money to provide benefit to citizens or consumers from the products and services acquired, procurement is subject to compliance with general rules and principles in order to ensure efficient purchasing. Therefore, public procurement necessarily includes formal and bureaucratic processes, depending on the thresholds of the contract.

Public procurement rules reduce political pressures, introduce accountability in public sector purchasing, and promote economic activity. At the same time, public procurement ensures market competition in the public sector, stimulates competition among businesses that supply the required products and services, and also poses strict rules that must be complied with in order for the contract to be awarded.

In order to ensure compliance with the rules, aggrieved parties and other interested parties involved in the public procurement procedure must be given the right to have those rules enforced, as well as the right to appeal, i.e. to challenge the award decision.

For these reasons, the State Commission for the Supervision of Public Procurement Procedures has been established. Thus, all parties involved in the procurement procedure can exercise their given constitutional right of appeal against individual acts of the state administration and bodies vested with public powers.[1]

The Republic of Croatia does not have a long tradition of regulated public procurement, as do some European countries. Nevertheless, in

* Irena Tusek, LL.B. (Zagreb), LL.M. candidate in Competition and IP Law (Liege), legal councellor - State Commission for Supervision of Public Procurement Procedures, Zagreb.

[1] Constitution of the Republic of Croatia (NN, 41/01) art 18 para 1.

order to comply with duties assumed under the Stabilisation and Association Agreement,[2] especially under Articles 69 and 71, the Croatian Parliament enacted the Public Procurement Act[3] in 2001 (amended in 2005), and the Act on the State Commission for Supervision of Public Procurement Procedures[4] in 2003. These Acts constitute a legal framework for public procurement procedures and for their review, with a view to the effective expenditure of the state budget and to the stimulation of free market competition.

The right to stand before the state commission

For the procurement procedure to have tangible effects, effective and rapid remedies must be available in the event of infringements of public procurement rules. Therefore, it is highly important to define the persons to whom review procedures are available.

According to Article 70, paragraph 1 of the Public Procurement Act, in order to protect its own rights, each tenderer[5] or competitor that has participated in a tendering procedure may, within three days from the receipt of a written award decision or decision on the annulment of the procurement procedure, lodge a written objection with the procuring entity on the grounds of irregularities in the tendering procedure.

According to Article 71, paragraph 1 of the same Act, the party lodging the objection referred to in Article 70, paragraphs 1 and 2 may, in the case of a negative reply from the procuring entity, or if the procuring entity fails to reply, lodge a written complaint with the State Commission for the Supervision of Public Procurement Procedures (hereinafter: State Commission), at the same time delivering compulsorily a copy of the complaint to the procuring entity.

Therefore, three conditions have to be met in order to bring proceedings before the State Commission. First, a person has to participate in the contract award procedure by submitting an offer or a request to participate in the public procurement procedure.[6] Second, the objection must be lodged with the contracting authority. Third, the tenderer must receive a negative reply from the contracting authority (or not receive a reply at all).

A somewhat different formulation is given in Article 70, paragraph 2 of the Public Procurement Act concerning the right to appeal in the case

---

[2] NN MU (14/01)

[3] NN (117/01, 92/05)

[4] NN (117/03)

[5] Art 2 item 6 defines a tenderer as any physical or legal person who has submitted an offer in the procurement procedure.

[6] Selective tendering in a restricted procedure.

of a negotiated procedure without publication.[7] Here, any person who has an interest in a particular procurement/contract, i.e. whose rights might be harmed, has the right to lodge an objection (and therefore a complaint). Because of the nature of the negotiated procedure without publication, possible complainants cannot meet the condition of submitting an offer in the procurement procedure. Therefore, any party with an interest in a specific contract, or that claims possible harm, and that had previously lodged an objection with the procuring entity, has the right to stand before the State Commission. However, the Public Procurement Act does not regulate how to prove an interest in obtaining a certain procurement contract, or how to prove that a party's rights might be harmed by the conclusion of the contract with the intended tenderer. In any case, in the author's opinion, the complainant must at least prove that he is registered to perform the respective works, or provide the services and goods.

However, from the formulation of Article 70, paragraph 1, we can conclude that the legislator deems that any undertaking that has submitted a tender has an interest in obtaining a certain contract, despite the fact that it might have submitted an unacceptable tender. Such a formulation of Article 70, paragraph 1 may be contrary to the principle of effectiveness of public procurement procedures, since any undertaking that has submitted an unacceptable offer has the right to stand before the State Commission despite the fact that by no means can it be awarded a contract.

For example, according to Article 60, paragraph 1 of the Public Procurement Act, a tender shall be deemed unacceptable if it does not comply with the tender documentation and conditions, or if it is incomplete or contains aberrations or impermissible sections that contradict the tender documentation, or if it is from a tenderer that did not duly take over or purchase the tender documentation pursuant to the conditions stipulated in the tender documentation.

An example of the last case would be for one undertaking to take over or purchase the tender documentation and another undertaking to submit the tender instead of the first one.

According to Article 28, paragraph 5 of the Public Procurement Act, the contracting authority and tenderer may use the tender documents for their own purposes or refer them to third persons, but only with the con-

[7] A negotiated procedure without publication is a type of public procurement procedure in which the contracting authority must at least 15 days before concluding a contract publish a contract award decision in the official journal, stating the chosen tenderer and the scope of goods, services or works. The contracting authority may award the contract by negotiated procedure without publication if certain circumstances stated in art 12 paras 6 and 7 of the Public Procurement Act have occurred.

sent of the other party. According to, paragraph 4 of the same Article, the names of the tenderers that have requested or received tender documents must remain confidential until the opening of the tenders.

According to the above-mentioned Article, it is forbidden to purchase tender documentation and give it to another undertaking. The undertaking that has not duly taken over or purchased the tender documentation cannot be awarded a contract under any circumstance. Therefore, its rights cannot be harmed by the alleged infringements, nor does it have an interest in obtaining a certain contract, despite the fact that it has submitted a bid.

Bearing in mind that the public procurement procedure has to be carried as rapidly as possible in order to be effective, and that the decisions must be reviewed within a 15 days period, the question rises whether the above-mentioned tenderers that cannot win the contract should have the right to stand before the State Commission.

According to the formulation of the Public Procurement Act, the answer in the author's opinion is yes, provided that such a tenderer has previously lodged an objection with the contracting authority and has received a negative reply or has not received a reply at all.

The formulation of Article 70, paragraph 1 may be contrary to the principle of the effectiveness of public procurement procedures since any undertaking that has submitted an unacceptable offer has the right to stand, despite the fact that it cannot be awarded a contract. Still, it complies with the constitutional principle of the right to appeal, which has a stronger legal force than the principle of effectiveness of the public procurement procedure proclaimed in the Public Procurement Act.[8]

However, let us imagine another situation. What if the undertaking has duly taken over or purchased the tender documentation pursuant to the conditions stipulated in the tender documentation but did not submit a bid since the tender documentation contains discriminatory specifications and is tailor-made? Does such an undertaking have the right to stand before the State Commission? Or does it have to submit a bid knowing that it does not comply with the tender documentation and the conditions stated in it, and therefore is unacceptable, in order to retain the right to appeal?

In interpreting Article 70, paragraph 1 of the Public Procurement Act, the author's opinion is that such an undertaking does not have the right to appeal. It must make and submit a bid and pay the costs incurred in order to retain the right to appeal. Theoretically, it could be given the opportunity to apply for a review of the discriminatory tender

[8] Art 3 para 1 and art 71.

conditions before the deadline for the submission of tenders, but unfortunately Croatian law does not recognise that institute. The tender documents may be revised only upon an objection or a complaint (i.e. after the contracting authority has rendered the award decision).

Discriminatory tender conditions - Directive 89/665/EEC and Case C-230/02 Grossman Air Service before ECJ

Interesting case law concerning discriminatory tender conditions in relation to the Remedies Directive 89/665/EEC has been established before the European Court of Justice.

According to Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of the review procedures to the award of public supply and public works contracts, the Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2 (7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

Article 1, paragraph 3 of the Remedies Directive prescribes that the Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

According to Article 2(1)(b) of the Remedies Directive, the Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the authorities to either set aside or endure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure.

In the case C-230/02 Grossmann Air Service[9] before the European Court of Justice, the Bundesvergabeamt (Federal Public Procurement Of-

[9] A dispute between Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG (Grossmann) and the Republic of Austria, represented by the Federal Ministry of Finance (the Ministry), concerning an award procedure for a public contract.

fice) of Austria asked for preliminary rulings and raised the following questions: "Is Article 1(3) of ... Directive 89/665 ... to be interpreted as meaning that the review procedure must be available to any undertaking which has submitted a bid, or applied to participate, in a public procurement procedure? In the event that the answer to Question 1 is no:...(3) Is Article 1(3) of Directive 89/665, in conjunction with Article 2 (1) thereof, to be interpreted as meaning that an undertaking must be afforded the opportunity in law to seek review of an award procedure regarded by it as unlawful or discriminatory even where it is not capable of performing the totality of the services for which bids were invited and, for that reason, did not submit a bid in that award procedure?"

The dispute was as follows: on 27 January 1998, the Ministry invited tenders for the provision for the Austrian Federal Government and its delegations of non-scheduled passenger transport services by air in executive jets and aircraft. Grossmann submitted a tender. On 3 April 1998, the Ministry decided to annul the first invitation to tender.

On 28 July 1998, the Ministry issued another invitation to tender for non-scheduled passenger transport service by air for the Austrian Federal Government and its delegations. Grossmann obtained the documents for that invitation to tender, but it did not submit an offer. In a letter of 8 October 1998, the Austrian Government notified Grossmann of its intention to award the contract to Lauda Air Luftfahrt AG (Lauda Air). Grossmann applied to have the contracting authority's decision to award the contract to Lauda Air set aside. Grossmann claimed essentially that the invitation to tender had been tailored from the beginning to one tenderer, namely Lauda Air.

The Bundesvergabeamt dismissed Grossmann's application on the ground that Grossmann had failed to assert its legal interest in obtaining the entire contract. It found that since Grossmann did not have large aircraft available to it, it was not in a position to provide all the services requested, and that it had not submitted a tender in the second award procedure for the contract at issue.

The Court held that the questions above must be regarded as ones asking whether Articles 1(3) and 2(1)(b) of Directive 89/665[10] should be interpreted as precluding a party from being regarded, once a public contract has been awarded, as having lost its right of access to the review procedures provided for by the Directive if it did not participate in the award procedure for that contract on the ground that it was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to

[10] OJ 1989 L 395, 33 amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, 1).

the invitation to tender, and did not seek review of those specifications before the contract was awarded.

As in Case C-249/01 Hackermüller [2003] ECR I-6319, paragraph 18), the Court held that "the Member States are not obliged to make those review procedures available to any person wishing to obtain a public contract, but may also require that the person concerned has been or risks being harmed by the infringement he alleges."[11]

The Court also held that participation in a contract award procedure may, in principle, with regard to Article 1(3) of Directive 89/665, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award the contract. "If he has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision."[12]

In that light, the author's opinion is that the formulation of Article 70(1) of the Public Procurement Act ("In order to protect its own rights each tenderer[13] or competitor who has participated in a tendering procedure may... lodge a written objection...") is in accordance with Directive 89/665 and the relevant case law.

However, concerning the protection of rights from allegedly discriminatory specifications in tender documents, the Court held that it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications.[14]

The Court held that: "...it is clear from the wording of Article 2(1)(b) of Directive [89/665] that the review procedures to be organised by the Member States in accordance with the Directive must, in particular, set aside decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications ... . It must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated."[15]

---

[11] Case C-230/02 *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v Republik Österreich* [2004] ECR I-1829 para 26.

[12] Ibid para 27.

[13] Art 2 item 6 defines a tenderer as any physical or legal person who has submitted an offer in the procurement procedure.

[14] *Grossmann* (n 11) para 29.

[15] Ibid para 30.

Finally, the Court ruled that Articles 1(3) and 2(1)(b) of Council Directive 89/665 EEC must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, and did not seek review of those specification before the contract was awarded.

As seen from the above-cited case, a person who has not submitted a tender because of allegedly discriminatory specifications in the tender documents cannot be considered as having an interest in a procurement contract nor that he has been harmed or risks being harmed as a result of that award decision. Nevertheless, that person must be given the right to apply for review of the discriminatory tender conditions directly, i.e. before the procedure for awarding a contract is terminated.

The Public Procurement Act has not instituted the opportunity for an undertaking to apply for review of the invitation to tender before the contract is awarded. The only possible way to challenge the documents relating to the invitation to tender is to submit a tender, wait for the award decision to be rendered, and then challenge it, first before the procuring entity and afterwards before the State Commission.

Since the above-mentioned opportunity to appeal has not been provided for in the Public Procurement Act, which was amended on 15 July 2005 to align with the *acquis communautaire* in the sphere of public procurement (i.e. new Directives 17 and 18), it is clear that Croatia has not fully implemented the *acquis* and that the legal protection in the sphere of public procurement is not opportune.

Conclusion

As can be seen, in the existing Croatian legal system concerning public procurement, complete legal protection is not ensured. This results in legal uncertainty and annuls the positive effects introduced by the Public Procurement Act.

Although public procurement procedures must be carried out quickly and effectively, and so must the procedures before the State Commission, it is highly important to extend legal protection even to persons who have not submitted a tender for reasons of allegedly discriminatory tendering documents.

In the author's opinion, legal protection (in the sense that persons may apply for review of an allegedly discriminatory invitation to tender) must be allowed before the deadline for the submission of tenders so

that all illegalities may be removed at the earliest possible stage and to enable public procurement to be effective, as given in the case law of the European Court of Justice (C 230/02). Forcing a person to submit the tender knowing that it does not comply with the tendering documents simply to reserve the right to appeal is contrary to the basic principles of the Croatian Constitution and also to the principle of the effectiveness of public procurement.

Therefore, in the author's opinion, when amending the Public Procurement Act and implementing the *acquis communautaire*, Croatia must take into account the relevant case law before the European Court of Justice, since it ensures the sound interpretation of EU law and establishes legal principles. In this way, Croatia will fulfil one of the Copenhagen criteria (implementation of the *acquis communautaire*) more quickly and effectively, since the judicial *acquis* (decisions and legal principles of the ECJ) forms a part of the *acquis*. Thus, the task for Croatia must not simply be to implement the *acquis* in terms of the acts of the EU institutions, but also to implement the interpretation of those acts through the decisions of the European Court of Justice. Only in that way will the implementation fully serve its purpose.