

## PUBLIC PROCUREMENT

### XIV.

#### XIV.1 Legal Framework

The specific character of the budgetary and public funds requires a special procedure for their spending. Therefore, the Public Procurement Act (“PPA”) sets forth the state policy on the award of public procurement contracts.

The Bulgarian legislator has provided for special procedures for spending of the funds provided for or accumulated by public services. Thus it aims at increasing the effectiveness of the use of budget and public resources and at the protection of the consumers of public services.

The effective Public Procurement Act of 1999 codifies the public procurement legal framework. This law is hereinafter referred to as the ‘old law.’ In March 2004 the Bulgarian Parliament adopted a new Public Procurement Act that will become effective on 1st October 2004 – hereinafter referred to as the ‘new law.’

One of the principal goals of the newly adopted law is to harmonize the Bulgarian legislation concerning public procurement with the **four major public procurement directives of the European Union.**

The Bulgarian legislation acknowledges the importance of the public interest related to the award of public procurement contracts and provides the rules for the protection and control over public and budgetary spending. The provisions are imperative and regulate all material aspects of public procurement.

#### XIV.2. Legal Definitions

The PPA regulates the terms and procedures for the award of public procurement contracts, the objects and subjects of the public procurement procedures, the bodies implementing the state policy in this area, the procedures on awarding contracts and the procedure on appeal against public procurement related decisions.

The PPA defines the parties in the contract award procedures – **assignors, candidates** and **contractors.**

The assignors are enumerated in the law and classified in several categories. These are the state bodies, the diplomatic and consular representations of the Republic of Bulgaria abroad, organizations of the public law, the medical establishments, public companies and commercial companies when they perform some of the activities specified in the law, etc. One of the new terms adopted by the law is “organization of the public law”. As defined in §1 of the additional provisions of the PPA, the “organization of the public law” is a legal entity created for the satisfaction of a given public interest, having no commercial or industrial character, and satisfying the conditions set in the law.

According to the PPA the assignors are private law entities. They are not vested with state powers as to the contract award procedures, being thus equal with the candidates. Hence, the acts of the assignors issued in the contract award procedures are no administrative acts.

The assignors benefit from a special legal protection, as the law provides that several imperative clauses in their favor should be implemented in any public procurement contract. An example for such a clause is the assignors’ right to unilaterally terminate the awarded contract under some special conditions, explicitly set forth in the law.

The candidates for the award of a public procurement contract can be any Bulgarian or foreign natural person or legal entity, as well as alliances thereof. This definition makes it obvious that unlike the old Law, the new Law does not require the candidates to be registered as freelancers, sole entrepreneurs or companies. Hence, for the award of public procurement contract there can apply all kinds of merchants, regardless of their organizational form. Foreign persons and entities can also apply in the public procurement procedures regardless whether they are registered as merchants under Bulgarian or under their respective local legislation.

For some business activities the respective special legislation imposes specific requirements thus limiting the circle of possible candidates. For example, public procurement contracts for the supply of insurances can only be awarded to insurers.

The Contractor is a candidate who has taken part in the public procurement procedure and who has concluded a public procurement contract.

Objects of public procurement can be various types of activities that can be assigned to contractors under the procedures for the award of public procurement contracts under the rules of the PPA. Instead of enumerating all the objects of public procurement procedures, the Law only marks most of them, but expressly indicates all the exceptions to this scope. The exceptions refer to the character of the activity or the value of the contract. In general, the new Law benchmarks higher contract values above which a public procurement procedure must take place.

#### XIV.3. Procedures

The law regulates the types of procedures for the award of the public procurement contracts. According to the old law these types include the **open procedures**, the **restricted procedures** and the **negotiated procedures.** The new Law however provides for two kinds of negotiated procedures – with or without announcement, and also introduces a new type of procedure – the **design contest procedures.** The main criterion for distinction between the various types of procedures is the circle of possible participants in each procedure. In general, the announcements for the start of a procedure are published in the State Gazette. In an open procedure all interested persons and entities can obtain the documentation, present their offers and participate in

the procedure as candidates. In a restricted procedure the assignor conducts a preliminary selection among an unlimited number of candidates and invites the approved candidates to present their offers. Similarly, in the negotiated procedure contracting with an announcement, the procedure is open to all interested candidates, but the assignor conducts a preliminary selection and invites for negotiations only the approved candidates. In the negotiated procedure without an announcement, the assignor invites for negotiations a limited number of candidates, and an announcement for the start of a procedure is not published at all. The design contest procedure can be conducted either as an open procedure or as a restricted procedure.

The assignors are free to choose the type of procedure that they can conduct. However, the negotiated procedures with and without announcement can only be applied in a limited number of cases explicitly set forth in the law. The new Law, alike the European legislation, introduces special rules for the award of public procurement contracts by entities operating in the water, energy, transport and telecommunications sectors. The main difference from the general rules is the right for the assignors in this group to choose and apply any procedure, the only restriction being that the assignor can conduct a negotiated procedure without an announcement only in a small number of cases, expressly limited by Law. Besides, only this group of assignors can award framework contracts with their chosen contractors.

The procedure for awarding public procurement contracts is opened by a Decision of the assignor, with which the assignor approves the public announcement and the documentation for the candidates' participation in the procedure. The Decision and the announcement are sent simultaneously to the State Gazette and to the Agency for the Public Procurement for registration in the Register of Public Procurement. The announcement shall meet the requirements of the Law concerning its form and minimum content. Further, the announcement for the opening of a public procurement procedure must be sent in electronic form as well.

The Law provides that a "preliminary announcement" for the opening of a public procurement procedure shall be made whenever the value of the contract exceeds certain levels. The preliminary announcement is also sent to the State Gazette and the Register of Public Procurement. This obligation affects a circle of assignors defined in the Law. The preliminary announcement should be sent before 31 March each year and shall contain all public procurement procedures that the assignor plans to open during the same year.

The assignor appoints a special commission for the purpose of conducting the procedure. The commission's task is to review, evaluate and rate the candidates' offers according to the terms set by the assignor. The commission's final act is the protocol for the candidates' classification.

Based on that protocol, the assignor has to adopt a decision that announces the classification of all candidates and the candidate that has been chosen for a contractor. Then the assignor signs a public procurement contract with the candidate who won the first place according to the commission's protocol and therefore obtains the award of the contract.

#### **IV.4. Appeals**

According to the old law, the decisions taken by the assignors in the course of the public procurement procedure were considered to be individual administrative acts and were subject to judicial review.

According to the new law these decisions will no longer be classified as individual administrative acts and because of that will not be subject to appeal. Instead, a limited number of decisions expressly determined by the new law could be challenged before the civil courts. The civil claims will be filed with the lowest courts of general jurisdiction – the regional courts.

The interested parties could seek for the annulment of the decision of the assignor in cases expressly enumerated in the law and on the following grounds: \*when a decision contradicts the law, \*when the approved candidates, respectively the chosen contractors, do not meet the requirements for the award of the contract, or \*when the evaluation criteria are disregarded. The new Law gives every candidate the right to turn to the court for the annulment of an assignor's decision. The procedure can develop in two instances. The decision of the lower court can be appealed before the district court, whose decision is final.

The new Law provides for the creation of an Arbitration Court for the Public Procurement related disputes. This Arbitration Court is created at the Public Procurement Agency as an institutional arbitration. The list of the court is open, each party being entitled to appoint as an arbitrator any person that meets the legal requirements. The arbitrators can only be adults having a clean criminal record and at least 5 years of legal practice.

The judicial power of the Arbitration Court is subject to the existence of an **arbitration agreement**. Every assignor can offer to the candidates such an agreement to be signed before filing of the offers. Any candidate for the award of a public procurement contract can also offer the adoption of an arbitration clause. The arbitration clause can only refer to the arbitration court at the Public Procurement Agency. Whenever an arbitration clause is adopted, the Arbitration Court shall solve the dispute according to the rules of the LPP, with the subsidiary application of the Bulgarian law on the international commercial arbitration.

#### **IV.5. Public Procurement Agency**

According to the provisions of the new Law, the State policy in the area of the public procurement shall be carried out by the Minister of Economy, unlike the old

law, which assigned this competence to the Minister of the State Administration. A new state body – the Public Procurement Agency - shall assist the minister. The Agency shall create and manage a Register of the Public Procurement, where the decisions and announcements on the opening of public procurement procedures will be registered, information on the awarded public procurement contracts and other data as provided by the law will be available.

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