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## TRENDS IN THE DEVELOPMENT OF THE EUROPEAN PUBLIC PROCUREMENT FRAMEWORK - POSITIVES AND WEAKNESSES

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**Assist. Prof. Vanya Panteleeva, PhD**

Faculty of Law

Department of Public Law,

University of Ruse "Angel Kanchev"

Tel.: +359 887 412 662

E-mail: vpanteleeva@uni-ruse.bg

**Abstract:** *In 2016, a new Public Procurement Act was adopted. The main reasons for drafting and voting on a whole new legal framework were two. First, the need to transpose EU public procurement directives which Bulgaria has not yet introduced or has done so incompletely. Secondly, the repeated changes and additions to the repealed PPA since 2004 the amendments reached 33, some of which created controversial practices. In the next lines will look at more important aspects of the transposed European ones norms in the new PPA, as well as some trends in the pan-European framework itself, which Bulgaria is also fully affected. Below we will try to review the European regulatory framework which was transposed into the new PPA, highlighting its development trends, positive changes and weaknesses.*

**Keywords:** *legal treatment, procurement, public law, EU law*

**JEL Codes:** *K340, K330*

### INTRODUCTION

According to the European Commission, public procurements are between 15 and 20% of the world gross domestic product, and in Bulgaria for 2015 the funds spent through public procurement represent 9% of the country's GDP (according to National Statistic Institute and Public Procurement Agency). At the base of the European and national regulatory framework for public procurement are the principles set out in the Procurement Agreement (PA) from 1981 of the World Trade Organization, renegotiated in 1994, as well as its most recent revision in 2012. In this document are set out the principles of transparency, equal treatment and the promotion of competition in public procurement.

### EXPOSITION

#### **Changes to the common regulatory mechanism.**

In the new Public Procurement Act (PPA) was made an attempt to transpose fully Directive 2014/24 / EU of the European Parliament and of the Council on the overall regulation of public procurement. It should be noted that much of this directive deals with the clarification and derogation of that directive, which are governed by other regulations, directives and mechanisms that revisit public procurement. We will mention only a few - Regulation (EC) No 1370/2007 of the European Parliament and of the Council, which provides that Directives 2004/17 / EC and 2004/18 / EC apply respectively to public service contracts and public service procurements for bus or tram transportation; Directive 94/22 / EC for Coal Mining and Directive 2012/34 / EU of the European Parliament and of the Council on passenger transport at national level; European Financial Stability and European Stability Mechanism, which are excluded from the scope of Directive 2014/24 / EU, etc.

Tightening the regulatory framework and endless tools, mechanisms and regulations make it difficult for businesses to get involved in the procedures and, at the same time, bureaucratize European and national institutions, which are constantly busy transposing new and new rules, and local economic operators are tasked with constant learning and implementation of new mechanisms.

It is difficult for national courts to assess which national and which European rules to apply directly to public procurement cases and in which cases there is a breach of EU law in national law and practice.

In this way, the otherwise stated priority objective cannot be achieved - to involve small and

medium-sized enterprises (SMEs) in the procurement and procurement processes. Many of these companies refuse to apply for public procurement because they cannot afford to have an employee or an entire department within the structure that deals only with the documentation and administration of participation in the public procurement.

The incorrect transposition of the Directive on facilitating the inclusion of SMEs in public procurement procedures is the second reason for the European Commission to initiate criminal proceedings against Bulgaria. The regulatory burden should be considerably simplified.

As part of the transposition of Directive 2014/24 / EU, the new PPL envisages the promotion of flexibility in decision-making by contracting authorities to use direct negotiation or competitive dialogue, but under explicit conditions.

The new Public Procurement Law had to transpose another directive - 2014/25 / EU on procurement rules by contracting entities active in the water, energy, transport and postal services sectors. In this directive, the Council recognizes that competition and private initiative are a strong enough motivator to effectively outsource individual services without the need to further complicate public procurement regulation.

In Art. (25) The Directive states that "It is appropriate to exclude contracts for the purpose of oil and gas exploration, as it has been repeatedly established that this sector is subject to such competitive pressure that discipline is no longer necessary of the contracts imposed by Union rules for the award of contracts." . At the same time, oil and gas production is not excluded from the scope of European public procurement regulation and the Directive respectively.

#### **Unification of public procurement in the field of defense and security.**

Next, Directive 2009/81 / EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works, supply and service contracts by contracting authorities or entities in the field of defense and defense was transposed into the new PPA. security and amending Directives 2004/17 / EC and 2004/18 / EC. The purpose of this Directive is to regulate specific requirements, in particular in the area of security of supply and information security, to open up the market between EU Member States by unifying the various specific requirements for suppliers in this sector.

These requirements mainly relate to the purchase of weapons, ammunition and military supplies, as well as directly related services and construction for the armed forces. Some particularly sensitive purchases in the area of non-military security are also guaranteed. The directive states that "... in these areas, the absence of pan-European regimes impedes the opening up of defense and security markets between Member States."

An undoubtedly important aspect of the Directive is the pan-European regime on information security, including the mutual recognition of national authorizations for access to security-relevant information, as well as the uniform regulation of the exchange of classified information between contracting entities and European undertakings. Something that Bulgaria failed to transpose qualitatively into the new PPA and is one of the reasons in the beginning of December 2016. The European Commission to initiate criminal proceedings against Bulgaria for non-compliance with European standards.

#### **Promoting the employment of disabled and disadvantaged people.**

Directive 2014/25 / EU, as well as Directive 2014/24 / EU, regulates the preference for local economic operators who contribute to the integration of people with disabilities or disadvantaged people - the unemployed, minorities and others. '(51) Employment and the pursuit of a profession contribute to social integration and are key elements in ensuring equal opportunities for all. In this context, protected enterprises can play a significant role."

Such preferences have been transposed with the changes in the old PPA, allowing for the absolute and significant advantage of enterprises that have employed disabled or disadvantaged people. The danger here is that these preferences often lead to distortions of competition, since certain economic units formally hire disadvantaged persons and automatically acquire special rights, regardless of the other features of their proposal under the procurement procedure.

Since the adoption of this amendment in 2015, there has been a boom in registered "specialized" enterprises. In the first months of 2015, 96 enterprises were registered, which is 44% of the total

registered ones since such a list of specialized enterprises has been available, that is, since 2004. The newly registered specialized enterprises are for the most part long-standing players in the field of public procurement. Who may doubt that they have experience in working with people with disabilities.

The Ministry of Labor and Social Policy also found that abuses were observed by formally registering such companies in order to suppress competition in certain public contracts. For this reason, MLSP adopted mid-2016 changes in the regulation of these entities, such as a threefold reduction in the activities for which a specialized entity may be registered.

A positive direction of the Directive is that public procurement related to innovation in a particular field gives more flexibility to contracting entities to establish a long-term partnership for the development of certain innovative products without the need to have a separate procurement procedure for the products. It is also explicitly stated that only the price / quality criterion should be applied to these products, with the exception of the lowest price criterion.

**A persistent attempt to close the public procurement market.**

As can be seen from the above summarized important aspects of the European legal framework for public procurement, regulations have as their primary objectives the opening up and liberalization of the market, but then they are largely concerned with "saving" it from more serious liberalization. Of course, directives are not one-sided, but contain both liberalization mechanisms and protection mechanisms for certain economic operators. However, a more in-depth review of European legislation shows that protection mechanisms are increasingly preferred by the European authorities, especially when choosing specific legal mechanisms beyond the general principles.

That is to say, the general principles are always transparency and competition, but the exceptions are increasing. So, if we dig deeper into the legal framework and in practice, we see that behind the hollow phrases there is usually the opposite - new barriers to competition, new procedures and requirements for both contractors and contractors, new controls and reporting documentation.

It should be noted that the European Commission is trying to close the market to all third countries without taking into account that in some countries the market has been liberalized, including in China, where by 2011 preference was given to local companies when applying for public companies. However, due to criticism from outside companies in June 2011, the Chinese government re-liberalized the procurement market. For this reason, the Commission's argument that parts of the Chinese procurement market were closed to third parties is streamlined and even manipulative.

In any case, the breach of the competitiveness principle is to the detriment of the domestic economy. Competition with third countries can make the European, including the Bulgarian economy, more flexible and competitive, including outside the EU. Last but not least, every product or service that enters Bulgaria or another EU country comes with its innovation potential. Closing the market in any form whatsoever to third countries will slow down the flexibility and hence the growth of the European economy.

**Positive aspects in the new PPA to promote competition.**

It should also be noted that improvements have been made to one of the main priority objectives, namely to promote competition by introducing combined and e-procurement opportunities. Among them is the implementation of framework agreements, one of the most appropriate options for substantially optimizing the contracting process. Framework agreements allow one contracting authority to conclude contracts with more than one contractor. This significantly reduces the number of procedures that must be performed in order to achieve a result. The bill provides opportunities for widespread use of framework agreements, and it is expected that this use will lead to reduced procedures and increase the efficiency of the procurement process.

**An attempt to promote quality, not the lowest price.**

Concerning the quality of public procurement, changes were made to the award criteria, with the transposition of European norms giving absolute priority to the approach to seeking the most economically advantageous tender, ie the price / quality criterion, rather than the "lowest price" (Art. 70 et seq.). The advantages of this approach are definitely that it gives priority to quality, and therefore to innovation and to the long-term effect of the relevant contract. The downside is that the discretion of the contracting authorities is being strengthened, which is an open door to abuse and corrupt

practices.

In assessing the quality / price ratio, subjective criteria such as environmental and social value added of the contract will also be taken into account. Another similar subjective criterion introduced in the new PPA is the ability of contracting entities to include the professional competence of staff as an indicator of assessment. According to the previous PPA, such a criterion could not be placed at the competitive stage of the procedure, but only as one of the minimum criteria. Reasons for the new PPA state that "the new approach will make it possible to highlight not only the offers that offer better performance, but also those that support it with better prepared teams."

It follows from the above that the new European legal framework transposed in the new PPL contains positive tendencies in terms of free negotiation and transparency, but also contains weaknesses in terms of promoting competition and reducing administrative (bureaucratic) burdens with regard to economic operators. Such an increase in administrative burdens also results from the new scrutiny powers of the Public Procurement Agency, which we consider below.

#### **New control powers of Public Procurement Agency.**

The reasons for the new 2016 PPA state the following: "The regimes have been proposed in such a way that, to the maximum compliance with the above principles, a gradual reduction of the administrative and organizational burden in carrying out the procedures, including at each stage, is established. reduces the type and number of procedures applicable, as well as the requirements and time limits for their implementation. " However, what we see in some of the new mechanisms in the law is the opposite - an increase in red tape and an increase in the documentation required by the contracting authority. In this analysis, we will apply one example of such a burden.

In the new Public Procurement Act of 2016, a whole section of "External control exercised by the Public Procurement Agency" is separated. These new powers enable the Agency to exercise greater control over the entire process of preparing, announcing and awarding public procurement by bodies and organizations that spend state resources.

It is still too early to say whether the Public Procurement Agency is coping effectively with its new task and whether there are results from this oversight activity. The problem with this type of PPA activity is that, as with any activity of the administration, it is extremely bureaucratic and documentary. There are 5 new control procedures to be carried out by the PPA bodies. One of these is the so-called random selection control, whereby the procedures published in the electronic Public Procurement Register (PPR) are checked at random by the PPA.

A special system and methodology for random selection, based on the potential risk of the procedure, is established to determine which procurement is to be checked. According to the "Rules for Electronic Exchange of Information in External Ex-ante Control", each contracting authority must complete the Registration Form for the ex-ante control procedure, which is in the Public Procurement Portal. To a large extent, the data in this registration form is the same as the data entered by the contracting authority in describing the specific procedure in the Portal, therefore this registration form is unnecessary bureaucratic burden for the contracting authorities, and the risk can be measured by automatically generating data from the announcements for procurement in the Portal. If necessary, several additional fields can be created in the procedure declaration form. Otherwise, it turns out that the contracting authorities fill out different forms with similar data in the Portal. Failure to complete the ex-ante control form should be subject to scrutiny and sanction, which further complicates the work of the PPA and creates the risk of having a large number of contracting entities failing to comply with this requirement.

The new ex-ante and ex-post powers that the PPA has, could be useful in order to avoid unnecessary bureaucracy and the necessary data for random selection and for the checks themselves to be extracted from the Public Procurement Portal and its registry.

Bulgaria has been criticized by the European Commission mainly because of the insufficient expertise and competence of the Bulgarian administration, which cannot be overcome by expanding its powers and staffing. The current qualifications of the current audit and control administration need to be upgraded and no more control units established.

## CONCLUSION

The European Union and Bulgaria as a Member State still cannot cope with over-regulation of the matter and bureaucratization of the application and implementation processes, although they have identified precisely these problems as priorities in their strategies and regulations. In the new PPL of 2016 Some steps have been taken towards facilitating the application, reporting and audit of public procurement by improving the Public Procurement System. The single application form has been introduced as well as the possibility to choose one of the facilitated procedures - framework agreement, direct negotiation, innovation partnership, competitive dialogue and more. There are a total of 13 procedures that can be implemented depending on the needs of the contracting authority and the specific nature of its activity. In addition to the gaps in national legislation, it should be noted that the policy at European level to close the public procurement market to third countries is incorrect. The arguments that there are third countries that have also closed their markets to EU countries or that in times of crisis financial flows should be trapped within the EU are not based on economic facts and analysis. Opening up the procurement market to third countries would be positive for the economic development of the EU and, hence, for public, cultural and political relations with third countries. In an open and competitive market, EU economies will remain stimulated to maintain the flexibility, innovation and quality of services and products offered. On the contrary, closing the market will make it lazy, inefficient and slow down growth. Figuratively speaking, if a good athlete competes only with neighborhood friends and not the best in the world, he or she will probably sooner or later fall behind in their development. The European Union, and in particular Bulgaria, should not deviate from its basic principles in the treatment of public procurement, namely promoting competition, non-discrimination and reducing bureaucracy.

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