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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Croatia

-- Session V --

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Croatia --

1. Introduction

1. The Public Procurement Act (OG 110/2007, 125/2008; furthermore: PPA) of the Republic of Croatia, regulates the following: (i) public procurement procedures of all values, whereby contracting authorities and bidders conclude public works contracts, public supply contracts and public service contracts; (ii) the competencies of the competent authorities; and (iii) legal protection concerning public procurement procedures.¹ The PPA provides for protection of competition, within the entire scope of the public procurement process². The detailed implementation of the competition statutes follow based on the Croatian Competition Act (2003), whereas the authority in charge for the competition protection issues, the Croatian Competition Agency, provides the implementing authorities for the public procurement supervision, on expert advises and instructions on how to rightfully assess the particular situation of public procurement.

2. Particular questions for consideration³

2.1. Size and policy objectives

1. *What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?*

2. According to the latest data, based on notices on concluded contracts, public procurement in the period of Year 2009 amounts nearly 35 billion HRK (less than 5 billion EUR). The Principles of public procurement in the Republic of Croatia according the PPA (Art. 6), are following: (i) the principle of freedom of movement of goods; (ii) the principle of freedom of establishment the businesses and to provide services, as well as the principles deriving out of the mentioned; (iii) the principle of competition; (iv) the principle of efficiency; (v) the principle of equal treatment; (vi) the principle of non-discrimination; (vii) the principle of mutual recognition; (viii) the principle of proportionality and (ix) the principle of transparency.

1. Public Procurement Act (PPA -2008; consolidated version), Art. 1, item 1.

2. PPA, Art. 2(15e); Art. 6(1); Art. 10 (3); Art. 11(5), and others.

3. The responses on the questions under this section follow out of contribution from the side of the Ministry of Economy, Labor and Entrepreneurship of the Republic of Croatia, Office for Public Procurement (Dec. 29, 2009).

2.2. *Corruption*

2.2.1. *What is the cost of corruption?*

2.2.2. *What factors facilitate corruption? Do some factors appear to be more important than others?*

2.2.3. *How do transparency programs help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?*

3. The greatest risks and possible measures for the suppression of corruption and conflict of interest in public procurement, according to the phases of procedure are the following:

Planning, preparation and selection of public procurement procedures:

- The greatest risks for corruption are the following:
 - Unnecessary investments that do not add value to the enterprise;
 - Overestimated quantities;
 - Selection of the negotiated procedure without prior notice contrary to the prescribed conditions;
 - Tendering documentation could be structured in a discriminating manner and could lead towards favouring certain economic operators (e.g. conditions and requirements were not set in accordance to the procurement objective);
 - Failure to adhere to the terms of the public procurement procedures in line with estimated values and decreasing the value of procurement to prevent its coming within the scope of the prescribed procurement procedure;
 - The excessive specification of the type of goods that puts the bidder/manufacturer in the privileged position;
 - Technical specifications could be prepared by the potential bidders, which could produce difficulties for other bidders in order to ensure them equal positions during the bidding process;
 - Technical specifications could be prepared in a way that only certain economic operator could comply with the conditions set out on the tender.
- Furthermore, the possible measures for insuring increased transparency and responsibility are the following:
 - Publishing the contracting authorities' and/or entities' profile;
 - Publishing the annual procurement plan at contracting authorities' website, so that interested business entities, particularly small and medium sized entrepreneurs, could timely prepare for the participation in particular tenders;

- Establishing internal rules, in which obligations and authorities of all participants involved in preparation and execution of public procurement procedures and contracts would be specified. It would also be recommended that internal rules include the obligation to maintain records about all steps in the preparation and implementation of the procedures, so that conflicts of interest and corruptive practices could be more easily determined.

Implementation of public procurement procedures:

4. In mentioned phase, the greatest risks for corruption appear in connection with setting of the tenders, when could come to the consolidation of different forms of cartel agreements in order to influence the outcomes of tenders. There are three types of agreements, which could possibly occur: (i) the price fixing agreement; (ii) the delivery agreement; and (iii) the agreement concerning the best bid. The major formal and material indicators of cartel agreements were recognised as: (i) the formal one, whereas different tenders contain the same mistakes: the bids appear identical, the contracting authority determines that bidder maintained contact during the procurement procedure; and (ii) the material one, whereas the large discrepancies between the highest and the lowest bids could occur. Namely, unknown (new) bidder submits the bid with extremely high price, and the prices for other bids would be adjusted accordingly. Tender documentation could be purchased by various bidders, but only one valid bid would be submitted even though the market conditions would indicate that more business entities were able to comply with the terms of the tender. In case of the most economically advantageous tender, the selected bidder did not sign the contract regardless of the lost collateral.

Tender evaluation:

- Uneven evaluation of the bid components, excluding bidders or bids that meet the tender terms, or accepting bids that should not be accepted;
- Measures for increasing transparency and responsibility;
- Preparation of Internal reports on all public procurement procedure phases on a regular basis;
- Establishing rules for reporting irregularities;
- Division of functions within public procurement procedures (for instance, the same person cannot be responsible for both the preparation and control over the execution of contracts);
- If the contracting authority contacts a particular bidder, all other bidders must be informed about it in a way that could be proven;
- In addition to the publication in the Electronic Procurement Classifieds, all relevant documents (including contracts, except the classified components) should be published at the contracting authorities' website.

Contract execution; the greatest risks for corruption:

- Failure to fulfil the contract, especially in terms of quality, prices and deadlines;
- Material changes in the contracts' terms that are in contradiction to the undertaken public procurement procedure (the price, the technical content, the completion date, etc.);

- The procurement subject could be partially or entirely changed during the execution of the contract;
- Signing of the contract for smaller quantities of goods, works or services. Afterwards additional procurements could be obtained from the same economic operator without contract notice. Frequent risks are on award of public contracts on additional works or services without fulfilment of prescribed requirements or in the way that could not be coherent to the Law;
- Signing the public procurement contract, annulling the part of the contract, and then signing a new contract (without the notification) with the explanation that the contract's price did not exceed the estimated value for which the implementation of the public procurement rules were prescribed.

Measures for increasing transparency and responsibility:

- Publishing contracts at the contracting authorities' website;
- Division of functions (signing the contract and exercising control over the execution of the contract);
- External control over the execution of contract.

2.2.4. *Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.*

5. With regard to the qualification of suppliers to take part in the procedure, the Public Procurement Act (cons.vers.2008) prescribes three mandatory reasons for exclusion, among which are the following: the suppliers who had been subject of a conviction by final verdict for criminal acts of participation in a criminal organisation, corruption, fraud or money-laundering or corresponding acts in accordance with the legal provisions of the country where they had been established, would be obligatorily excluded from the tendering procedure.

2.2.5. *Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?*

6. The institutional framework for the efficient identification, prosecution and sanctioning of the criminal offences of corruption is made up of the following: the National Police Office for the Suppression of Corruption and Organised Crime within the Ministry of Interior, the State Attorney's Office (USKOK), the Supreme Court, and county and municipal courts.

7. The Criminal Code regulates a number of criminal offences in corruption in the public and private sectors, thus enabling the sanctioning of all forms of corruption. A prison sentence is foreseen as a sanction for each criminal offence of corruption. Also, the Amendments of the Criminal Code from December 2008 (OF 152/2008) introduced the possibility of extended confiscation of property gains which were acquired by criminal offenses under the jurisdiction of the USKOK. It is assumed that the total property of the perpetrator was acquired as property gain of a criminal offense unless the perpetrator makes probable that their origin was legal. Consequently, the burden of proof that the property of the perpetrator of the criminal offense was acquired in a legal manner is "transferred" to the perpetrator.

2.3. Collusion

2.3.1. What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

2.3.2. What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?

2.3.3. Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

2.4. Fighting collusion and corruption

2.4.1. What cases from your jurisdiction have involved both corruption and collusion in public procurement?

2.4.2. Have collusion and corruption cases or allegations occurred predominantly at the local government level, provincial government level, or national government level?

8. Such cases are present at all levels, and it is hard to extract which one would be dominating.

9. For example, number of controls by Directorate for the Public Procurement (MELE) has been exercised over City of Zagreb, i.e., there have been frequent media cases related to public procurement procedures. However, the most publicly known case has been the one related to procurement of military trucks by the Ministry of Defence. USKOK has carried out inquiry on that case on October 28, 2009, and an indictment was issued for the former Minister of Defence and the Assistant Minister of Defence.

10. In the period from January 1, until December 1, of the year 2009, the Directorate has received 66 requests in total which were qualified as the prevention and instruction activities dossiers. The prevention and instruction activities were initiated:

- by anonymous application – 15;
- by application of concerted economic operator, citizen(s), councillor(s) (municipality, county, city level) – 32;
- by random check of the public procurement notices published Electronic classifieds – 2;
- by media articles -9;
- upon request by other state authorities: the State Attorney's office, the Ministry of Interior; Sector for Budget of the Ministry of Finance – 8;

11. The structure of dossiers according to the category of the contracting authority / entity is:

- State authorities – 8;
- Municipalities, cities, counties and the City of Zagreb – 13;

- legal persons established for specific purpose of meeting needs in the general interest, not having an industrial or commercial character referred to in Article 3, paragraph 1, item 3 of the PPA – 31;
- Utility companies – 14.

12. In 17 dossiers the Directorate had not exercise its powers due to the fact that the subject matter of the dossiers was not under the competencies of the Directorate or that candidate (the company in question was not on the list of entities bound by the PPA, the subject matter of the dossiers was not covered by the PPA, etc.) or the bidder requesting control in the public procurement procedure concerned had also initiated legal protection procedure before the State Commission for the Supervision of the Public Procurement Procedures.

2.4.3. *What methods and techniques for fighting corruption would aid the fight against collusion?*

13. In the year 2009, the Directorate for the Public Procurement System of the Ministry for Economy, Labour and the Entrepreneurship of the Republic of Croatia, had undertaken the activities directly focused on prevention of corruption and conflict of interest. Focus was put on ensuring of enforcement of Article 5 (c) of the PPA. The Article stipulates that contracting authorities shall not award public contracts to economic operators if the head of the body or a member of the management or supervisory board of the contracting authority concerned simultaneously; performs management duties in the economic operator concerned, or owns business shares, stocks or other voting rights by virtue of which he / she was involved in the management or the capital funds of the economic operator concerned in a share exceeding 20%.

14. Public contracts concluded contrary to the above mentioned provision shall be null and void. Contracting authorities shall publish a list of economic operators to which public contracts must not be awarded within the meaning of Art. 5 Paragraph 1, on their websites.

15. With the aim of rising awareness on obligation arising from the Article 5 (c), MELE submitted the reminder on this Article to the Association of Cities, the Association of Municipalities and the Croatian Counties Association (based on the Questionnaire submitted earlier in the first half of the year 2009) and those associations distributed it to their members (local and regional level). The reminder was also published on the Public Procurement Portal.

16. In addition, the Directorate drafted the short “Instruction on Conflict of Interest and Corruption Prevention in Public Procurement System”. The major part of the Instruction was dedicated to reminder on obligation arising from the Article 5 (c) of the PPA and clarifications on certain aspects of its implementation. Reminder of the Instruction contains some basic information related to relevant documents (brochures, legislation) and the greatest risks and possible measures for the suppression of conflict of interest in public procurement procedures.

17. The Instruction was submitted by e-mail system of the Electronic Public Procurement Classifieds to all registered contracting authorities and entities at the beginning of December 2009. The Instruction was also published on the Public Procurement Portal. The results of above mentioned activities on awareness rising on obligation from the Article 5 (c) were instantly visible. Number of the contracting authorities had published the list in accordance with the Article 5 (c) on their websites.

18. Furthermore, the “Anticorruption Program for State-Owned Enterprises for the Period 2010-2012” was adopted at the first session of the Committee chaired by the Prime Minister held on November 23, 2009. Extract from the “Anticorruption Program for State-Owned Enterprises for the Period 2010-

2012” containing measures implementation of which is directly or indirectly related to public procurement procedures is given in the following text:

19. “Three main objectives of the Program are:
- Objective 1 – Improving integrity, responsibility and transparency;
 - Objective 2 – Creating preconditions for the prevention of corruption at all levels;
 - Objective 3 – Affirmation of the ‘zero tolerance’ approach for corruption”.

Measures for the systematic elimination of the causes of corruption;

Objective 1. Improving integrity, responsibility and transparency:

20. Measure 1.1. Define and publish online: mission and vision statements; general and specific goals for the next 3 years period; basic organisational values and principles with regard to the relationship with third parties (customers, suppliers, government and other stake holders).

21. Expected execution date: February 2009.

22. Measure 1.2. Define and publish in form of a Guidelines, or incorporate in the already existing Rules of Internal Code of Conduct, specific values and rules for the prevention of corruption and ensuring the professional code of conduct with regard to: gifts and compensation given to or received from business partners; asset management; confidentiality and impartiality; engagement in and independent business practice; separation of private and business interests.

23. Expected execution date: February 2009.

24. Measure 1.3. Introduce the obligation to sign a “confidentiality and impartiality statement” for all employees, whose workplaces are perceived as highly risky in terms of corruption (public procurement employees, employees issuing documents necessary to earn certain rights, etc.). The statement in which the employees under material and criminal liability confirm that they performed their duties in accordance with the law and that they will do the same next year, which should be signed at the beginning of every year, no later than January 31.

25. Expected execution date: end of January each year, starting from January 2011.

26. Measure 1.4. Create and publish “Disciplinary Rules” for determining the types of disciplinary measures and procedures that can be undertaken in cases of violations of policies, procedures, and code of ethics for the purpose of enhancing the level of awareness about the issues and consequences of improper behaviour.

27. Expected execution date: end of September 2010.

28. Measure 1.5. For procurement of goods in excess of 6 Mio HRK (less than 1 Mio Euro), and for procurement of public works in excess of 12 Mio HRK, the bidders need to sign the “Integrity Statement”, in which they guarantee the fairness of the procedure, promise to refrain from any illegal activities (corruption, fraud, offering, giving or promising improper benefits that might influence the behaviour of employees). By signing the Integrity Statement, the bidders agree that the procedure be audited by independent experts, and accept the sanctions (penalties, termination of the contract) following the violation of rules.

29. This measure implies ongoing execution, starting from the establishment of the action plan.
30. Measure 1.7. Publishing the information on the organisation's website, especially:
31. 1.7.3. Information related to public procurement procedures, in accordance with the Public Procurement Act, Annex 6, paragraph 2, item (a) (OG 110/2007, and 125/2008), including the announcement of public procurement, information about the tender and tendering documentation, information about the status of all ongoing public procurement procedures, and the notice on closed deals.
32. This measure implies ongoing execution. The information about the public procurement should be published on the organisations' website by September 2010.
- Objective 2. Creating preconditions for the prevention of corruption at all levels.*
33. Measure 2.2. Appoint the "Ethics Commissioner", who should be in charge of handling complaints from employees, citizens and other parties, with regard to unethical and possibly corruptive practices by the employees, and will promote ethical interpersonal relationships among employees.
34. Expected execution date: end of February 2010.
35. Measure 2.3. Establishment and / or improvement of the financial management and control system in accordance with the Act on Internal Financial Control System in Public Sector (OG Nr., 141/2006). It is necessary to ensure the ongoing implementation of all control mechanisms that would guarantee the control and supervision of business activities and management. This entails strengthening control mechanisms, identifying and minimising of the risk.
36. Expected execution date: because the implementation of this measure is administratively and functionally challenging, it is recommended that the preconditions (organisational, staff) for the establishment of the financial management and control systems would be in place by June 2010.
37. Measure 2.4. establishment and / or improvement of the internal audit in accordance with the Act on the Internal Financial Control System in Public Sector (OG, Nr. 141/2006). It is necessary to ensure the integrity of the audit process, and require that auditors and accountants perform their duties consistently and in accordance with the audit rules in cases of fraud and corruption.
38. Expected execution date: end of September 2010.
39. Measure 2.5. Establishment and / or improvement of the audit committees that supervise the financial reporting procedures, internal control systems, internal financial control systems, risk management systems and audit processes.
40. Expected execution date: end of September 2010.
41. Measure 2.7. Establishment of an efficient system for reporting irregularities by creating of the mechanisms that would allow prevention of irregularities, fraud and corruption by their early reporting. This entails establishing of the internal reporting system that will enable to the employees for reporting of the sources of the problem of corruption, without facing of the risk of retaliation. It is also necessary to provide an e-mail address, and appoint a person responsible for maintaining the register of irregularities and dealing with irregularities and frauds by utilising control mechanisms at his or hers disposal.
42. Expected execution date: end of May 2010.

Objective 3. Affirmation of the “zero tolerance” for corruption breaches.

43. Measure 3.2. Establishment of the training plans.

44. Expected execution date: end of February, each year.

2.4.4. *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?*

45. Yes.

2.5. *Advocacy*

2.5.1. *How do regulatory or institutional conditions help facilitate bid rigging and corruption?*

46. The described above shows that the great efforts have been undertaken by the Government and other stake holders, in order to improve legislative and institutional framework to prevent and sanction the frauds in tendering processes.

2.5.2. *In what ways can competition authorities work to improve the efficiency of public procurement?*

47. Croatian Competition Agency frequently provides advises to the Public Procurement authorities how to assess the different situations in connection to the bidding procedures, where the bid rigging and / or cartel cases could arise. Such advises are produced in a form of the expert opinions issued by the Croatian Competition Council, and are also frequently followed by the same authorities.

2.5.3. *What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?*

48. As already described above there are undertaken numerous steps from the side of the Government in order to improve institutional framework and adopt the necessary legislation in order to penalise and before that prevent felonies and 7 or frauds during the public procurement processes.

2.5.4. *When adopting measures to reduce collusion and bid rigging in public procurement, have you taken into account the impact that such measures may have on the risks of corruption?*

49. Yes.

2.5.5. *Has your competition agency undertaken competition advocacy in this area?*

50. Yes, along with the regular advocacy efforts concerning antitrust and state aids situations. For example, after the adoption of the expert opinions on particular public procurement cases on the Council sessions, the Croatian Competition Agency launches the communication in a form of the press releases to its web site. Such communication later on appears in media (news papers, other broadcasting).

2.5.6. If your agency has prosecuted procurement corruption or collusion cases, what type of remedies have you considered?

51. The full jurisdiction in such cases goes to the State Attorneys. Agency would have only advisory role, upon the requested of relevant authorities.