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Public Procurement
Put on Ice
Lawyer Boyan Ivanov: The New Public Procurement Act Will Not Change the Status Quo Substantially

- Mr. Ivanov, how do you interpret the government’s drive to cancel tenders worth more than 2 billion Leva in different economic sectors?

- The recent drive can only be qualified as a clash between legality and political expediency. On a purely principle level, in a country governed by the rule of law, the result of such a clash should be predetermined. It is no accident that the legislator has defined express and detailed reasons for the termination of a procedure for selection of a contractor. It can generally be concluded that even though the termination of the procedures allegedly does not cause a stress in business — that is a clear sign of existing political instability.

Such large-scale termination of public procurement procedures is not a precedent. In the second half of 2009, in the beginning of Borisov’s first government term, the implementation of projects under the Environment Operational Program 2007-2013 was suspended and the procedures for selection of contractors were cancelled. That shelving of the procedures also caused certain concerns about the lawfulness of such actions (in particular connected with the lack of sound rationale under the then effective Public Procurement Act), and the result was extremely negative, with many of the affected projects never being completed; the program did not achieve its objectives.

- What problems does the new Public Procurement Act attempt to address?

- The drafting and adoption of an entirely new PPA is not so much the result of internal, national processes and a need for reorganization of the sector, but rather of the reform initiative on a community level to address the strategic priorities and goals specified for the 2014-2020 period. Thus the new Bulgarian legislation is a direct consequence of the adoption of the new directives in 2014. Therefore, the key issue the PPA of 2016 resolves is connected with the transposition of the European norms. It should be noted that according to the terms of the Partnership Agreement of the Republic of Bulgaria, which outlines the support from the European structural and investment funds for the 2014-2020 period, the proper and timely enforcement of the respective harmonized legal framework is a prerequisite for the provision of grants through the EU mechanisms and programs.

- Are the EU rules for transparent and fair spending of public funds guaranteed by the new PPA?

- The legal guarantees for compliance with the core principles related to publicity, transparency, open competition, equal treatment, proportionality, equal and compatible access that the PPA of 2016 provides are equal in intensity and scope as those contained in the non-effective legislation. Undoubtedly, the availability of such regulatory framework is a necessary condition for the correct, expedient, legal, effective and efficient spending of public funds; however, there is a problem with the correct implementation of the written legal norms and their observance in general. Even now the effective rules can be considered adequate to the European rules, a statutory guarantee which, if properly applied, can ensure the full implementation of the said principles.

- Is the single register of public procurement contracts an efficient measure for fighting malfeasance and corruption practices?

- The establishment of an open Public Procurement Register was stipulated in the current PPA with its adoption in 2004 and since 2009 it has been part of a comprehensive Public Procurement
Portal, which is maintained by the Public Procurement Agency. It cannot be denied that the availability of information about the awarded contracts that is easy to access without any administrative and technical restrictions has a positive effect on curbing malfeasance and corruption practices. It is also important how this information is used, what methods and mechanisms are employed to establish certain anomalies and what further action is efficiently taken against the established cases of public fund abuse. In this sense the question is not whether the availability of publicly accessible information in the Public Procurement Register is an efficient measure against malfeasance and corruption practices but whether and how this information is used for prevention and control.

- What is your opinion about the new schedule of fees collected for appeal of public procurement tenders? Is the right to appeal decisions guaranteed?

- The schedule of fees that was published for public comment sets simple fees of 1,000 Leva, 3,000 Leva and 5,000 Leva depending on the estimated value of the contracts. A purely mathematical comparison between the minimum and maximum size of fees thus set and the fees applied under the Council of Ministers Decree No 196/10 of July 2014 that was recently revoked by the Supreme Administrative Court (from 850 Leva to 15,000 Leva) can justify the conclusion that the financial burden on appellants is considerably relieved, which will have a direct impact on the possibility for initiation of proceedings at the Commission for Protection of Competition and the Supreme Administrative Court by the interested parties.

- What issues remain unresolved by the new law? Is there a risk that the procedures for its implementation in practice may distort competition or affect the security of the contractor or the contracting authority?

- The new PPA was defined as a framework law in its very first drafts. Such a definition rounds the contents and structure of the draft law is found in the statement of reasons for it. Leaving aside the question of what a framework law actually is and leaving aside the fact that such legislative technique is inapplicable in the context of the Bulgarian legal doctrine and that such a legislative approach has often resulted in laws being ruled unconstitutional, the PPA of 2016 is quite susceptible to criticism.

Firstly, it should be noted that the regulation of a lot of essential elements is left to the implementing rules for the PPA. These include the terms and conditions for the work of the evaluation committees; for conducting public procurement procedures and design contests, including the procedures for removing inconsistencies and gaps in the offers and applications; for selection of contractors for public procurement contracts below the national thresholds; for ex-ante and ex-post control; for the requirements for the contents of offers and applications and how they are submitted and received. In this way, it is actually those public relations that are necessary for the regulation of which justifies the new law, that remain outside its scope. In this sense it can be concluded that the PPA of 2016 as such is adopted mainly for the purpose of formally observing the requirements for transparency ensuing from the directives of 2014. That palliative decision of the Bulgarian legislator does not allow making a comprehensive analysis of the impact the new legislation will have on the public procurement market and the economic environment in Bulgaria as a whole.

Secondly, one of the most important elements in the new PPA is the so-called e-procurement. That is what actually allows defining the all-European initiative in the sector as reform. The Bulgarian dimensions of that reform are also susceptible to criticism. When determining the rules for electronic communication, Bulgarian legislators have translated word for word the respective articles in the directives, without taking into account the correlation between the obligations of the member states, on the one hand, and the individual obligations of contracting authorities, on the other. The more so that those rules do not agree with the overall context of the national legislation in the area of e-government and the requirements ensuing from the special regulations in the area of trust services. Some of the provisions seem to be inadequate in view of the decision to develop a common national electronic platform. The roots of some of these deficiencies of the regulation can be traced to the contents of the directives themselves, which refer to community rules that will soon be repealed: with the final entry into force on July 1, 2016, of Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market, which introduces a new regime for electronic signatures and electronic documents and new types of trust services, all references to the provisions of Directive 1999/93/EC concerning the legal framework of the Community for electronic signatures will lose their effect. In this sense it can be said that the respective provisions in the new PPA are "stillborn" and will have to be amended even before they enter into force. That gives reason to say that many of the issues related to e-procurement have not found a solution in the new law.

- Who will benefit from the new rules? Will the access of small enterprises to public procurement procedures improve? Has the status of subcontractors been regulated?

- The main measures for improving the access of small and medium-sized enterprises to public procurement procedures are connected with the possibility for fragmentation of the subject-matter of contracts: the mandatory division of contracts into lots and the possibility for receiving a share of the contract for subcontractors. Those measures will definitely create the necessary preconditions for more active participation of small and medium-size enterprises. However, a review of the rules for determining the selection criteria and more specifically for the admissible sizes and the type of requirements regarding the financial and technical capacity shows that they are much more restrictive than the current ones, which supports the conclusion that we will hardly witness a substantial change in the status quo.

The status of the subcontractor in the new PPA is regulated in a manner similar to the current law. Some of the more essential differences are connected with the possibility for contracting authorities to make direct payments to subcontractors and the re-introduced requirement that subcontractors shall meet the same selection criteria depending on the type and share of the contract they are going to perform. A new element connected with the possibility for in-house awarding of contracts is the rules for selection of subcontractors on the part of selected contractors, who in such cases also act as contracting authorities within the meaning of the law.