

RATIONALE

I CONSTITUTIONAL BASIS FOR THE PASSING OF THE LAW

The Constitutional basis for the passing of the Law Amending the Law on Public Procurement is contained in Article 16 item 5 of the Constitution of Montenegro, laying down that a Law, in line with the Constitution, governs other issues of interest for Montenegro.

II REASONS FOR ADOPTION OF THE LAW

Practical application of the Law on Public Procurement in effect in the past has shown that its concept is well-defined, but that certain legal solutions are not executed in the clearest way possible, and hence, as such, they significantly affect the implementation of the Law.

In this regard, first and foremost, it is important to note that there are enterprises founded by the state or local government, which are, according to the currently applicable provisions of the Law on Public Procurement, covered parties, and which essentially should not be.

Also, there are certain segments that should be exempted from the application of the Law on Public Procurement because of their specificities, such as the procurement of the election materials and procurement of goods and services for the needs of using the aircraft of the Government of Montenegro.

In addition, the prescribed procedure is in certain segments burdened by the unnecessary formalism and requests which are not of essential importance to the quality of the bid and secure implementation of the future contract, requesting from the bidder increased expenses and promptness in preparation of the bid, at the same time significantly contributing to the prolongation of the timeline of the procedure by provoking circumstances and situations which affect the final outcome of the procedure.

In the up-to-date application, the provisions relating specifically to the following have proven to be legal solutions of insufficient quality: criteria for defining and identifying of the covered parties, definitions of certain terms; powers of the Public Procurement Administration relating to preventive monitoring, launching of the public procurement procedure and inspection surveillance; application of the general administrative procedure rules; carrying out of the certain public procurement procedures types within the defined value scales; public procurement procedure by shopping and direct agreement; value scales; method of preparing bids, decision making and public procurement contract; certain procurement in the field of defence and security, applying the LAP accordingly, launching a complaint procedure by an interested party, deciding by the State Commission, composition and method of election of the State Commission, method of work of the State Commission.

Furthermore, the existing Law does not define the cases of urgent public procurement, which unfortunately, occur in practice. Also, there is a need for legal defining of low-value public procurement, and the manner of their application.

The Bill Amending the Law on Public Procurement (hereinafter: the Bill) adequately removes the above difficulties in conducting the public procurement procedures and defines the cases occurring in

practice which have not been covered by the Law, without changing the concept of the basic text of the Law.

The basic intention of the proposed amendments is to, to the extent possible, simplify the public procurement procedure and facilitate the participation of the interested parties as bidders in all public procurement procedures and to establish the highest quality, efficient and economic mechanisms for the protection of rights and legal interests of the participants in a public procurement procedure, as well as the public interest.

Quality of the proposed amendments will be additionally ensured and improved through the adoption of the secondary legislation for the implementation of the Law, which is of direct importance to its implementation.

With a view to providing for the best possible preparation of the text of the Bill, the Ministry of Finance has considered the submitted suggestions and proposals of the Ministry of Defence, Ministry of Interior, Ministry of Health and the State Election Commission so that, following the direct communication with the representatives of these bodies, certain proposals, which were acceptable at this moment, have been entered into the text of the Bill, while the others will be considered on the occasion of the adoption of the new Law.

III EXPLANATION OF THE BASIC LEGAL INSTITUTES

Article 1 of the Bill amends Article 2 of the Law in effect, which defines the covered parties under the Law, i.e. that the covered parties under the Law are the business organizations fulfilling all the following prerequisites: have a legal person status, were founded for the purpose of conducting an activity of public interest and are not performing industrial nor commercial activity, and in which the state, or a local government unit possess more than 50% shares or stake in that business organization or which is financed by the state, or local government or another contracting authority with more than 50% of the funds from the budget of Montenegro, or local government unit and other public revenues or which is under the surveillance of a contracting authority or which has more than half of the members of the management body or surveillance body appointed by the contracting authority. It was necessary to define the contracting entities in this way in the part relating to the business organizations, because in the practical application there were a lot of doubts and disagreements regarding the business entities founded by the state or local government, as to whether they are contracting entities or not.

Article 2 of the Bill supplements the Article 3 of the Law in effect in order to create a possibility of exemption from the application of the Law for the procurement of election materials and procurement of goods and services relating to the use of the Government aircraft. Namely, given the long timeframes for the implementation of the public procurement procedure where the public procurement procedure for election material would take, in the most favourable circumstances, three months to be finished, and given the fact that the State Election Commission has to carry out procurement of the election material in a relatively short time, we consider this exemption justified, which was even envisaged up until 2014. Also, for the needs of using the Government aircraft, used by high state dignitaries, it often happens that a malfunction occurs on the aircraft, both in the country and abroad, which has to be removed immediately, so it is impossible to conduct a public procurement procedure in these exceptional cases.

Article 3 of the Bill amends the provisions of Article 4, so it is more precisely defined who is the authorized person of the contracting authority, who is the authorized person of the bidder, as well as what a decision is and what an interested person is, and it is being aligned with the text of the Law.

Articles 4, 16, 34 and 37 of the Bill provide for an alignment with the new LAP which does not recognize the terms *reject* and *conclusion*, and the procedure is referred to as *administrative procedure* and not *general administrative procedure*.

Articles 5, 12, 13, 14, 19, 20, 21, 22 and 23 of the Bill provide for an alignment of the text of the Law, since Article 7 of the Bill deletes shopping and direct agreement as types of public procurement procedure.

Article 8 of the Bill amends Article 21 in effect – Value Scales, so the Bill, in line with the EU thresholds lays down that the contracting authority is obliged to apply the public procurement procedures for the procurement of goods and services with estimated value of the public procurement equal to or exceeding EUR 15,000.00 and for the procurement of works with estimated value of the public procurement equal to or exceeding EUR 30,000.00. Furthermore, it is laid down that the procurement of goods, services and works below the values referred to in paragraph 1 of this Article shall be carried out by the contracting authority in line with Article 30 (low-value procurements), unless some of the procedures referred to in Article 20 of this Law are conducted for that procurement. Also, it is laid down that the contracting authority must not divide the public procurement subject matter which represents a unique whole, with the intent to evade the application of this law.

Article 9 of the Bill suggests deletion of Article 25 paragraph 1 item 1 indent 3 in the sense of alignment with the amended Article 29 of the Law in effect, and in this regard, Article 18 of the Bill suggests amendment to the Article 91 in effect.

Article 10 of the Bill amends Article 29 by means of regulating urgent procurement, so this Article lays down that the contracting authority may, without conducting a public procurement procedure, conduct an urgent procurement, in order to remove and prevent danger from unforeseeable events to which the contracting authority could not have or cannot have an impact, removal of consequences of such unforeseen events, jeopardized health and life of citizens, if they are not able to conduct the public procurement procedure and act within the deadlines provided for in this Law. In case of urgent procurement, a procedure is implemented which is established by the contracting authority under a special act, which it publishes on its web page, while the form and substance of this act are defined by the Ministry of Finance. On the occasion of conducting urgent procurement, the public procurement principles have to be respected, as follows:

- principle of competition by ensuring at least three bids;
- principle of transparency, by publishing the invitation on the web page of the contracting authority;
- principle of equality by having the contracting authority ensure a level playing field to all and
- principle of cost-effectiveness and efficiency by having the contracting entity, on the occasion of the selection of the most favourable bid, ensure economic and rational spending of funds.

Pursuant to the amendments of the Article 21 in effect, Article 11 of the Bill amends Article 30 of the Law in effect. Namely, this Article lays down that the low-value procurements (below the values established in Article 21) are subject to the procedure established by the contracting authority under a

special act, with respect for the public procurement principles. The obligation of the contracting authority is also prescribed to publish the special act on its web page, and to provide for an appropriated deadline for the bidder to submit the bid, which must not be shorter than three working days. The form and the substance of the special act are defined by the Ministry of Finance.

Article 15 of the Bill simplifies the method of preparation of the bid. Namely, Article 76 in effect is amended so that the bidder is obliged to prepare the bid as a signed whole and to mark every first page of every paper and the total number of papers of the bid by an ordinal number, except for the bid guarantee, catalogue, photographs, publications etc. Documents which are compiled by the bidder, and which make an integral part of the bid, must be signed by the authorized person of the bidder or the person authorized by him. The bid must be bound by a single red tape so that individual papers cannot be subsequently inserted, removed or replaced without damaging the paper of the bid. The bid and the samples requested by the tender documents are to be submitted in the appropriate closed cover (envelope, package, etc.) so that it can be ascertained with certainty on the occasion of the bid opening that it is being opened for the first time. The cover of the bid reads: bid, number of tender documents, name and seat of the contracting entity, name, seat, i.e. name and address of the bidder and text: "Do not open prior to public bid opening". This Bill avoids surplus formalities which have, in practice, led to an increased number of incorrect bids, which had no essential significance.

Article 17 of the Bill, given the problems in practice and different interpretations, lays down that the offered prices is written in numerals, and not alike in the Article 84 paragraph 3 in effect, which prescribes that the offered price is written both in numerals and letters, and in case of their incompatibility, the relevant price is the one written in letters.

Article 24 paragraph 1 of the Bill deletes in Article 105 paragraph 2 the words: i.e. public procurement officers, which stems from the amendment to the Article 29 of the Law in effect. Furthermore, paragraph 2 adds a new paragraph prescribing the content of the decision on the suspension of the public procurement procedure.

Article 25 paragraph 1 of the Bill aligns in Article 106 paragraph 2 the text of the Bill with the amendments to Article 29 of the Law in effect. Furthermore, paragraph 2 adds a new paragraph prescribing the content of the decision on the selection of the most favourable bid.

Article 26 of the Bill adds in Article 107 after paragraph 7 a new paragraph laying down that if the bidder fails to sign the contract or fails to submit the performance guarantee with the signed contract, the contracting authority may enter into a contract with the next most favourable bidder, if the difference in price does not exceed 10% in relation to the primarily selected bid or, may annul the public procurement procedure.

Articles 27 and 28 of the Bill technically align Articles 108 and 112 of the Law in effect, in line with the suggested amendments.

Given the specificities of the areas of defence and security, and in cooperation with the Ministry of Defence and the Ministry of Interior, Articles 29, 30 and 31 of the Bill provide for conditions so that certain procurements from this areas be governed by the regulation of the Government of Montenegro, while the procurements exempted from the application of the Law are to be implemented in line with the procedure defined by the contracting authority under a special act.

Articles 117 and 118 are being supplemented by Articles 32 and 33 of the Bill in the sense that the contracting authorities are to keep records and submit the reports for procurements referred to in Articles 29, 30 and 116a (urgent procurement, low-value procurement and procurements in the area of defence and security).

Article 35 of the Bill amends Article 122 paragraph 7 of the Law in effect, relating to filing a complaint to the tender documents, in the sense that an interested party may file a complaint since the day of publication, i.e. submission of the tender documentation at the latest 10 days prior to the day designated for bid opening.

Article 36 of the Bill amends Article 125 of the Law in effect by amending paragraph 2 which now lays down that the complainant is obliged to file along with the complaint a proof of payment of fee for conducting of the procedure. Also, two new paragraphs are being added, so one prescribes that the State Commission would reject the complaint as incomplete if the complainant fails to submit the proof of payment of the fee for launching of the complaint procedure. In the other case, if the complaining submits the proof of payment of the fee in the amount lower than that prescribed, the State Commission will reject the complaint as incomplete, without the obligation to refund the amount paid in, which becomes a part of the budgetary funds. In this way, attempts are made at preventing the unserious bidders from filing unsubstantiated complaints. Furthermore, this Article prescribes also the obligation of the State Commission to compensate to the complainant for the costs of conducting the procedure if a decision is made in his favour in the complaint procedure, which has so far been an obligation on the part of the contracting authority.

Article 38 of the Bill amends Article 132, which lays down decision-making by the State Commission, improves the text of the Law and simultaneously aligns it with the new LAP. Namely, it is laid down that the State Commission in the complaint procedure decides by a decision suspending the complaint procedure or rejecting the complaint as inadmissible, untimely or presented by an unauthorized person. In if fails to reject the complaint for the above stated reasons, the State Commission examines the legality of the complaint act to the extent of the request referred to in the complaint, and takes care ex officio of the existence of the significant infringements envisaged by the Law. Following examination of the complaint, the State Commission will reject the complaint by a decision as unfounded, when it ascertains that the contracting entity has regularly conducted the procedure or public procurement activity and that the decision is regular and legally based, or adopt the complaint wholly or partly, annul the decision or procedure or public procurement activity in the part where illegality has been ascertained, including the discriminatory provisions from the tendering documentation. The obligation has been laid down for the contracting authority to act upon the decision of the State Commission, within the deadline defined by the State Commission in that decision, and inform it thereof within the envisaged deadline, whereas in case the contracting authority fails to do so, the State Commission shall inform the Government thereof, or the competent body of the local government unit and the public procurement inspector.

Article 134 has been terminologically aligned by Article 39 of the Bill, so the words “until the restriction of market documentation” are being replaced by “until the restriction of market competition”.

Article 40 of the Bill deletes paragraph 1 from Article 136, which laid down that the decisions of the State Commission were final. Furthermore, after paragraph 2 a new paragraph is added reading:

„complaint filed against the decision of the State Commission does not have a suspensive character for entering into a public procurement contract”.

Article 41 of the Bill expands the composition of the State Commission in the sense of increasing the number of members. Also, it has been proposed that the president and members of the State Commission be appointed by the Government at the proposal of the Ministry of Finance, as well as that one member of the State Commission may be a graduate economist as well as conditions for his engagement.

Article 42 of the Bill terminologically aligns Article 147 paragraph 1 by replacing words “competent body” by “administration body in charge of inspection affairs”.

Article 43 of the Bill, referring to the amendments to Article 149 in effect – misdemeanour liability, suggests amendments in line with the proposed amendments and alignment of these provisions with the substantive provisions.

Article 44 of the Bill technically aligns Article 149a of the Law in effect.

Article 45 of the Bill lays down that the public procurement procedures started before the commencement of application of this Law shall be finalized according to the regulations under which they had been started, and that the public procurement procedures in the area of defence and security shall, until the adoption of a special act, be carried out in line with the Law in effect, while Article 46 lays down that the appointment of two members of the State Commission would be carried out within 90 days from the day of entry into force of this Law.

Article 47 of the Bill adds three new Articles laying down deadlines for alignment of the secondary legislation, deadlines for the adoption of the new secondary legislation and deadlines for alignment of the public procurement plans.

Article 48 lays down entry into force of this Law.

IV FINANCIAL RESOURCES

In order to implement the Law, it is necessary to allocate additional financial resources from the budget of the state for the work of the State Commission for the Control of Public Procurement Procedures, given the increase in the number of members of this Commission.

V REASONS FOR THE PASSING OF THE LAW BY SUMMARY PROCEDURE AND ENTRY INTO FORCE ON THE DAY OF PUBLICATION IN THE OFFICIAL GAZETTE OF MONTENEGRO

Reasons for the adoption of the Law Amending the Law on Public Procurement in a summary procedure and entry into force of the Law on the day of publication in the Official Gazette of Montenegro reflect the need to improve the business environment and to provide for a more cost-efficient and efficient business doing of the entities covered by this Law. In this way, a reduction in public expenditure will be ensured, since the proposed expediting of the procedures influence the overall social and economic development, especially given the fact that the public procurement account for a significant share of the gross domestic product.

