

11 MOST FREQUENT MISTAKES MADE BY CONTRACTING AUTHORITIES IN THE IMPLEMENTATION OF PUBLIC PROCUREMENT PROCEDURES

→ WHAT IS THE PURPOSE OF PUBLIC PROCUREMENT?

The purpose of public procurement is the stipulation of a contract for the supply of goods, services and works in order to satisfy the needs of the end-users. The end-users are the citizens of the Republic of Serbia. The contract is stipulated in accordance with the principles and regulations governing public procurement, with the aim of fulfilling these needs efficiently, whilst also satisfying the “value for money” standard.

→ HOW TO IMPROVE THE PUBLIC PROCUREMENT SYSTEM?

One of the most efficient ways to improve the public procurement system is to strengthen the capacities of the participants in public procurement procedures. In addition to this, it ought to be stressed that the system cannot be improved without an efficient system for protecting the rights of bidders in public procurement procedures.

Bearing this in mind, training contracting authorities, with focus on their most frequent mistakes, is undoubtedly a good mechanism for strengthening the public procurement system and building the trust of businesses and end-users in the public procurement system in the Republic of Serbia.

An analysis of the reports of the Republic Commission for the Protection of Rights in Public Procurement Procedures (hereinafter: Republic Commission) reveals a relatively high percentage of public procurement procedures that were either partially or fully annulled by decision of the Republic Commission. Specifically, 656 public procurements were partially annulled, while 126 were fully annulled in 2016, out of a total of 1,370 decisions taken concerning the submitted requests for the protection of bidders’ rights.

An analysis of these decisions revealed certain improper actions by contracting authorities that can be characterized as frequent, and these irregularities must be pointed out to the contracting authorities in order to reduce the number of bidder requests for protection of rights.

Frequent improper actions by contracting authorities can be divided into two phases – preparation of tender documents and the evaluation of bids.

→ WHAT DO WE WANT TO ACHIEVE?

The purpose of this document is to point out the most frequent mistakes made by the contracting authorities in the implementation of public procurement procedures that result in the (partial or full) annulment of public procurement procedures.

The purpose of this document is to contribute to cutting down the number of mistakes by contracting authorities, i.e. to avoid having contracting authorities make the same mistakes, which proved to be frequent in public procurement procedures, and consequently also to reduce the number of requests for the protection of rights submitted by bidders, which will result in a more efficient satisfaction of the needs of the end-users in public procurement procedures.

In addition, this will also contribute to building the trust of the private sector (business entities, bidders) in the public procurement system and the procedures implemented by contracting authorities.

Hereinafter is an overview of the most common improper actions by contracting authorities observed in the procedures for the protection of bidders' rights.

→ **PREPARING THE TENDER DOCUMENTS**

The tender documents are among the key documents prepared by the contracting authority in the public procurement procedure. The tender documents must be prepared in a way that will enable bidders to formulate an acceptable bid on the basis of these documents. Three segments are particularly important from the aspect of the annulment of a public procurement procedure as a consequence of shortcomings in the tender documents: determining the technical specifications, determining the eligibility requirements and determining the contract award criteria.

The Public Procurement Law (Official Gazette of the RS No. 124/12, 14/15 and 68/15, hereinafter: PPL) envisages that a contracting authority may not restrict competition and, in particular, may not prevent any bidder from participating in the public procurement procedure by using a negotiated procedure with no valid justification, or by applying discriminatory requirements, technical specifications and criteria.

1. Irregularities in defining technical specifications

Technical specifications are the part of the tender documents in which the contracting authorities provide an accurate description of the subject of public procurement. This description provides information concerning the requirements of the contracting authority with respect to the features, quality, quantity and other elements of the subject of public procurement. In drawing up the technical specifications, the contracting authority should be as impartial as possible and should avoid giving any partial assessment or referring to a specific trade mark, patent or type or other circumstances that could determine the selected bidder, i.e. supplier of the goods, in advance.

Article 70(1) of the PPL stipulates that, for the purposes of this law, technical specifications design documents are technical requirements which are a mandatory and integral part of the tender documents; they determine and describe the characteristics of the goods, services or works. They must ensure that the goods, services or works to be procured are described objectively and in a way that meets the needs of the contracting authority.

Article 72 of the PPL stipulates that the contracting authority may not use, or refer to, technical specifications or standards which specify goods, services or work of a specific make, source or construction; that the contracting authority may not indicate in the tender documents any particular trade mark, patent or type, or a specific origin or make; and that the contracting authority may not include in the tender documents any provision that would result in favouring or eliminating certain bidders, as referred to under paragraphs 1 or 2 of this Article, unless the contracting authority is unable to describe the subject of the contract in a way that would make the specifications clear enough for the bidders. The indication of elements such as trade mark, patents, type or manufacturer must be accompanied by the words "or equivalent".

The following improper actions by contracting authorities were identified in the analysed procedures for the protection of rights:

- technical specifications can only be met by a specified manufacturer¹;
- Improper use of trademarks, i.e. manufacturer's brand without allowing the bidders to offer "equivalent" goods²;
- prescribing the testing of samples without envisaging a methodology, transparency and similar.³

2. Irregularities in defining additional requirements – financial capacity

The PPL foresees that the contracting authority may determine additional requirements for bidders in the tender documents with respect to the financial, business, technical and personnel capacity, as needed, taking into account the subject of the public procurement, provided that these requirements are not discriminatory to bidders and that they are logically connected with the subject of public procurement.

Improper actions by contracting authorities in determining additional eligibility requirements, i.e. violations of Article 76(2) and (6) of the PPL identified in the procedures for the protection of rights of bidders are: lack of a logical connection between the additional requirement and the subject of public procurement, the inability of the contracting authority to explain the reasons that led them to define an additional requirement, i.e. the need for it, with a view to the subject of public procurement, in other words failure to justify the objective need for stipulating a certain requirement.

The following improper actions by contracting authorities were identified based on the procedures for the protection of rights:

- the contracting authorities requires a level of income that is too high, or a certain level of income in a short period of time⁴;
- without a valid reason, the contracting authority requires bidder liquidity as a condition, and no net operating loss⁵.

3. Irregularities in defining additional requirements - business capacity

The following improper actions by the contracting authorities were identified in the procedures for the protection of rights:

- without a valid reason, the contracting authority requires that the bidder has supplied the subject of public procurement in the last 12 months⁶;
- unacceptable linking of references to certain categories of prior contracting authorities⁷;

¹ For example, refer to the following decisions of the Republic Commission:

- No 4-00-954/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/954-2016odlukark.pdf?id=18961>)
 - No 4-00-2980/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/2980-2015odlukark.pdf?id=17698>)
 - No 4-00-867/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/867-2016odlukark.pdf?id=18511>)

² For example, refer to the following decisions of the Republic Commission:

- No 4-00-2139/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/2139-2015odlukark.pdf?id=17379>)
 - No 4-00-2749/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/2749-2015odlukark.pdf?id=17245>)

³ For example, refer to the following decisions of the Republic Commission:

- No 4-00-261/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/261-2016odlukark.pdf?id=17233>)
 - No 4-00-2905/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/2905-2015odlukark.pdf?id=16856>)

⁴ For example, refer to the following decisions of the Republic Commission:

- No 4-00-1564/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1564-2016odlukark.pdf?id=20051>)
 - No 4-00-807/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/807-2016odlukark.pdf?id=18653>)

⁵ For example, refer to the following decisions of the Republic Commission:

- No 4-00-954/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/954-2016odlukark.pdf?id=18961>)
 - No 4-00-453/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/453-2016odlukark.pdf?id=17908>)

⁶ For example, refer to the following decision of the Republic Commission No. 4-00-518/2016

(<http://www.kjn.gov.rs/sw4i/download/files/article/518-2016odlukark.pdf?id=18523>)

- inability to explain the logical connection with the subject of procurement (ISO 9001, 14001, 18001, 13485, 27001)⁸.

4. Irregularities in defining additional requirements - personnel capacity

The following improper actions by the contracting authorities were identified in the procedures for the protection of rights:

- requiring that the personnel is employed under an open-end contract⁹;
- the required number of personnel is too high, given the subject of procurement¹⁰;
- safety and health in the workplace is an additional requirement, and it is already prescribed as a mandatory requirement¹¹.

5. Irregularities in defining additional requirements – technical capacity

The following improper actions by the contracting authorities were identified in the procedures for the protection of rights:

- the requirement that facilities and equipment be owned by the bidder¹²;
- the inability to explain the logical connection between the subject of procurement and the required technical capacity¹³.

6. Irregularities in defining additional requirements for awarding the contract

Pursuant to the definition in Article 3(1)(29) of the PPL, a criterion is a norm used for evaluating, comparing and assessing bids. Criteria, just like technical specifications and eligibility requirements, are a constitutive element of the tender documents. Bidders are selected according to the requirements, and only thereafter, the bid(s) is/are selected according to the criteria.

Article 84(1) and (3) of the PPL stipulates that the elements of the criteria applied by the contracting authority for awarding the contract must be described and evaluated and should not be

⁷ For example, refer to the following decisions of the Republic Commission:

- No. 4-00-827/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/827-2016odlukark.pdf?id=18852>)
 - No. 4-00-1585/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1585-2016odlukark.pdf?id=19750>)
 - No. 4-00-24/2017 (<http://www.kjn.gov.rs/sw4i/download/files/article/24-2017odlukark.pdf?id=20335>)

⁸ For example, refer to the following decisions of the Republic Commission:

- No. 4-00-554/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/554-2016odlukark.pdf?id=18522>)
 - No. 4-00-1855/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1855-2016odlukark.pdf?id=19867>)
 - No. 4-00-761/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/761-2016odlukark.pdf?id=18449>)

⁹ For example, refer to the following decisions of the Republic Commission:

- No. 4-00-582/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/582-2016odlukark.pdf?id=18248>)
 - No. 4-00-297/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/297-2016odlukark.pdf?id=18057>)
 - No. 4-00-2476/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/2476-2015odlukark.pdf?id=17678>)
 - No. 4-00-554/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/554-2016odlukark.pdf?id=18522>)

¹⁰ For example, refer to the following decision of the Republic Commission:

No. 4-00-1585/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1585-2016odlukark.pdf?id=19750>)

¹¹ For example, refer to the following decision of the Republic Commission No. 4-00-1236/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1236-2016odlukark.pdf?id=19156>)

¹² For example, refer to the following decision of the Republic Commission No. 4-00-392/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/392-2016odlukark.pdf?id=17902>)

¹³ For example, refer to the following decisions of the Republic Commission No.

- No. 4-00-392/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/392-2016odlukark.pdf?id=17902>)
 - No. 4-00-104/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/104-2016odlukark.pdf?id=17046>)
 - No. 4-00-585/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/585-2016odlukark.pdf?id=18027>)
 - No. 4-00-2905/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/2905-2015odlukark.pdf?id=16856>)
 - No. 4-00-172/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/172-2016odlukark.pdf?id=18226>)
 - No. 4-00-1489/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1489-2016odlukark.pdf?id=21132>)

discriminatory and must have a logical connection to the subject of the public procurement, and the contracting authority in the tender documents should state, describe and evaluate the criterion and all the elements of the criterion that he intends to apply, and, in particular, state the methodology for weighing each element of the criterion that will enable the subsequent impartial verification of the evaluation of bids.

Article 85(4) of the PPL stipulates that eligibility requirements under Articles 75 and 76 of this Law cannot be set as elements of the criterion.

The following improper actions by contracting authorities were identified in the procedures for the protection of rights:

- elements of the criterion lack a well-developed or proportional methodology for their application¹⁴;
- *cassa sconto* as an element of the criterion¹⁵;
- “mixing up” eligibility requirements and criterion elements¹⁶;
- the discriminatory nature of an element of the criterion¹⁷.

→ EXPERT EVALUATION OF BIDS

An expert evaluation of bids is an extremely important phase of the public procurement procedure which follows the opening of the bids and in which the contracting authority selects the successful bidder (bid) to receive award of the public contract.

In the phase of expert evaluation of bids, the contracting authority determines whether the bidders (and bids) meet the requirements prescribed in the PPL and other public procurement regulations, as well as the requirements established in the tender documents for that public procurement procedure, and then ranks the bids which are deemed to meet all of the requirements envisaged in advance, by applying the elements of the criterion and the weighting methodology previously determined in the tender documents.

The errors that contracting authorities make in the phase of the expert evaluation of bids can lead to awarding the contract to a bidder who did not submit the “best” bid and the consequent damage to both the public interest and the bidder who would have received award of the contract in question, if the bids had been evaluated properly.

The most important provisions of the PPL in the phase of the expert evaluation of bids that the contracting authorities must consider and apply properly are the provisions on: major deficiencies in the bid (Article 106 of the PPL), additional explanations concerning the submitted bids (Article 93 of the PPL), unusually low price (Article 92 of the PPL), as well as the provisions on the requirements and decision for awarding the contract.

¹⁴ For example, refer to decisions of the Republic Commission:

- No. 4-00-139/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/139-2016odlukark.pdf?id=17932>)

- No. 4-00-2981/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/2981-2015odlukark.pdf?id=17306>)

¹⁵ For example, please see decisions of the Republic Commission:

- No. 4-00-111/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/111-2016odlukark.pdf?id=18224>)

¹⁶ For example, refer to decisions of the Republic Commission:

- No. 4-00-3176/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/3176-2015odlukark.pdf?id=18059>)

- No. 4-00-139/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/139-2016odlukark.pdf?id=17932>)

- No. 4-00-2905/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/2905-2015odlukark.pdf?id=16856>)

- No. 4-00-2529/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/2529-2015odlukark.pdf?id=16565>)

- No. 4-00-695/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/695-2016odlukark.pdf?id=18655>)

¹⁷ For example, please see decisions of the Republic Commission:

- No. 4-00-1275/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1275-2016odlukark.pdf?id=19284>)

- No. 4-00-867/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/867-2016odlukark.pdf?id=18511>)

i.e. suspension of the public procurement procedure, (Art. 107-109 of the PPL). Certainly, the previously drafted tender documents are of extreme importance for the expert assessment of bids.

7. Incomplete establishment of facts

Article 93 of the PPL stipulates that the contracting authority may request the bidder to provide additional explanations that will help the former to examine, evaluate and compare bids, and may also carry out control (inspection) of the bidder or his subcontractor. The contracting authority may not demand, allow or offer any alterations to any of the elements of the bid that are relevant for the application of the criterion for awarding the contract, i.e. any change that would turn an inadequate or inadmissible bid into an adequate and admissible one, unless otherwise follows from the nature of the public procurement agreement.

As identified in the procedures for the protection of rights, contracting authorities do not use the aforesaid provision of the law “sufficiently”, consequently, they assess the bids as (un)acceptable/(in)adequate before fully establishing the facts¹⁸.

8. Procedures of the contracting authorities in connection with Article 92 of the PPL - unusually low price

Pursuant to Article 92 of the PPL, the contracting authority may reject the bid because of the unusually low price only if:

- the offered price significantly deviates from the market comparable price and raises suspicions as to the feasibility of implementing the public contract in accordance with the offered conditions;
- the contracting authority requests the bidder to provide a detailed explanation of constituent elements of the bid it considers relevant;
- the contracting authority, upon receiving an explanation checks the relevant constituent elements of the bid.

The following improper actions by the contracting authorities were identified in the procedures for the protection of rights:

- when drawing up the tender documents the contracting authority failed to determine the quantity, and in the procedure of expert evaluation of the bids rejected a bid due to an unusually low price for the reason that the bidder has offered low prices for certain items⁹;
- incorrect assessment of explanations of the tendered price²⁰;
- the contracting authority failed to provide a reasoning for its actions²¹.

9. Failure to provide the reasoning for the expert assessment of bids

Article 108(4) of the PPL stipulates that the decision on the awarding of the contract must be supplied with an explanation, containing, in particular, information from the report on the expert assessment of bids and instructions concerning the legal remedies. Also, Article 109(3) of the PPL prescribes that the contracting authority is obliged to provide a written reasoning for its

¹⁸ For example, refer to the decisions of the Republic Commission:

- No. 4-00-681/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/681-2016odlukark.pdf?id=18693>)

- No. 4-00-1712/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1712-2016odlukark.pdf?id=20455>)

- No. 4-00-1760/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1760-2016odlukark.pdf?id=19958>)

- No. 4-00-1847/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1847-2016odlukark.pdf?id=19922>)

¹⁹ For example, refer to the decision of the Republic Commission No. 4-00-119/2016

(<http://www.kjn.gov.rs/sw4i/download/files/article/119-2016odlukark.pdf?id=17221>)

²⁰ For example, refer to the following decision of the Republic Commission:

No. 4-00-810/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/810-2016odlukark.pdf?id=19781>)

²¹ For example, refer to the following decisions of the Republic Commission:

- No. 4-00-937/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/937-2016odlukark.pdf?id=19240>)

- No. 4-00-1324/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1324-2016odlukark.pdf?id=19632>)

decision to suspend the procedure, in particular stating the reasons for the suspension of the procedure and instructions on legal remedies.

The following improper actions by the contracting authorities were identified in the procedures for the protection of rights:

- failure to provide the reasons for rejecting a bid ²²;
- failure to provide the reasons for suspending the public procurement procedure ²³.

10. Incorrect assessment of the evidence supplied

Pursuant to the PPL, the contracting authority is obliged to draw up the tender documents in a clear and precise manner. Also, Article 106 of the PPL (Major deficiencies in a bid) prescribes that the contracting authority may reject a bid, among other if the bidder fails to prove that it meets the mandatory or additional requirements for participation in the tender. Hence, pursuant to the law, the reason for rejecting a bid is not merely the failure to provide the required proof, in itself, but the failure of the bidder to prove that it meets the requirements with the supplied proof.

The following improper actions by the contracting authorities were identified in the procedures for the protection of rights:

- the contracting authority incorrectly interpreted the contents of the evidence supplied;
- the contracting authority failed to accept an equivalent proof (evidence that proves compliance with a requirement from the tender documents but is not identical to the required one) ²⁵.

11. Rejection of a bid due to “formal” shortcomings

Article 106 of the PPL (Major deficiencies in a bid) prescribes that the contracting authority may reject a bid if: 1) the bidder fails to prove it fulfils mandatory requirements for participation; 2) the bidder fails to prove it fulfils additional requirements; 3) the bidder fails to provide the requested collateral; 4) the offered period of validity of the bid is shorter than the stipulated one; 5) the bid contains other deficiencies due to which it is not possible to determine the actual contents of the bid or compare it with other bids.

The following improper actions by the contracting authorities were identified in the procedures for the protection of rights:

- rejection of a bid because the forms supplied are not identical to the required ones, although they contain all required information;
- rejection of a bid for failure to state information in the required form although it is contained in another part of the bid ²⁷.

²² For example, refer to the decisions of the Republic Commission:

- No. 4-00-74/2017 (<http://www.kjn.gov.rs/sw4i/download/files/article/74-2017odlukark.pdf?id=20317>)

- No. 4-00-983/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/983-2015odlukark.pdf?id=14084>)

- No. 4-00-1359/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1359-2016odlukark.pdf?id=19453>)

²³ For example, refer to the following decisions of the Republic Commission:

- No. 4-00-134/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/134-2016odlukark.pdf?id=17854>)

- No. 4-00-1538/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/1538-2016odlukark.pdf?id=19553>)

²⁴ For example, refer to the following decision of the Republic Commission:

No. 4-00-350/2016 (<http://www.kjn.gov.rs/sw4i/download/files/article/350-2016odlukark.pdf?id=17818>)

²⁵ For example, please refer to the following decision of the Republic Commission:

No. 4-00-2410/2015 (<http://www.kjn.gov.rs/sw4i/download/files/article/2410-2015odlukark.pdf?id=16449>)

²⁶ For example, refer to the decision of the Republic Commission No. 10 (No. 4-00-2410/2015)

²⁷ For example, refer to the decision of the Republic Commission No. 4-00-109/2017

(<http://www.kjn.gov.rs/sw4i/download/files/article/109-2017odlukark.pdf?id=20475>)

**This document was produced in cooperation with the OECD/SIGMA representatives with the aim of improving the activity of contracting authorities in the public procurement system in the Republic of Serbia.*