Republic of Serbia
REPUBLIC COMMISSION FOR THE
PROTECTION OF RIGHTS IN PUBLIC
PROCUREMENT PROCEDURES

Bulletin of the Case Law

No. 10-11/2019

Belgrade 2019

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in Public Procurement Procedures

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Contents

The Effects of the Application of the Public Procurement Law ("Official Gazette of the RS", Nos. 124/2012, 14/2015 and 68/2015) through the Case Law of the Republic Commission for the Protection of Rights in Public Procurement Procedures

At the time of writing the papers published in this Bulletin of the Case Law of the Republic Commission for the Protection of Rights in Public Procurement Procedures (hereinafter: the Bulletin), the proposal of the new Public Procurement Law was submitted to the Assembly by the Government of the Republic of Serbia, and in all likelihood its adoption may be expected by the time of publication of this Bulletin.

This Bulletin's regular readers already know that over the period of application of the Public Procurement Law ("Official Gazette of the RS", Nos. 124/2012, 14/2015 and 68/2015 — hereinafter: the PPL) the Republic Commission for the Protection of Rights in Public Procurement Procedures (hereinafter: the Republic Commission) has published, in cooperation with the OSCE Mission in the Republic of Serbia, several annual edition of the Bulletin.

In its Bulletin No. 1/2014, the Republic Commission presented 18 principled legal positions taken at the plenary sessions of the Republic Commission during 2013

and 2014. Starting from 2015, the Bulletin has been published as a double edition. Papers by authors from Slovenia and Serbia and the material created under the SIGMA initiative on issues concerning the application of the PPL that were topical during 2015 were published in Bulletin No. 2-3/2015

In Bulletin No. 4-5/2016, the Republic Commission informed all economic operators, contracting authorities and the interested public about significance of procedural assumptions for acting upon requests for the protection of rights, and elaborated the issues of legal standing to sue, timeliness, and completeness of requests for the protection of rights using the examples from the decisions of the Republic Commission.

During the period of application of the PPL, the Republic Commission has had a very successful and continuous cooperation with the SIGMA initiative which has, through its recommendations for the work of the Republic Commission, recognised and underlined the importance of the Republic Commission's practice for the public procurement system in the Republic of Serbia. By implementing the Action Plan which was based on the recommendations of SIGMA, the Republic Commission decided to share the most common irregularities in the conduct of contracting authorities in public procurement procedures in Bulletins 6-7/2017 and 8-9/2018 by means of examples identified in the work of this body, as well as the most frequent situations of unsuccessful challenging the contracting authorities' action in public procurement procedures, with examples from the decisions taken by the Republic Commission. This way, both parties in procedure for the protection of rights, contracting authorities and claimants, got acquainted with the reference practice of the Republic Commission, systematically and with expert comments, which is a manner appropriate for communication of an independent and autonomous body reviewing the regularity of public procurement procedures in the Republic of Serbia.

At the time after the visit of the European Commission Expert Mission to the Republic of Serbia in April 2019 (which appraised the work of the Republic Commission as exceptional, clearly acknowledging that the status of this body and the nature of the procedure for the protection of rights were determined in accordance with the practice of the European Court of Justice, according to the Dorsch criteria) Republic Commission is continued successful cooperation with the OSCE Mission in the Republic of Serbia. As a result in this edition, we intend to present the effects of the application of the PPL, through the data on the

work of the Republic Commission and essays elaborating topics which have in a way marked the entire period of the application of the PPL — essential deficiencies of bid, additional eligibility requirements in public procurement procedure, deadlines in public procurement procedure (with examples from the decisions of the Republic Commission, mostly taken in the period after the publishing of the previous edition of the Bulletin) and the special competences of the Republic Commission. In the section of the Bulletin with information on the work of the Republic Commission are only presented cases in which the Republic Commission acted upon the initial acts which had been filed pursuant to the PPL, even though the entire period of the application of the current PPL, the Republic Commission has also been adjudicating in cases in which the initial acts had been filed pursuant to the provisions of the previously applicable Public Procurement Laws. The total number of all received cases in which the Republic Commission adjudicated within the period of application of the PPL is 13,510, of which in 12,578 cases the Republic Commission has decided pursuant to the PPL. The total number of all resolved cases in the period of application of the PPL is 13,162, out of which 12,144 cases were decided by applying the provisions of the PPL.

During the period of application of the PPL, the Republic Commission has been facing various professional challenges, since the PPL had introduced many substantive changes in the public procurement system and important novelties in the system for the protection of rights in public procurement procedures. The provisions of the PPL introduced special competences of the Republic Commission in exercising new jurisdictions of this body. An unusually large number of cases in the protection of rights and the fact that the Republican Commission did not work in its full composition for a substantial part of the period of application of the PPL, have adversely affected the duration of adjudicating in the process of protection of rights. However, regardless of these challenges, from the information presented in this Bulletin is evident that the trend in the Republic Commission's work got reversed and the duration of the proceedings was shortened, so that the average number of days of adjudicating got to be more in line with deadlines prescribed by the PPL and the average in the EU Member States.

After the amendments to the PPL of 2015, the Republic Commission has invested additional efforts to apply its amended provisions so to make the procedure for

the protection of rights more effective and more streamlined with the requirements of the EU Directives, in the way facilitated by the new solutions under the PPL. Over the period of application of the PPL, the Republic Commission received a total of 272 proposals for continuation of activities and approved a total of 22 of those (of which only 2 after the amendments to Articles 149 and 150 of the PPL in 2015). Among data on the work of the Republic Commission, the procedures for the protection of rights are highlighted by means of presented data on resolved requests for the protection of rights, on appeals against contracting authorities' conclusions, and on conduct of contracting authorities in the subsequent proceedings upon orders from the decisions of the Republic Commission. The Bulletin also provides information on actions of the Republic Commission concerning the cancellation of contracts and fining and on the Administrative Court's judgements handed down in legal suits filed against the decisions of the Republic Commission.

Presented information evidently display a significant contribution of the consistent application of sound legal solutions, and of the stable and reasoned practice of the Republic Commission in the public procurement system in the Republic of Serbia. The data presented in this Bulletin witnesses the professional authority of this body and the observance of decisions taken by the Republic Commission. The way of resolving the merits of requests for the protection of rights reflects the need to reinforce the activities of competent state authorities in the public procurement system in the Republic of Serbia in the further educational efforts for expert personnel on the part of contracting authorities and in the raising of general legal culture concerning the use of legal remedies.

There is a special segment of the Bulletin dedicated to the cancellation of contracts and fining, having in mind clear and unambiguous significance that these special competences bear for the procedure for the protection of rights. Article 139, Paragraph 1, of the PPL provides for other special competences of the Republic Commission under the scope of its competences, whereas over the period of application of the PPL the Republic Commission, faced with the challenges of the legislative framework within which it acts and of the nature of the procedure for the protection of rights, has had no opportunities for a greater contribution to the penal policy through the conducts in misdemeanour proceedings. Considering the existing legislative framework governing the matter of misdemeanour liability in the Republic of Serbia and having in mind a recommendation of

the SIGMA initiative, the draft new Public Procurement Law also provides for the special authorisation of the Republic Commission under the provision which prescribes that the Republic Commission can and shall file request for initiating a misdemeanour proceedings to the competent Misdemeanour Court when, acting within the scope of its competences, it establishes a committed violation of that Law which may constitute the basis for misdemeanour liability.

During the application of the PPL, the total number of requests for initiating misdemeanour proceedings submitted to the Republic Commission is 252, of which 61 requests were filed by the Public Procurement Office, 96 by the State Audit Institution, 38 by budgetary inspections monitoring the operation of contracting authorities at different levels of government (AP Vojvodina, Cities of Belgrade, Novi Sad, Zrenjanin, Niš, Sombor), and 57 by other petitioners, physical and legal persons.

The Republic Commission, as the only body independent from contracting authorities, which ensures the protection of rights in public procurement procedures in the Republic of Serbia, holds that the presented data asserts the authority of this body built upon its quality decisions, which has also been recognised in the Progress Reports for Chapter 5 — Public Procurement. During the period of application of the PPL, the Republic Commission, in accordance with its authorities, succeeded in achieving the legislator's goals by means of its decision, to the extent as authorised by the legal norm.

According to the past experience in situations in which the Republic Commission has exercised its competences over the years in which were adopted new legal solutions, it is expected that even after the adoption of the new Public Procurement Law the Republic Commission will in its work still be applying the provisions of the current PPL for a certain period of time. Over that period of time, it will be possible to monitor similarities and differences between these two pieces of legislation through the practice of the Republic Commission.

It is a firm belief of the Republic Commission, supported by its decisions, that the effects of application of the PPL in the public procurement system in the Republic of Serbia were exceptional, and that through the solutions it had introduced into the public procurement system and the system for the protection of rights in public procurement procedures, this Law significantly improved this area in the Republic of Serbia, which also proved to be adequately noticed and

evaluated by the European Commission in its reports for Chapter 5 — Public Procurement, in the segment on the evaluation of legislative framework.

The Republic Commission continuing the practice initiated by Bulletin 8-9/2018 is publishing this Bulletin also in an English version. Both language versions of the Bulletin will also be posted on the Republic Commission's website www.kjn.rs.

Belgrade, October 2019

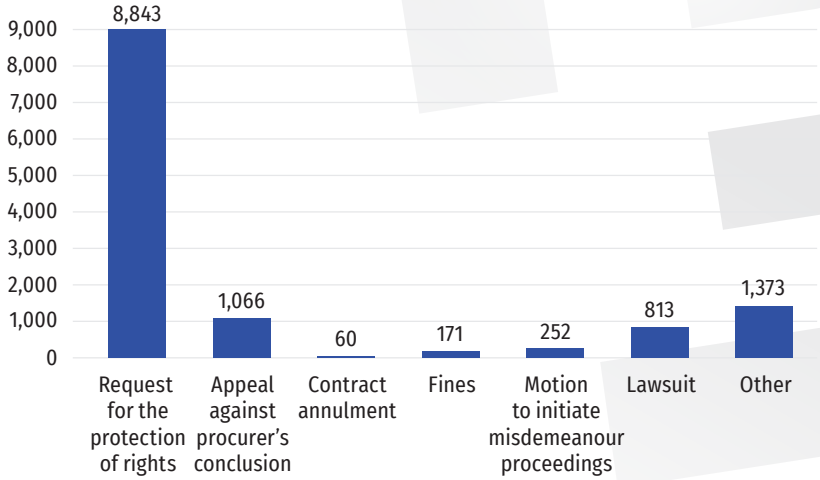
Overview of Work of the Republic Commission for the Protection of Rights in Public Procurement Procedures from 1.4.2013 to 30.9.2019

Application of the Law on Public Procurement ("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

TOTAL NUMBER OF RECEIVED CASES OVER THE PERIOD FROM 1.4.2013 — 30.9.2019
Application of the Law on Public Procurement ("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)
By types of initial acts

Received cases

Type of initial legal act	Number of cases	Share of initial acts, by type, in the total number of received cases, in %
Request for the protection of rights	8,843	70.31
Appeal against procurer's conclusion	1,066	8.48
Contract annulment	60	0.48
Fines	171	1.36
Motion to initiate misdemeanour proceedings	252	2.00
Lawsuit	813	6.46
Request for reimbursement of costs	852	6.77
Motion to resume activities	271	2.15
Motion to repeat the procedure	21	0.17
Motion for reverting to previous state	6	0.05
Complying with decision of the Administrative Court	164	1.30
Prohibition of abuse of request for the protection of rights	22	0.17
Appeal against RC's conclusion — minor offense	20	0.16
Motion to declare decision null and void	0	0.00
Complying with decision of the Misdemeanour Appellate Court	17	0.14
Total	**12,578**	**100%**


9,000
8,000
7,000
6,000
5,000
4,000
3,000
2,000
1,000
0
8,843
1,066
60
171
252
813
1,373
Request for the protection of rights
Appeal against procurer's conclusion
Contract annulment
Fines
Motion to initiate misdemeanour proceedings
Lawsuit
Other

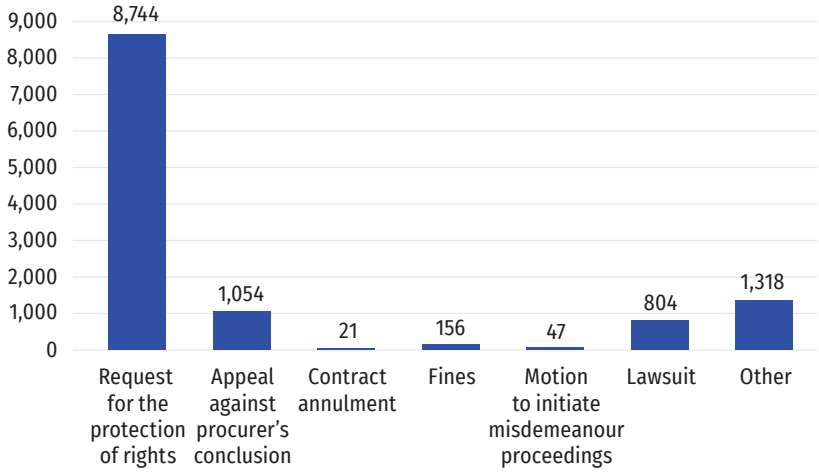
TOTAL NUMBER OF ADJUDICATED CASES OVER THE PERIOD FROM 1.4.2013 — 30.9.2019
Application of the Law on Public Procurement ("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)
By types of initial acts

Adjudicated cases

Type of initial legal act	Number of cases	Share of initial acts, by type, in the total number of adjudicated cases, in %
Request for the protection of rights	8744	72.00
Appeal against procurer's conclusion	1054	8.68
Fines	156	1.28
Contract annulment	21	0.17
Motion to initiate misdemeanour proceedings	47	0.39
Lawsuit	804	6.62
Request for reimbursement of costs	831	6.84
Motion to resume activities	271	2.23
Motion to repeat the procedure	19	0.16
Motion for reverting to previous state	6	0.05
Complying with decision of the Administrative Court	156	1.28
Prohibition of abuse of request for the protection of rights	13	0.11
Appeal against RC's conclusion — minor offense	20	0.17
Motion to declare decision null and void	0	0.00
Complying with decision of the Misdemeanour Appellate Court	2	0.02
Total	12144	100%

TYPE OF INITIAL LEGAL ACT: REQUEST FOR THE PROTECTION OF RIGHTS
TOTAL NUMBER OF ADJUDICATED CASES OVER THE PERIOD
FROM 1.4.2013 — 30.9.2019
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)
By decision outcomes

Total number of adjudicated cases	Total number of adopted requests for the protection of rights	Total number of refused requests for the protection of rights	Total number of procedurally resolved requests for the protection of rights
8,744	5,201 (60%)	2,644 (30%)	899 (10%)



TYPE OF INITIAL LEGAL ACT: REQUEST FOR THE PROTECTION OF RIGHTS
TOTAL NUMBER OF ADJUDICATED CASES OVER THE PERIOD FROM 1.4.2013 — 30.9.2019
Application of the Law on Public Procurement ("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)
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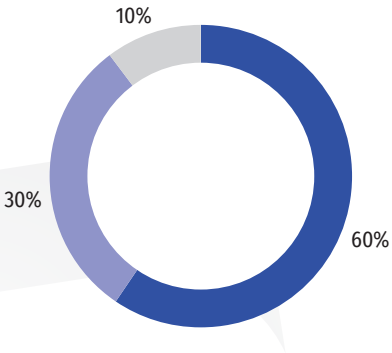


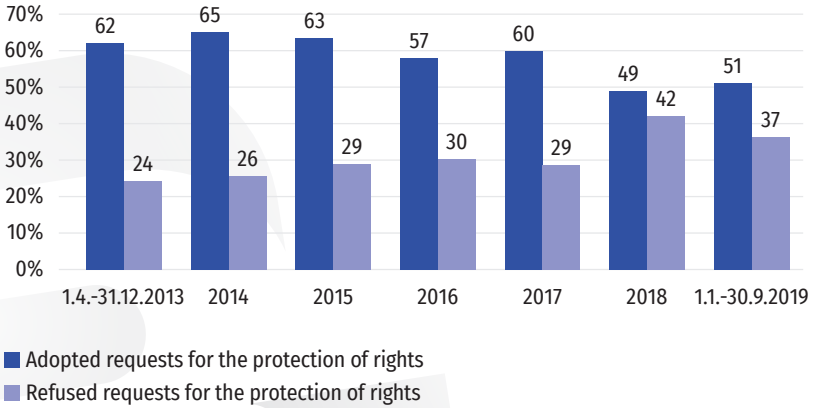
Total number of adopted requests for the protection of rights
Total number of refused requests for the protection of rights
Total number of procedurally resolved requests for the protection of rights

TYPE OF INITIAL LEGAL ACT: REQUEST FOR THE PROTECTION OF RIGHTS
TOTAL NUMBER OF ADJUDICATED CASES
By decision outcomes – by years
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Year	Total number of adjudicated cases	Total number of adopted requests for the protection of rights	Total number of refused requests for the protection of rights	Total number of procedurally resolved requests for the protection of rights
1.4.-31.12.2013	573	353	138	82
2014	2,010	1,316	513	181
2015	1,907	1,194	562	151
2016	1,395	800	415	180
2017	1,127	676	322	129
2018	1,094	536	457	101
1.1.-30.9.2019	638	326	237	75

TYPE OF INITIAL LEGAL ACT: REQUEST FOR THE PROTECTION OF RIGHTS
SHARE OF THE NUMBER OF RESOLVED CASES IN THE TOTAL NUMBER OF RESOLVED CASES, IN %
By decision outcomes – by years
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Year	Adopted requests	Refused requests
1.4.-31.12.2013	62%	24%
2014	65%	26%
2015	63%	29%
2016	57%	30%
2017	60%	29%
2018	49%	42%
1.1.-30.9.2019	51%	37%

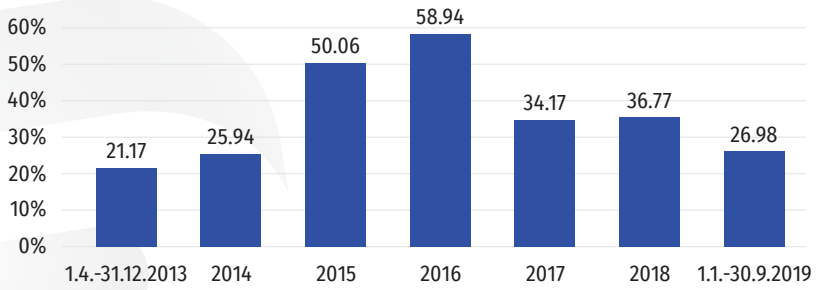


TYPE OF INITIAL LEGAL ACT: REQUEST FOR THE PROTECTION OF RIGHTS
AVERAGE NUMBER OF ADJUDICATING DAYS IN THE PROCEDURE FOR THE PROTECTION OF RIGHTS BEFORE THE REPUBLIC COMMISSION
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Period	Total number of received cases	Total number of adjudicated cases	Average number of adjudicating days (in calendar days)
from 1.4.2013 to 30.9.2019	8,843	8,744	37.22

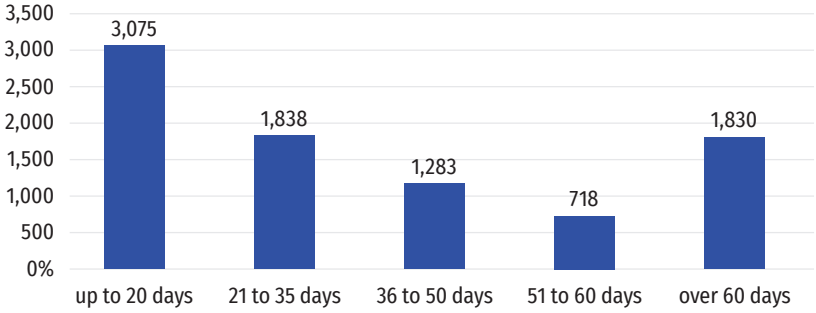
TYPE OF INITIAL LEGAL ACT: REQUEST FOR THE PROTECTION OF RIGHTS
AVERAGE NUMBER OF ADJUDICATING DAYS IN THE PROCEDURE FOR THE PROTECTION OF RIGHTS BEFORE THE REPUBLIC COMMISSION
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)
By years

Year	Total number of received cases	Total number of adjudicated cases	Average number of adjudicating days (in days)
1.4.-31.12.2013	715	573	21.17
2014	2,130	2,010	25.94
2015	2,006	1,907	50.06
2016	1,202	1,395	58.94
2017	1,135	1,127	34.17
2018	1,027	1,094	36.77
1.1.-30.9.2019	628	638	26.98



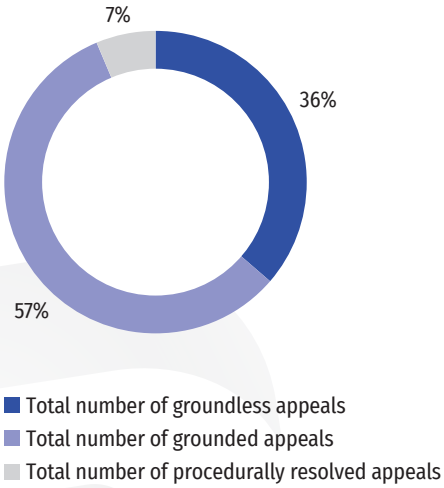
TYPE OF INITIAL LEGAL ACT: REQUEST FOR THE PROTECTION OF RIGHTS
ADJUDICATION TIME IN CASES RESOLVED FROM 1.4.2013 — 30.9.2019
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Adjudication time	Total number of cases decided within timeline from Column 1	Share of cases decided within cited timelines in the total number of resolved cases, in %
up to 20 days	3,075	35.17
21 to 35 days	1,838	21.02
36 to 50 days	1,283	14.67
51 to 60 days	718	8.21
over 60 days	1,830	20.93
Total	8,744	100 %



TYPE OF INITIAL LEGAL ACT: APPEAL AGAINST PROCURER'S CONCLUSION
TOTAL NUMBER OF ADJUDICATED CASES OVER THE PERIOD
FROM 1.4.2013 – 30.9.2019
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)
By decision outcomes

Total number of adjudicated cases	Total number of groundless appeals	Total number of grounded appeals	Total number of procedurally resolved appeals
1,054	383 (36%)	604 (57%)	67 (7%)

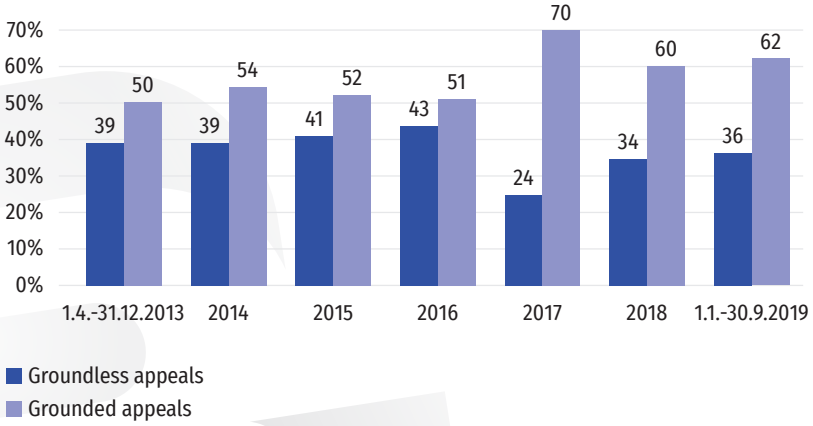


TYPE OF INITIAL LEGAL ACT: APPEAL AGAINST PROCURER'S CONCLUSION
TOTAL NUMBER OF ADJUDICATED CASES, BY DECISION OUTCOMES
By years
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Year	Total number of adjudicated cases	Total number of groundless appeals	Total number of grounded appeals	Total number of procedurally resolved appeals
1.4.-31.12.2013	62	24	31	7
2014	178	69	96	13
2015	192	78	100	14
2016	203	88	104	11
2017	207	50	144	13
2018	146	50	88	8
1.1.-30.9.2019	66	24	41	1

TYPE OF INITIAL LEGAL ACT: APPEAL AGAINST PROCURER'S CONCLUSION
SHARE OF THE NUMBER OF RESOLVED CASES IN THE TOTAL NUMBER OF RESOLVED CASES, IN %
By decision outcomes – by years
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Year	Groundless appeals	Grounded appeals
1.4.-31.12.2013	39%	50%
2014	39%	54%
2015	41%	52%
2016	43%	51%
2017	24%	70%
2018	34%	60%
1.1.-30.9.2019	36%	62%

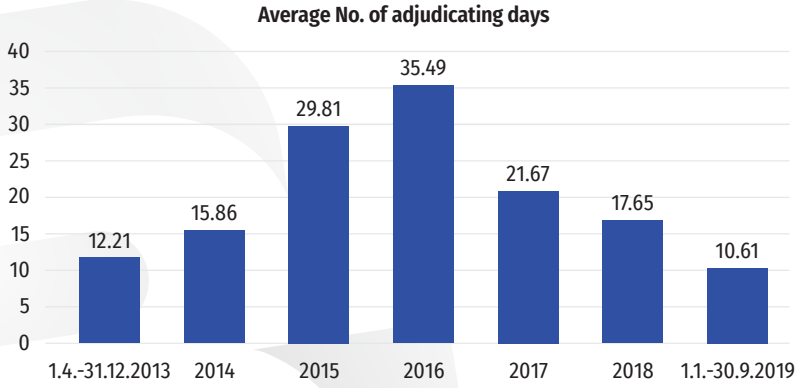


TYPE OF INITIAL LEGAL ACT: APPEAL AGAINST PROCURER'S CONCLUSION
AVERAGE NUMBER OF ADJUDICATING DAYS IN THE PROCEDURE BEFORE THE REPUBLIC COMMISSION
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Period	Total number of received cases	Total number of adjudicated cases	Average number of adjudicating days (in calendar days)
from 1.4.2013 to 30.9.2019	1,066	1,054	23.03

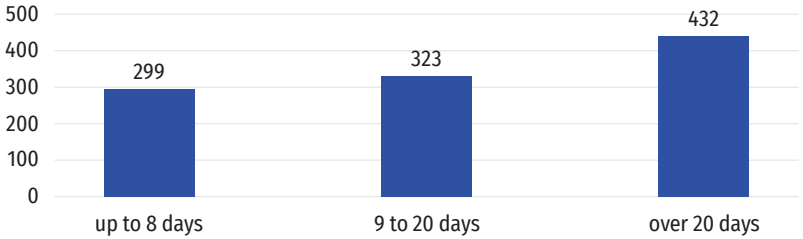
TYPE OF INITIAL LEGAL ACT: APPEAL AGAINST PROCURER'S CONCLUSION
AVERAGE NUMBER OF ADJUDICATING DAYS IN THE PROCEDURE BEFORE THE REPUBLIC COMMISSION
Application of the Law on Public Procurement ("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)
By years

Year	Total number of received cases	Total number of adjudicated cases	Average number of adjudicating days (in days)
1.4.-31.12.2013	71	62	12.21
2014	185	178	15.86
2015	206	192	29.81
2016	186	203	35.49
2017	204	207	21.67
2018	141	146	17.65
1.1.-30.9.2019	73	66	10.61



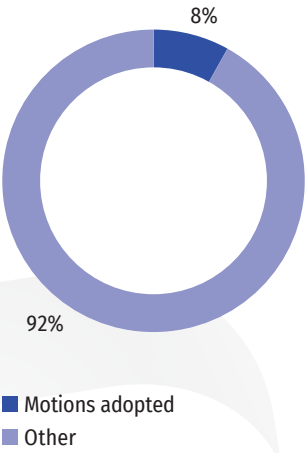
TYPE OF INITIAL LEGAL ACT: APPEAL AGAINST PROCURER'S CONCLUSION
ADJUDICATION TIME IN CASES RESOLVED FROM 1.4.2013 — 30.9.2019
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Adjudication time	Total number of cases decided within timeline from preceding column	Share of cases decided within cited timelines in the total number of resolved cases, in %
up to 8 days	299	28.37
9 to 20 days	323	30.64
over 20 days	432	40.99
Total	1,054	100 %



TYPE OF INITIAL LEGAL ACT: MOTION TO RESUME ACTIVITIES
NUMBER OF RESOLVED CASES IN THE ADJUDICATING PERIOD
FROM 1.4.2013 — 30.9.2019
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Adjudicating outcome	
Motions adopted	22
Other	249
Total:	271



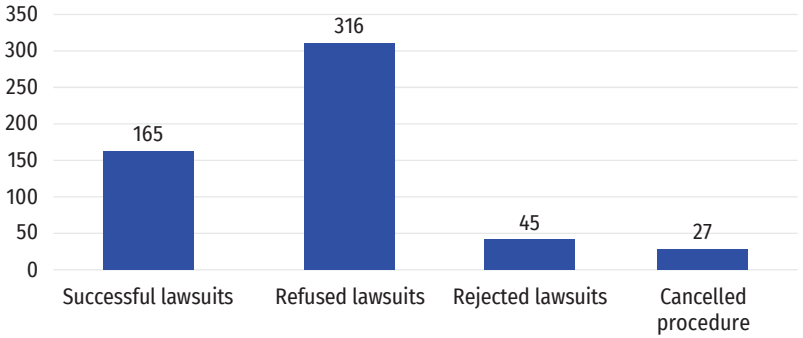
NUMBER OF ADMINISTRATIVE COURT'S JUDGMENTS RENDERED UPON LAWSUITS FILED AGAINST DECISIONS OF THE REPUBLIC COMMISSION TAKEN OVER THE PERIOD OF ADJUDICATING FROM 1.4.2013 — 30.9.2019
Application of the Law on Public Procurement ("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)
By decision outcomes

The total number of decisions taken by the Republic Commission while deciding upon requests for the protection of rights and upon appeals against procurers' conclusions, in application of the provisions of the Public Procurement Law, is 9,798.

The total number of lawsuits filed against decisions of the Republic Commission taken in the procedures for the protection of rights, in application of the provisions of the Public Procurement Law, is 813.

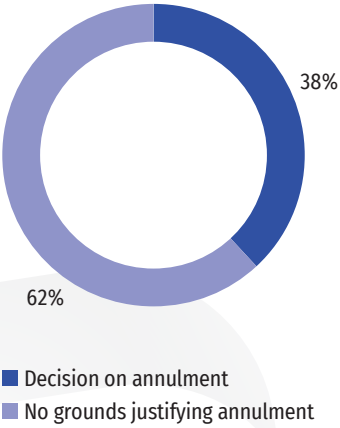
The total number of judgments of the Administrative Court rendered upon the above lawsuits is 553.

Adjudicating outcome	
Successful lawsuits	165
Refused lawsuits	316
Rejected lawsuits	45
Cancelled procedure	27
Total:	553



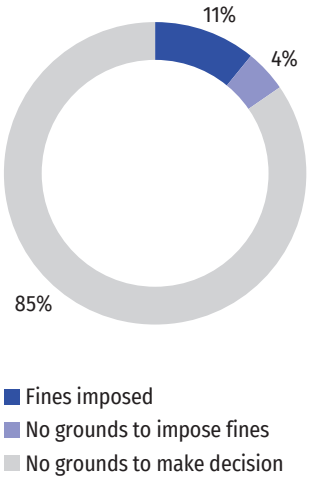
CONTRACT ANNULMENT
NUMBER OF RESOLVED CASES IN THE ADJUDICATING PERIOD
FROM 1.4.2013 — 30.9.2019
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Adjudicating outcome	
Decision on annulment	8
No grounds justifying annulment	13
Total:	21



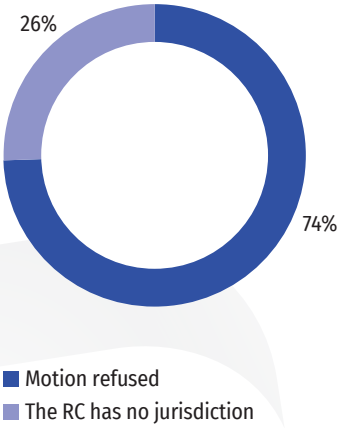
FINES
NUMBER OF RESOLVED CASES IN THE ADJUDICATING PERIOD
FROM 1.4.2013 — 30.9.2019
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Adjudicating outcome	
Fines imposed	17
No grounds to impose fines	7
No grounds to make decision	132
Total:	156



TYPE OF INITIAL LEGAL ACT:
MOTION TO INITIATE MISDEMEANOR PROCEEDINGS
NUMBER OF RESOLVED CASES IN THE ADJUDICATING PERIOD FROM 1.4.2013 — 30.9.2019
Application of the Law on Public Procurement
("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Adjudicating outcome	
Motion refused	35
The RC has no jurisdiction	12
Total:	47



NUMBER OF CASES IN RESPECT OF WHICH WERE REVIEWED THE REPORTS ON CONTRACTING AUTHORITIES' COMPLYING WITH THE DECISIONS TAKEN BY THE REPUBLIC COMMISSION OVER THE PERIOD FROM 1.4.2013 — 30.9.2019

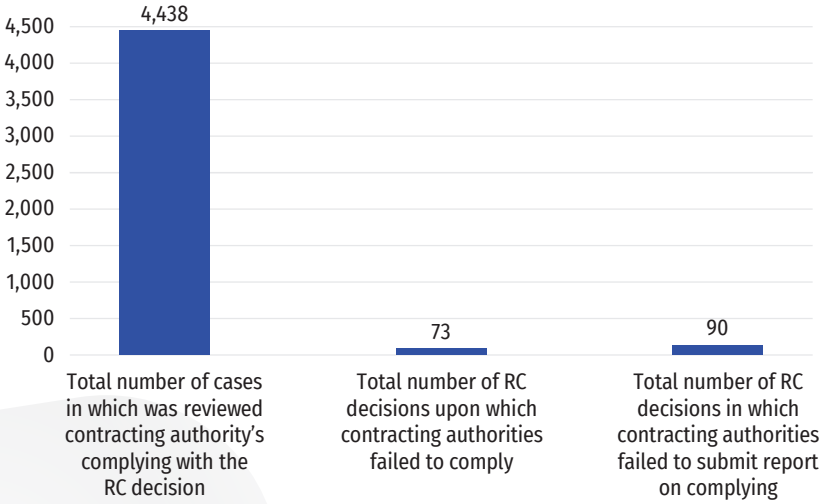
Application of the Law on Public Procurement ("Official Gazette of the RS" No. 124/2012, No. 14/2015, and No. 68/2015)

Pursuant to the provisions of Article 160 of the PPL, contracting authority shall comply with orders of the Republic Commission contained in its decision, as set forth therein.

The Republic Commission may request from contracting authority to submit reports, documents, and statements of representatives within deadline set by the Republic Commission, and contracting authority has to comply within the deadline set by the Republic Commission's request.

Total number of adopted requests for the protection of rights	Total number of cases for which were requested reports, and in which was reviewed contracting authority's complying with the Republic Commission's decision	Total number of the Republic Commission's decisions upon which contracting authorities failed to comply	Total number of the Republic Commission's decisions in which contracting authorities failed to submit report on complying
5,201	4,438	73	90

Total number of cases in which was reviewed contracting authority's complying with the Republic Commission's decision	Total number of the Republic Commission's decisions upon which contracting authorities failed to comply	Total number of the Republic Commission's decisions in which contracting authorities failed to submit report on complying
4,438	73 (1.64%)	90 (2.03%)



Jasmina Stošić
Head of the Department for Expert Tasks in the Protection of Rights in Public Procurement Procedures

Essential Deficiencies of Bid Pursuant to the Public Procurement Law ("Official Gazette of the RS" Nos. 124/2012, 14/15 and 68/15)

The legal solutions contained in the Public Procurement Law ("Official Gazette of the Republic of Serbia Nos. 124/2012, 14/2015 and 68/2015; hereinafter: the PPL) have introduced in the public procurement practice in the Republic of Serbia the notion of essential deficiencies of the bid as a part of a broader notion of unacceptable bid, the latter also having been introduced in the public procurement practice by legal solutions from that same Law.

Namely, Article 3, Para 1, Point 33, of the PPL provides that the status of an acceptable bid shall have a bid that cumulatively fulfils several requirements, meaning a bid which is:

- timely (the notion of a timely bid is prescribed under Article 3, Para 1, Point 31, of the PPL).
- one that contracting authority did not reject due to essential deficiencies (essential deficiencies are set forth under Article 106 of the PPL),
- which is adequate (the notion of an adequate bid is prescribed under Article 3, Para 1, Point 32, of the PPL),
- which does not restrict or condition either the rights of contracting authority or the obligations of bidder,
- which does not exceed the amount of estimated public procurement value.

Article 106, Para 1, of the PPL provides that essential deficiencies of bid exist where:

- bidder fails to prove he complies with mandatory eligibility requirements (mandatory eligibility requirements are set forth under Article 75 of the PPL);
- where bidder fails to prove he fulfils additional requirements (the notion of additional eligibility requirements and the relating contracting authority's competencies are set forth under Article 76 of the PPL);
- where bidder fails to supply requested collateral (the relating contracting authority's competencies are set forth under the provisions of Article 61, Paragraphs 7, 8 and 9, of the PPL);
- where the offered period of validity of the bid is shorter that the prescribed one (minimum period of validity of the bid and the relating contracting authority's competencies are set forth under Article 90 of the PPL);
- bid contains other deficiencies due to which is not possible to determine the actual contents of the bid, or to compare it with other bids.

The introduction of the concept of essential deficiencies of bid in the public procurement practice has changed the basis for expert evaluation of bids in this part relative to legal solutions established under the previously applicable Public Procurement Law ("Official Gazette of the Republic of Serbia" No. 116/2008), given that it explicitly provides which type of deficiencies prevents further expert evaluation of the bid in terms of firstly checking whether it is adequate and thereafter in terms of ranking it by applying the criterion for evaluation of bids as determined in tender documents, for the purpose of awarding a public procurement contract.

Considering that the application of the PPL began on 1.4.2013, namely, since more than six years ago, the intervening period is apparently long enough to make it possible for the case law of the Republic Commission, generated from a large number of the procedures for the protection of rights adjudicated by this body, to reveal certain patterns and specificities when it comes to the application of Article 106 of the PPL when performing expert evaluation of bids in actual public procurement procedures.

Firstly, one can say that evidently, over the past few years, the subject of the protection of rights in only a relatively small number of cases was the matter of

whether the bid have an essential deficiency under Article 106, Para 1, Point 1, of the PPL from the aspect of whether the bidders proved to comply with mandatory eligibility requirements prescribed under Article 75, Paragraph 1, Points 1), 2), 4) and 5) of the PPL, in that they are registered with the competent body or entered in appropriate registry, that they or their legal representatives have not been convicted for any criminal act as members of organized criminal group, that they have not been convicted for any commercial criminal offence, criminal offence against environment, criminal offence of receiving or offering bribe, criminal offence of fraud, that they have paid due taxes, contributions and/or other public charges in accordance with laws of the Republic of Serbia or a foreign country in which they have registered seats, and that they hold valid permit issued by competent body to carry out economic activity which is the subject of public procurement, if such permit is stipulated by special regulation.

In this regard, it may be inferred that pursuant to Directives 2014/24/EU and 2014/25/EU, the mandatory eligibility requirements as a whole are the expression of legislator's logical and justifiable intention to enable the access to public funds from which public procurements are financed solely to those bidders who run their businesses in full compliance with legislation and who duly settle all their business-related obligations towards the Republic of Serbia or a foreign state in which they have registered seat, with a clear consequence that bids of bidders later on found to have failed to prove to comply with mandatory eligibility requirements, are going to be declared as bids having an essential deficiency, which in turn establishes a direct basis to refuse the bid in accordance with Article 1, Paragraph 1, Point 1, in conjunction with Article 107, Paragraph 1, of the PPL.

The importance of duties directly impacting ability to participate in public procurement procedures has been broadly recognised by bidders; as a rule, once they decide to take part in a public procurement procedure, they submit regular proofs on their compliance with mandatory requirements prescribed under Article 75, Para 1, Points 1), 2), 4) and 5) of the PPL. In addition, important aspects are the fact that it is relatively easy to verify whether the bidder is registered with the competent body or entered in appropriate registry, by means of insight into information available on the website of the Agency for Business Registries and into the Registry of Bidders, and the possibility to stipulate in tender documents an option that compliance with some or all individual requirements, ex-

cept the requirement under Article 75, Para 1, Point 5) of this Law, is to be proved by submitting bidder's statement.

From the aspect of consequences of possible existence of essential deficiencies of bid under Article 106, Para 1, Point 1, of the PPL, a particularly interesting is the aspect of legal solutions contained in the PPL governing the registration into the Registry of Bidders.

Namely, Article 78 of the PPL established the Registry of Bidders as a public registry of bidders (entrepreneurs and legal entities) who meet mandatory requirements under Article 75, Para 1, Points 1 through 4, of the PPL, whereby any person registered with organisation responsible for registration may apply for entry into the Registry of Bidders by means of submitting documents proving their compliance with mandatory requirements. Data from the Registry of Bidders is publicly available on the website of competent organisation (the Agency for Business Registries) so that the search of information on registered bidders is enabled by means of accessing to the relevant part of such website and typing a bidder's name or registration number.

Article 78, Para 5, of the PPL provides that when persons registered in the Registry of Bidders submit bids or applications they are not obliged to prove their compliance with mandatory requirements, and in the practice bidders frequently exercise this possibility because it enables easier preparation of bids and in the process saves time and money.

The continuous monitoring of a large number of cases adjudicated by the Republic Commission reveals a trend that, in a number of cases, bidders fail to properly understand that the possibility provided for under Article 83, Paragraph 5, of the PPL only applies to the preparation of bids, meaning that when drawing up their the bidders are not obliged to submit as integral part thereof the evidence proving their compliance with mandatory eligibility requirements under Article 75, Para 1, Points 1), 2) and 4) of the PPL, and yet that their registration into the Registry of Bidders does not excuse them from duty to possess evidence demonstrating this compliance and to supply those, upon contracting authority's request, for the latter's examination during expert evaluation of bids, before the decision on awarding contract is taken. Likewise, in a number of cases bidders fail to understand that the fact they have registered in the Registry of Bidders does not necessarily mean that data relating to the matter of

compliance with said mandatory eligibility requirements is beyond verification at the stage of expert evaluation of bids for the sake of establishing the indisputable facts of relevance to the question of whether the bid contains essential deficiencies under Article 83, Paragraph 1, Point 1) of the PPL.

The same can be said for the case where contracting authority, pursuant to Article 83, Paragraph 4, of the PPL, stipulates in tender documents that compliance with all or only certain requirements, except the requirement under Article 75, Para 1, Point 5) of this Law is to be proved by submitting statement whereby bidders under full criminal responsibility and liability confirm they fulfil requirements, which is also a legal solution firstly introduced in the public procurement practice pursuant to the provisions of the PPL for the purpose of facilitating the preparation of bids and at the same time reducing the related costs.

The reasoning is that, in terms of Article 3, Para 1, Point 33), of the PPL, the determining of acceptability of bid is the ultimate conclusion that contracting authority is obliged to make for each bid evaluated at the stage of their expert evaluation, and this has to be preceded by the establishing of facts concerning all cumulatively stipulated requirements which have to be complied with for a bid to be evaluated as an acceptable one.

From the reasoning of Decision of the Republic Commission No. 4-00-96/2019 of 1.3.2019:

...From the established facts follows that under mandatory eligibility requirements in public procurement procedure, contracting authority stipulates that bidders have to have paid due taxes, contributions and/or other public charges in accordance with laws of the Republic of Serbia or a foreign country in which they have registered seats, as a mandatory legal requirement under Article 75, Para 1, Point 4), of the PPL, also stipulating proofs on the fulfilment of the above. In addition, under the provisions of tender documents contracting authority allows the bidders to prove compliance with mandatory and additional requirements, pursuant to Article 83, Paragraph 4, of the PPL, by filling in a statement foreseen in Forms 2 and 2b of tender documents, with a note that upon contracting authority's written request bidders are obliged to submit the originals or certified copies of requested evidence on compliance with all or only certain

(specified) mandatory and additional requirements, within five days from the receipt of this contracting authority's written notice. Likewise, contracting authority stipulates in its tender documents that bidder (a subcontractor or a member of the group) already registered in the Registry of Bidders may, instead of proofs under Points 1) through 4) under Article 75, of the PPL, submit a copy of decision on registration in the Registry of Bidders, or specify the website at which this information can be verified.

Further, from the established facts and having regard to the contents of the bidder's bid, it follows indisputably that in the case at hand the claimant has together with the bid also supplied the statement on compliance with requirements required by tender documents, foreseen on Form 2 and Form 2b, for both members of the consortium of bidders, as well as the members' statements confirming both of them being registered in the Registry of Bidders, also specifying relevant website, and Decision on Registration in the Registry of Bidders BPN 3433/2017 of 29.12.2017 for bidder "SION GARD" d.o.o. Belgrade, and Decision on Registration in the Registry of Bidders BPN 4125/2014 of 22.8.2014 for bidder "TIME PARTNER" d.o.o. Belgrade.

Having in mind contracting authority's duty to take its decision on the basis of properly and completely established facts, and aware that from the reasoning of the challenged Decision on awarding contract and from argumentation contained in the response to request for the protection of rights follows that contracting authority has certain doubts about veracity of signed statement — Form 2b on compliance with mandatory requirements under tender documents issued for a member of the consortium of bidders in the claimant's bid — namely, bidder "TIME PARTNER" d.o.o. Belgrade, the Republic Commission notes that the contracting authority did have the legal grounds and that it did not act in a way contrary to the provisions of the PPL when it asked the claimant, at the stage of expert evaluation of bids, to supply evidence on compliance with mandatory requirement under Article 75, Para 1, Point 4), of the PPL, i.e., the Tax Authority's confirmation on tax debt balance for bidder "TIME PARTNER" d.o.o. Belgrade.

Even though in given public procurement procedure the bidders were allowed to prove their compliance with mandatory and additional requirements by means of statement on compliance with mandatory and additional requirements, so that bidder registered in the Registry of Bidders, instead of proofs under Points 1) through 4) under Article 75, of the PPL could supply copy of decision on regis-

tration in the Registry or specify website at which this information can be verified, from the foregoing does not follow that contracting authority was precluded from carrying out additional checks in order to establish beyond doubt the compliance with mandatory requirement under Article 75, Paragraph 1, Point 4) of the PPL in that the claimant's bid was acceptable in terms of Article 3, Paragraph 1, Point 33) of the PPL, meaning that it is free from any essential deficiency under Article 106, Paragraph 1, Point 1) of the PPL, in particular having regard to the fact that contracting authority stipulated in tender documents bidders' duty, if requested so by contracting authority, to submit the originals or certified copies of requested evidence on compliance with all or only certain (specified) mandatory and additional requirements, within five days from the receipt of contracting authority's written notice.

In regard with the above, the Republic Commission notes that registration in this particular Registry of Bidders, prescribed under Article 78 of the PPL, is a rebuttable presumption of veracity of information of relevance for compliance with mandatory eligibility requirements under Article 75 of the PPL which, as such, if challenged by other participants in public procurement procedure or if found suspicious by contracting authority, have to be checked and established in an indisputable manner...

From the reasoning of Decision of the Republic Commission No. 4-00-1141/2018 of 6.11.2018:

...From the established facts follows that contracting authority stipulates in tender documents that bidder must prove his complies with mandatory eligibility requirements in given public procurement procedure, as defined under Article 75 of the PPL, specifying therein in terms of Article 83, Paragraph 1, Points 1) through 4) the exact mandatory eligibility requirements and the evidence to be submitted by bidders in orders to prove such mandatory requirements.

In given procedure, the claimant participated in the consortium of bidders comprising as follows: "Složna braća" d.o.o. Branch: "Putevi — Zlatar", Nova Varoš, as the authorised member of the consortium consisting of bidder "MBA — Ratko Mitrović" Niskogradnja d.o.o. Belgrade, bidder "Domextra" d.o.o. Užice, and bidder Slobodan Pešić PR Artisan Service for Geodetic Works Priboj. It is further established that Consortium Member Slobodan Pešić PR Artisan Service for Ge-

odetic Works Priboj as evidence proving his compliance with mandatory eligibility requirements submitted his statement of registration in the Registry of Bidders kept by the Agency for Business Registries thus proving, pursuant to Article 83, Paragraph 5, of the PPL, his compliance with mandatory requirements under Article 75, Paragraph 1, Points 1) through 4) of the PPL, by Decision No. BP 128998/2013 issued by the Registry of Bidders. It is further established that he has supplied Decision No. BP 128998/2013 of 18.12.2013 issued by the Agency for Business Registries, stating that the Agency accepts the singular registry application for the establishment of legal entities and other operators and registration into the single registry of taxpayers and, consequently, Slobodan Pešić PR Artisan Service for Geodetic Works Priboj is entered into the Registry of Economic Operators.

The Republic Commission is of the opinion that, in the case at hand, the contracting authority was right to evaluate the claimant's bid as unacceptable in terms of Article 83, Paragraph 1, of the PPL. Namely, in terms of the provisions of Article 75, Para 1, of the PPL bidders in a public procurement procedure must prove the following: 1) that they are registered with the competent body or entered in appropriate registry; 2) that they or their legal representatives have not been convicted for any criminal act as members of organized criminal group, that they have not been convicted for any commercial criminal offence, criminal offence against environment, criminal offence of receiving or offering bribe, criminal offence of fraud; 3) that they have paid due taxes, contributions and/or other public charges in accordance with laws of the Republic of Serbia or a foreign country in which they have registered seats. As for the proof, Article 77, Para 1, of the PPL provides that bidders prove compliance with requirements under Article 75, Para 1, of this Law by means of supplying the following evidence: 1) extract from registry of competent authority; 2) confirmation by competent court or competent police authority; 4) confirmation by competent tax authority and organisation for compulsory social insurance, or confirmation by competent authority that bidder undergoes the process of privatisation. Likewise, Article 78, Para 5, of the PPL provides that persons registered in the Registry of Bidders are not obliged to prove compliance with mandatory requirement when submitting their bids.

In this regard, the Republic Commission notes the claimant failed to prove that consortium member Slobodan Pešić PR Artisan Service for Geodetic Works Priboj complies with mandatory eligibility requirements in given public procurement

procedure, which the claimant was obliged to do in terms of Article 83, Paragraph 1, Points 1) through 4) in conjunction with Article 81, Para 2, of the PPL. Namely, the claimant does not supply evidence prescribed under Article 83, Paragraph 1, of the PPL (extract from registry of competent authority, confirmation by competent court or competent police authority, and confirmation by competent tax authority and organisation for compulsory social insurance, or confirmation by competent authority that bidder undergoes the process of privatisation) in order to prove compliance with mandatory requirement, but instead supplies Statement on being registered in the Registry of Bidders kept by the Agency for Business Registries, and Decision No. BP 128998/2013 of 18.12.2013 issued by the Agency for Business Registries, stating that the Agency accepts the singular registry application for the establishment of legal entities and other operators and registration into the single registry of taxpayers and, consequently, Slobodan Pešić PR Artisan Service for Geodetic Works Priboj is entered into the Registry of Economic Operators. On that point, the contracting authority properly concluded the same the Republic Commission undoubtedly established upon insight into the website of the Agency for Business Registries, notably, that consortium member Slobodan Pešić PR Artisan Service for Geodetic Works Priboj was not registered in the Registry of Bidders. The claimant also supplied Decision No. BP 128998/2013 of 18.12.2013 issued by the Agency for Business Registries, stating singular registry application for the establishment of legal entities and other operators and registration into the single registry of taxpayers is accepted and Slobodan Pešić PR Artisan Service for Geodetic Works Priboj is entered into the Registry of Economic Operators, which, however, is not decision on entering a bidder into the Registry of Bidders but instead into the Registry of Economic Operators, and this is merely a mandatory eligibility requirement under Article 75, Para 1, Point 1) of the PPL that bidder is registered with the competent body or entered in appropriate registry. The Republic Commission finds the contracting authority's argumentation given in its response to request for the protection of rights to be grounded, in contending that the PPL does not prescribe it as a duty of a bidder to register in the Registry of Bidders, but in that case the bidder must also provide with his bid the evidence on his compliance with mandatory requirements under Article 75 of the PPL...

On the other hand, the practice reveals a number of situations in which contracting authorities, while carrying out expert evaluation of bids, simply overlooked the option prescribed for bidders under Article 78, Para 5, of the PPL, and

failed to interpret the fact of missing evidence on compliance with mandatory eligibility requirements under Article 75, Para 1, Points 1), 2) and 4) of the PPL as an essential deficiency prescribed under Article 106, Para 1, Point 1) of the PPL, without making additional checks and establishing relevant state of facts in terms of Article 78 of the PPL and in accordance with the principled legal position 8 (Article 78) adopted at the plenary session of the Republican Commission held on 27.12.2013.

From the reasoning of Decision of the Republic Commission No. 4-00-679/2019 of 14.8.2019:

...Therefore, from the established facts follows that contracting authority in its tender documents, under Points 1) through 4), stipulated mandatory eligibility requirements in given public procurement procedure, as well as the evidence by which the bidders were to prove their compliance, pursuant to Article 75 of the PPL, and that the claimant failed to supply the above evidence with his bid, due to which the contracting authority found his bid to be unacceptable.

However, the Republic Commission finds that even though the claimant within his bid did not supply evidence on his compliance with mandatory requirements provided for under Article 75, Para 1, Points 1) through 4) of the PPL, the claimant was not legally required to do so, since Article 78, Paragraph 5 of the PPL provides that persons registered in the Registry of Bidders are not obliged to prove compliance with mandatory requirements when submitting their bids.

Further to this, at the plenary session of the Republic Commission held on 27.12.2013 was adopted Position 8 (Article 78 of the PPL) which reads that where bidder or applicant with the bid or application do not supply evidence on compliance with eligibility requirements under Article 83, Paragraph 1, Points 1) through 4) of the PPL, contracting authority is obliged to check whether such persons are registered in the Registry of Bidders which, pursuant to Article 78 of the PPL, is available on the website of the Agency for Business Registries, regardless of whether these persons in their bids or applications referred to being registered in this Registry. In such case, said requirements will be considered fulfilled if bidder or applicant are registered in the Registry of Bidders prior to the expiry of deadline for the submission of bids in given public procurement procedure, and contracting authority is also obliged to verify this.

Since the provisions of Article 78, Paragraphs 1 and 2 of the PPL provide that the Registry of Bidders is public and available on the website of competent organisation (Agency for Business Registries) and since the search of registered bidders is enabled to all by means of accessing the relevant segment of website and typing bidder's name or registration number, and also having in mind other cited provisions of the PPL, in cases where a bidder or an applicant fails to attach to their bid or application some or all proofs on compliance under Article 75, Paragraph 1, Points 1) through 4) of the PPL, contracting authority is obliged to check whether such person is registered in this registry. Contracting authority shall do so also in the case where bidder or applicant fail to state in their bid or application they are registered in the Registry of Bidders.

Therefore, from the foregoing follows that contracting authority in this particular case was obliged to check whether the claimant and/or each participant in joint bid were registered in the Registry of Bidders, having in mind that the claimant did not attach to his bid any evidence on compliance with eligibility requirements under Article 83, Paragraph 1, Points 1) through 4) of the PPL, which the former did not do but instead went on to evaluate the claimant's bid as unacceptable without prior checks.

Consequently, having in mind all the foregoing plus the fact that in the case at hand was indisputably established that the claimant was registered in the Registry of Bidders as an active bidder, just like were both participants in joint bid, namely, TERMO-MAX from Belgrade starting from 13.3.2006, and TERMOVENT-TERMOMETAL d.o.o. Belgrade starting from 25.1.2006, hence the Republic Commission finds the claimant's allegation to be grounded...

From the point of the Republic Commission's practice arises another interesting aspect of legal solutions contained in the PPL from the aspect of their consequences on potential existence of essential deficiencies of bid under Article 106, Para 1, Point 1, of the PPL, and this is the mandatory eligibility requirement set forth by Article 75, Para 2, of the PPL.

According to the provision of Article 75, Para 2, of the PPL, contracting authority is obliged to require bidders or candidates to explicitly state in their bids that they fulfilled obligations under applicable legislation concerning safety at work, employment and working conditions, environmental protection, and that at the time of the submission of bid they have no ban in force on performing economic

activities. Having in mind the content of Article 75, Paragraph 2, of the PPL, a clear distinction may be discerned between this one and the remaining mandatory eligibility requirements (Article 75, Paragraph 1, Points 1), 2), 4) and 5)), since the proving of compliance with this mandatory requirement, as a rule, is made by bidder's statement to this effect, attached as an integral part of the bid.

It may be inferred from the practice of the Republic Commission that, in a number of cases, solely because of the way of proving compliance with mandatory requirement under Article 75, Paragraph 2 of the PPL, neither bidders nor contracting authorities give sufficient thought to its importance, both failing to understand that although the sole legally required proof is the bidder's statement, if in the process of expert evaluation of bids contracting authority comes into possession of evidence of non-compliance with said obligation, this fact will necessarily result in the finding that bid has an essential deficiency referred to in Article 106, Paragraph 1, Point 1) of the PPL, and that it may not be granted the status of an acceptable bid as defined in Article 3, Paragraph 1, Point 33) of the PPL. On the other hand, the practice of the Republic Commission also leads to the conclusion of necessity to carefully consider the facts of relevance to determine whether in given case there is an essential deficiency of the bid under Article 106, Paragraph 1, Point 1) in conjunction with Article 75, Paragraph 2, of the PPL because frequently information and documentation indicating non-compliance, in particular with obligations stemming from the applicable legislation on occupational safety, employment and working conditions, are obtained and supplied to the contracting authority by a competing bidder together with the latter's suggestions of the way in which contracting authority should act in expert evaluation, while the state of facts in terms of positive legislation does not lead to the conclusion that the matter at hand is an essential deficiency of the bid.

From the reasoning of Decision of the Republic Commission No. 4-00-479/2019 of 9.7.2019:

...Consequently, having in mind the established facts and the claimant's allegation, it follows that contracting authority was obliged to refuse the selected bidder's bid as unacceptable on the basis of uncontested evidence in its possession, on the grounds of the selected bidder having been convicted in the misdemean-

our proceedings prior to the initiation of given public procurement procedure for violation of regulations governing labour relations, thus leaving as untrue Statement signed by the selected bidder in Form 2 of tender documents.

Having in mind the established facts and cited legal provisions, the Republic Commission finds that in the case at hand contracting authority was wrong to evaluate the selected bidder's bid as acceptable.

Namely, Article 75, Paragraph 2, of the PPL clearly prescribes that contracting authority is obliged to require bidders to explicitly state in their bids that they fulfilled obligations stemming from applicable legislation concerning safety at work, employment and working conditions, and the protection of environment, and to do so by filling in the form of statement which makes an integral part of tender documents developed by contracting authority in line with its duty under Article 61, Paragraph 1, of the PPL, so to enable bidders to prepare acceptable bids pursuant to tender documents, all this being a mandatory legal requirement they need to comply with in order to take part in public procurement procedure conducted by contracting authority. The purpose of this mandatory legal requirement is to facilitate participation in public procurement procedure to those bidders who prove that they have observed all their obligations from the above areas during the course of their business operation, meaning that thus far they have not violated legislation governing the domains of occupational safety, employment and working conditions, and the environment protection. Therefore, by proving they have observed obligations defined under Article 75, Para 2, of the PPL in the manner set forth by the applicable legislation, bidders gain opportunity to participate in public procurement procedure conducted by contracting authority, whereas on the other hand contracting authority has both right and duty during the stage of expert evaluation of bids to carry out additional checks and verify credibility of given statements on fulfilment of obligations arising from regulations referred to under Article 75, Para 2, of the PPL, that is, whether the bidders meet the legal eligibility requirements in given public procurement procedure

Having in mind that Decision of the Misdemeanour Court in Pančevo Pr. No.: 13 PR 4564/15-7 of 8.7.2016 clearly reveals that the selected bidder is convicted for violation of legal provisions governing labour relations, for offence under Article 276, Paragraph 1, Point 1, of the Labour Law, as evidence that the selected bidder has supplied with his bid a statement not corresponding to the facts,

the Republic Commission concludes that the selected bidder's bid has not been properly evaluated as an acceptable one in accordance with Article 3, Paragraph 1, Point 33, in conjunction with Article 106, Para 1, Point 1, of the PPL. Namely, since this concerns proof that the selected bidder, over the period preceding this particular public procurement, had not observed obligations under applicable legislation governing labour, occupational safety, working conditions and the environmental protection, even though this same bidder attached to his bid duly completed form of bidder's statement on fulfilment of requirements under Articles 75 and 76 of the PPL (Form 2), which does not have the power of unquestionable evidence if proven to the contrary, and which is in the case at hand proven by document supplied by competent authority (Decision of the Misdemeanour Court in Pančevo, Pr. Number: 13 PR 4564/15-7 of 8.7.2016), hence in the view of the Republic Commission the contracting authority acted contrary to the provisions of the PPL while evaluating the selected bidder's bid as acceptable.

The Republic Commission further notes that in the case at hand the established facts are not affected either by contracting authority's contention that the selected bidder was duly registered in the Registry of Bidders or by certificates issued by the Agency for Business Registries of the Republic of Serbia, No. BD 52612/2019 of 30.5.2019. and No. BD 52606/2019 of 30.5.2018. The reasoning is that the Registry of Bidders only records data relating to the compliance with the mandatory legal requirements under Article 75, Para 1, Points 1 through 4 of the PPL, whereas the confirmations of the Agency for Business Registries of the Republic of Serbia merely refer to requirement that the selected bidder is not banned from performing economic activity effective at the time of submitting the bid, but not to requirement that it has observed obligations stemming from the applicable legislation on occupational safety, employment and working conditions and environmental protection.

Having in mind all the foregoing, the Republic Commission finds that the claimant has rightly contended that contracting authority was wrong to fail to take into account the above reasons so to refuse the selected bidder's bid as unacceptable...

From the reasoning of Decision of the Republic Commission No. 4-00-927/2018 of 25.10.2018:

...Further to this, the Republic Commission firstly notes that Article 75, Para 2, of the PPL clearly prescribes that contracting authority is obliged to require bidders to explicitly state in their bids that they fulfilled obligations stemming from applicable legislation concerning safety at work, employment and working conditions, and the protection of environment, and to do so by filling in the form of statement which makes an integral part of tender documents developed by contracting authority in line with its duty under Article 61, Paragraph 1, of the PPL, so to enable bidders to prepare acceptable bids pursuant to tender documents, all this being a mandatory legal requirement they need to comply with in order to take part in public procurement procedure conducted by contracting authority.

Having considered the foregoing, and taken into account the argumentation offered by the claimant when challenging the selected bidder's compliance with given mandatory requirement by recalling that the latter had been obligated by the judgement of the Basic Court in Kuršumlija to pay certain sum to a previous employee now the plaintiff for the lost income caused by an unlawful dismissal, the Republic Commission notes that this arguments does not, and cannot, affect the acceptability of the selected bidder's bid.

In the case at hand is uncontested that Judgement 3P1 No. 131/2014 of 18.2.2016 by the Basic Court in Kuršumlija, putting an end to the labour dispute between the selected bidder as employer and employee Š.Ž., upheld the claim of Š.Ž. as Plaintiff and consequently ordered the selected bidder as Respondent to disburse certain amount of money to the Plaintiff as the compensation for lost earnings caused by an unlawful dismissal, and to pay contributions for pension and disability insurance to the competent Fund, and also to disburse to the Plaintiff certain sum as the unpaid annual leave allowances.

However, since that the provisions of the Labour Law entitle employer to terminate an employment contract, and since all employee's rights are protected in the proceedings before the competent court as prescribed by the provisions of that same law so that the protection of employee's employment-related rights is ensured by the court proceedings, hence the fact that this employer's conduct was found to have been unlawful in terms of not having been in accordance with the Labour Law cannot represent the grounds for evaluating this bidder's

conduct as contrary to the rules stemming from the applicable legislation governing occupational safety, employment and working conditions, and the environmental protection as a mandatory eligibility requirement under Article 83, Paragraph 2, of the PPL.

The reasoning is that employer's unlawful dismissal, by its nature, does not constitute a failure to comply with obligations stemming from the applicable legislation governing occupational safety, employment and working conditions, and the environmental protection, so the Republic Commission finds that in the case at hand has not been established that the selected bidder's bid contained a deficiency rendering it unacceptable in terms of Article 106, Para 1, in conjunction with Article 3, Para 1, Point 33) of the PPL, due to the reasons stated in this part in the request for the protection of rights at hand...

With regard to essential deficiencies of bid, it can be inferred from the practice of the Republic Commission that the most frequent subject of the protection of rights is the question whether a bid has an essential deficiency under Article 106, Para 1, Point 2) of the PPL, meaning whether a bidder has demonstrated compliance with additional eligibility requirements in public procurement procedure.

The provisions of the PPL do not prescribe additional eligibility requirements in public procurement procedure, primarily in terms of financial, business, technical and personnel capacities, as mandatory parts of tender documents; instead, Article 76, Para 2, of the PPL allows contracting authorities to define the above as needed at their discretion and having in mind the subject of public procurement, namely, when they assess that possession of certain capacities or fulfilment of other conditions by bidders is necessary to ensure conditions for quality implementation of public procurement contract to be concluded upon having previously duly conducted adequate procedure in line with the provisions of the PPL, whereby contracting authorities are obliged to define such requirements so not to discriminate the bidders and so to be logically related to the public procurement subject. Namely, the meaning and the purpose of setting additional eligibility requirements in public procurement procedure are to ensure that participants in public procurement procedure are legal and physical persons who in their capacity of economic operators possess capacities necessary for reliable, quality, and responsible fulfilment of contractual obligations to be assumed if awarded contracts upon completed public procurement procedure.

Even though the PPL does not prescribe such requirements as a mandatory part of tender documents, where contracting authority opts to define them therein, this will directly translate into bidders' duty to prove their compliance by means of evidence attached to the bid supplied for the purpose of participating in public procurement procedure, because otherwise such bid would turn to have an essential deficiency and thus create a direct ground to be refused pursuant to Article 106, Para 1, Point 2) in conjunction with Article 107, Paragraph 1, of the PPL. On the other hand, pursuant to the provision of Article 3, Para 1, Point 33) of the PPL in conjunction with provisions of Article 61, Para 1, of the PPL, the establishment of the fact whether the bid under evaluation contains an essential deficiency, can and must be performed exclusively on the basis of the contents of tender documents as known to the potential bidders from the moment of its publication; this means that for the answer to the question whether the supplied evidence proves fulfilment of additional eligibility requirements the relevant aspect is the way in which the content of the additional eligibility requirement was defined in tender documents developed for conducting of the particular public procurement procedure, as unambiguously formulated by contracting authority in exercising legal power under Article 83, Paragraph 2, of the PPL.

From the reasoning of Decision of the Republic Commission No. 4-00-19/2019 of 22.1.2019:

...In this particular case, from the content of the selected bidder's bid follows that, as the proof of compliance with the required business capacity proving that within the period not longer than three years up to the day of publishing the invitation to bid he has concluded at least two contracts for providing physical and technical security services of at least RSD 16,000,000 without VAT per contract in value, the bidder supplied requested proofs in the form of a list of provided services, completed and stamped, and two confirmations of referenced contracting authorities verifying that the selected bidder did provide physical and technical security services in compliance with the contractual conditions, as follows: "Luka Dunav" a.d. Pančevo under Contract No. 01-272/2 of 1.2.2016 in the amount of RSD 23,910,550.00, and "Vital" a.d. Vrbas under Contract No. 01/1-1/2 of 4.1.2017 in the amount of RSD 25,028,710.00.

In the view of the Republic Commission, the fact that against selected bidder was pronounced the measure of ban from performing economic activity on 18.6.2018 which was thereupon, a month later, by Decision of 18.7.2018, deleted from the Registry of economic operators of the ABR on 18.7.2018, meaning before the publication of the invitation to bid, does not question the validity of supplied evidence on fulfilment of business capacity. Namely, requested confirmations were signed and certified by stamps of referenced contracting authorities with whom the selected bidder had concluded contracts on providing physical and technical security services, on 1.2.2016 and 4.1.2017, respectively, i.e., well before the entry on the ban on performing economic activity which anyhow was not in force at the time of contracts implementation; this is supported by the confirmation' contents which clearly and unambiguously state that physical and technical security services were completed, meaning provided, by the selected bidder.

Having in mind the foregoing, in the view of the Republic Commission the contracting authority acted properly by evaluating the selected bidder's bid as acceptable pursuant to Article 3, Para 1, Point 33) of the PPL, which renders the claimant's allegation in this case unfounded...

From the reasoning of Decision of the Republic Commission No. 4-00-112/2019 of 1.3.2019:

Therefore, as it follows from the established facts in the case at hand, under the additional requirement in terms of technical capacity the contracting authority requests that bidder should have available 5 submersible sludge pumps that fulfil a technical requirement of being capable to pump out water heated up to 90°C, with capacity Qmax ≥ 15 m^3/h.

Since the manner of proving the required additional requirement in terms of technical capacity defined under tender documents stipulates that where the inventory list does not contain characteristics of equipment and vehicles which need not be registered, the bidder is obliged to supply the manufacturer's catalogue, or an excerpt thereof, or another manufacturer's printed publication, demonstrating technical characteristics of equipment and vehicles, hence the claimant has supplied excerpt from manufacturer's catalogue "Wilo" because in Form No. 12 on technical equipment, he stated he has at his disposal sludge pumps TSW 32/11-A, produced by that manufacturer.

However, what contracting authority finds as a contentious aspect in terms of sludge pumps available and referred to by the claimant when demonstrating compliance with the requested additional requirement in terms of technical capacity, is description from the manufacturer's catalogue stating "fluid temperature ranging 3°C... 35°C" in short-burst operation of up to 3 minutes at maximum 90°". In the view of contracting authority, the above does not make a criterion on the basis of which it could assess compliance with the requested technical criterion, i.e. conditions for operation of said submersible pumps, given that fluid temperature of 90°C is not intended for long-term operation of equipment offered by manufacturer in conditions which are the operation subject of this public procurement, but instead is merely fluid temperature that given equipment can endure during an interval of maximum 3 minutes. Contracting authority further elaborates that since the pump, pursuant to supplied technical characteristics, at water temperature of 90°C can only sustain operation up to 3 minutes — which is not in line with additional requirement under tender documents — a 3-minute (short-burst) pump work is no potential mode of operation under contracting authority's existing working conditions for submersible sludge pumps that last 2 to 3 hours, as typically necessary to drain accident site of pipe leakage and enable unimpeded dredging; hence, the claimant's allegation is unacceptable.

On the basis of the above, primarily the reasons stated in decision on awarding contract due to which the contracting authority evaluated the claimant's bid as unacceptable and the way the requested additional requirement in terms of technical capacity was defined under this particular tender documents, the Republic Commission finds this allegation of the claimant to be grounded.

The reasoning is that contracting authority based its argumentation in terms of evaluation of the claimant's bid on the fact that technical features of claimant's sludge pumps, described in the manufacturer's catalogue as capable to sustain operation at water temperature of 90°C for maximum 3 minutes, does not satisfy requirement set by tender documents.

Namely, the contracting authority bases its entire reasoning concerning unacceptability of pumps at the claimant's disposal on the assertion that, in terms of technical capacity, the requested pumps must have capability to operate at water temperature of 90°C, meaning that this threshold value is necessary for a typical long-term operation under the conditions of given public procurement, so that a short-term operation (maximum 3 minutes at water temperature 90°C)

of the claimant's sludge pumps is not in line with additional requirement in terms of technical capacity as defined under tender documents.

In this regards, the Republic Commission firstly notes that while formulating the requested additional requirement in terms of technical capacity, contracting authority did not make it certain in any way in the provisions of this tender documents that requested sludge pumps had to have capability of long-term operation at water temperature of 90°C, also specifying the time interval which was to be considered as long-term operation. The only exact specification set by the contracting authority in terms of requested sludge pumps and also the only specific requirement is pump's capability to pump out water whose temperature may be up to 90°C, without specifying any interval of time within which pump has to remain capable of pumping out water of 90°C.

Therefore, since given tender documents did not stipulate any requirement in terms of necessary time during which the pump would be pumping out water of 90°C for requested additional requirement in terms of technical capacity for needed sludge pumps, and since from the catalogue supplied with the claimant's bid can be incontestably determined that pumps at his disposal are capable to also pump out water at temperature of up to 90°C, this being the sole requirement defined under the tender documents, hence, in the view of the Republic Commission, contracting authority had no grounds to evaluate the claimant's bid as unacceptable for reasons stated in its decision on awarding contract; consequently, the claimant's allegation is found to be grounded.

The above is also supported by the fact that, during the first expert evaluation of bids, the fact that the claimant's sludge pumps can pump out water at temperature of 90°C in short-term operation of up to 3 minutes was not evaluated by the contracting authority as an essential deficiency requiring the claimant's bid to be evaluated as unacceptable...

From the reasoning of Decision of the Republic Commission No. 4-00-578/2019 of 4.7.2019:

...Namely, in this particular case is undisputed that through defining the requested additional requirement in terms of business capacity, from the aspect of necessity to supply adequate references contracting authority requested

those to relate to the construction or reconstruction of sports pools. Contracting authority confirmed the above requirement in its response to clarifications requested by interested parties on 19.4.2019, stating therein it would also accept as adequate references relating to swimming pools built in commercial-residential buildings if these were sports pools on which had been performed hydromechanics works in minimum value of RSD 50,000,000.00.

Hence, as follows from the content of tender documents concerning the stipulated additional requirement in terms of business capacity, bidders were undeniably obliged to supply references as evidence of compliance, thereby proving they did perform hydromechanics works on construction or reconstruction of a sports pool. Therefore, in the view of the Republic Commission, contracting authority was right in its expert evaluation of bids to only partially accept given reference on the basis of the concluding report which included all performed works for which the disputed reference was issued, that is, it acted properly by not accepting the works on installation and mounting of a children's pool and works on pool lighting as adequate ones in terms of requirements under tender documents.

As previously stated by contracting authority in its response to request for the protection of rights, hydromechanics equipment for sports pool, or in the case at hand, for an Olympic pool and a children's pool cannot be construed as a single complex, as contended by the claimant. The reasoning for the above is also invoked by contracting authority, because the fact that the claimant has at one site combined hydromechanics equipment on an Olympic and a children's pool does not necessarily means that this equipment is used in the same manner on both pools nor that the equipment used was having the same features, because — as also argued by contracting authority — this is in technical terms impossible due to different dimensions of those pools, difference in their respective volumes and water flows, filtration speeds, required power, etc. In this regard, contracting authority presented differences in the features of equipment stated in the supplied concluding report for the contested reference.

Considering the above, namely, undeniable fact that a children's swimming pool does not compare to a sports or an Olympic swimming pool, starting from the differences in dimensions of those pools, differences in volumes and consequently in water flows, filtration speeds, required power and other differences in terms of features of those pools, as also underlined by contracting authority

in arguments presented in its response to request for the protection of rights, in the view of the Republic Commission it is indisputable that in view of all those differences the reference comprising also the works on mounting and installation of children's pool cannot be accepted as an adequate one in terms of requirements stipulated under tender documents, and that contracting authority's expert evaluation of bids was conducted in compliance with requirements under tender documents and that it is not contrary to the provisions of the PPL.

Further to this, the Republic Commission notes that contracting authority also acted properly in terms of the same references to refuse to accept as adequate the works relating to pool lighting. Just like contracting authority rightly stated in its response to request for the protection of rights, hydromechanics works and electrical works are certainly not the same types of works, hence the electrical ones cannot be used to prove references for hydromechanics works. Likewise, LED lighting installed into swimming pools when requested by investor does not amount to hydromechanics equipment at all.

Therefore, in the view of the Republic Commission, contracting authority was right at the stage of expert evaluation of bids to only partially accept reference attached to the claimant's bid as in line with the requirements of tender documents, that is, it acted properly by not accepting as adequate per requirements of tender documents the works on installation of pool lighting in the amount of RSD 272,910.60, since those did not relate to hydromechanics works, or the works on mounting and installation of children's pool in the amount of RSD 5,042,893.80 without VAT.

Having in mind the foregoing, i.e., uncontested fact that neither the works on mounting and installation of children's pool nor the works on installation of pool lighting are not hydromechanics works are tantamount to hydromechanics works on the construction or reconstruction of sports pool, meaning that, consequently, the claimant failed to supply adequate reference in line with requirements defined under tender documents, the Republic Commission find that contracting authority acted properly at the stage of expert evaluation of bids and that it has not breached the provisions of the PPL while conducting this stage of the procedure, due to which it finds the reviewed allegation of the claimant to be ungrounded.

From the reasoning of Decision of the Republic Commission No. 4-00-437/2019 of 16.7.2019:

...From the established facts follows that contracting authority in tender documents stipulated additional requirement of business capacity that bidders must fulfil if they wish to participate in given public procurement, and evidence proving their compliance. Therefore, contracting authority requested that bidder, over the past three calendar years (2016, 2017 and 2018) had implemented contracts on performing works on installation of external water supply and sewerage systems in the total amount exceeding RSD 5,000,000 without VAT, also stipulating that, where a part of the works was performed before 2016, it would also accept its value provided that it was expressed in the completed report submitted over the requested three-year period. It further stipulated that, if the works were not entirely completed, it would also accept the value of partially performed works pursuant to temporary reports, subject to having other requirements fulfilled.

In regard of compliance with requested additional requirement in terms of business capacity, contracting authority stipulated bidder's duty to submit the list of performed works on installation of external water supply and sewerage systems in the total amount exceeding RSD 5,000,000 without VAT, with data from Form X of tender documents with confirmation issued and signed by each of referenced contracting authority in Form XI of tender documents and photocopy of contracts and reports for all performed works from the list, over the past three calendar years (2016, 2017 and 2018).

The Republic Commission ascertains that in given tender documents contracting authority did not stipulate it would only accept evidence of works performed on faecal sewerage or it would only accept completed reports certified by a supervisory body holder of a specific licence, and that it did not instruct the bidders to look up the provisions of laws and regulations as well as the Decision of the Chamber of Engineers which it invoked in the wording of Decision on cancelling procedure and of Response to request for the protection of rights, so that the bidders fully understand the terminology it had used and the types of works (faecal sewerage) and the types of personal licence held by supervisory body it had in mind when stipulating evidence demonstrating compliance with additional requirement in terms of business capacity.

Namely, it was only in its Decision on cancelling procedure and its Response to request for the protection of rights that contracting authority precisely stated that necessary business capacity referred to works performed on faecal sewerage and specified personal licence to be held by supervisory body which verified completed reports that were attached as evidence on performed works.

From the established facts follows that contracting authority refused the claimant's bid under reasoning it was unacceptable because the claimant failed to prove he fulfilled the additional requirement in terms of business capacity.

Article 61, Paragraph 1, of the PPL provides for contracting authority's duty to prepare tender documentation so that on the basis of it bidders can prepare acceptable bids.

Article 3, Para 1, Point 33) of the PPL provides that an acceptable bid is a bid which is timely, one that contracting authority did not refuse due to substantial deficiencies, which is adequate, one that does not restrict or condition either the rights of contracting authority or the obligations of bidders, and which does not exceed the amount of estimated value of public procurement.

Article 106, Paragraph 1, Points 1) through 5) of the PPL prescribes essential deficiencies of bid due to which contracting authority shall refuse a bid. For instance, Point 2) provides that contracting authority shall refuse a bid unless bidder proves it complies with the additional eligibility requirements, whereas Point 5) provides that contracting authority shall refuse a bid if it contains other deficiencies due to which is not possible to determine the actual contents of the bid, or to compare it with other bids.

Article 107, Paragraph 1, of the PPL provides for contracting authority's duty to reject all unacceptable bids in public procurement procedure after inspecting and evaluating all bids.

Having in mind the established facts and cited provisions of the PPL, the Republic Commission finds that contracting authority has not acted properly by refusing the claimant's bid due to the reasons stated in its decision on cancelling procedure.

Having in mind the definition of an acceptable bid and of essential deficiencies due to which contracting authority shall refuse a bid, it follows that acceptable bid is one by which a bidder proves to also fulfil, among others, the requested

additional requirements. However, evaluation of acceptability of bids is preceded by contracting authority's duty to develop tender documentation in such way so to enable bidders to prepare acceptable bids. Hence, contracting authorities are obliged to draw up clear and precise tender documentation.

In the view of the Republic Commission, upon having in mind the established facts in the case at hand, contracting authority refused a bid it had not grounds to refuse as unacceptable for the reasons stated in Decision on cancelling procedure.

The Republic Commission recalls contracting authority's duty to prepare tender documentation so that on the basis of it bidders can prepare acceptable bids, in line with the provisions of Article 61, Paragraph 1, of the PPL, from which follows that bidders will prepare their bids in accordance with the requirements contained in tender documents of each individual public procurement procedure, in the manner stipulated thereunder. In this regard, the Republic Commission notes that in each specific public procurement procedure tender documents constitute the basis of each bid, and thus the basis for evaluation of its acceptability given that the contents of bid itself is directly conditioned by the contents of tender documents, and therefore the evaluation of acceptability of such bid should be appraised pursuant to parameters and requirements on the bases of which it was prepared.

This in particular means that bidders can prepare acceptable bid merely under the guidance of the contents of tender documents, meaning without further studying of other laws and regulations and/or contracting authority's founding acts (that contracting authority cited in Decision on cancelling procedure and thereafter in its Response to request for the protection of rights) or any indirect inference. The Republic Commission ascertains it cannot accept as justified contracting authority's argumentation from its response to request for the protection of rights to the effect that Regulation on Classification of Economic Activities does not distinguish works on internal from works on external networks of water supply or sewerage, which points to the conclusion that where contracting authority stipulated such distinction in additional eligibility requirements in public procurement procedure, it must apply a general legal act which recognizes such distinction. The reasoning is that, in contracting authority's view, the application of this regulation is primarily limited to statistical purposes, whereas Decision on types of licences issued by the Serbian Chamber of

Engineers distinguishes works on internal from works on external water supply and sewerage networks, and distinguishes works on water supply or sewerage networks from works on drainage systems and rainwater sewers systems. When formulating eligibility requirements in public procurement procedure in terms of business capacity, contracting authority merely applied terminology of the Serbian Chamber of Engineers as an entity established directly under the Law on Planning and Construction, and evaluated evidence supplied by the claimant's by adhering to the prescribed terminology.

The Republic Commission finds that in the case at hand contracting authority has only specified its requirements concerning the additional requirement on necessary business capacity as late as in its Decision on cancelling procedure.

As previously established, requirements on business capacity specified by contracting authority in its Decision on cancelling procedure and Response to request for the protection of rights (that is, after the expiry of deadline for the submission of bids) are not integral parts of tender documents and thus were unknown to bidders at the stage of preparing the bids, so bidders could not have known what exactly contracting authority meant by works on installation of external water supply and sewerage systems or which (specific) personal licence had to hold supervisory body which certified the final reports, without resorting to indirect inference or to studying laws or regulations or contracting authority's founding acts, all invoked by contracting authority in its Decision on cancelling procedure and Response to request for the protection of rights, because contracting authority undertook as late as at the stage of expert evaluation of bids to explain terms which were critical for preparation of bids in this case and cited by it as reasons to refuse the claimant's bid, but which were not parts of tender documents (such as: Differences between works on water supply and sewerage networks and works on drainage systems and rainwater sewers systems; differences between internal installation of water supply and sewerage and external water supply and sewerage networks; differences between the atmospheric, faecal and water sewerage; differences between personal licences held by supervisory body; and other terms used in Decision on cancelling procedure).

Had the contracting authority considered everything cited in the reasoning of Decision on cancelling procedure and Response to request for the protection of rights to have been really vital for evaluating a bid as acceptable, it would have been obliged, in terms of the provision of Article 61, Para 1, of the PPL, to

accordingly formulate the above through requirements and conditions in tender documents, so to make it absolutely clear to the bidders including the claimant, and so that they would be able to prepare acceptable bids by means of following the contents of tender documents. Therefore, when defining the additional requirement in terms of business capacity in tender documents, the contracting authority was obliged to clearly and precisely state what is meant by "works on installation of external water supply and sewerage systems". In the view of the Republic Commission, all the above was also necessary to enable the contracting authority to lawfully refuse bids that do not match its actual needs but which previously had to be clearly stipulated by tender documents.

Since contracting authority failed to act as described above, the Republic Commission finds that the claimant's bid cannot be refused as unacceptable for the reasons contracting authority cited in the reasoning of Decision on cancelling procedure when having in mind the way it had formulated the additional requirement on business capacity in tender documents, meaning without precisely and clearly stating conditions for this requirement and the way for proving compliance...

From the reasoning of Decision of the Republic Commission No. 4-00-709/2019 of 5.9.2019:

...Therefore, having in mind that additional requirement in terms of appropriate technical equipment was defined so to require the bidders to possess a delivery vehicle with load capacity of minimum 1.5 tons and to possess a working construction scaffolding of minimum 1000 m^2, and also having in mind stipulated evidence for proving compliance with the relevant additional requirement and the contents of proofs supplied by the claimant with his bid, the Republic Commission finds that the contracting authority was right to refuse this particular bid as unacceptable in line with the provisions of Article 107, Paragraph 1, of the PPL.

This is especially supported by the contents of the list of fixed assets as of 31.12.2018, property of economic operator GP LN GRADNJA d.o.o. Kostolac, demonstrating the bidder has at his disposal "façade tube and clamps scaffolding 500 m^2" (quantity: 1), whereas the contents of another list of fixed assets covering immovable fixed assets as of 31.12.2017, property of economic operator and

a participant in joint bid "Aingor" d.o.o. Kragujevac, demonstrates the existence of "construction scaffolding 4000 m²", which as evidence cannot be accepted from the point of this tender documents since the provisions thereof clearly and precisely defines that the evidence proving compliance with said requirement is an excerpt from the inventory list effective on 31.12.2018, signed and stamped by the responsible person.

The foregoing means that from the aspect of the way of proving compliance with said requirement, this evidence, i.e., inventory list issued on 31.12.2017, cannot be accepted. Not even the claimant disputes this fact, given that in his request for the protection of rights he confirmed that, according to him, the inventory list effective on 31.12.2017 had been attached due to a technical error.

Starting from the way the requirement in question was defined in terms of appropriate technical equipment and the manner of proving compliance, requiring that evidence, among other required ones, is an excerpt from the inventory list effective on 31.12.2018, the Republic Commission underlines it also took in consideration the contracting authority's reasons from its response to request for the protection of rights justifying the reasons to require this particular evidence and reasons for which is vital and relevant that required evidence i.e., the inventory list, is issued on 31.12.2018. On the other hand, the contents of tender documents in the part with the way of defining this requirement in terms of appropriate technical equipment and the way of proving compliance, was not challenged by means of request for the protection of rights in terms of Article 149, Paragraph 3, of the PPL in conjunction with the provisions of Article 63, Paragraph 2, of the PPL.

Thus, given that for compliance with requirement in terms of appropriate technical equipment bidder was required to prove to possess a working construction scaffolding of minimum 1000 m², and given that from the contents of proofs attached to the claimant's bid can be undeniably established that the bidder proved it had at his disposal a scaffolding of 500 m², and taking into account that the contents of evidence i.e., an excerpt from the bidder's inventory list covering immovable fixed assets existing as of 31.12.2017, property of economic operator and a participant in joint bid "Aingor" d.o.o. Kragujevac demonstrating possession of construction scaffolding of 4000 m² cannot be valued because this piece of evidence had been issued on 31.12.2017, hence in the view of the Republic Commission the contracting authority did not act contrary to the provisions of

tender documents and the PPL when it refused the claimant's bid as unacceptable at the stage of expert evaluation of bids. Therefore, since the claimant's bid is established to be unacceptable for the above reasons, the Republic Commission stopped short from considering the second contention from request for the protection of rights referring to the remaining reason for evaluating it as unacceptable, given that a potentially different evaluation thereof could not result in a potentially different decision in this legal matter...

As for the question whether the bidder supplied the requested collateral as integral part of his bid which is relevant because the consequence of failure to do so is an essential deficiency of bid under Article 106, Para 1, Point 3) of the PPL, this matter may only be subject to the protection of rights on condition that contracting authority has stipulated in tender documents a collateral whereby the bidders guarantee the fulfilment of their obligations in public procurement procedure and fulfilment of their contractual obligations.

Pursuant to Article 61, Paragraph 5, of the PPL, as a general rule contracting authority does not have to, but may choose, to stipulate in tender documents that bidders have to supply specific collateral, but if it opts to define them therein, this will directly translate into bidders' duty to prove their compliance by means of evidence attached to the bid supplied for the purpose of participating in public procurement procedure, because otherwise such bid would turn to have an essential deficiency and thus create a direct ground to be refused pursuant to Article 106, Para 1, Point 3) in conjunction with Article 107, Paragraph 1, of the PPL.

An exception to this general rule that contracting authority is not obliged to stipulate in tender documents that bidders have to supply a specific collateral is the case where tender documents foresees an advance payment, because in such case it is legally obliged to request a collateral to ensure repayment, regardless of the percentage or amount of such advance payment.

From the reasoning of Decision of the Republic Commission No. 4-00-494/2019 of 4.7.2019:

...On the basis of the established facts and having in mind cited provisions of laws and by-laws, the Republic Commission finds that in the case at hand, in regards with the considered matter, the contracting authority did not properly perform expert evaluation of the claimant's bid. The reasoning is that in given tender documents contracting authority has not stipulated an obligatory wording of the bank guarantee for the seriousness of bid, that is, that given tender documents do not contain an explicit contracting authority's request obliging bidders to supply a bank guarantee for the seriousness of bid with an obligatory clause that it would be activated in situation where the successful bidder does not sign the public procurement contract in a timely fashion. Instead, the contracting authority has in tender documents only foreseen situations in which this bank guarantee may be activated. Therefore, in the view of the Republic Commission the contracting authority had no grounds to evaluate the claimant's bid as unacceptable for reasons stated in its decision on awarding contract.

For "change of territorial jurisdiction" in bank guarantee, as maintains the contracting authority naming it the reason to refuse the claimant's bid, the Republic Commission is of the view that contracting authority has not properly performed expert evaluation of the claimant's bids on this point. This is because contracting authority has not explicitly specified territorial jurisdiction in tender documents in the case of dispute over the issued guarantee, but instead has only stated that "the supplied bank guarantee cannot contain additional conditions for payment, a reduced amount, or changed territorial jurisdiction for resolution of disputes". In the view of the Republic Commission, the fact that in its template contract as an integral part of tender documents contracting authority stipulated that contracting parties, namely, the selected bidder and the contracting authority, would resolve potential disputed before the Commercial Court in Subotica, notably, disputes yet to arise after the public procurement contract is concluded, cannot be linked to the contractual jurisdiction in the case of dispute over the issued bank guarantee between the Guarantor Bank, the Guarantee beneficiary, and the Principal, namely, a dispute potentially arising before the public procurement contract is concluded.

In addition, the Republic Commission finds that from the content of the subsequently supplied bank statement indisputably follows that thereby the bank confirmed that bank guarantee for the seriousness of bid No. 905LGO3191120001, attached to the bid, was undeniably payable even in the case that the Principal as the bidder awarded with public procurement contract failed to timely sign such contract, and that this guarantee contained other essential elements requested under the tender documents.

Therefore, in the view of the Republic Commission from all the foregoing follows that in this case the reasons which the contracting authority in its decision on awarding contract evaluated as deficiencies of the bank guarantee attached to the claimant's bid, cannot be taken as the reasons due to which the claimant's bid would be having an essential deficiency in terms of Article 106, Para 1, Point 3, of the PPL. This is because, if needed, the guarantee is incontestably payable which means that contracting authority can collect the amount under the bank guarantee regardless of which court is competent in the case at hand, given that the guarantee is irrevocable, unconditional (without right to object) and payable at the first written invitation.

Due to the foregoing, in the view of the Republic Commission, contracting authority has not performed expert evaluation of the claimant's bid in accordance with the provisions of Articles 106 and 107 of the PPL by refusing it on the grounds of it being faulty, in that it did not represent an unambiguous declaration of the bank that it would redeem the bank guarantee: "if the bidder awarded with the contract fails to sign public procurement contract in a timely fashion" and "because the claimant has changed the territorial jurisdiction for resolution of disputes in the bank guarantee". On the basis of the foregoing, the Republic Commission finds the reviewed claimant's allegation to be grounded...

From the reasoning of Decision of the Republic Commission No. 4-00-372/2019 of 14.6.2019:

...From the established facts follows that in the case at hand the tender documents requested the bidders to supply a financial security for the seriousness of bid as a blank own promissory note issued with clauses "no protest" and "no reports", signed by the legal representative or person authorised by the legal representative, in the manner prescribed by the Law on Bills of Exchange, and which

will be recorded in the Register of Bills of Exchange and Authorisations kept by the National Bank of Serbia, and the Promissory Letter — the proxy whereby the bidder authorised contracting authority to collect the promissory note for an amount of minimum 2% of the bid value (excluding VAT) with a validity of at least 30 days longer than the period of validity of the bid. Tender documents also stipulated that where promissory note and promissory authorisation are not signed by the bidder's legal representative, the proxy whereby the legal representative authorises persons to sign promissory note and promissory authorisation in this legal matter ought to be supplied, as well. In addition, to the promissory note for the seriousness of bid and promissory letter ought to be attached photocopies of a valid signature card and of the OP form, and proof of registration of promissory note in the Register of Bills of Exchange of the National Bank of Serbia.

The Republic Commission ascertains that on behalf of the financial security for the seriousness of bid, the selected bidder submitted promissory note with serial No. AC 8099226 certified by bidder's seal and by signature of bidder's authorised person; the application for registration / deletion of promissory note dated 18.1.2019; "Promissory Letter — authorisation for beneficiary of blank own promissory note", certified by bidder's seal and by signature of bidder's authorised person; Proxy authorising Michael Boszard to sign the promissory note signed by the Director General Aleksandar Vasiljević and certified by bidder's seal; Signature card listing the following persons entitled to dispose of bidder's funds deposited at a commercial bank: Aleksandar Vasiljević and Michael Boszard, certified by the bank on 19.2.2019; and the OP Form for Aleksandar Vasiljević, certified by competent authority on 29.1.2019. The Republic Commission further ascertains, upon consulting the Register of Bills of Exchange, that the selected bidder has registered its blank promissory note with serial No. AC 8099226 at "Societe Generale Bank Serbia" a.d. on 18.1.2019.

In this regard, the Republic Commission finds that facts referred to by the claimant in its request for the protection of rights cannot affect acceptability of the selected bidder's bid, notably, cannot be considered as deficiencies due to which given bid could be refused pursuant to Article 106, Para 1, Point 3) of the PPL.

Namely, since from the established facts in the case at hand follows that for the financial security contracting authority requested the provision of blank own promissory note for the seriousness of bid which, among other things, were to be signed by the legal representative or person authorised by the legal represent-

ative, in the manner prescribed by the Law on Bills of Exchange, and that it were to be recorded in the Register of Bills of Exchange and Authorisations kept by the National Bank of Serbia which was to be demonstrated by the application to a commercial bank to register promissory note with specific serial number; thus, it also follows that the selected bidder acted so, in that it did provide signed blank own promissory note of series AC 8099226, registered in the Register of Bills of Exchange and Authorisations on 18.1.2019, attaching thereto its certified application to a commercial bank to register promissory note of given series; hence, the contracting authority had no legal grounds to refuse the selected bidder's bid as unacceptable, as demonstrated by the claimant.

In this regards, the Republic Commission notes that the claimant's assertion that here the signatory of promissory note is neither the legal representative nor person authorised by the legal representative; that the signature card with the bidder's stamp as attached to the selected bidder's bid differs from the bidder's stamp affixed to promissory note and the application for its registration which, chronologically, occurs after the promissory note was registered; and that the latter failed to supply OP Forms for the signatory of promissory note; cannot affect the acceptability of the selected bidder's bid in terms of Article 106, Para 1, Point 3) of the PPL, given that attached to his bid was supplied blank own promissory note for the seriousness of bid together with requested supporting documents.

The reasoning is that the Decision on Exact Conditions, Contents, and Manner of Keeping the Register of Bills of Exchange provides that a bank, upon verifying whether the data from the application to register promissory note are identical to the data within promissory note and whether the signature on promissory note matches the signature of person designated to sign promissory note either by the signature card or otherwise under the contract with the bank, confirms the receipt of such application by means of verifying it. Since in this case the selected bidder's commercial bank has confirmed the above, i.e., verified receipt of application to register promissory note on the basis of which this promissory note was registered in the Register of Bills of Exchange and Authorisations on 18.1.2019, one cannot infer conclusion of unacceptability of the selected bidder's bid due to the reasons invoked by the claimant.

Further, taking into consideration the claimant's contentions, the Republic Commission notes that the purpose of the signature card is to evidence persons au-

thorised to sign orders and dispose with the funds on a company's account, or here, to demonstrate whether a promissory note is signed by a person authorised for its signing. Considering that in the case at hand is indisputably established that this promissory note was registered in the official Register of Bills of Exchange, from this follows it was signed by an authorised person designated in the signature card for persons authorised to sign orders disposing with the funds from the account. Likewise, the fact that the selected bidder failed to attach to his bid OP Form for the signatory of relevant promissory note does not affect possible payability of the financial security for the seriousness of bid in the case at hand, given that OP Form itself is not a financial security or a document necessary for its eventual redeeming by a commercial bank in favour of its beneficiary, and therefore the failure to supply this form cannot be construed as failure to supply requested means of financial security. As for the claimant's allegations that promissory authorisation from the selected bidder's bid is undated thus making the bid unacceptable since it cannot be determined whether it fulfils the requirement on the promissory authorization's validity, the Republic Commission notes that tender documentation stipulates the promissory authorization's validity of at least 30 days longer than the period of validity of the bid, which is indisputably stated in the submitted promissory authorisation, while the validity of the bid is stated in the Bid Form (60 days from the day of opening of bids), and in this respect the absence of a date on promissory authorisation does not affect the determination of duration of its validity.

Pursuant to all the foregoing, the Republic Commission finds that in this case and for the reasons invoked by the claimant, the selected bidder's bid could not be evaluated as unacceptable in terms of the provisions of Article 106, Paragraph 1, Point 33) of the PPL, in conjunction with the provisions of Article 106, Paragraph 1, Point 3) of the PPL, due to which this allegation of the claimant is found to be ungrounded...

Further, the Republic Commission's practice reveals that the question whether a bid has essential deficiency under Article 106, Para 1, Point 4) of the PPL, namely, whether the offered period of validity of the bid is shorter than the stipulated one, has been the matter of adjudicating in a negligible number of cases, which may be explained by the fact that when preparing bids for participating in public procurement procedures, bidders are fully aware that pursuant to Article 90 of the PPL the bid validity period is set by contracting authority and has to be

stated in the bid, and cannot be shorter than 30 days from the day of opening of bids.

Finally, from the practice of the Republic Commission generated from a substantial number of procedure for the protection of rights decided by this body can be inferred that perhaps the most interesting aspect of legal solutions contained in the PPL, in terms of their impact on possible existence of essential deficiencies of bid, is the fact that Article 106, Paragraph 1, Point 5) of the PPL introduces an exceptionally pragmatic solution according to which such bid deficiencies that do not relate to the fulfilment of mandatory and additional eligibility requirements or to supplying of the required collaterals and the bid validity period (which are legally prescribed essential deficiencies rendering the bid unacceptable), constitute the basis for bid refusal only if they result in inability to determine the actual content of the bid or make it impossible to compare this bid to other bids.

In this regard, the provision of Article 106, Para 1, Point 5) of the PPL proved to be the most significant and most useful change introduced by the adoption of the applicable PPL into the public procurement practice in the Republic of Serbia This legal solution was the legislator's immediate response to the needs of the practice and the practice-prompted objections to the legal solutions contained in the Public Procurement Law (''Official Gazette of the Republic of Serbia" No. 116/2008). Namely, the practitioners have over many years complaining about excessive formality of the notion of regular bid (formerly the equivalent to the present notion of acceptable tender) as a significant flaw having serious repercussion on the conduct of public procurement procedures and their outcomes, given that the formulation of the notion of a regular bid translated into duty of contracting authorities to refuse quality bids which were economically favourable in terms of offered prices, too, solely because of certain insignificant deficiencies.

Considering the contents of requests for the protection of rights reviewed before the Republic Commission during the application of the PPL, it can be inferred that a frequent subject of the procedure for the protection of rights was the consideration of the impact and relevance of certain deficiencies in bids, namely, whether those resulted in inability to determine the actual content of bids, in which aspect this legal provision applies so that the character of essential deficiency only have such deficiencies that are relevant to the content of

bid; to this end, a distinction is made relative to deficiencies which are formal in nature, and as such do not affect the actual content of the bid.

However, despite the fact that the above legal solution was introduced precisely in order to acknowledge the justified objections of both contracting authorities and bidders on the solutions contained in the previously applicable laws governing public procurement and incorporating at the same time the best trends from new European directives regulating public procurement, the practice of the Republican Commission points to the conclusion that certain deficiencies of bids are still being interpreted in public procurement procedures in a manner which is in direct conflict with efforts to employ legal solutions so to ensure that the reasons for refusing bids or for their exclusion from public procurement procedure, are substantial ones, rather than deficiencies which do not have any impact on the actual contents of bids which is relevant for their evaluation, comparison with other bids, and ranking.

From the reasoning of Decision of the Republic Commission No. 4-00-80/2019 of 21.2.2019:

...Having in mind the fact that in the reviewed request for the protection of rights the claimant offers argumentation from which follows that the selected bidder's bid has an essential deficiency in terms of Article 106, Para 1, Point 5, of the PPL because, according to him, the Bid Form contains two numbers thus making it unclear which one of those is the number of the bid as information that must be entered in the template contract, the Republic Commission undertook to examine said bid.

The Republic Commission ascertains that in this way it established the claimant's argumentation concerning this point does not correspond to the actual facts stemming from the content of the selected bidder's bid, namely, that it can be concluded the claimant failed to take into account the content of this bid as a whole.

Namely, upon examining the selected bidder's bid, the Republic Commission established that in the part of the Bid Form designated for number and date of the bid for given public procurement was written number 5/1-2019 of 18.1.2019.

In addition, the Republic Commission established that all forms provided as integral parts of tender documents in which the bidders were obliged to fill in re-

quested information, in their upper right-hand corner had the selected bidder's receiving stamp containing the protocol number and the date.

Specifically, the Bid Form has protocol number 10-1/1 of 18.1.2019, the Price Structure Form with instructions how to be filled in has protocol number 10-1/5 of 18.1.2019, the Template Contract has protocol number 10-1/2 of 18.1.2019, the Form of Statement on Fulfilment of Requirements under Article 75 of the Law has protocol number 10-1/4 of 18.1.2019, and the Independent Bid Statement Form has protocol number 10-1/3 of 18.1.2019.

Considering the established facts, the Republic Commission ascertains that in the case at hand is indisputably established that the selected bidder's bid has only one number and date of the bid displayed at the designated place, meaning in line with tender documents, those being 5/1-2019 of 18.1.2019, whereas designation 10-1/1 of 18.1.2019 displayed in the receiving stamp in the upper right-hand corner is exclusively the number under this particular document was received and registered by relevant bidder as protocol number.

The Republic Commission ascertains that from the foregoing follows that on the basis of the reasons offered for this point under given request for the protection of rights it has not been established that there existed deficiencies in the selected bidder's bid which would render it unacceptable in terms of Article 106, Para 1, Point 5, in conjunction with Article 3, Paragraph 1, Point 33) of the PPL and which would obligate contracting authority to refuse it by applying Article 107, Paragraph 1, of the PPL...

From the reasoning of Decision of the Republic Commission No. 4-00-272/2019 of 12.4.2019:

...On the basis of all the foregoing, the Republic Commission recalls that Article 3, Para 1, Point 33, of the PPL provides that an acceptable bid is a bid which is timely, one that contracting authority did not refuse due to essential deficiencies, which is adequate, one that does not restrict or condition either the rights of contracting authority or the obligations of bidders, and which does not exceed the amount of estimated value of public procurement, whereas Article 106 provides for exhaustively itemised essential deficiencies of bid obliging contracting authority to refuse such bid, as follows: where bidder fails to prove

it fulfils mandatory eligibility requirements, or fails to prove it fulfils additional requirements, or fails to provide the requested collateral, or where the offered bid validity period is shorter than the stipulated one, and finally where bid has other deficiencies due to which is not possible to determine its actual contents, or to compare it with other bids.

In this regard, the Republic Commission recalls that on IV Plenary Session held on 16.4.2014 was adopted the 18th principled legal position of the Republic Commission that where certain constituent parts of bid do not contain a piece of information the bidder was obliged to provide in his bid pursuant to requirements from the tender documents, then contracting authority cannot refuse such bid due to essential deficiencies if the bidder has provided the relevant information in another part of his bid on the basis of which contracting authority can determine the actual content of the bid in terms of the provisions of Article 106, Para 1, Point 5, of the PPL, and that the actual content of the bid, in terms of Article 106, Para 1, Point 5, of the PPL constitute all relevant data in a bid as a whole, regardless of in which parts of the bid such data is provided. Consequently, if information requested by contracting authority under tender documents is provided in any part of the bid (such as Bid Form, Template Contract, etc.), the bid cannot be refused as unacceptable due to essential deficiencies in terms of cited provisions of the PPL.

Considering the foregoing, the Republic Commission finds that the selected bidder's bid has an essential deficiency in terms of Article 106, Para 1, Point 5, of the PPL because in the case at hand, on the basis of all evidence attached to the selected bidder's bid, it cannot be determined who is the manufacturer of the offered hook for Position 4 under Lot 1, meaning its make and mark, and cannot be determined whether the offered hook meets the technical specification in that it is nickel-plated or that it is an integral part of electro-insulating telescopic pole as the goods offered for Position 1.

Namely, in its response to request for the protection of rights the contracting authority stated that the offered metal nickel-plated hook fully meets the technical characteristics it requested, because is used with the product in Position No. 1 (electro-insulating telescopic pole), that the bidder in his statement confirmed that Position 4 was compatible with Position 1 supporting this statement by a photograph from which could be determined that it was appropriate.

However, when taking into account the content of the Price Structure Form and Section 6.3 — "Mandatory Bid Content" and requirements from tender documents concerning the articulation of offered goods and proving their compliance with technical specification, and also the fact that the selected bidder failed to specify in his bid the manufacturer, or the mark or make of the good offered for Position 4, meaning that he failed to provided evidence pursuant to which could be determined technical specification of the hook in the first place, therefore, in the view of the Republic Commission, on the basis of documentation making an integral part of the selected bidder's bid the contracting authority was not able to determine the actual content of the bid in terms of Article 106, Para 1, Point 5, of the PPL.

Namely, the providing of information on manufacturer, the mark or the make of the offered good for Position 4, as well as supplying of evidence on compliance with technical specification from which could be determined information thereon, all according to the requirements of tender documents, implies the articulation of the good offered in the bid. Since the selected bidder attached to his bid the photographs from which cannot be inferred either technical specification of the offered hook (being nickel-plated and integral part of electro-insulating telescopic pole which is offered for Item 1) or data on manufacturer, the mark or the make of the offered good, hence the bidder, in the view of the Republic Commission, did not articulate the goods for Position 4 in Lot 1, and the consequence is that the actual content of his bid in this part remains unknown. Any subsequent articulation in this regard would be contrary the provision of Article 93, Para 3, of the PPL which provides that contracting authority may not require, permit or offer, any alterations to the elements of bid relevant for applying the criterion for awarding contract, or any change that would turn an inappropriate or unacceptable bid into an appropriate or acceptable one, unless otherwise follows from the nature of public procurement procedure.

The Republic Commission also recalls that the selected bidder did not name the manufacturer of the offered hook, did not state the mark or the make of the good, and did not supply evidence from which could be inferred that he made his Statement dated 21.1.2019 in the capacity of the manufacturer of this good, thus this statement remains irrelevant from the point of proving compliance with technical specification for the good offered for Position 4 in Lot 1.

Consequently, since this bid as a whole did not enable the determination of the

actual content in the part relating to the good offered for Position 4 in Lot 1, the outcome of this fact is that contracting authority has not properly performed expert evaluation of the selected bidder's bid in the relevant part, and hence the reviewed claimant's allegation is found to be grounded...

From the reasoning of Decision of the Republic Commission No. 4-00-271/2019 of 9.5.2019:

...From the established facts follows that for Position 5 of technical specification the contracting authority stipulated radio stations of manufacturer "Motorola MX 320 NLN5860, NiCD or NiM", with capacity 1200 mAh and voltage of 7.5V, requesting the bidders to attach to bids the complete manufacturer's technical specification for the offered batteries from which could be seen all feature of those batteries, and also to supply samples of batteries at the opening of bids.

In its bid, in "Bid Form", the selected bidder wrote it offered for Position 5 the battery of manufacturer "Giseke/NLN5860NiCd", whereas on the other hand as the proof of compliance with technical characteristics he offered an excerpt with technical characteristics for the battery of manufacturer "Motorola NLN5860 — P/N: M333C1-A".

Having in mind the established facts, the Republic Commission notes that the selected bidder's bid contains deficiencies due to which is not possible to determine the actual content of the bid or to compare it with other bids. Namely, in the selected bidder's bid is established as uncontested that there is discrepancy on data relating to the battery offered for Position 5, because in "Bid Form" is written that the battery offered is "Giseke/NLN5860NiCd", whereas as the proof of compliance with technical characteristics for this Position is provided excerpt with technical characteristics for the battery of manufacturer "Motorola NLN5860" — P/N: M333C1-A, due to which is not possible to determine with certainty which of the two batteries was offered by the selected bidder for the contested position. Further to the contracting authority's assertion it was about a technical error in the bid form, later on rectified by the submission of samples with which the delivery must be harmonised, the Republic Commission has established that in the minutes on testing the samples the contracting authority stated that for Position 5, for the testing, the selected bidder had supplied the

battery of manufacturer "Motorola MX 320", which was not referred to anywhere else in his bid, i.e., in the bid form, and had not supplied the catalogue for battery type "MX 320" by manufacturer "Motorola", which constitutes an additional corroboration of this body's view that on the basis of the entire content of given bid is not possible to unquestionably determine the actual content of the bid of good offered for Position 5, due to which this bid should have been evaluated as unacceptable pursuant to Article 106, Paragraph 1, Point 5) of the PPL...

From the reasoning of Decision of the Republic Commission No. 4-00-478/2019 of 10.7.2019:

...In the case at hand, as follows from the established facts, by defining the technical specification for the good in question the contracting authority stipulated, among other things, that offered good must have a gearbox that meets requirement on requested speeds of at least 20 forward speeds and 20 reverse speeds, with a fuel tank to change the movement direction without using the clutch. As evidence of the fulfilment of requirement set by tender documents on the basis of which was to be determined that the offered good was adequate, the bidders were obliged to submit the manufacturer's catalogue or an excerpt thereof for the offered good with marked offered items in line with the requested positions in the Price Structure Form, and to cite the manufacturer's website, if any, on which the submitted catalogue could be found.

As established by insight into his bid, the claimant has stated in the Price Structure Form that it offered good by manufacturer "McCormick" Italy, model G165MAX, attaching as an annex the technical specification for the offered good in which, in terms of the gearbox of the offered good, he cited "105 forward speeds and 36 reverse speeds, with a fuel tank to change the movement direction without using the clutch".

However, upon insight into the excerpt of this manufacturer's catalogue, also supplied by the claimant with his bid and in the Serbian, it is established that there, in the part "Transmission" is stated the following: 18 forward speeds and 18 reverse speeds, 36 forward speeds and 36 reverse speeds, 54 forward speeds and 18 reverse speeds and 103 forward speeds and 18 reverse speeds, but there were no gearbox speeds of 105 forward and 36 reverse, where the latest char-

acteristics the claimant stated as the number of gearbox speeds of the offered model of this particular good.

Similarly, upon insight into the excerpt of manufacturer's catalogue supplied by the claimant with his request for the protection of rights and also supplied by the contracting authority as the proof of the latter's checking of offered good and visiting the manufacturer's web link, both excerpts now in English, it is established that the same part, "Transmission", cites the following speeds: 18 forward speeds and 18 reverse speeds, 36 forward speeds and 36 reverse speeds, 54 forward speeds and 18 reverse speeds and 108 forward speeds and 18 reverse speeds, and 108 forward and 36 reverse speeds.

Hence, neither the content of said excerpt from catalogue confirms the existence of 105 forward speeds and 36 reverse speeds, as stated by the claimant as the gearbox speed number characteristic in the technical specification as the characteristics of the gearbox of the offered good.

Considering the above, i.e., that from the established facts can be indisputably determined that the claimant failed to submit in his bid the evidence from which could be determined that the offered model of this good does have a 105 forward speeds and 36 reverse speeds gearbox and fuel tank to change the movement direction without using the clutch, which characteristic concerning the number of gearbox speeds was cited by the claimant in the technical specification as an annex to the Price Structure Form specifying therein which model of "Tractor 125" and by which manufacturer he offered, and considering that not even by visiting the manufacturer's web link could be determined whether the offered good possesses the gearbox characteristic as written by the claimant himself in the technical specification as an annex to the Price Structure Form, hence, in the view of the Republic Commission, the contracting authority acted properly to evaluate the claimant's bid as unacceptable on the grounds of the foregoing.

Namely, as inferred from his bid, the claimant stated it offered the good with gearbox having 105 forward speeds and 36 reverse speeds from manufacturer "McCormick" Italy, providing for this good excerpt from this manufacturer's catalogue from Italy which however does not contain the cited characteristic of gearbox as claimed by the claimant for the offered model, but instead this characteristic i.e., the number of gearbox speeds differs from the information entered in the bid.

Therefore, given that from the supplied excerpt from this manufacturer's catalogue as submitted by the claimant with his bid, in Serbian, cannot be determined whether the offered model of tractor G165MAX by manufacturer "McCormick" Italy does have a 105 forward and 36 reverse speeds gearbox, cited by the claimant in technical specification as the characteristic of the offered model G165MAX, in the view of the Republic Commission the claimant did not act in accordance with the requirements from tender documents in terms of the manner of proving compliance with the requested technical characteristics, meaning that he did not submit the proof, specifically, an excerpt from the catalogue of the manufacturer of the offered good demonstrating that the offered good has a 105 forward and 36 reverse speeds gearbox.

The above especially so when aware that contracting authority could not determine that the offered model of this good has a 105 forward and 36 reverse speeds gearbox, not even by visiting the link of manufacturer "McCormick" Italy where can be found the catalogue for the offered good, which was anyhow a requirement defined under the tender documents for the way of verifying the catalogue submitted with the bid; instead, this official catalogue contains the following speeds of the offered model G165MAX: 18 forward speeds and 18 reverse speeds, 36 forward speeds and 36 reverse speeds, 54 forward speeds and 18 reverse speeds and 108 forward speeds and 18 reverse speeds, and 108 forward and 36 reverse speeds.

Therefore, aware that neither upon insight in an excerpt from the catalogue for offered good as submitted with the claimant's bid, nor upon insight into an excerpt from the catalogue which was submitted both by the claimant with its request for the protection of rights and by the contracting authority as the excerpt that could be found at the link of the manufacturer of this good, can be established that either contains the very characteristic — the number of gearbox speeds entered by the claimant himself into the table with technical specification as annex to the Price Structure Form — by filling in this: a 105 forward and 36 reverse speeds gearbox; also aware that instead, upon insight into the above was established that the number of gearbox speeds differs not only relative to the number of speeds listed in the bid but also relative one to another, it is indisputable that, due to this, it is not possible to determine the content of the claimant's bid in this particular part; hence, the Republic Commission finds that in its expert evaluation of bids the contracting authority did not act contrary to

the provisions of tender documents and the PPL, by having evaluated, due to the cited facts, the claimant's bid as unacceptable pursuant to Article 3, Paragraph 1, Point 33) of the PPL in conjunction with Article 106, Paragraph 1, Point 5) of the PPL and, subsequently, finds the claimant's bid to be groundless.

In this regard, the Republic Commission also notes that even the claimant in his request for the protection of rights does not explicitly state that the gearbox speeds of the offered good stated in the table of technical specification — 105 forward and 36 reverse speeds, is indeed contained in the supplied excerpt from catalogue, but instead he invokes the fact this has to do with speeds greater than those requested by tender documents, so consequently, the contracting authority was able to determine the content of the bid in terms of the gearbox on the basis of the submitted excerpt from the catalogue...

From the reasoning of Decision of the Republic Commission No. 4-00-523/2019 of 2.8.2019:

From the established facts follows that the forms which make integral parts of the claimant's bid, notably, Bidder's Statement on Compliance with Requirements under Articles 75 and 76 of the PPL, Bid Form, and Description of the Procurement Subject, Template Contract, Price Structure Form with instruction how to fill it in, Statement on Independent Bid, and Form of Statement on Compliance with Obligations under Article 75, Paragraph 2, of the PPL, were filled and signed but not stamped by the claimant, due to which the claimant's bid was refused as unacceptable in terms of the provisions of Article 106, Para 1, Point 5) of the PPL in conjunction with the provision of Article 3, Paragraph 1, Point 33) of the PPL.

Considering those facts and having in mind that the claimant completed and signed all forms making constituent parts of his bid, especially the Template Contract, it follows that he has agreed with the content of the template contract, from which in turn follows that the fact the claimant failed to stamp all forms making constituent parts of his bid does not amount to an essential deficiency which makes it impossible for the contracting authority to determine the actual content of the bid of this bidder in terms of Article 10, Paragraph 1, Point 5, of the PPL.

This is especially supported by the fact that the provisions of the Law on Companies provide that legal entities may not object to non-use of stamps, nor may

such objections be invoked as the reason for annulment, termination, or invalidity of concluded legal arrangements, or undertaken legal actions, not even where the company's internal legal acts stipulate that the company has and uses a stamp in doing its business

Thus, having in mind the established facts and cited provisions, the Republic Commission finds that the fact of claimant's failure to stamp the forms which make constituent parts of his bid does not amount to an essential deficiency due to which cannot be determined the actual content of the claimant's bid and compared with other bids, which in turn means that contracting authority had no legal grounds to refuse the claimant's bid as unacceptable in terms of the provisions of Article 3, Para 1, Point 33) of the PPL in conjunction with Article 106, Paragraph 1, Point 5) of the PPL, for reasons stated in its decision on awarding contract No. 5229/1 of 22.4.2019.

Accordingly, given request for the protection of rights is found to be grounded...

From the reasoning of Decision of the Republic Commission No. 4-00-589/2019 of 7.8.2019:

...From the established facts follows that the contracting authority, in tender documents for given public procurement procedure under the Technical Specification and under the Price Structure Form, for Position No. 1.3, described good which, among other things, was the subject of this particular public procurement, claiming it to be Analyser System S700 (analysers MULTOR and OXOR P with sampling equipment — pumps, cold storages...).

Having in mind the foregoing and the fact that the selected bidder has with its bid supplied the statement claiming explicitly that in the case at hand he offered "complete MKAS system housed in Rital cabinet and comprising a complete sample preparation equipment (pump, cooler, filters and S700 gas analyser)" and the fact that with his bid he has supplied the catalogue for offered equipment including S700 analyser, hence in the view of the Republic Commission the contracting authority had no legal grounds to refuse this bid in terms of Article 106, Paragraph 1, Point 5) of the PPL in conjunction with Article 3 Paragraph 1, Point 33) of the PPL.

Namely, in the view of the Republic Commission the fact that the catalogue supplied with the selected bidder's bid also offers technical characteristics for other

parts of the equipment and for other systems, in the case at hand cannot be viewed as the fact affording the contracting authority the grounds to refuse this bid as unacceptable in terms of Article 106, Para 1, Point 5, of the PPL, because it can be clearly determined from the selected bidder's statement and the Price Structure Form which good is offered by the selected bidder for Position No. 1.3, whereby for this same good is also supplied an excerpt from the catalogue...

From the reasoning of Decision of the Republic Commission No. 4-00-764/2019 of 17.9.2019:

...Having in mind the contents of this tender documents, the Republic Commission ascertains it is evident that, according to the content of Form VI — "Bid Form", Point 5 — "Description of Procurement Subject — electric energy for sustained supplying", in the case at hand there was duty of bidders to state the unit price for single-tariff metering within the first out of the total of five tables making constituent parts of said Point of this Form, as a piece of information directly correlated with the contract execution and the obligation to pay for the delivered electric energy, given that Article 3 of the template contract explicitly stipulates that a single-tariff metering is applied in the case where due to objective reasons the higher and lower tariff cannot be accurately measured (meter failure, etc.) for the measured and demonstrable quantities of electric energy which information, as such, is a vital element of the content of the bid.

Considering the foregoing and the fact it is indisputable in this case that the claimant in his bid did not include information on unit price for single-tariff metering to be applied in the case where due to objective reasons the higher and lower tariff cannot be accurately measured (meter failure, etc.) for the measured and demonstrable quantities of electric energy, as defined under Article 3 of the template contract which is an integral part of tender documents, hence the Republic Commission ascertains the above means that the claimant's bid cannot have the status of an acceptable bid in terms of Article 3, Paragraph 1, Point 33) in conjunction with Article 106, Para 1, Point 5, of the PPL so that pursuant to Article 107, Paragraph 1, of the PPL, notably, by virtue of the law, contracting authority has duty to refuse it because Article 107, Paragraph 1, of the PPL provides that contracting authority is obliged to refuse all unacceptable bids in public procurement procedure after inspecting and evaluating all bids.

Svetlana Ražić
Member of the Republic Commission

Deadlines in the Procedure for the Protection of Rights Pursuant to the Public Procurement Law ("Official Gazette of the RS" Nos. 124/2012, 14/15 and 68/15)

Exercising the protection of rights in public procurement procedures starts with the timely filing of a request for the protection of rights, notably, with such submission by an authorised person within the deadline and in the manner provided for by the Public Procurement Law ("Official Gazette of the RS" Nos. 124/2012, 14/15 and 68/15 — hereinafter: the PPL). The filing of a request for the protection of rights is allowed during the entire public procurement procedure and against each contracting authority's action, unless otherwise specified by the Law.

Legal deadlines for filing request for the protection of rights are set depending on the phase and/or type of public procurement procedure and the challenged action of contracting authority. Where request for the protection of rights challenges the type of procedure or the contents of invitation to submit bids or the contents of tender documents, request shall be deemed timely if ***received*** by contracting authority no later than seven days prior to the expiry of deadline for the submission of bids, and in low-value public procurement procedure three days prior to the expiry of this deadline, regardless of the manner of delivery and provided that the claimant acted in line with Article 63, Para 2, of the

PPL in that it had notified contracting authority to possible deficiencies and irregularities but contracting authority failed to remedy those[1]. In other words, consideration on merits of such request requires more than it being simply filed as described above, in that one more condition has to be fulfilled, meaning that pursuant to Article 63, Para 2, of the PPL the claimant has to notify the contracting authority of existence of any potentially identified irregularities and deficiencies in selecting the procedure, or in the contents of invitation to bid or of tender documents that contracting authority failed to remedy in spite of having been duly warned, rather than invoking those for the first time in the request for the protection of rights. Reporting such irregularities and deficiencies as late as in the request for the protection of rights results in its rejection without considering the merits of the assertions contained therein.

Related to the above described situation is a decision taken by the Republic Commission in which, during consideration and deciding upon request for the protection of rights, was stated the following: *"Having examined complete available documentation and the Public Procurement Portal, the Republic Commission found that claimant had failed to act in line with Article 63, Para 2 of the PPL so to seek additional information or clarifications for preparing the bid from contracting authority and had failed to notify the latter to potentially identified deficiencies and irregularities in tender documents, within the deadline prescribed by the law and prior to filing its request for the protection of rights. Given that from the cited provisions of Article 149, Para 3, of the PPL, which govern the manner and deadlines for filing request for the protection of rights, follows that the precondition for filing such request in the stage prior to the expiry of deadline for the submission of bids is that claimant beforehand notifies the contracting authority of potential deficiencies and irregularities but the latter fails to remedy those, hence the Republic Commission underlines that in the case at hand have not been fulfilled legal preconditions to adjudicate upon the filed request for the protection of rights.*

The reasoning is that the claimant, prior to filing its request for the protection of rights, did not notify contracting authority of any alleged deficiencies and irregularities in tender documents that the claimant has subsequently invoked in its request, and did not ask any questions related thereto. Namely, in terms of all

[1] Article 149, Para 3 of the PPL

doubts involving the reasons which made the claimant believe that in the case at hand the principle of competition had been violated, as contended in given request for the protection of rights, the Republic Commission makes a point that the claimant was required, pursuant to Article 149, Para 3, in relation with Article 63 Para 2, of the PPL, to firstly submit to contracting authority a request for additional information or clarifications regarding the preparation of bid, thereby also notifying the same contracting authority of any potentially identified irregularities and/or deficiencies in tender documentation. This is the only claimant's course of action, namely, the prior notifying to alleged irregularities, that fulfils legally prescribed precondition for the request for the protection of rights to be processed, pursuant to an explicit provision of Article 149, Para 3, of the PPL.

Since the claimant has undeniably filed this particular request for the protection of rights without having previously notified the contracting authority of potential deficiencies and irregularities, which action pursuant to Article 149, Para 3, of the PPL had to precede the submission of request for the protection of rights, hence the Republic Commission finds that legal preconditions for deciding on merits upon this particular request for the protection of rights have not been met, due to which it took to decide as in the dispositive of this Conclusion, pursuant to Article 157, Para 5, Point 1, of the PPL."[2]

It should be noted that the provisions of Article 63, Para 2, of the PPL explicitly prescribe that an interested person may seek, in writing, additional information or clarifications with regards to preparation of bids from contracting authority, and in doing so may also notify the latter to potentially observed deficiencies and irregularities in tender documents, ***no later than five days prior to expiry of deadline for the submission of bids***. This deadline is provided for under the PPL as a deadline in public procurement procedure, notably as the cut-off date for actions to be taken by interested persons and not by claimant, and this should be taken into account, as well as the fact that where this deadline expires on a non-working day (Sunday, public holiday, religious holiday etc.) then there are no grounds to invoke Article 80, Para 5, of the Law on Administrative Procedure (the LAP), since deadlines in PP procedure are governed by the provisions of the PPL. In the case at hand, the provisions of Article 63 Paragraphs 2 and 3 of the PPL clearly prescribe deadlines for actions to be taken both by interested per-

[2] Conclusion No. 4-00-851/2018 of 23.8.201

sons and by contracting authorities. An interested person may seek additional information and clarifications from contracting authority and indicate any perceived deficiencies and/or irregularities in tender documents *no later than five days prior to the expiry of deadline for the submission of bids*, whereas contracting authority is obliged to publish its response on the Public Procurement Portal and on its website ***within three days since the receipt of the request***. Having in mind the provision of Article 63, Paragraphs 2 and 3 of the PPL, whose contents specifies deadline for acting on the part of interested parties and contracting authorities in public procurement procedure, the provisions of the LAP do not apply in situations where those deadlines expire on a non-working day, because the provisions of the LAP may only be applied in the protection of rights procedure, since Article 148, Para 5, of the PPL provides that, ***in the proceedings for the protection of rights, to any matters not governed by the PPL accordingly apply the provisions of the law governing administrative procedure***.

Considering the above, the point is made of Conclusion on rejecting request for the protection of rights No. 4-00-154/2019 of 27.3.2019, where the claimant supported the timeliness of his request by the assertion that *"where the fifth day prior to expiry of deadline for the submission of bids, as the last day for an interested person to seek from contracting authority any additional information and/or clarification regarding the preparation of bid, falls on a non-working day, then contracting authority is obliged to reply to such inquiry or to consider such allegations provided that interested person submits those on the first subsequent working day. Having in mind that in the case at hand the fifth day was Sunday — a non-working day — according to the claimant's view the deadline within which an interested person could act in compliance with Article 63, Para 2, of the PPL was to be governed by the provision of Article 80, Para 5, of the LAP"*. In this Conclusion, the Republic Commission in particular made the following point: *"Regardless of the day on which this deadline expires (be that Sunday, public holiday, religious holiday, etc.) there are no grounds to apply provisions of Article 63, Para 2, of the LAP given that deadlines in public procurement procedure, both for interested persons and contracting authorities, are fully governed by the PPL, concretely by the provision of Article 63, Para 2, of the PPL which specifies deadline for actions taken by interested parties in public procurement procedure, not by claimants in procedure for the protection of rights. The reasoning is that the provisions of Article 148, Para 1, of the PPL prescribes that request for the protection of rights may be filed by an interested person who*

has an interest to be awarded contract in given public procurement procedure and who has sustained or may sustain damage due to contracting authority's actions made contrary to the PPL, and that procedure for the protection of rights is only initiated upon the filing of such request, and that to such procedure may only be accordingly applied the provisions of the LAP in accordance with Article 148, Para 5, of the PPL if certain matter within the procedure for the protection of rights are not regulated by the provisions of the PPL. The Republic Commission further notes that contracting authority's action of notifying the claimant that the latter's request seeking additional clarifications of tender documents was not timely, in given case does not represent an action of the former capable of triggering the application of Article 149, Para 4, of the PPL, when having in mind the deadline under Article 63, Para 2, of the PPL.

Therefore, the Republic Commission notes that the claimant had opportunity to send request for additional clarifications to contracting authority timely and in any case at latest on 17.2.2019 regardless of this day being a Sunday, given that the contracting authority had also enabled electronic communication in given public procurement procedure and that the claimant did use this mode of communication to send his request for additional clarifications of 18.2.2019 to the contracting authority."

In the same Conclusion the Republic Commission also notes that *"deadlines in public procurement procedure set under the PPL as the cut-off deadline for acting by interested parties have not been provided for as procedural deadlines, but rather from the aspect of the principle of efficiency in public procurement procedure as deadlines that enable contracting authorities to plan certain actions in public procurement procedure and to manage the overall procedure.*

Hence, it is in the best interest of persons intent to bid to make use of deadlines under the PPL in order to prepare acceptable bids, instead of using those as means of tactics through seeking additional clarifications and generating legal constructions in order to delay public procurement procedure. Therefore, it is established as undisputed in given procedure that request for additional clarifications was sent to contracting authority after the expiry of deadline under Article 63, Para 2, of the PPL, and that in terms of this request's contents that refer to the contents of tender documents, the claimant had opportunity to file a timely request for the protection of rights in compliance with Article 149, Para 3, of the PPL. The reasoning takes into particular consideration the fact that

the relevant contents of tender documents relating to the claimant's request for clarifications have never been amended, meaning that the pertinent wording has been known to interested persons from the date when tender documents were published on the Public Procurement Portal, that is, since 8.11.2018.

Consequently, the Republic Commission has found that given request for the protection of rights was untimely, since it has been clearly and undeniably established on the basis of all of the foregoing that this request was filed after the expiry of deadline for submission of a timely request for the protection of rights as set forth under Article 149, Para 3, of the PPL, which is supported by evidence in the case files, and that in given situation there is no grounds for evaluation of timeliness of this request for the protection of rights in terms of the provision of Article 149, Para 4, of the PPL."

In addition to duty of interested persons to act within deadline set under Article 63, Para 2, of the PPL, there is duty of contracting authorities to reply within deadline set under Article 63, Para 3, of the PPL and post the response on request for additional information and clarification of tender documents on the Public Procurement Portal and their websites. The above was referred to by the Republic Commission in its Decision No. 4-00-524/2019 of 16.7.2019, stating that *"as the claimant, invoking Article 63, Para 2, of the PPL, on 22.5.2019 sought from contracting authority additional information and clarification concerning the preparation of its tender, thereby also notifying the latter of deficiencies and irregularities in tender documents, therefore pursuant to Article 63, Para 3, of the PPL contracting authority was obliged to post its response on the Public Procurement Portal and its website within three days, meaning no later than by 25.5.2019. Since the contracting authority posted its responses to requested additional clarifications on the Public Procurement Portal on 28.5.2019, hence the Republic Commission finds the claimant's assertion that contracting authority, in doing so, has committed violation of Article 63, Para 3, of the PPL, to be grounded."*

Considering that the PPL prescribes minimum durations of deadline for the submission of bids relative to the types of public procurement procedures, which run longer than deadline for filing timely request for the protection of rights in line with Article 149, Para 3, of the PPL explicitly providing that request for the protection of rights has to be received by contracting authority at latest seven days prior to the expiry of deadline for the submission of bids or three days in

low-value public procurement procedures, it should be noted that the PPL does provide for certain exception to this rule. An exception set forth in Article 149, Para 4, of the PPL is only applied where a request for the protection of rights challenges actions taken by contracting authority within the period after the expiry of deadline under Article 149, Para 3, of the PPL (actions taken after the seventh or the third day, respectively) and before the expiry of deadline for the submission of bids. Under such scenario, request for the protection of rights filed at latest by the expiry of deadline for the submission of bids shall be considered a timely one.[3]

For an interested person to be permitted to file in a timely manner its request for the protection of rights pursuant to Article 149, Para 4, of the PPL, contracting authority's action would have to be unlawful and/or taken after the expiry of deadline for the filing of request for the protection of rights in terms of Article 149, Para 3, of the PPL. In practice, most common instances related to the application of Article 149, Para 4, of the PPL are situations where claimants challenge the contents of tender documents, which they could have challenged within deadline set forth under Article 149, Paragraph 3 of the PPL, especially those where contracting authority after the expiry of deadline for the filing of request for the protection of rights under Article 149, Para 3, of the PPL responds to sought clarifications of tender documents pursuant to Article 63, Para 3, of the PPL, but without changing any part of tender documents so that its contents remain identical to the contents of the originally published tender documents.[4] Further to this it should be noted that Article 63, Para 3, of the PPL does not prescribe duty on the part of contracting authority to amend tender documents so to comply with request for additional information and clarifications or indications of potential deficiencies and/or irregularities in tender documents presented by an interested person, hence the conduct of contracting authority cannot be construed as illicit or unlawful. In this regard, interested persons bear the responsibility to seek in a timely fashion any additional information and clarifications of tender documents that have been known to them since their publishing and that have remained unchanged after given responses and clarifications or, in other words, to act in such time lines and manner which will ensure sufficient time for a potential challenging the contents thereof by filing

[3] Article 149, Para 3 of the PPL

[4] Decision No. 4-00-1456/2018

request for the protection of rights within the deadline set forth under Article 149, Para 3, of the PPL.

A pertinent example is offered in the Republic Commission's Decision No. 4-00-227/2019 of 7.6.2019. Therein, the Republic Commission states as undisputed *"that by given clarification and reply to the claimant's inquiry, published on the Public Procurement Portal on 11.3.2019, contracting authority has not changed the contents of tender documents. From this follows conclusion that upon publishing of contracting authority's response of 11.3.2019 the tender documents has not undergone any change in the part of foreseen technical specification and that it remained identical to the wording published on 7.2.2019; hence, contracting authority's response published on the Public Procurement Portal on 11.3.2019 wherein it states its persisting in requirements of tender documents as published on 7.2.2019, cannot be construed as a new development capable of creating the grounds for eventual application of Article 149, Para 4, of the PPL."*

Further to this, the Republic Commission noted that *"indisputably, Article 149, Para 4, of the PPL enables interested persons to file request for the protection of rights in order to challenge unlawful actions of contracting authority potentially undertaken after the expiry of deadline for filing request for the protection of rights under Article 149, Para 3, of the PPL, which is not the case here, given that after 5.3.2019 (as the final day for receiving a timely request for the protection of rights), all contracting authority did was to furnish clarification of tender documents on 11.3.2019 but without changing the tender documents, and therefore, in the view of the Republic Commission, in the case at hand there were no grounds to justify the application of Article 149, Para 4, of the PPL."*

On the other hand, the Republic Commission's practice includes situations in which claimant has timely filed request for the protection of rights pursuant to Article 149, Para 4, of the PPL, having in mind that relevant contracting authority, by replying to questions asked and by giving clarifications of tender documents within period after the expiry of deadline under Article 149, Para 3, of the PPL and before the expiry of deadline for the submission of bids had actually amended relevant tender documentation but had failed to extend the deadline in line with Article 63, Para 5, of the PPL. In this particular case adjudicated by the Republic Commission was established that *"from the claimant's assertions contained in his request for the protection of rights follows his belief that contracting authority, by virtue of the contents of response, has actually amended tender doc-*

umentation in the part of requirement for 'electro-mechanics-powered motion of table' into 'electro-mechanics and hydraulic-powered motion of table', that the latter has altered the requirement for 'inclination of leg plate electrically adjustable +/-90°' by accepting 'inclination of leg plate electrically adjustable +35/-90°' thereby changing the functionality of the operating table, and that by modifying requirement 'ability to change the plate position for 180°' into 'ability to rotate and extend the table' has made it impossible to prepare an adequate bid. According to the claimant, the contracting authority has thus violated Article 63, Para 5, of the PPL and made it impossible for bidders to prepare adequate bids, taking into consideration the altered contents of tender documents in the parts dealing with required technical specification. Further, the Republic Commission finds that from the reasoning of the challenged contracting authority's conclusion follows that the latter holds it did not alter tender documents by responses to requested additional clarifications of tender documents of 31.8.2019 in that the acceptance of equipment having better features than the previously required minimum ones (electromechanical and hydraulic adjustment of table, inclination of leg plate electrically adjustable +35/-90°, option to rotate and extend the table) did not amount to an alteration of tender documents but rather to a mere expanding of competition and that, as such, it facilitated the procurement of goods which in addition to the minimum required features also possess the upgraded ones."

On the basis of the foregoing, the Republic Commission finds that *"by acting as described i.e., by replying that it would be accepted as adequate offered goods possessing both electro-mechanics and hydraulic-powered motion of table, and by accepting to replace requirement of inclination of leg plate being electrically adjustable +/-90° with inclination of leg plate being electrically adjustable +35/-90°, and by replying that ability to change the plate position for 180° referred to ability to exchange positions and rotate the table extensions, the contracting authority effectively modified its tender documents, since from its responses follows that it has altered the contents of requirements under technical specifications for sought goods in Lot 1.*

Consequently, and aware that in the case at hand it has been established that, by virtue of publishing on the Public Procurement Portal on 31.8.2019 its responses to sought additional clarifications which contained new facts not previously known to potential bidders, contracting authority did modify tender documents but did not extend the deadline for the submission of bids, the view of the Re-

public Commission is that the described conduct of the contracting authority made it impossible for interested persons to act in line with Article 63, Para 2, of the PPL so to notify contracting authority of potential deficiencies and irregularities in given tender documents and also to opt to file request for the protection of rights in accordance with Article 149, Para 3, of the PPL, having in mind that deadline for the submission of bids had been set on 3.9.2018...

...Therefore, since additional clarifications of tender documents that were subsequently found to have been the modifications thereof, were published by contracting authority on the Public Procurement Portal on Friday, 31.8.2019, and since the claimant filed its request for the protection of rights which was received by contracting authority on 3.9.2019 which date was the closing day of deadline for the submission of bids, hence the Republic Commission finds that this request for the protection of rights had to be evaluated as timely in terms of Article 149, Para 4, of the PPL.

Having in mind the above, in the view of the Republic Commission the contracting authority had no legal grounds under the PPL to reject given request for the protection of rights as untimely."

The provisions of the PPL contain another exception to the application of the provisions of both Article 149, Para 3, of the PPL and of Paragraph 4 of the PPL, meaning that these provisions do not apply in the case of negotiated procedure without prior invitation to bid, if the claimant or a person related to claimant has not participated in that procedure.[5] In such situation do not apply deadlines for the filing of request for the protection of rights set forth under Article 149, Paragraphs 3 and 4 of the PPL and instead applies the general provision of Article 149, Para 2, of the PPL that allows the filing of request for the protection of rights throughout the entire public procurement procedure against each action taken by contracting authority, provided that the claimant (or a related person) is not a bidder who has participated in given public procurement procedure. This exception is foreseen because the claimant (or a related person) has not been involved in the conducting of this type of procedure and accordingly has had no opportunity to learn that the procedure had been initiated or to get to know the contents of tender documents in the same manner as the bidders invited by the contracting authority to bid. Due to this kind of situation that may

[5] Article 149, paragraph 5 of the PPL

befell an interested person, the timeliness of the request cannot be evaluated pursuant to Article 149, Paragraphs 3 and 4 of the PPL.[6]

After having taken decision on awarding contract, decision on concluding framework agreement, decision on recognizing qualifications, or decision on cancelling procedure, the deadline for filing request for the protection of rights is tend days since the publishing of relevant decision on the Public Procurement Portal, and five days in law-value public procurement and in the case of decision on awarding contract based on framework agreement under Article 40a of the PPL.[7]

A request for the protection of rights which is filed after the publishing of decision concluding public procurement procedure is considered to be a timely one if ***filed*** within ten days or five days, respectively, since the day of publishing relevant decisions on the Public Procurement Portal. The above does not presume that the filed request for the protection of rights ought to be received by contracting authority within ten days or five days, respectively, but rather means it has to be dispatched at latest on the tenth or on the fifth day, respectively, since the publishing of decision.[8]

Therefore, such request is timely if filed within the legally prescribed deadline which begins running since the day the relevant decision has been published on the Public Procurement Portal, whereby Article 149, Para 6, of the PPL does not provide for a condition that such request has to be received by contracting authority prior to the expiry of statutory deadline in order to be considered a timely one.

As follows from the provisions of the PPL, the procedural solution presupposing that request for the protection of rights also has to be received by contracting authority before the expiry of deadline within which it may be filed, is provided for under Article 149, Para 3, of the PPL and applies solely to requests for the protection of rights challenging the type of public procurement procedure, the contents of invitation to bid or of tender documents, but not to the cases where request for the protection of rights is filed after decision which concludes such procedure has been taken.[9]

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6 Decision No. 4-00-164/2017

7 Article 149, paragraph 6 of the PPL

8 See Article 81 of the LAP

9 Decision No. 4-00-639/2018

Article 149, Para 2, of the PPL provides that request for the protection of rights may challenge any action of contracting authorities unless otherwise specified under the PPL, and this makes the rule which is the basis for claimants to exercise their protection of rights. However, the PPL provides that request for the protection of rights may not challenge actions undertaken by contracting authority within a public procurement procedure if the claimant knew or may have known the reasons for filing it before the expiry of deadline for filing under Article 149, Paragraphs 3 and 4

of the PPL, yet the claimant failed to file it prior to the expiry of this deadline.[10] From the above follows that the expiry of deadline for filing request for the protection of rights formulated under Article 149, Paragraphs 3 and 4 of the PPL is a decisive point in time, after which the claimant cannot challenge any more the reasons they that far either knew or may have known in terms of the type of procedure, the contents of invitation to bid or of tender documents, given that only the provisions of Article 149, Paragraphs 3 and 4 of the PPL prescribe the deadlines for filing request for the protection of rights whereby interested persons may challenge the type of procedure, the contents of invitation to bid or of tender documents, except, as previously noted, for the exception provided for under Article 149, Para 5, of the PPL.[11] The purpose of this rule is to ensure that conduct of contracting authorities and interested parties, i.e., bidders in public procurement procedure and thus the conducting of public procurement procedure itself are as efficient as possible, and to prevent misuse on the part of claimants i.e., their contesting in later stages of the procedure such circumstances that they should have brought about much earlier. Most common instances of such conduct on the part of claimants relate to challenging the contents of tender documents as late as after decision concluding given public procurement procedure is taken and published.[12]

Article 149, Para 8, of the PPL provides for another mechanism aimed at preventing abuses in procedure for the protection of rights by claimants, by means of prescribing that where the same claimant in public procurement procedure once more files request for the protection of rights, that second request may

10 Article 149, paragraph 7 of the PPL
11 Article 149, paragraph 5 of the PPL
12 Decision No. 4-00-253/2019 of 12.4.2019 and Decision No. 4-00-206/2019 of 21.5.2019

not challenge those actions of contracting authority which the claimant knew or may have known during the submission of its previous request. The purpose of this provision is also to prevent undue prolongation of public procurement procedure by claimants, with a view to achieving efficiency of given public procurement procedure.

With regards to the above, the Republic Commission has in its decisions repeatedly stated that claimants are precluded from contesting in their second requests those actions of contracting authorities which they knew or may have known at the time of submission of previous requests in the same public procurement procedure, and that there are no grounds to decide such requests on merits, due to which it has routinely found such requests for the protection of rights to be unfounded in the pertinent parts.[13]

Having in mind the ongoing practice in the system of protection of rights created by the Republic Commission's work, and in particular the tendency to further improve this system in terms of efficiency of legal protection and of the procedure of public procurement, the Proposal of a new Public Procurement Law provides for much clearer rules of operation for all participants in the procedures in order to ensure an effective legal mechanism. Namely, it explicitly prescribes that request for the protection of rights may not challenge the selection of the type of procedure, the contents of invitation to bid and tender documents, if the contested subject involves potential deficiencies and irregularities not previously communicated to contracting authority in the manner set forth under Article 97 of that Law.[14]

In this regard, Article 97 of the Draft Law prescribes as follows:

"An economic operator may seek from contracting authority additional information or clarifications regarding the tender documentation, in writing via the Public Procurement Portal, whereby it may notify the latter if it considers there are certain deficiencies or irregularities in tender documentation, no later than:

1) by eighth day prior to the expiry of deadline set for the submission of bids or applications, for public procurement with estimated value equal to or greater than the amount of EU thresholds;

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[13] Decision No. 4-00-14/2019 of 22.1.2019, Decision No. 4-00-738/2019 of 19.8.2019

[14] Article 204, paragraph 5 of the Draft Law

2) by sixth day prior to the expiry of deadline for the submission of bids or applications, for public procurement with estimated value less than the amount of EU thresholds.

Where request under Paragraph 1 of this Article is timely filed, contracting authority shall post additional information and/or clarifications on the Public Procurement Portal or make them available in the same way as it did for the basic documentation, without specifying claimant's particulars, no later than:

1) by sixth day prior to the expiry of deadline set for the submission of bids or applications for public procurement with estimated value equal to or greater than the amount of EU thresholds;

2) by fourth day prior to the expiry of deadline set for the submission of bids or applications, for public procurement with estimated value less than the amount of EU thresholds, and in procedures in which contracting authority exercised option to shorten deadlines for the reasons of urgency.

The subject of contention in procedure for the protection of rights may not be such potential deficiencies or irregularities in tender documentation that have not previously been communicated in the manner provided for under Paragraph 1 of this Article."

Considering the above deadlines within which may be requested additional information and clarifications of tender documentation and deadlines for contracting authorities to publish those, Article 214, Paragraph 2, of the Draft Law provides that request for the protection of rights challenging contracting authority's conduct in determining the type of procedure, the contents of invitation to bid and tender documents will be deemed as timely if ***received*** by contracting authority no later than ***three days prior to the expiry of deadline for the submission of bids or applications, regardless of the manner of delivery***.

Paragraph 3 of that same Article of Draft Law provides that request for the protection of rights challenging contracting authority's actions taken after the expiry of deadline for the submission of bids or applications may be ***filed*** within ***ten days from the day contracting authority's decision was published on the Public Procurement Portal, or from the day of receipt of decision in cases where this Law does not provide for publishing such decisions on the Public Procurement Portal***.

It further sets forth deadline for filing request for the protection of rights in negotiated procedure without prior call for competition, providing that request for the protection of rights challenging contracting authority's conduct in determining the type of procedure, the contents of notice on conducting negotiated procedure, invitation to bid and tender documents will be deemed as timely if ***received by contracting authority no later than ten days from the day of publishing notice on conducting negotiated procedure, or from the day of receipt of tender documents or the amendments to tender documents***.[15]

There is another provision aiming at more comprehensive legal protection in public procurement as option to file request for the protection of rights challenging the legality of contract awarded pursuant to Articles 11 through 21 of the Draft Law (for contracts awarded on the grounds of an exception to the application of the law). In this case, deadline for the submission of request for the protection of rights is ***ten days from the day of publishing voluntary ex ante transparency notice*** under Article 109, Para 5, of the Draft Law, if contracting authority has published this notice. In such case, claimant who has missed to file request for the protection of rights after voluntary ex ante transparency notice under Article 109, Para 5, of the Draft Law is published, is precluded from filing request for the protection of rights after the notice on awarded contract is published. Where contracting authority has published only a contract award notice, in the case of contracts concluded pursuant to Articles 11 through 21 of this Law, request for the protection of rights contesting legality of concluding such contract shall be deemed timely if ***filed*** no later than ***within 30 days from the day the contract award notice was published***. Request for the protection of rights contesting legality of contract concluded without having previously conducted public procurement procedure shall be deemed timely if ***filed at latest by 60 days from the date of learning of such contract, and no later than six months from the day this contract was concluded***. In the case at hand, procedure for the protection of rights serves to protect the rights of interested parties, to ensure competition and prudent spending of public funds, and it may be timely initiated even after contract has been awarded directly without conducting public procurement procedure which, according to the law, should have been carried out, and this is directly linked to the special powers of the Republic Commission under Article 233, Para 1, Point 6, of the Draft Law.

[15] Article 214, paragraph 4 of the Draft Law

In addition to the above changes and novelties concerning deadlines for filing requests for the protection of rights, it specifies cases in which will be ***accordingly*** applied provisions of the law which governs administrative procedure, notably, to which matters in the proceedings under the competences of the Republic Commission — unless otherwise provided for under that Law — are going to be accordingly applied provisions of the law governing administrative procedure, all the while observing the principles from the Public Procurement Law and the specificities of procedures both for public procurement and for the protection of rights:

1) representation by proxy;
2) rules on delivery and notification;
3) calculating deadlines;
4) reinstating previous state of play;
5) rules on public documents;
6) decision and correction of errors in decision;
7) costs of the procedure;
8) stay of the proceedings;
9) preliminary matters;
10) language in the proceedings;
11) reopening of the proceedings;
12) reviewing case file and notification of the course of the proceedings;
13) minutes.[16]

Therefore, it follows that in procedures under the competences of the Republic Commission, the calculation of deadlines prescribed under the PPL will be governed accordingly by the rules from the law governing the administrative procedure but in a way which is linked to the specificities of procedures both for public procurement and for the protection of rights (example — Article 214, Para 2, of the Draft Law).

[16] Article 212 of the Draft Law

Jasmina Milenković
Member of the Republic Commission

Bidder's References as Additional Eligibility Requirement of Business Capacity in Public Procurement Procedure/Negative References as Reason for Bid Inadmissibility Pursuant to the Provisions of Public Procurement Law ("Official Gazette of the RS" Nos. 124/2012, 14/15 and 68/15)

References are an additional eligibility requirement in public procurement procedure which the Public Procurement Law ("Official Gazette of the RS" Nos. 124/2012, 14/2015 and 68/2015 — hereinafter: of the PPL) provides as an additional eligibility requirement under Article 76 that contracting authority may stipulate as business capacity in addition to the financial, technical and personnel capacities, whereas the proving of compliance is provided for under Article 77 of the PPL.

Shortly after the applicable PPL cane into force, the Republic Commission proclaimed its principled legal position concerning the application of Article 76 of the PPL, therein stating the following: "As additional conditions in terms of Article 76 of the Public Procurement Law may only be set such conditions that relate to the bidder, notably, conditions that set necessary level of bidder's competence and performance to participate in given public procurement procedure and, as such, cannot be set as element of the criterion in terms of Article 84, Para 2, of the Public Procurement Law." This legal view clarifies that references as an additional eligibility requirement cannot be an element of the criterion because this would go against the very nature of elements of the criterion which serve to weight the bid itself, and this implies that through elements of the criterion advantage is accorded to the bid on the basis of which the bidder will be awarded the contract. Unlike elements of the criterion, references reflect capacities of bidder and shed light on bidder's capability, experience and seriousness in previous doings on the market. After the PPL came into force and the Republic Commission published the above principled legal position, contracting authorities ceased to classify references as elements of the criterion, which has hitherto been a common practice in public procurement procedures.

In contrast to bidder's references as business capacity and an additional eligibility requirement in terms of Article 76 of the PPL, the quality of engaged personnel that implies reference experience of bidder's staff, may, in terms of Article 85 of the PPL, be an element of the criterion of most economically advantageous tender. Therefore, this is a 'personnel reference', typically of the key technical staff, which in terms of the above mentioned provisions of the PPL may be an element of criterion 'quality of engaged personnel' or otherwise named element of criterion which, by means of scoring, stimulates the experience the key personnel had in similar jobs. This in fact serves to present the key personnel's personal references, qualifications and experience in drafting similar projects, providing works or services in their CVs, i.e., professional biographies, together with pertinent certificates confirming, for example, that they had personally been site managers, project authors in a specific area, and the like.

Bidder's references as an additional eligibility requirement are of a particular significance and purpose in public procurement procedures. The Law uses expression 'business capacity' which primarily presupposes references, however business capacity may also refer, for example, to the possession of adequate

standards such as ISO standards. References as bidder's business capacity testify to bidder's knowledge, presence on the market, and experience in the area relevant for given public procurement, whereby bidder as an economic operator confirms he is able and knows how to do the job at hand, and that he has thus far demonstrated success in performing such job. Further to this, evidence proving the fulfilment in terms of relevant experience may be of particular importance.

Although the PPL under Article 77, Para 2, Point 2), Sub-Points (1) and (2) of the PPL provides for only two types of evidence in the format of 'list of most important works performed, goods delivered, or services rendered' and of 'professional references', contracting authorities routinely also ask for various other proves intended to corroborate the references, as the obligation to supply concluded contracts, invoices, closing reports, and confirmations of references that usually contain a provision to the effect that the bidder has fulfilled all commitments within the set deadlines and in full compliance with the conditions stipulated under the contract. This is why contracting authorities typically in their tender documents include the forms for reference confirmations in which the key clause reads "all contractual obligations undertaken within contracted deadlines, with quality, without objections", or in similar wording. Where contracting authorities opt to draft the form of tender documents themselves, as relevant proof verifying the references, the contents of such evidence should be harmonised with the actual condition of business capacity. A failure to include information of relevance for evaluation of fulfilment of reference experience into evidence of reference confirmations in the manner designed by tender documents, results in the need to have it subsequently verified at the stage of expert evaluation of bids and in the procedure for the protection of rights. Offering an example of the described situation, the Republic Commission has in the procedure for the protection of rights stated as follows: *"Further, in its 'reference confirmation' contracting authority foresaw that referenced contracting authority should attest therein that bidder delivered services appropriate to the subject of the public procurement at hand, that being service of overhauling of rotating engines (traction electric motor) over the previous three years, starting from the day of publishing the invitation to bid, and also to state the relevant total value. Therefore, in that same confirmation contracting authority did not foresee option for bidders to fill in numbers of overhauled engines in order to prove compliance with the minimum of 30 engines requested by ten-*

der documents, and instead designed Forms so that referenced contracting authority should enter therein the values of concluded contracts, although tender documents have not stipulated this value as an integral part of the additional requirement.[17]

References have a special justification and purpose in public procurements intended for the provision of services and execution of construction works. The significance of references in the areas such as the high-rise construction, processing industries, bridge construction, and reconstruction of energy plants can be explained by the specificities and complexities needed to conduct the works in those areas. References have even greater significance in the services sector, where requiring the bidders to possess experience in servicing, designing, consulting and developing software, and thereafter to have those successfully implemented, or to have timely and duly implemented at least one or more referenced works, results in having to deal with reliable and serious bidders. Therefore, by means of references in the areas of performing works and providing services, contracting authorities select operationally capable bidders, since the fact that a bidder has performed at least one identical or similar job reflects his ability to also successfully complete the job at hand, and confirms that the bidder possesses knowledge, capacity and experience.

A relatively frequent reason for disputing references has to do with newly established bidders with recent presence on the market, or relatively short operation so that at the point of initiated public procurement they had no experience in referenced works, due to which and from their standpoint, they undertook to challenge the requirement for reference experience. Over time, by accepting smaller works and eventually landing some similar jobs, and by joining forces with other bidders to jointly implement some jobs, they will also acquire reference experience. For instance, in a public procurement of services of regular maintenance of two electromotive vehicles of specific series, contracting authority required experience in the same jobs for at least two sets of trains of the same series, and the claimant contested this requirement arguing that: *"contracting authority has discriminated against companies which met other conditions relative to companies who have performed repairs that are the subject of this public procurement, and it has discriminated against the companies that are newly es-*

[17] Decision of the Republic Commission No. 4-00-1286/2018

tablished, possess all relevant certificates and are anyway fully competitive for the provision of required services by virtue of their investing into own operation, modernisation of equipment and the work processes. The claimant argued that disputed condition directly resulted in the restricting of the newly established companies' motivation to invest, and indirectly adversely affected the development of relevant market and the increase of competitiveness by entering of newly established companies on the market, and that it went contrary to the trading principles and the Constitutional principles of economic regulation in the Republic of Serbia which rests on market economy, open and free market, and contrary to the Constitutional guarantee of equal position in the market for all. The claimant questioned justifiability of the condition in a situation where contracting authority within business capacity requires that bidder holds certain certificates which testify to fulfilment of adequate standards on the area for which the public procurement procedure is being conducted, and which constitute a more reliable proof of bidder's compliance. He argued on that, since each bidder had to supply a means of security for good execution of job and for seriousness of bid, this amounted to a significant security for contracting authority which indicated seriousness of bidder in intent to justify one's own technical, financial, business and other capacities, due to which the claimant found contracting authority's request to also supply confirmations from referenced client and copies of invoices, as evidence, to be unclear."[18] In given procedure for the protection of rights, the Republic Commission supported its evaluation of this contention as ungrounded by the following argumentation: *"The Republic Commission notes that references are a specially significant condition of business capacity, in particular in procedures for public procurement of services, in that the bidders' experience reflects their possession of adequate knowledge for doing the job at hand and, thus, confirms their referenced business capacity to perform the required job. By their nature, references are not 'friendly' to newly established potential bidders which however does not diminish their significance and justification in procedures for public procurement of services.*

As for the claimant's contention that request of five-year time line is counted relative to the day of publishing invitation to bid rather than relative to the day on which expires deadline for the submission of bids was a discriminatory one, the Republic Commission recalls that the matter at hand are complex services of reg-

[18] Decision of the Republic Commission No. 4-00-1224/2018

ular maintenance of four-piece electromotive train set of series 412/416, for which contracting authority as evidence of compliance with required business capacity demanded bidders to supply confirmations of referenced contracting authorities together with invoice photocopy, as adequate evidence proving the compliance with said condition. Lacking claimant's argumentation and proofs which may have revealed that the formulation of disputed condition in terms of point in time from which onwards was sought the possession of relevant experience was discriminatory, and especially given that contracting authority has not foreseen a short duration of time to which the references had to apply but instead the maximum duration set forth for services by the provisions of the PPL whereby such provisions do not set a particular point in time starting from which to request a certain duration, it follows that claimant, by failing to supply relevant facts and evidence, also failed to convince of fact of discrimination in terms of Article 10, Para 2, of the PPL or of principle of equality under Article 12 of the PPL having been violated by the way the contested condition in terms of the point in time relevant for bidder's experience was formulated in the case at hand.

Since the argumentation presented by claimant, in the view of the Republic Commission, does not constitute the basis for conclusion that contracting authority's contested condition is discriminatory and contrary to the principle of equality, because it actually offered opportunity for a larger number of potential bidders who have provided the service to be procured within the five-year period preceding the publication of invitation to bid, specifically for 2 trains in any area, in order to meet the requirement in terms of business capacity, hence the claimant's allegation in the case at hand is found to be ungrounded."[19]

Other bidders have in a similar fashion contested contracting authority's requirement, in a public procurement for transportation of pupils, that bidders have at least three years of experience in contracted transport over the past five school or calendar years, claiming it to be an unjustifiable restriction of competition relative to bidders which exist and provide service of transport on the market, and suggesting its modification so to require bidders to have at least one year of working experience in jobs of the same-type. The Republic Commission's reasoning is as follows: *"In given case, contracting authority explained the need for the contested business capacity in its response to request*

[19] Decision of the Republic Commission No. 4-00-1224/2018

for the protection of rights, stating that it has chosen not to limit this additional requirement to merely past three years, that by meeting this requirement bidders prove experience in providing service of transportation of schoolchildren, that the children/pupils were in elementary school and very young, which all together aimed at their as safe and as quality transport as possible.

Due to the above, in the view of the Republic Commission, contracting authority's argumentation justified logical connection to the subject of public procurement so to request from bidders at least three years of experience in contracted transport of pupils over past 5 school or calendar years, having in mind the nature of this procurement subject and the fact it requested the bidders to prove they have provided service of transportation of schoolchildren within a five-year time frame, thereby not restricting this requirement, in the view of the Republic Commission, exclusively to children of elementary school age. In this regard, the Republic Commission notes that the way contracting authority formulated business capacity did not discriminate in terms of Article 10, Para 1, of the PPL, given that the provisions of the PPL allow the submission of joint bid.

The Republic Commission notes that contracting authority is obliged, pursuant to Article 10, Para 1, of the PPL, to ensure competition among the bidders, which does not necessarily mean it has to define the requirements in the procedure in a way which enables just any interested bidder to participate in public procurement procedure. Therefore, contracting authority defines conditions and requirements in tender documents according to its objective needs and not according to any business or economic interests of bidders. Since this is the way contracting authority defines requirements, in practice not just any interested bidder will be able to submit a complying bid, which however does not imply they will be discriminated against or that competition among the bidders will be restricted. Consequently, if there exist a potential group of bidders capable of meeting the set requirements, the competition is ensured and contracting authority is able to select most economically advantageous bid. In this regard, the Republic Commission notes that requirement in terms of business capacity for provided 3 reference transport services (the service of transportation of pupils is contracted for a school/calendar year) is not discriminatory in itself, starting from claimant's argumentation which disputes it merely by suggesting its downgrading to 1 reference same-type service, due to which the argumentation was found to be arbitrary and groundless and, as such, unfounded. Here, the

Republic Commission notes that pursuant to Article 81, Para 1, of the PPL, in addition to acting on their own bidders are also allowed to submit joint bids, and in that case bid is submitted by a group of bidders which, taken together, could meet requirement in terms of business capacity, and this was explicitly stated by contracting authority in tender documents. Consequently, where bidders cannot bid on their own, they may exercise legal option to submit a joint bid, thus being able to participate competitively in given public procurement procedure."[20]

The provision of Article 76, Para 2, of the PPL provides that contracting authority sets in tender documents additional eligibility requirements in public procurement procedure in terms of financial, operational, technical and personnel capacities whenever it is necessary having in mind the subject of public procurement. Further, Paragraph 6 of that same Article provides that contracting authority sets eligibility requirements in such way so not to discriminate bidders and to be logically related to the subject of public procurement. A proper setting of references implies that tender documents define clear requirements in terms of the subject to which the reference delivery should relate, or define deliveries of which goods or works or services will be considered as reference, and which period will be accepted as reference, and it is also possible to request certain amounts or values on behalf of completed jobs.

In fact, any imprecise defining of the above three segments describing references may lead to differing interpretation of requirements for references and of the matter of bidder's compliance with the business capacity requirement. In its decisions in cases of imprecise requirements in tender documentation in terms of references, the Republic Commission submits there is no grounds for expert evaluation to be based on any interpretation which is not explicitly and unambiguously contained in the provisions of tender documents. For example, the reasoning of the Republic Commission's decision in a case of disputed manner to evaluate compliance with requirement of bidder's business capacity reads as follows: *"in the case at hand, for an additional eligibility requirement in given public procurement procedure the contracting authority set business capacity involving a list of most important services rendered whose subject-matter was transport of pupils for period (2015, 2016 and 2017) with amounts, dates, and lists of contracting authorities. By means of reference list as the stipulated proof, bid-*

[20] Decision of the Republic Commission No. 4-00–767/2018

ders had to prove facts which were the contents of this requirement, which in given case, according to the wording of this additional eligibility requirement in tender documents, implied the rendered service of transport of pupils for period (2015, 2016 and 2017). Having in mind such wording of business capacity as additional eligibility requirement, which did not imply that contracts that are bidder's references in given public procurement procedure had to refer to each year under defined period individually, i.e., that this requirement for contracting authority means it has requested capacity which implies that the service of transport of pupils was rendered in each year of the defined period, that is, individually in 2015, 2016 and 2017, but instead the requirement itself was defined generally as that service of transport of pupils for period (2015, 2016 and 2017) was rendered, so that from such wording follows that a particular service of transport of pupils may be reference if provided in any particular year of thus-worded period, the Republic Commission consequently finds that contracting authority in its expert evaluation of bids could not attach the above meaning to this requirement. The reasoning is that this matter was not specified by the contents of tender documents, whereas from the established facts follows that selected bidder did supply the proof, a reference list showing it had performed service of transport of pupils in 2017; the contracting authority did not contest this list but rather confirmed it to be the only acceptable one. This leaves as irrelevant the fact that besides this list was also supplied a reference to 2018 in which transport was provided for female handball players and not pupils, over the period 2014-2017. Therefore, since tender documents in the part of contents of this additional eligibility requirement has not specified that referenced contracts had to refer to each year under defined period that covered 2015, 2016 and 2017, and instead the definition of this requirement as used in tender documents implied that what is required are services of transport of pupils rendered over the defined period covering all three years, so that in line with such wording this requirement could be construed so as it suffices if the service of transport of pupils was rendered in any single year within the set time frame, whereas on the other hand an integral part of tender documents is reference related to the contract on transporting pupils in 2017, hence the Republic Commission finds this constitutes a sufficient evidence for a positive evaluation of compliance with the subject requirement, when having in mind the way in which it has been defined in tender documents."[21]

[21] Decision of the Republic Commission No. 4-00–227/2018

Further, when contracting authorities under description of reference services enumerate areas to which should refer the reference jobs, their using of commas in enumeration may raise doubts on whether the reference confirmations should cover experience in all the foregoing or only at least one of those. A relevant decision of the Republic Commission reads as follows: *"Namely, the business capacity requirement is defined so to require bidders to posses at least three references relating to drafting of technical documentation for transport and disposal of ashes, slag and gypsum, without specifically providing that only such technical documentation will be recognised which relate to transport and disposal of all three above materials (ashes, slag and gypsum, cumulatively). Therefore, the interpretation bestowed by the claimant to these provisions of tender documents that three references provided by selected bidder were actually not relevant because they did not cover gypsum for which in given public procurement should be compiled technical documentation, has no basis in the manner in which the business capacity requirement in public procurement at hand was defined, due to which the claimant's alleging that the above references should not be accepted for this reason, cannot be regarded as grounded."*[22]

Similar to this scenario is situation in which contracting authorities, by virtue of repeated amendment to tender documents effected upon bidders' requests for clarifications, provide inconsistent responses on reference periods to which relate the reference services. A relevant decision of the Republic Commission establishes as follows: *"Therefore, by defining this requirement, contracting authority specifies to which 8 years relates the referenced period within which need to have been performed works that are the subject of given public procurement and in the way as required to have been between 2010 and 2017.*

From the content of response to request for the protection of rights follows that contracting authority, while commenting the merits of contentions under request for the protection of rights, explained that additional eligibility requirement in terms of business capacity was defined so to require references for entire calendar year for the previous 8 (eight) calendar years from 2010-2017, and accordingly it contends that the way of defining this requirement did not violate the PPL and did not restrict the competition in terms of Article 10 of the PPL.

[22] Decision of the Republic Commission No. 4-00–88/2019

However, having in mind the conduct of contracting authority in this public procurement procedure, the Republic Commission finds that explanation it gave is not acceptable, especially when aware of its inconsistent conduct in given public procurement procedure while defining the manner of proving compliance in terms of business capacity requirement; the reasoning is that the former, in its clarifications of tender documents of 21.2.2019 upon inquiry of an interested party of 4.3.2019 concerning the manner of defining and proving compliance in terms of business capacity, has accepted to modify tender documents so to also endorse references for 2018, whereas upon an inquiry of another interested party concerning the same matter on which it had responded earlier, contracting authority modified tender documents once more, now to the effect of rejecting again the references for 2018.

Further, contracting authority's explanation furnished in its response to request for the protection of rights failed to elaborate the defining of additional eligibility requirement in terms of business capacity relative to the requested years, and in terms of Article 76, Para 6, of the PPL to explain the logical connection between such-defined requirement and subject-matter of this public procurement, especially having in mind that it cannot be determined on the basis of objective criteria what were contracting authority's reasons to request, for the sake of proving compliance with the business capacity requirement, that requested references had to do with works performed within 2010 — 2017 time frame, that is, since in light of assertion under request for the protection of rights and its own inconsistent conduct throughout given public procurement procedure, this contracting authority completely failed to explain why would it not be acceptable to have compliance with the business capacity requirement in Lots 1 and 2 proved by reference confirmations that the works were performed in 2018 as the year immediately preceding the year in which the public procurement at hand is conducted.

Therefore, having regard to the facts that this public procurement procedure was initiated by contracting authority's decision of 28.12.2018, that invitation to bid in this PP procedure was published on the Public Procurement Portal on 1.2.2019, the specificities of the procurement subject, contracting authority's inconsistent conduct concerning the manner of defining additional eligibility requirement in terms of business capacity requirement in given public procurement procedure, and contracting authority's argumentation in its response to request for the

protection of rights, the Republic Commission notes that contracting authority is obliged to harmonise and define the disputed requirement in relevant part and in the manner consistent with its objective needs, and which on the other hand ensures the principle of competition and is in the logical connection with the subject of this particular public procurement."[23]

As for contesting such provisions of tender documents that refute the references by declaring them to be discriminatory by nature since they recognise only such reference jobs that have to do with identical type of services or works to be procured, and which are of almost matching technical features as in given public procurement, the Republic Commission while deciding on merits is reviewing both allegations contesting the requirements under tender documents and, separately, contracting authority's argumentation explaining the reasons for such defining of the references. For example, in public procurement of software for health and information and budgetary systems, contracting authority requested references implying that "bidder has concluded contracts for this software with at least 3 secondary/tertiary healthcare users, each having more than 1,000 employees and an integrated solution applied." This requirement was challenged by the following argumentation: *"contracting authority has violated provisions of Article 10 and Article 12 of the PPL, by having stipulated in tender documents, as an additional eligibility requirement in given public procurement procedure, that bidder had to have realised sales from the software in question solely in the domain of secondary/tertiary healthcare levels. The claimant alleged that the subject of this public procurement was software which was not a specificity of healthcare institutions only, but rather software (budgetary accounting) applied in all spheres of business operation." Therefore, as further alleged, by virtue of formulating this requirement in this way and by emphasising in additional clarifications of tender documents that it would not accept bid of bidder whose turnover on the sale of the software at hand was effected to customers not exclusively from healthcare domain, the contracting authority had unjustifiably restricted competition among the bidders. By the same doings, he alleged, the contracting authority had also breached the provisions of the PPL when setting as an additional eligibility requirement in terms of required business capacity in this tender documents that bidder had to have concluded contracts for said software with at least 3 secondary/tertiary healthcare users, each*

[23] Decision of the Republic Commission No. 4-00–202/2019

having more than 1,000 employees and an integrated solution applied. Namely, as alleged, contracting authority modified tender documentation in that particular part, by stipulating that bidder had to have concluded contracts for said software with at least 1 secondary/tertiary healthcare users, each having more than 1,000 employees, but that did not "change the essence of that discriminatory requirement" which restricted competition among the bidders so that "merely a very narrow circle of bidders (one, no more than two) could potentially apply in this public procurement", and that was contrary to the provisions of Article 10 of the PPL."[24] Starting from the contracting authority's argumentation, the Republic Commission finds the above allegations to be unfounded, with the following reasoning: *"In line with the foregoing, the Republic Commission also takes into consideration contracting authority's explanation in its response to request for the protection of rights wherein the latter, among other matters, recalls the specificity of its business processes which presuppose mutual interaction and two-way connections: between the patient admission, taking anamnesis, prescribing therapy, implementing outpatient and inpatient protocols, establishing and keeping medical histories, and recording any surgeries, medical interventions and childbirths, followed by duty to generate proper electronic reports on hospitalisation in accordance with predefined requirement by the IZJZS (Batut) and duty to send necessary data to IZIS; — between procurement, requisition and recording of the spending of medical drugs, of implantable, medical and other related consumables and blood in line with the records of provided health services; — between duty, starting from 2018, of healthcare institutions (including the contracting authority as the ultimate reference healthcare institution) to introduce a new format of invoicing healthcare services, medical drugs and supplies, by issuing invoices for insured inpatients to the Republic Health Insurance Fund (the RHIF) for hospital treatment episodes of each hospitalised person who has stayed in overnight or longer than 24 hours; — between contracting authority's duty to apply the method of classifying inpatients into groups sharing similar clinical specificities and needing similar use of hospital resources, in short DRG (diagnostically related groups); — between contracting authority's duty to send to the RHIF the final calculation on the basis of its official records and pursuant to the Regulation on concluding contracts on healthcare protection under the compulsory health insurance with the healthcare providers, and pursuant to*

[24] Decision of the Republic Commission No. 4-00–473/2018

the Instruction on ways and procedures for periodic calculations and reconciling accounting and other records with the healthcare providers", and also the fact that enumerated business processes, as stated, involve 1800 employees that include 1500 healthcare professionals at 11 clinics of the Clinical Centre of Serbia and 300 administrative staff in expert supporting services; hence, due to all the foregoing, contracting authority is procuring software which will integrate all the above processes (including the medical part as the primary one, and the necessary supporting financial part), with all the above having been elaborated in detail in tender documents as the subject of procurement at hand.

Therefore, from the described argumentations of both claimant and contracting authority follows that the claimant challenges the additional eligibility requirements set in tender documents of given public procurement procedure that refer to necessary financial and business capacities, alleging that the subject of this public procurement is software which is not a specificity of healthcare institutions only, "but rather a software (budgetary accounting) implemented in all spheres of business operation", whereas contracting authority under its technical specification and additional clarifications of tender documents of 25.4.2018 describes specificity of needed software it needs and which is implemented in secondary/tertiary healthcare institutions, as large healthcare systems. Namely, from this description follows that specificity of the software at hand is reflected in the fact that it is not only a budgetary accounting software, as alleges the claimant in its request for the protection of rights, but rather an integrated software software solution expected to cover business processes as defined under general functional requirements in tender documents in 13 contracting authority's organisational units and, as such, to enable data exchange between the medical segment and the administrative-financial and accounting segments of operation, as underlined by contracting authority both in its tender documents and its additional clarifications thereof, and in its response to request for the protection of rights.

Therefore, since the subject of this public procurement presumes the developing of described software solution, hence the Republic Commission finds that, pursuant to Article 76, Para 6, of the PPL, in the case at hand exist both logical connection and justification for contracting authority's requiring experience in developing and implementing such integrated solution under the requirements of financial and business capacities.

On the other hand, while contracting authority in its response to request for

the protection of rights makes a point that the specific integrated software has already been implemented in 15 secondary/tertiary healthcare institutions which possess relevant experience in implementing the described software and the necessary defined financial and business capacities, the claimant only very broadly alleges that the procurement at hand can implement "merely a very narrow circle of bidders (one, no more than two)", and consequently, in the view of the Republic Commission, on the basis of thus-worded contentions for disputed financial and business capacities it cannot be concluded that contracting authority has indeed violated the principles of competition and of equality as prescribed under Articles 10 and 12 of the PPL.

Further to this, the Republic Commission recalls that pursuant to Article 76, Paragraphs 1, 2 and 6, of the PPL, contracting authority has the right to determine the extent of financial and business capacities it is going to require from bidders so that it remains in logical connection and in proportion to the procurement subject and to pay attention that eligibility requirements in given public procurement are not discriminatory."

Likewise, when the regularity of completed expert evaluation of bids for references is contested, first to be reviewed is the way in which the tender documents describes the matter to which should relate the reference delivery of goods or the type of performed services or works. Some contracting authorities define the reference works within business capacity that bidders must meet in a rather broadly manner, in that they require that bidder has over a certain period "performed works identical or similar to the procurement subject" in certain value, so that the Republic Commission considers as unfounded allegations that *"selected bidder in contract No. 674/17 of 11.9.2017 with referenced contracting authority "Termomont" d.o.o. Belgrade, performed works in manufacturing AL windows, doors, and interior partitions, meaning he has not delivered finished goods procured from another firm or manufacturer, that performing works in manufacturing joinery is in direct and logical connection with the subject of public procurement, meaning that it can be unambiguously determined that the selected bidder performed joinery works which corresponds to the additional business capacity requirement requesting bidders to "have performed works identical or similar to the procurement subject."*[25] Similar to this is the situation

[25] Decision of the Republic Commission No. 4-00–323/2019

in which was established that contracting authority has had no grounds in the provisions of tender documents defining business capacity as the services of "servicing and repair" of devices to refuse references of "remaking" air conditioners. Namely, relevant decision of the Republic Commission states as follows: *"However, despite the foregoing, in the view of the Republic Commission, from the way the tender documents determines additional requirement, i.e., request that bidder, over the past 5 years prior to the day of public opening of bids, has been providing the services of servicing and repair of air conditioners on vehicles, firms as end users, in the minimum amount of RSD 20,000,000.00, does not follow that thereby was excluded possibility that compliance with this requirement is proved by invoices containing amounts for the repair of air conditioners.*

The reasoning is that the provisions of tender documents in the part of said additional requirement foresaw the services of servicing and repair of air conditioners, which in the view of the Republic Commission also cover the services of remaking thereof.

In the above part, the Republic Commission notes that contracting authority neither in challenged decision nor in its response to request for the protection of rights explained what was the difference between those services, that is, why exactly the servicing and repair of air conditioners did not include the services of remaking thereof."[26]

Likewise, once the contracting authority has determined a precise request as to the actual domain that reference works involve, as is the case where it requires the bidder to "has provided services on hydro power plants identical or similar to diver's" there is no grounds to derogate from thus-formulated requirement in its expert evaluation of bids so to also recognize the services on thermal power plants as reference ones. To this end, the Republic Commission stated the following in the reasoning of its decision: *"The Republic Commission notes that contracting authority in its response to request for the protection of rights did not refute claimant's allegation that selected bidder failed to prove performance of reference services on hydro power plants as requested under tender documents but had performed such services on thermal power plants, and instead stated it accepted references submitted with the bid because those indisputably related to services identical or similar to diver's services. Therefore, given that from the*

[26] Decision of the Republic Commission No. 4-00–674/2019

evidence submitted with the selected bidder's bid for Lot 2 indisputably follows that reference driver's services were performed on thermal power plants instead on hydro power plants, contracting authority was obliged to reject the selected bidder's bid as unacceptable in terms of Article 3, Para 1, Point 33) of the PPL in conjunction with Article 106, Para 1, Point 2) of the PPL, because the latter failed to prove compliance with additional requirement in terms of business capacity for Lot 2 in the way this requirement had been formulated under the tender documents. Namely, the Republic Commission notes in particular that contracting authority's argumentation supplied in its response to request for the protection of rights cannot be taken as relevant, given that contracting authority is obliged to execute expert evaluation of bids so to ensure observance of the principle of transparency in public procurement procedure and the principle of equality of bidders. From the foregoing follows that in the stage of expert evaluation of bids contracting authority cannot base its evaluation of a bid as an acceptable one on the fulfilment of certain requirements and conditions which were not foreseen under the tender documents.[27]

In another procedure for the protection of rights in which contracting authority had formulated business capacity by stating it would accept references of bidder who "has performed hydromechanics works (works of installation of pool water preparation and pool equipment) on reconstruction or construction of at least 2 sports pools in minimum value of RSD 50,000,000.00 without VAT", it was established that contracting authority was right in its expert evaluation of bids to refuse to accept as reference works those performed on the children's pool and those on the pool lighting. In this regard, the Republic Commission established the following: *"Hence, as follows from the content of tender documents concerning the stipulated additional requirement in terms of business capacity, bidders were undeniably obliged to supply references as evidence of compliance, thereby proving they did perform hydromechanics works on construction or reconstruction of a sports pool. Therefore, in the view of the Republic Commission, contracting authority was right in its expert evaluation of bids to only partially accept given reference on the basis of the concluding report which included all performed works for which the disputed reference was issued, that is, it acted properly by not accepting the works on installation and mounting of a children's pool and works on pool lighting as adequate ones in terms*

[27] Decision of the Republic Commission No. 4-00–660/2019

of requirements under tender documents." It also noted that: *"Hydromechanics equipment for sports pool, or in the case at hand, for an Olympic pool and a children's pool cannot be construed as a single complex, as contended by the claimant. The reasoning for the above is also invoked by contracting authority, because the fact that the claimant has at one site combined hydromechanics equipment on an Olympic and a children's pool does not necessarily means that this equipment is used in the same manner on both pools nor that the equipment used was having the same features, because — as also argued by contracting authority — this is in technical terms impossible due to different dimensions of those pools, difference in their respective volumes and water flows, filtration speeds, required power, etc. In this regard, contracting authority resented differences in the features of equipment stated in the supplied concluding report for the contested reference.*

Considering the above, namely, undeniable fact that a children's swimming pool does not compare to a sports or an Olympic swimming pool, starting from the differences in dimensions of those pools, differences in volumes and consequently in water flows, filtration speeds, required power and other differences in terms of features of those pools, as also underlined by contracting authority in arguments presented in its response to request for the protection of rights, in the view of the Republic Commission it is indisputable that in view of all those differences the reference comprising also the works on mounting and installation of children's pool cannot be accepted as an adequate one in terms of requirements stipulated under tender documents, and that contracting authority's expert evaluation of bids was conducted in compliance with requirements under tender documents and that it is not contrary to the provisions of the PPL.

Further to this, the Republic Commission notes that contracting authority also acted properly in terms of the same references to refuse to accept as adequate the works relating to pool lighting. Just like contracting authority rightly stated in its response to request for the protection of rights, hydromechanics works and electrical works are certainly not the same types of works, hence the electrical ones cannot be used to prove references for hydromechanics works. Likewise, LED lighting installed into swimming pools when requested by investor does not amount to hydromechanics equipment at all."[28]

[28] Decision of the Republic Commission No. 4-00–578/2019

As of lately, in procedure for the protection of rights the bidders have argued that evidence requested to prove compliance with references are nor reliable, so that requests for the protection of rights suggested that instead of the option of alternative supply of evidence as either confirmation or contract, this requirement should be replaced by insisting on supplying confirmations as a 'more reliable' evidence; the Republic Commission found such assertions as unfounded and recalled that any evidence stipulated by tender documents and supplied with the bid was subject to subsequent verification by contracting authorities. In this regard, point was made that: *"Accordingly, only if such evidence at the stage of expert evaluation of bids raises contracting authority's suspicion of whether the bidder did have experience in relevant services on the basis of the supplied contract, contracting authority has an option, pursuant to Article 93, Para 1, of the PPL, to ask for additional clarifications from the bidder. Further to this, the Republic Commission notes that contracting authority enjoys such option also in a case where bidder supplies confirmation by referenced contracting authority, and if any suspicion arises it may ask for clarifications in order to verify whether relevant services were indeed delivered in full compliance with the requested business capacity requirement."*[29]

On the other hand, some bidders in procedures for the protection of rights deem that, once they supply evidence for references requested by contracting authorities in tender documents, the latter have no grounds to ask for additional evidence in the course of subsequent verification; however, this view is wrong because a proper, lawful, and objective expert evaluation of bids that contracting authority has to do endows them with every right to seek additional checks from bidders and they are obliged to comply. In line with the above, the Republic Commission stated in the reasoning of its decision the following: *"However, while acting upon request to clarify his bid the claimant failed to supply requested contracts and invoices, claiming these are the company's business secret. According to all established facts, the Republic Commission notes that in the case at hand contracting authority has exercised option set forth under Article 93, Para 1, of the PPL to seek additional clarifications from the claimant, notably, copies of contracts and invoices for reference users in order to rule out any doubts and verify whether the claimant meets additional requirement in terms of business capacity, but the claimant*

[29] Decision of the Republic Commission No. 4-00–1320/2018

did not supply requested documentation invoking the fact that it represented companies business secret."[30]

In public procurements for construction works, contracting authorities commonly as reference works stipulate works on adaptation, construction, reconstruction, which raises as disputed matters the question whether they can accept works on rehabilitation, while invoking provisions of the Law on Planning and Construction which define these notions. In addition, contracting authorities often do not define these notions in greater detail under the provisions of tender documents, and do not invoke provisions of certain professional rules and regulations as applicable for their disambiguation. In respect with the described situation, in the reasoning of its decision[31] the Republic Commission stated the following: *"Having in mind the established facts and especially taking into consideration contracting authority's explanation in its decision on awarding contract No. 5/18/2-3629 of 22.11.2018, as the reason for finding the claimant's bid unacceptable, the Republic Commission in the case at hand states that contracting authority failed to offer adequate arguments to substantiate that it had conducted a proper and lawful expert evaluation of claimant's bid in terms of business capacity. First of all, in the description of business capacity by the provisions of tender documents, contracting authority does not link the notions of works on the construction of new facilities with works on adaptation and reconstruction of the existing ones, so therefore the relevant experience has to relate to works which are as such determined under the Law on Planning and Construction. In addition, the Republic Commission notes that from legal definition of the notion of adaptation (as construction and other works on an existing object which change the spatial organisation within object, or replace devices, facility, fittings or installations of the same capacities but which do not affect structural stability and safety of the object, do not alter external appearance and do not affect safety of adjacent objects, traffic, fire protection and environment) and of investment maintenance (as performing construction and craft works or other works depending on the type of object and in order to upgrade the conditions of use of given object during exploitation) cannot be determined whether contracting authority has the grounds to conclude that "investment maintenance is a different type of works relative to adaptation",*

30 Decision of the Republic Commission No. 4-00–516/2019

31 Decision of the Republic Commission No. 4-00–1392/2018

but rather that those are the works that are routinely intertwined and, as such, difficult to disambiguate.

Likewise, the Republic Commission states that in this case certain positions of works described in detail in concluding reports supplied by the claimant correspond to the works stipulated in bill of quantities for construction and craft works under tender documents (1. demolition — dismantling of doors and wood trims around openings, breaking ceramic floor tiles and ceramic wall tiles; 4. ceramic and flooring works — tiling first-class floor ceramics of a domestic manufacturer; 6. joinery works — procurement and installation of interior doors; 7. toilets — procurement and installation of ceramic bathtubs, toilet sinks, toilet seats with water tanks). In this regard, request for the protection of rights reasonably argues that the contents of concluding reports and contracts concerning two contested references indicating that works on investment maintenance were performed does not mean that the actual nature of performed works does not also correspond to the works on adaptation and reconstruction, regardless of how the referenced contracting authority describes them.

Also, it is really not possible or justifiable to ask that the naming of referenced public procurements in substantial terms be identical to the name of given public procurement; rather, the point is that upon reviewing the supplied concluding reports one can unambiguously establish the possession of relevant experience in high-rise facilities.

On the grounds of all above, the Republic Commission finds that contracting authority did not offer adequate and sufficient reasons due to which, at the stage of expert evaluation of bids, it had based its conclusion that the claimant did not meet business capacity requirement solely on the naming of referenced works from the supplied evidence and on those that the Law on Planning and Construction prescribes for the notions of construction, reconstruction, adaptation and investment maintenance of facilities. Due to the above, while evaluating fulfilment of the selected bidder's business capacity, contracting authority did not explain that it had acted in accordance with Article 10, Paragraph 1, Point 2, of the PPL and that, consequently, its evaluation of the claimant's bid as unacceptable was proper and lawful."

Unlike the PPL, the previous Public Procurement Law made no distinction between compulsory and additional requirements, and when compared, the appli-

cable PPL in its Article 76 contains elaborate provisions governing only additional eligibility requirements that contracting authorities may stipulate whenever necessary having in mind the procurement subject. As above stated, the most commonly discussed matters in procedures for the protection of rights linked to references within the period of application of the PPL have to do with the need to stipulate them, the discriminatory character of their formulation, and different interpretations of what the supplied evidence was supposed to confirm in terms of referenced jobs.

The Draft Public Procurement Law currently in the Parliamentary procedure provides for **professional capacity** as the criterion for the selection of entity, in terms of evidence provides for the submission of statement on fulfilment of criteria for qualitative selection of economic operator, and also elaborates contracting authority's duty prior to taking decision in public procurement procedure to request the bidder with most advantageous bid to supply evidence on compliance with the criteria, and an option for contracting authority to ask the other candidates and bidders to submit all or part of evidence on compliance with the criterion for qualitative selection. Further, the Draft Public Procurement Law elaborates cases when contracting authority does not have to ask for these proofs to be supplied, and in terms of evidence of professional capacities in the format of a list, it provides the latest five year as relevant period for works, and three latest years for goods and services. It remains to be seen in the coming period the extent to which these new normative solutions are going to bring about new problems and concerns in practice.

Negative references as the reason for unacceptability of bids

Legal institute of negative references was introduced by the applicable PPL, and previous laws had no provisions governing how should contracting authority deal with bids of bidders who act maliciously either when submitting bids or during implementation of public procurement contracts.

The originally planned two articles dedicated to negative references underwent changes in 2015, so that the entire Article 83 of the PPL enumerating the list of negative references was deleted from the PPL, whereas the provision of Article 82 of the PPL was amended so that instead of the originally prescribed duty to refuse bids, it introduced option for contracting authority to do so if it pos-

sesses relevant evidence provided for by that same Article. Further, Paragraph 2, Point 8) of this Article was amended in terms of evidence prescribed by that Article so that 'other relevant evidence' need not be stipulated under tender documents.

First of all, most frequent misconceptions of participants in the procedure are that only termination of contract generates the basis for negative reference and that the Public Procurement Office should keep the list of negative references. Namely, among the evidence provided for under Article 82, Para 2, of the PPL, termination of contract is merely one of possible situations in which may be pronounced a negative reference due to failure to fulfil obligations under the previously concluded public procurement contracts. Also, provisions on the list of negative references compiled by the Public Procurement Office ceased to apply after amendments to the PPL of 2015, almost four years now; even back when they were in force, the Public Procurement Office has issued a single conclusion establishing the existence of a negative reference. This conclusion of the Public Procurement Office establishing existence of a negative reference was challenged by an appeal, which was decided and rejected by the Republic Commission.[32]

The key point here is that pursuant to the PPL, negative references merely create an opportunity to refuse a bid on that account, meaning they create possibility but not obligation on the part of contracting authority to refuse bid in situations prescribed by the law, when it possesses relevant evidence.

Article 83, Paragraph 1, of the PPL provides for four situations when contracting authority may refuse a bid if it possesses evidence that the bidder, over three years preceding the publishing of invitation to bid, and are related to the conduct of contracting authority in public procurement procedure, which are violations of Articles 23 and 24 of the PPL governing the protection of integrity of the procedure, and duty to report corruption, and providing false information in the bid, and bidder's unjustified refusal to conclude the contract awarded to him, and finally the refusal to submit evidence and means of security in line with the content of the bid.

Further, provisions of Article 82, Para 2, of the PPL provide for situations where contracting authority may refuse the bid if it possesses evidence confirming that

[32] See Conclusion of the Republic Commission No. 4-00-334/2015

bidders did not fulfil their obligations under previously concluded public procurement contracts which related to the same procurement subject, within the past three years prior to the publishing of invitation to bid. The only evidence of here enumerated eight that contracting authority may use even if it was procured from another contracting authority, is evidence in the form of final decision of the court or another competent authority, whereas other enumerated evidence may serve as the grounds to refuse a bid by means of negative reference only if obtained in the procedure before the contracting authority which conducts given public procurement procedure. Since our judiciary system relatively rarely produces court decision in procedures conducted on concluded contracts on public procurement, hence in procedures for the protection of rights had no cases in which this evidence i which this evidence, enumerated as the first one in Article 83, Paragraph 2, of the PPL, was used by contracting authorities. The next two legally prescribed evidence in the form of a document on executed means of ensuring the fulfilment of obligations in public procurement procedure or of contractual obligations, or document on levied fine, contracting authorities should possess, given that almost all public procurement procedures stipulate fines as the payment of a certain percent of contract price, as well as activating any collateral, in relevant clauses under the concluded public procurement contracts. A proof in the form of consumer or user complaint should be linked to drafting the minutes on the quality of delivered equipment, as should be possessed adequate evidence that complaints are not remedied within contracted deadline. The next prescribed evidence in the form of report of an oversight body on the performed works which are not in accordance with the project or contract is typically found in the construction, where such reports are compiled. As for the statutory wording of proof in the form of "statement on contract termination due to failure to fulfil essential elements of contract given in the manner and under conditions provided for by the law governing obligations", we see it presumes it sufficient for contracting authority to issue unilateral statement on termination of contract pursuant to the Law on Obligations and, when determining whether there are the grounds for negative references, that such statement need not to be supported by court decision establishing that contracting authority was entitled to terminate contract in the manner it actually applied in a particular situation. This grounds provided for under the PPL may be challenged by bidder to whom contracting authority has pronounced negative reference, by arguing that the latter had no grounds to terminate contract based on the reasons pre-

sented in the statement and that he has initiated relevant court proceedings challenging such statement. However, this legal provision provides contracting authorities with sufficient grounds to terminate contract solely on the basis of existence of statement on contract termination due to failure to fulfil essential elements of contract, without having to link this grounds with any court decisions confirming that such statement was given in a lawful manner. Another explicitly prescribed grounds for refusing a bid is the possession of evidence on the engagement of persons not designated in the bid as subcontractors or as members of a consortium of bidders to implement a public procurement contract, which is the case commonly referred to as a very frequent practice, yet this type of evidence is rarely used as the grounds for issuing negative references. This scenario of introducing a subcontractor not designated in the bid requires an adequate proof, one such being the report of an oversight body. Legislator has very flexibly foreseen "other adequate proof relevant for the procurement subject" that refers to fulfilment of obligations in previous public procurement procedures or previous public procurement contracts. This means that, in addition to explicitly enumerated seven proofs, the law also provides for another possible grounds for refusing a bid due to negative references, as any "other adequate proof" which need not be specified under the tender documents and on the basis of which may be established any failure to fulfil obligations in previous procedures or previous contracts. By the latest amendments to the PPL in 2015, legislator amended the contents of possible proofs as the grounds for negative references due to failure to fulfil obligations under previously concluded contracts, in that it removed the clause that any appropriate proof relevant to the procurement subject has to be stipulated under the tender documents, which was only logical since the bidders had no way to know beforehand which particular potential bidders may apply in given public procurement procedure and, consequently, could not beforehand enumerate all possible proofs in tender documents on the basis of all negative experience they have had with previous bidders in previously concluded contracts within the past three years.

Decisions taken by the Republic Commission in procedures for the protection of rights upon reviewing regularity of contracting authority's conduct in applying the provisions of Article 82 of the PPL are few, which implied that contracting authorities seldom exercise this legal institute, so that the bidders have little opportunity to challenge their conduct in view of negative references.

Why is it that there are few decisions by contracting authorities on refusing bids due to negative references, even though the law provides ample possibilities in terms of proofs that may be used? The answer probably lies in psychological reasons, as reluctance of contracting authorities to induce inconvenience by stirring resentment among bidders who act maliciously in implementation, do not comply with contractual obligations as stipulated under public procurement contracts and their bids; the outcome is bidders' conscious acceptance of risk of the quality of performed works and services or delivered supplies deviating from the offered one, because they mostly do not suffer any adverse consequences from such conduct.

In terms of decisions taken by the Republic Commission over the previous period in procedure for the protection of rights in which it has established that contracting authority had no grounds to pronounce a negative reference to bidder, some instances should be noted where contracting authorities used evidence acquired in public procurement procedures by other contracting authorities, although the provisions of the PPL do not provide the basis for this. Thus, in procedure for the protection of rights was established the following: *"Having in mind the contents of report on expert evaluation of bids, decision on awarding contract and response given to request for the protection of rights, the Republic Commission finds that from the foregoing follows that in the case at hand contracting authority concluded that the fact it has available two documents of other contracting authorities, notably, notice of the General Hospital in Subotica No. 01-7543/16-22 of 21.3.2016 and notice of the General Hospital Studenica in Kraljevo No. 12-25/15 of 4.3.2016 from which follows that in March 2016 the claimant notified both of not being able, in his capacity of selected bidder, to conclude respective awarded public procurement contracts, that this constituted legal grounds to refuse the claimant's bid due to the reason under Article 82, Para 1, Point 3, of the PPL."*[33] *It further reasoned as follows: "Therefore, having in mind the quoted provision of Article 82 of the PPL in its entirety, the Republic Commission finds that the legal grounds enabling contracting authority in public procurement procedure to refuse a bid of a particular bidder due to the reasons set forth under the cited Article but which were created and relate to a procedure conducted or contract concluded by another contracting authority (not the contracting authority directly invoking Article 82 of the PPL), exist under the following conditions:*

[33] See Decision of the Republic Commission No. 4-00-594/2018

- *that such reason was brought about within the previous three years prior to the publishing of invitation to bid,*
- *that the evidence thereof, in accordance with Paragraph 4 of this Article, is a final court decision or a final decision of another competent authority,*
- *that this has to do with the same type of the procurement subject.*

Considering the type of documents of other contracting authorities that the contracting authority in this case invoked as the factual basis for applying Article 82 of the PPL, the Republic Commission finds that the legal grounds for refusing the claimant's bid in terms of Article 82, Para 4, in conjunction with Paragraph 3, Point 1 of that same Article of the PPL cannot be determined, having in mind the reasons stated in the report on the expert evaluation of bids and the decision on awarding contract."

A similar example is found in public procurement procedure conducted by an elementary school, where contracting authority used evidence obtained by another contracting authority and pronounced negative reference to a bidder although it did not have the legal grounds for this, which was later on reasoned in relevant decision of the Republic Commission[34], when evidence was used that was qualified as "evidence of false information" for a member of the group who came up as a member of a joint bid also in a public procurement that he himself was conducting.

In its relatively recent practice, the Republic Commission issued some decisions confirming decisions taken by contracting authorities on refusing bids sue to negative references. Thus, it confirmed decision of contracting authority which was procuring food — chicken meat, when it was established that contracting authority possessed another adequate evidence appropriate to the procurement subject, in the form of invoices and bills undoubtedly revealing delivery delay in the previously concluded public procurement contract.[35] In that same public procurement, a bidder did not comply with the clauses of his previously concluded contracts stipulating the procedure for replacing the meat producer relative to the one designated in the bid, and there were indisputable evidence that, during a delivery of chicken meat, was deviated

[34] See Decision of the Republic Commission No. 4-00-270/2019

[35] See Decision of the Republic Commission No. 4-00-314/2017

from the contractually stipulated procedure making it possible to replace the meat producer.

In another public procurement for organising excursion for pupils and recreational classes, conducted by a school, a previously concluded contract on the same-type procurement contained a clause obligating the bidder to organise transport of pupils by high tourist class buses in accordance with the Law on Traffic Safety and other legislation governing the organisation of schoolchildren excursions. The Parent Council, already dissatisfied with quality of services provided in the previous year's procurement, from the records of the Police Directorate and the conducted inspection established that the troublesome bus carrier did not keep tachograph slips and records or records on the working hours of its crew which is duty set forth under the Regulation on the Records of Working Hours of Vehicle Crew, for which was pending initiation of misdemeanour procedure pursuant to the Law on Working Hours of Vehicle Crew in Road Transport, and this was accepted as adequate evidence appropriate to the procurement subject from which could be established the conduct contrary to traffic regulations and, thus, the breach of the provisions of previous contract.[36]

In a separate public procurement for performing construction works on a segment of the road, contracting authority had the statement on termination of contract with the bidder although the job was practically completed by issuing of the closing report. But in addition to this evidence, contracting authority also had the statement of the supervisory body overseeing the works, also contractually engaged, revealing that in the course of inspection of the site during the asphalting was noticed presence of the machinery of a company not designated in the bid of the bidder to whom the contract was awarded. This evidence is one of proofs provided for under Article 82, Para 2, Point 7, of the PPL, and the report of the supervisory body is an adequate evidence which established this fact.[37]

The bidder challenged contracting authority's refusal of bid due to negative reference alleging the lack of grounds, and following the unilateral statement on termination of contract initiated proceedings contesting the legality of termination of contract, and in its request for the protection of rights it also asserted that contracting authority also failed to fulfil its own obligations under a previ-

[36] See Decision of the Republic Commission No. 4-00-766/2018
[37] See Decision of the Republic Commission No. 4-00-138/2019

ous contract. Eventually, the Republic Commission made decision rejecting the contesting of this basis for pronouncing negative references as ungrounded. The Republic Commission notes that the provisions of Article 82, Para 2, Point 6, of the PPL do not provide for existence of a 'justifiable' or 'final' statements on termination of contract, and that it only deals with the fact that a contract is terminated due to failure to fulfil obligations, and therefore arguments contesting such conduct by allegation that there is no final court decision on the proclaimed termination have no bearing on regularity of the contracting authority's conduct.

The new PPL pending in the Parliamentary procedure does not contain any provision specifically titled as negative references; however, it provides for a legal option for exclusion of economic operator from public procurement procedure in the situation where contracting authority stipulates in tender documents it will exclude economic operator if it "finds that over the period of the past three years from the day of expiry of deadline for the submission of bids, economic operator failed to fulfil obligations under previously concluded public procurement contracts or concession contract which resulted in the termination of that contract, collection of the collateral, compensation of damages, etc."

Vesna Gojković Milin
Member of the Republic Commission

Special Competences of the Republic Commission for the Protection of Rights in Public Procurement Procedures, as Mechanisms for Achieving Efficiency of Proceedings in the Protection of Rights, Pursuant to the Provisions of Public Procurement Law ("Official Gazette of the RS" nos. 124/2012, 14/15 and 68/15)

The application of the Public Procurement Law ("Official Gazette of the RS" Nos. 124/2012, 14/15 and 68/15 — hereinafter: the PPL) began on 1 April 2013 and, from this date onwards, the Republic Commission for the protection of rights in public procurement procedures (hereinafter: the Republic Commission) as an autonomous and independent body of the Republic of Serbia tasked with the protection of rights in public procurement procedures, has been acting within the scope of its competences set folrth under Article 139 of the PPL.

When compared with laws preceding the PPL, a novelty concerning the operation of the Republic Commission introduced by the provisions of the PPL are this body's special competences.

Even though each special competence set forth under the PPL is of an undoubted significance for the public procurement system, this paper is focusing on special competences authorising the Republic Commission to impose fines on contracting authority and responsible person within contracting authority, and authorising it to cancel public procurement contracts.

Pursuant to Article 162 of the PPL, the Republic Commission shall by its decision impose a fine on contracting authority, ranging from RSD 80,000 to 1,000,000 and on the responsible person within contracting authority, ranging from RSD 20,000.00 to 80,000.00, if contracting authority:

1) after filed request for the protection of rights fails to act in the manner and within deadline set by Article 153, Paragraph 1 of the PPL;
2) fails to deliver additional documentation, data, clarifications or opinions, upon request of the Republic Commission and within the deadline set by the Republic Commission;
3) fails to deliver report and statements of contracting authority's representative on having complied with the Republic Commission's decision;
4) fails to facilitate control in accordance with Article 161 of the PPL;
5) fails to act pursuant to decision of the Republic Commission.

Paragraph 2 of this Article provides that fines under Paragraph 1 of this Article are imposed by the Republic Commission's panel which decides upon request for the protection of rights.

Pursuant to Article 163 of the PPL, the Republic Commission may on its own initiative, or upon request of a claimant or an interested party, cancel a public procurement contract if it determines that contracting authority:

1) concluded public procurement contract through negotiated procedure without prior call for competition, and the requirements for such procedure provided by this Law did not exist and failed to publish notice on initiating the procedure and decision on awarding the contract;
2) concluded public procurement contract before the expiry of deadline for submission of request for the protection of rights;

3) concluded public procurement contract after submission of request for the protection of rights and before decision taken by the Republic Commission;

4) concluded public procurement contract acting in contravention of the Republic Commission's decision referred to in Article 150 of the PPL;

5) concluded public procurement contract by violating provisions and conditions of relevant framework agreement.

Paragraph 2 of that same Article provides that request for cancellation of contract is to be submitted either jointly with the request for the protection of rights, or within 30 days from the day of learning the reason for cancellation, but no later than within a year since the conclusion of contract, thus determining both subjective and objective deadline, in line with the PPL, within which the procedure for cancellation of contract may be initiated before the Republic Commission.

The consequence of such contract cancellation is set forth in Article 163, Paragraph 3, providing that upon its cancellation the public procurement contract ceases, and contracted parties are obliged to return what they received pursuant such contract, except if whatever was received cannot be returned or if its nature is contrary to being returned, for which cases Paragraph 4 of that same Article provides that contracting authority is obliged to pay to a conscientious vendor for the supplied goods, provided services or performed works.

The exception which prevails over situations foreseen in Article 163, Para 1, Points 1) through 5) of the PPL so to allow upholding of public procurement contract, is set forth in Paragraph 5 of that same Article; it reads that if contract annulment would bring about disproportionate consequences for the work or operation of contracting authority or the interests of the Republic of Serbia, the Republic Commission will not cancel relevant public procurement contract, however it may shorten the contract duration or impose a fine under Article 162 of the PPL.

The cited provisions of the PPL were an evident effort to harmonise legislative framework for public procurement in the Republic of Serbia with the requirements under EU Directives governing the reviewing of decisions on awarding contracts in public procurements of goods, services and works (hereinafter: the Remedies Directives).

These are Council Directive 89/665/EEC of 21 December 1989, Council Directive 92/13/EEC of 25 February 1992, and **Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007**[38] Amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving effectiveness of review procedures concerning the award of public contracts.

Under the process of accession to the European Union, the Republic of Serbia has committed to ensure an efficient and effective system for the protection of rights in public procurement procedures. This system is a corrective mechanism which is vital for ensuring lawful, efficient and effective use of public funds which is the primary objective in regulating public procurement procedures as the procedures wherein contracting authorities use public funds to procure goods, services and works to meet both the directs needs of contracting authorities themselves and the needs of end users, where the provision of which, pursuant to the law, falls under the legal competences of contracting authorities.

In order to present the way the Republic Commission exercises those special competences, and also the advantages and shortcomings of solutions provided for under the PPL and, lastly, to elaborate the solutions concerning those special competences of the Republic Commission as contained in the Draft Public Procurement Law presently in the Parliamentary procedure, we have to begin with elaborating the content of the Remedies Directives that govern invalidity of public procurement contracts.

This will make it easier to understand why the general public does not perceive the fines and the cancellation of contracts, as special competences exercised by the Republic Commission in its application of the PPL, to be a greater contribution to the effectiveness of the proceedings for the protection of rights. It will also reveal that, although these mechanisms are necessary to support a lawful, efficient and effective remedies system which the legislator had rightly recog-

[38] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; Directive 2007/66/EC of the European parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts — hereinafter: Directive 2007/66/EC

nised and sought to prescribe as best it could at given time, the system for the protection of rights in the Republic of Serbia, thanks to both Republic Commission and contracting authorities, has operated and keeps operating at the level that the European Commission has repeatedly, in a series of its annual reports, evaluated very affirmatively. In its reports, the EC has reasonably focused on the continuous need to better align the actual time limits for processing the cases for the protection of rights with deadlines set forth under the PPL and the European average; over the past two years the Republic Commission has achieved this, as confirmed by the Expert Mission's report of April 2019.[39]

Upon adopting the Remedies Directives, the European Union Member States committed, under the Preamble recitals and the wording of relevant articles, to ensure that decisions taken by body in charge of reviewing the contract awarding procedures are efficiently enforced[40].

Being designed to prevent unlawful direct award of contracts, which the European Court of Justice case law also recognises as the most serious infringement of EU legislation governing public procurement that contracting authorities can commit, the purpose of the Remedies Directives was to incorporate provisions on effective, proportionate and dissuasive sanctions, which they undoubtedly and explicitly did[41].

The laws governing the public procurement procedures and the review procedure, which were in force in the Republic of Serbia before the PPL, lacked special competences of the body responsible for reviewing the public procurement procedures, in terms of cancelling public procurement contracts. By incorporating provisions of the Remedies Directives into the wording of the PPL in a way it deemed appropriate at that time, the legislator also pursued its intention to prevent abuses that could have been possible in instances where a public procurement contract would have been concluded in cases for which the PPL set forth an option to cancel those. At the same time, lacking any reference practice in Member States concerning invalidity of public procurement contracts, at

[39] The European Commission, The Republic of Serbia 2018 Report accompanying the Commission Communication to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, 2018 EU Enlargement Policy Communication, 6.5. Chapter 5 Public procurement

[40] Recital 4, Directive 2007/66/EC

[41] Recital 13, Directive 2007/66/EC

the point of adopting the PPL in the most appropriate manner according to the available information on this legal matter, has also been fulfilled obligation to have the legislative framework for public procurement in the Republic of Serbia aligned with the Remedies Directives, as well.

The PPL's providing for cancellation of contracts as a special competence of the Republic Commission was the realisation of an explicit position under the Remedies Directives, namely, that contract concluded in violation of so-called "standstill period" or under automatic suspension of a contract award procedure, ought to be considered ineffective. To this end, cancellation of contract was expected to prevent that grave violations of law in PP procedures, in situations transposed into Article 163 of the PPL from the Remedies Directives, reduce the effectiveness of reviewing CA's conduct in a PP procedure in the proceedings for the protection of rights carried out by an independent body in charge of the review procedure.

The Remedies Directives clearly provide that due to breaches of "standstill period" and/or due to an automatic suspension, public procurement contracts should be considered ineffective in principle, if combined with infringements of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedure for the award of public works contracts, public supply contracts and public services contracts, or Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services, to the effect that those infringements have affected the chances to obtain relevant public procurement contract of the tenderer applying for review of contracting authority/contracting entity's decision[42]. This principle is fully in line with the principles of equality and ensuring competition in PP procedure, both provided for by the PPL, because without such an approach in the review procedure there would be no realistic possibility to award relevant public procurement contract to the claimant who has submitted a procedurally proper and justified request for the protection of rights, in situations prescribed under Article 163. of the PPL.

However, the provisions of the PPL stopped short from fully and consistently implementing a concept contained in the Remedies Directives, namely, that in the case of other infringements of formal requirements Member States may consid-

[42] Recital 18, Directive 2007/66/EC

er the principle of ineffectiveness to be inappropriate, and instead be allowed to provide for alternative penalties which should be limited to the imposition of fines to be paid to a body independent of contracting authority or entity, or to a shortening of the duration of the contract[43].

In the Remedies Directive, the European Parliament and the Council clearly state that the intended objective of rules that ensure ineffectiveness of public procurement contracts is that such contract should cease to be enforced and that rights and obligations of parties thereunder should cease to be exercised. Authors of the Directive have not restricted Member States' right to regulate the consequences by national laws. In fact, the Directive allows them to provide for retroactive cancellation of all contractual obligations (ex tunc) and, in addition, does not disallow to have the scope of cancellation limited solely to such obligations which would have yet to be performed under the cancelled contract (ex nunc)[44].

The Remedies Directive also explicitly states that if obligations deriving from a contract have already been fulfilled either entirely or almost entirely, then the alternative penalties should be provided for, taking into account the extent to which a contract remains in force pursuant to the national law, such as the recovery of any sum already paid, and other forms of possible restitution, including restitution in value where restitution in kind is not possible[45].

The principle pursuant to which the Remedies Directives are set in terms of modalities to be applied by Member States in pursuit of the set objective — ceasing to enforce public procurement contracts and rights and obligations of parties — reflects the diversity of legal systems of Member States, of which some share the same type of legal tradition concerning the notions of contracts cancelled ex nunc and/or ex tunc as does the legal system in the Republic of Serbia, whereas others have legal system based on case law. It should be also noted that, at the point of their adoption, the application of the Remedies Directives was directly related to infringements of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedure for the award of public works contracts, public supply contracts and public services contracts and Directive 2004/17/EC of the European Parliament

[43] Recital 19, Directive 2007/66/EC
[44] Recital 20, Directive 2007/66/EC
[45] Recital 21, Directive 2007/66/EC

and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services (both replaced by Directive of the European Parliament and of the Council 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, and by Directive of the European Parliament and of the Council 2014/25/EU of 26 February 2014 on procurement of entities operating in the water, energy, transport and postal services and repealing Directive 2004/17/EC) where both have provided for thresholds for applying the rules on public procurement procedures whose values considerably exceed the amounts to which, pursuant to the laws of the Republic of Serbia, apply the public procurement procedures provided for under the PPL.

One should also keep in mind that, at the point of adopting all Directives governing the award of public contracts and the review of procedures for their awarding, in a significant majority of Member States the realities of environments within which public procurement contracts are awarded are not exposed either to the same types or the same intensities of corruption risks. The objectives to which the Remedies Directives should contribute were not perceived primarily from the standpoint of anti-corruption provisions; instead, under environment within which Directives were adopted, this effect is being created indirectly, by means of generating conditions for effective competition. Thus, the objectives of the Remedies Directives primarily relate to the establishment of free and competitive market of goods, services and works to be procured from public funds, by means of ensuring effective lawfulness in the conducting of public procurement procedures. Along these lines should be understood certain deviations that resulted from the adoption of the PPL in terms of transposing the institute of ineffectiveness of public procurement contracts into the public procurement system in the Republic of Serbia.

In consistent realisation of notion that the outcome of review procedure should ensure realistic business chances for economic operators applying for review of contracting authority or entity's award decision, the Remedies Directives' provisions on ineffectiveness of public procurement contracts enable Member States to allow the body reviewing such decisions, in the case where public procurement contract is concluded, to adjudicate effectively and to secure the authority of its decision vis-a-vis contracting authorities. At the same time, in order to ensure proportionality of the imposed sanctions, it is also foreseen that Mem-

ber States may grant the body responsible for review procedures the possibility of not jeopardising the contract or of recognising some or all of contract's temporal effects, when the exceptional circumstances of given case require certain overriding reasons relating to a general interest to be respected, where alternative penalties should be applied instead. The Remedies Directives explicitly state that the review body (which is independent of contracting authority) should examine all relevant aspects, autonomously and independently from contracting authority, in order to establish whether overriding reasons relating to a general interest require that the effects of the contract are maintained.

Another point emphasised when adopting the Remedies Directives was that the need to ensure legal certainty of decisions taken by contracting authorities in the long term required the setting of a reasonable minimum period of limitation on review requests seeking to declare the contract to be ineffective[46].

A challenge encountered by the Republic Commission after the application of the PPL began, in terms of cancellation of public procurement contracts, is the fact that Article 139, Para 1, Point 11, of the PPL provides that the Republic Commission initiates the procedure for their annulment. This provision is related to Article 168 of the PPL which provides that public procurement contracts are null and void: if concluded without having conducted prior public procurement procedure which contracting authority was obliged to conduct pursuant to the PPL; those concluded contrary to the provisions of the PPL governing prevention of corruption and conflict of interest; where contracting authority has authorised a third party, other than contracting authority, to conclude a contract in order to evade the application of the PPL; those which are amendments to the original contracts but are concluded contrary to the provisions of the PPL; and those concluded contrary to any decision of the Republic Commission.

This competence vested on the Republic Commission under the PPL directly stems from an explicit provision of the Remedies Directive asserting (with a view to combating the illegal direct award of contracts which, according to the Court of Justice, is the most serious breach of Community law in the area of public procurement on the part of contracting authority or contracting entity) that a contract resulting from an illegal direct award should in principle be considered ineffective[47].

[46] Recital 25, Directive 2007/66/EC

[47] Recital 13, Directive 2007/66/EC

It should be noted that, while operating in a legal system wherein courts act as holders of the judicial power and the matter of cancelling contracts either ex nunc or ex tunc is both in theory and in practice subject to consideration exclusively under jurisdiction of courts in the proceedings initiated by interested parties, during the period of application of the PPL but before having taken its first decision on the cancellation of contracts and on fining contracting authorities and their relevant responsible persons, the Republic Commission found itself in unchartered waters and left on its own to regulate its conduct at its own discretion and in the manner not contrary to the PPL, so to enable itself to examine existence of any grounds for cancelling any given contract, in each of its 61 cases concerning the cancellation of contracts and in each of its procedures for the protection of rights initiated by requests for the protection of rights.

Acting in line with its legal competences and its own Rules of Procedure, the Republic Commission issued Decision on regulating and organising tasks for cancellation of contracts and initiating procedure for establishing contracts to be null and void (ex tunc), of 5 June 2014, Decision on regulating work of the Group for tasks related to imposition of fines, of 16 April 2014, Decision on determining the amount of fines under Article 162 of the Public Procurement Law, of 3 March 2015, and Decision on organising the monitoring of enforcement of decisions taken by the Republic Commission, of 12 February 2015.

The practice of the Republic Commission in the proceedings for the cancellation of contracts initiated after the beginning of application of the PPL has brought about some questions which have marked almost the entire period of the application of the PPL. The professional challenges faced by the Republic Commission in exercising this special competence under the scope of its competences, most notably in the absence of any procedural provisions thereon in the PPL, firstly arose as the question how to act as a body competent for cancellation of public procurement contracts in the Republic of Serbia, in a legal system which recognises exclusively the jurisdiction of courts for cancelling and/or nullifying contracts.

No less challenge was faced by the claimants applying for the cancellation of contracts on the grounds of their own perception of the situation to which should be applied the provisions of Article 163 of the PPL, given that Article 163, Para 1, of the PPL prescribes that request for the cancellation of contract may be filed by claimants and by interested parties. Even though the meaning of certain terms under the PPL and for the purposes of the PPL, including of an interested

party, is defined under Article 3 of the PPL, due to the lack of full context within which the Remedies Directives refer to ineffectiveness of public procurement contracts, it turned out that presently as interested persons pose persons who request cancellation of public procurement contracts but in terms of the PPL are not persons having interest to conclude specific public procurement contract or framework agreement; it should be noted that in 2015 this brought about amendments to Articles 149 and 150 of the PPL.

Due to the above, the total number of cases received by the Republic Commission related to exercising special competences concerning cancellation of public procurement contracts from 1 April 2013 through 30 September 2019 is 61. Over that same period, the number of resolved cases is 21, in eight of which the Republic Commission took decisions to cancel public procurement contracts[48]. In the remaining 13 cases, the Republic Commission found there were no grounds cited under Article 163 of the PPL to cancel the contracts and yet, pursuant to that same provision, there were no grounds to take a separate decision to either reject or refuse those requests to cancel the contract; in those cases, relevant facts of filed requests to cancel the contract have been considered at the session of a Republic Commission panel and, upon having established the facts in individual cases and concluded that none was any of instances provided for under Article 163, Para 1, of the PPL, the claimants were notified accordingly by letters.

The first decisions on cancellation of contracts taken by the Republic Commission have raised some other questions on ways of exercising this special competence, taking into account the severity of sanction, namely, the termination of concluded public procurement contracts.

Each decision is based on a detailed statement of facts and on consistent application of Article 163 of the PPL because the Republic Commission, an independent and autonomous body in charge of the revision of public procurement procedures, must act in line with its legally established competences.

Yet, in the review procedure of all cases whose public procurement contracts were cancelled and of those where no grounds for cancellation of contracts were established, the Republic Commission noted a professional dissatisfaction due to the fact that, in spite of lawful, expert and thorough analyses of

[48] All decisions taken by the Republic Commission in exercising this special competence are available on its website: www.kjn.rs Decisions — Special competences

concrete situations and exchange of experiences with experts for the review of public procurement procedures from other review bodies, the actual proceedings leading to the cancellation of contracts within the period of application of the PPL took too long for the effects of their cancellation to be any significant in practice in terms of relevant procurement procedures after which were concluded the subsequently cancelled contracts.

The above were the decisive reasons for the Republic Commission to analyse the Remedies Directives with particular attention and, in the absence of reference practices from Member States and guided by the facts established in the cases it had adjudicated both upon requests to cancel contracts and upon requests for the protection of rights, to examine which limitations in the existing provisions of the PPL, and in which way, could be overcome under the new Draft Public Procurement Law so to be in accordance with the Remedies Directive.

By doing so, and by analysing the established facts in a large number of public procurement procedures, the Republic Commission deduced the answers to some of the questions which, since the beginning of application of the PPL, have stirred dilemmas but remained unanswered by the existing practice of reference bodies, such as the matter of cancellation of contracts without filed request to cancel the contract, and the relation between cancellation of public procurement contracts ex tunc and/or ex nunc.

This approach has resulted in the conclusion on the meaning of the provision of Article 163, Para 1, of the PPL, which governs the initiating of procedure for cancellation of public procurement contracts and, among other matters, provides that the Republic Commission may on its own discretion cancel a contract where it finds that there is any one of situations foreseen in Points 1) through 5), relative to the requirements set by the Remedies Directive. It could only be inferred from the actual practice that this provision clearly referred to effective protection of rights in a given public procurement procedure challenged by a request for the protection of rights, this being possible and achievable in an environment wherein the actions of contracting authorities are made public pursuant to duty to publish all actions and decision on the Public Procurement Portal.

By analysing actual situations and establishing the facts in each individual case, conditions were made to determine true significance of relation between the public procurement contract cancellation ex tunc and cancellation ex nunc. In view of the provisions of Article 168 of the PPL enumerating situations in which public

procurement contracts are null and void, for which Article 139 of the PPL sets forth special competences of the Republic Commission to initiate procedure for determining grounds for cancelling public procurement contracts ex nunc[49], it was only on the basis of the practice, generated in the proceedings, possible to properly understand the provisions of the Remedies Directives which, in terms of the notion of ineffectiveness of public procurement contracts, refers both to situations of direct award of contracts and situations of the standstill period infringement.

This type of practice-based approach to a targeted understanding of specific provisions of the PPL on how the Remedies Directives treat ineffectiveness of contracts, has enabled the drafting of a new Public Procurement Law proposal in a bid to improve relevant provisions relative to the existing solutions in the PPL. The way the special competences of the Republic Commission have been formulated in the Draft Public Procurement Law should contribute to improving the effectiveness of the system for the protection of rights and, consequently, improve the practice of public procurement procedures[50].

The Republic Commission has also acted lawfully and responsibly and has been utilising the referent practices of Member States in a way that facilitates the attainment of lawful, efficient and effective protection of rights through the means of legislative framework and clear legal delimitation of competences of bodies controlling the spending of public funds, in terms of its special competence to fine contracting authorities and responsible persons within contracting authorities pursuant to Article 162 of the PPL. As for this special competence, after having analysed the provisions of Article 162 of the PPL in concrete practical situations in the Republic of Serbia, and having compared this with practices not only in Member States but also in those neighbouring countries wherein public procurement procedures are conducted in risk-related environments similarly

[49] In view of the above, it should be noted that Article 136, Paragraph 1, Point 21) of the PPL provides that the Public Procurement Office initiates procedure for establishing a public procurement contract to be null and void, which makes a logical way to exercise control over the spending of public funds that complies with the requirements laid down in Article 83 Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, and that Article 148, Paragraph 2, of the PPL in addition to claimants under Paragraph 1 also specifies the range of entities eligible for filing request for the protection of rights

[50] See Article 233 of the Draft Public Procurement Law at the website of the National Assembly of the Republic of Serbia of 30.9.2019 — draft laws in legislative procedure

as in the Republic of Serbia, it was concluded that the fines — as defined under relevant provision of the PPL — are situations in which, on the basis of establishing facts in given review procedure, the Republic Commission should also act so to indirectly determine the situation in the public procurement procedure challenged by the request for the protection of rights, with a view to introducing a specific "procedural discipline".

By their nature and the manner they are prescribed, the fines under Article 162 of the PPL, strictly speaking, are not alternative penalties referred to by the Remedies Directive. An exception to this is the provision of Article 163, Para 5, of the PPL. The fines under Article 162 of the PPL do contribute to a more efficient and effective review procedure and to a more efficient conducting of public procurement procedures, through the means of punitive measures. This is clearly evidenced by sanctioned situations relating to either inaction or untimely action of contracting authority in the review procedure after the receipt of a procedurally correct request for the protection of rights; failure to act pursuant to Article 154, Para 3, so to comply within the deadline and upon instruction given by the Republic Commission in the latter's request to supply further data needed to adjudicate in the pending procedures; failure to submit report on complying with the Republic Commission's decisions; or failure to comply with the Republic Commission's decision.

The significance of the envisaged situations for a lawful, efficient and effective review system varies, yet the legislator's intention as expressed in the PPL to also introduce procedural discipline in the part of the review procedure that depends on contracting authorities' actions is by all means justified. This intention is particularly significant given that deadlines for the Republic Commission's proceeding in the review procedures prior to the beginning of application of the PPL were longer and, as such, subject to a justifiable criticism by EU representatives and practitioners in the Republic of Serbia, alike. Without indulging into analysis of why the deadlines in practice proved to be unacceptably long for contracting authorities, the legislator set forth deadlines in the PPL within which the Republic Commission should act, and also deadlines and manners of actions for contracting authorities in the review procedure and in the subsequent course of public procurement procedure following decision made by the Republic Commission. Since the review procedure is not the goal but a tool to establish a lawful, efficient and effective practice in the conducting of public procurement proce-

dures, the legislator has prudently foreseen pecuniary penalties as the sanctions aimed to ensure the applications of those provisions of the PPL. However, at the times of adoption of the PPL, neither the practice not operation of both contracting authorities and the Republic Commission were sufficiently available and/or properly analysed and, consequently, while applying the provisions of Article 162 of the PPL, adjudicating in a total of 171 cases falling under the scope of this special competence, the Republic Commission has taken 17 decisions thereby imposing fines on contracting authorities and responsible person within contracting authorities. Monitoring of enforcement of those decisions in practice revealed that the fines had been paid up. In 132 fines-related cases, having in mind the provision of Article 162, Para 2, of the PPL and the fact that, over the period of application of the PPL, there have been several changes in the Republic Commission's personnel due to resignations and appointments of its new members, there were no conditions to have the decision on imposing fines taken by the same panel which had decided upon request for the protection of rights. Seven cases related to pecuniary penalties had to do with situations which, due to lack of a more specific legislation, contained no grounds for imposing fines. In line with Article 162, Para 3, of the PPL, the Republic Commission published all decisions imposing fines on contracting authorities and responsible persons within contracting authorities on its website[51]. The challenged decisions of the Republic Commission on fining contracting authorities and responsible persons within contracting authorities were subsequently ruled by the Administrative Court's judgements, which dismissed the claims as unfounded.

Resting only partially satisfied with its own results in exercising special competence for imposing fines (and in particular having in mind that reports on its work reveal the substantially reduced deadlines for acting upon requests for the protection of rights), the Republic Commission took to analyse in greater detail the reasons which had prevented it from having been more efficient in exercising this particular special competence, and it made an effort to contribute to improvement of this legal solution by the means of provisions on fining stipulated in the Draft Public Procurement Law (Article 231 of the Draft Public Procurement Law)[52].

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[51] See www.kjn.rs Decisions — Special competences

[52] See Draft Public Procurement Law at the website of the National Assembly of the Republic of Serbia — 30.9.2019 — draft laws in legislative procedure

The proposed solution limits the number of situations for imposing fines to those in which contracting authority's actions affect efficient and effective adjudication in the review procedures, given that request for the protection of rights is submitted to contracting authority. The proposal contained in the new Public Procurement Law should ensure that decisions on fining are pronounced simultaneously with decisions on merits in the review procedure before the Republic Commission, on the basis of the initial acts upon which this body decides, and thus to further contribute to effectiveness of the review procedure[53].

The proposed solution is the outcome of learning of the existence of procedural indiscipline on the part of claimants as well, which results in "procrastination" of review procedure and, as such, is a sort of manipulation of the claimant's legal rights. In view of this, proposal was made to introduce a fine for both claimants and responsible persons within claimants. This novelty in the Draft Public Procurement Law acknowledges that some requests for the protection of rights have not been submitted with a view to achieving claimant's legitimate and lawful rights as provided for under the Public Procurement Law, and does so in the form of a legal norm which will not result in restricting the right to file request for the protection of rights and which will aim to ensure efficiency of the review procedure. It has been expected, and indeed confirmed by this body's practice, that claimants genuinely interested in the outcome of public procurement procedure from the aspect of their business activities and obtaining relevant job under a public procurement contract, should act keenly, responsibly and conscientiously and submit without delay to the Republic Commission any information necessary for lawful and proper adjudicating on request for the protection of rights or on appeal challenging contracting authority's conclusion. This is also an attempt to make use of mechanisms regulated by law and known in advance on equal terms, so to prevent undue influence against contracting authority to whom request for the protection of rights is to be submitted.

In consideration of new solutions in the Draft Public Procurement Law, and in support of the need to apply those mechanisms of procedural discipline to the conduct of contracting authorities after the receipt of request for the protection of rights, there are the Republic Commission's data on average duration of

[53] For more on this, see Article 236, Paragraph 1, Points 17) and 18) of the Draft Public Procurement Law

public procurement procedures and of procedures for the protection of rights conducted before contracting authorities, relative to the duration of the review procedure before the Republic Commission. On the basis of data from case files kept by the Republic Commission for cases adjudicated upon filed requests for the protection of rights, in a total of 1027 cases in 2018, the duration of procedure for public procurement before having been challenged by request for the protection of rights was on average 75.17 days, whereas in those same cases the Republic Commission has taken its decision on average within 36.77 days. Since 1 January 2019 through 30 September 2019, the procedure in 628 cases lasted on average 61.77 days before contracting authority, and 26.96 days before the Republic Commission.

The Republic Commission, as an independent and autonomous body of the Republic of Serbia pursuant to the PPL, is the only body independent of contracting authority which is competent to ensure lawful, efficient and effective protection of rights of economic operators in the review procedure initiated by eligible persons in given public procurement procedure, hence the decisions of this body are the only source for a proper understanding of the provisions of the Remedies Directives in the public procurement system in the Republic of Serbia. In view of this, this body's practice is of significance for the entire public procurement system, which is why the Republic Commission has responsibly contributed to the need to improve public procurement system in the Republic of Serbia in the coming period, by suggesting potential improvements of the regulatory framework on the basis of deficiencies identified in the practice so far. In front of the Republic Commission lies duty, after the adoption of the new Public Procurement Law and pursuant to its wording voted by the National Assembly of the Republic of Serbia, in its future practice and decisions to continue to lawfully and consistently exercise its special competences so to facilitate, under the scope of its competences, an effective review of conduct of contracting authorities in public procurement procedures in the Republic of Serbia, which has been also set out under the Remedies Directives as the targeted goal.

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