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Commission for conduction of procedure on award of public procurements in the fields of defence and security

Summary

The lawful award of public procurements in the fields of defence and security is one of the elements, building the general background for security in the country. In order to be lawfully conducted a certain procedure for public procurement award in the fields of defence and security, significant appear the composition and actions of the assisting body of the contracting authority – the commission on conduction of the procedure. The commission shall be appointed by the contracting authority, as its order shall not be subject of independent challenge. A small number of requirements concern its members and special legal provisions are envisaged about the chair of the commission. The decisions shall be taken by majority as if a member of the commission does not agree with the decision, he shall sign it with reservation, with arguments in written. In case of two-state and three-stage procedures shall be appointed only one commission.

Keywords: public procurements, commission, security

Upon award of public procurements, civil ones and in the fields of defence and security, significant for their lawfulness appear the composition and actions of the commission, appointed by the contracting authority for conduction of selection of the applicants and the participants, examination and evaluation of the bids and conduction of negotiations and dialogue [1], hereinafter referred to as commission for procedure conduction.

The commission shall be established by order of the contracting authority. This order shall be issued immediately before the beginning of work of the commission, after expiration of the term for submission of applications for participation in case of restricted procedure, competitive dialogue or procedure of negotiation. [5, 6, 8] In the cases of civil procurements, this moment shall be after expiration of the term for submission of bids.[3, 5, 6, 8] The order appears part of the procedure actions of the contracting authority, related to issuance of the final administrative act – the decision on classification of the participants and choice of contractor or decision for termination of procedure, therefore it shall not be subject of independent challenge. (Judgment No 6766 of 17.05.2013 under adm. case No 2638/2013 of the Supreme administrative court of Republic of Bulgaria, IV department).

According to art. 103, para 1 of the Public procurement act, the commission shall be composed by odd number of members, which means that in its composition participate at least three persons.

Regardless of the number of members, this is violation of imperative provision of the law, which shall lead to unlawfulness of the decisions, taken by the commission, hence to unlawfulness of the decision of the contracting authority for classification of the participants and choice of contractor. If the commission consists of less number of members from the number, envisaged in the normative act, this shall also lead to unlawfulness of the decisions, taken by it.

By the order of the contracting authority shall be determined:

1. the members by name and the person, determined as a chair;
2. the terms for implementation of the work;
3. place for storage of the documents, related to the public procurements, till completing the work by the commission.

Members of the commission can be officials from the administration of the contracting authority, but they can also be persons, who are not in labor or official relations with it, as it should be executed a written contract with them. By its legal nature the contract appears a service contract. [6, 7, 8]

The normative acts do not contain special requirements to the members of the commission, except the ban not to exist conflict of interests with the applicants or the participants. According to §2, i. 21 PPA, „Conflict of interests” exists when the contracting authority, its employees or persons, hired by it out of its structure,

who take participation in the preparation or award of the public procurements or (who) can influence the result of it, have an interest, which may lead to a benefit by virtue of art. 2, para 3 of the Conflict of interests prevention and ascertainment Act and for which it could be considered that has an influence over their detachment and independence in relation to the award of the public procurements. Upon award of public procurements, which contain or require classified information, members of the commission for implementation of selection of the applicants and the participants, review and evaluation of the bids and conduction of negotiations and dialogue may only be persons, who have (obtained) permission for access to classified information according to the requirements of the Classified information protection Act.

It strikes that the Public procurement act does not envisage requirements for professional competence for the members of the commission, in contrast to the former act, where according to art. 34, para 2 PPA, there was a requirement in the composition of the commission to mandatorily participate one lawyer and at least half of the other members to be persons, holding professional competence, related to the procurement subject. There was a legal definition of that term in §1, i. 22a from the Additional provisions of PPA: „*Professional competence*” appears the existence of knowledge, obtained through education or additional qualification, and/or skills, learned in the process of exercising certain position or position in pursuance of labor, official or civil relations“.

The effective Public procurement act abandoned that approach and it has granted to the contracting authority the opportunity to judge what persons to include in the composition of the commission, without being limited by imperative requirements, which provided the applicants and the participants unlimited freedom of challenge, insofar as in cases of particular procurements having specific subject the proving of professional competence was disputable.

The Public procurement act determines special rules for the chair of the commission. He shall:

1. convoke the sessions of the commission and determine schedule about its work;
2. inform the contracting authority about all circumstances, which impede the implementation of the assigned tasks within the set terms;
3. отговаря за правилното съхранение на the documents до предаването им за архивиране;
4. make proposals for replacement of members of the commission upon ascertained impossibility someone of them to exert his obligations.

The members of the commission shall be obliged:

1. to participate on the sessions of the commission;

2. personally to examine the documents, to participate in taking the decisions and to put evaluations on the bids;
3. to sign all protocols and reports related to the work of the commission.

The members of the commission shall provide the contracting authority with a declaration that regarding them there is no conflict of interests with the applicants or the participants after receipt of the list of them and at each stage of the procedure, when there is a change in the declared data.

Each member of the commission shall be obliged to make a recusal of himself when he finds out that:

1. for objective reasons he can't fulfill his obligations;
2. a conflict of interests has arisen.

In such case the contracting authority by order shall determine a new member. In case of ascertained conflict of interests, when a member of the commission has not made a recusal of himself, the contracting authority shall remove him by its own initiative and it shall determine a new member by an order. The actions of the removed member, related to examination of the applications for participation and/or the bids and (related) to evaluation of the bids of the participants, after the ascertained circumstances have occurred shall not be taken in account and shall be made by the new member.

The replacement of the member of the commission shall be made by order of the contracting authority upon proposal of the chair of the commission, when the respective member has no opportunity to fulfill his obligations.

In the theory and practice it is disputable the issue whether the contracting authority, by the order for appointment of the commission, can appoint alternate members and in case of need they to replace the titulars. In its decision K3K-326/30.03.2017 the commission for protection of competition considered that it is admissible for the contracting authority to appoint alternate members, who without explicit order can replace the members of the commission.

The opposite statement, which I support, is provided in Decision No K3K-286/23.03.2017. „Actually the explicitly determined rules for determination of the commission membership in the Public procurement act are exhausted with the requirement for odd number of members and the lack of conflict of interests on behalf of the members of the commission with the applicants or the participants. The institute of „Alternate members“, existing in PPA (rev.) is no more mandatory, therefore the contracting authority shall judge alone whether to appoint such members or not. If we support that thesis, we can really consider that the Public procurement act does not put limitations to the contracting authorities to envisage alternate members, including a chair too, which in case of need to join the work of the commission. The issue is actually what shall be the statute of the appointed alternate members and whether they appear part of the composition

of the commission, appointed with the initial order. The commission for protection of competition rather supports the thesis that though being listed in the initial order, the alternate members shall have no legal statute and they shall rather be persons, for whom the contracting authority has ascertained that they have the required qualification if needed to join the commission as members on examination the bids of the participants. Further on, the act envisages a particular order for change of the commission, membership, as it stipulates two hypotheses – self-recusal and removal (art. 51, para 9, i. 1 and i. 2 of the Rules on the implementation of the Public procurement act – RIPPA). The absence of the persons because of an annual leave can be considered as a rather objective impossibility for fulfillment of the obligations. The Public procurement act and the rules on its implementation do not provide clear definition what is „Objective reason“, because of which a member of the commission can't fulfill its obligations. Obviously the judgment is left with the contracting authority and it has to assess whether a certain reason for absence is objective or not and respectively – whether to undertake actions for a change in the membership of the commission. Insofar as in paragraph 9 of art. 51 of RIPPA is stipulated a „self-recusal“ and the act does not envisaged the exact form and way, on which this to be made, the factual going on leave on behalf of a member of the commission and the lack of objections for that ought to be considered as a „self-recusal“, which the contracting authority shall considered to have been made under objective reasons. In such case art. 51, para 4, i. 4 of RIPPA envisage the chair of the commission to make a proposal for replacement of a member of the commission, and the contracting authority to respectively determine by order a new member (art. 51, para 11 of RIPPA). The legislator has clearly defined in its imperative norm that it is required an explicit order for replacement of a member from the membership of the commission and such order has to be issued for each particular case. In support of the above statement appears also the interpretation of the Public procurement agency, where in „Practical guidance on implementation of the legislation in the field of the public procurements“, p. 188 is envisaged: „There is no stipulated opportunity in the order to be determined alternate members of the commission membership. At the same time, art. 51, para 9 RIPPA stipulates that when for objective reasons a particular member cannot implement his obligations, he shall be obliged to make a self-recusal and the contracting authority shall be obliged to determine a new member by an order. This new way for filling the membership of the commission in case of ascertained impossibility of its member to implement his obligations is envisaged also in art.51, para 4, i.4 RIPPA, where it is specified that in this hypothesis the chair shall make proposals for replacement of the respective commission member“.

Upon award of public procurements in the fields of defence and security, the commission for conduction of the procedure shall apply the general rules, appli-

cable also for the civil procurements. The commission and any of its members shall be independent in expressing opinions and taking decisions as in their actions they shall be guided only by the law. Each commission member shall be obliged to immediately report to the contracting authority the cases, in which he has been put under pressure to take illegal decision in favor of an applicant or participant.

The decisions of the commission shall be taken by majority of the members. Though it is not explicitly stipulated in the act, under interpretative way is reached the conclusion that all sessions, open and closed, have to be held by the commission with a full complement of members. This conclusion derives from the requirement for a minimum members' composition of the commission, and the obligation for determination of alternate members. It has to be noted that in the open procedure and in the two-stage and three-stage procedures, under which shall be awarded public procurements in the fields of defence and security – restricted procedure, competitive dialogue or negotiation with announcement, there shall be determined one commission, which has to conduct the whole procedure from beginning to end.[5, 6, 8]

In the cases when the decision of the contracting authority for classification of the applicants and choice of contractor has been challenged an the control bodies (the Commission for protection of competition or Supreme administrative court) have revoked it and have referred the case back to the contracting authority for continuance of the procedure from the last lawful actions, the work shall be continued by the initially appointed commission, because this shall be the same public procurement and the legislator has not stipulated determination of a new auxiliary body [5, 6, 8].

The actions of the commission shall be entered into a protocol as the commission shall end its work with a report. The report has to have minimum contents, determined by the law and it has to be signed by all members of the commission. The lack of signature from the commission member shall lead to unlawfulness of the decision of the contracting authority, issued on the grounds of that report. It could be examined also the opposite opinion that after the protocol is signed by the necessary number of members, required for taking decision, according to art. 103, para 4 of the Public procurement act, not-signing by one of the members shall lead to significant violation, which shall not result in a fault in the declaration of will of the collective auxiliary body. I consider the first understanding as being correct, insofar as the provision of art. 60, para 3 of the Rules on implementation of the Public procurement act is imperative and does not allow an expanded interpretation. If the report is not signed by the members of the commission, it may not have such probative force as the law envisages.

The report and the protocols of the commission are not independent object of control for lawfulness under objections of participant in the procedure on behalf of the contracting authority, because by its nature they appear proposals to

the contracting authority for taking a certain decision, but not decisions with final consequences as regards the affected parties.

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