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## **Security of the information and deliveries upon award of public procurements**

### **Summary**

The award of public procurements in the fields of defence and security to a great extent follows the general rules, applicable for public contracting authorities, as in view of the specific requirements of the subject of these procurements, some of these rules are in conformity with the requirements of the national security. The specificity of the public procurements in the fields of defence and security very often forces upon their award part of the information, which shall be provided to the participants, to be with a certain extent of classification and the deliveries have requirements for security.

**Keywords:** public procurements, classified information, security

## Classified information in cases of public procurements in the fields of defence and security

„Classified information“ by virtue of the Public procurement act is any information or material regardless of the form, nature or way of transmission, for which is determined a level of classification or protection and which in the interest of the national security and according to the legislative, sub-legislative and administrative provisions, effective in the respective member state, require protection against misuse, destruction, elimination, disclosure, loss or learning from unauthorized persons or any other kind of harm.

This legal definition comprises in it the definition, envisaged in the Protection of the classified information act, according to which classified information appear the information, which is state or official secret.

State secret is the information, determined in the list, which is annex to the Protection of the classified information act, the illegal access to which would cause risk for or would affect the interests of Republic of Bulgaria, related to the national security, defence, foreign policy or protection of the constitutionally established order. This list comprises three groups of information:

- I. group – Information, related to defence of the country
- II. group – Information, related to the foreign policy and internal security of the country
- III. group – Information, related to the economic security of the country

Official secret is the information, created or kept by the state authorities or the bodies of the local self-government, which is not a state secret, the illegal access to which would unfavorably affect the interests of the state or would do harm to other legally protected interest. The information, subject of classification as official secret, is determined by the law. The head of the respective organization unit within the frameworks of the law makes announcement in a list of the categories of information, due to qualification as official secret for the field of activity of the organization unit.

The levels of classification for security of the information and their marking for security are:

1. “Top secret” – in the cases, when illegal access would threaten to extremely high extent the sovereignty, independence and territorial wholeness of Republic of Bulgaria or its foreign policy and international relations, related to the national security, or (it) would create a risk of arising of fatal or extremely major damages, or it could cause such damages in the field of the national security, defence, foreign policy or the protection of the constitutionally established order;

2. "Secret" – in the cases, when illegal access would threaten to a high extent the sovereignty, independence and territorial wholeness of Republic of Bulgaria or its foreign policy and international relations, related to the national security, or (it) would create a risk of arising of hardly repairable or major damages, or it could cause such damages in the field of the national security, defence, foreign policy or the protection of the constitutionally established order;
3. „Confidential” – in the cases when illegal access would threaten the sovereignty, independence and territorial wholeness of Republic of Bulgaria or its foreign policy and international relations, related to the national security, or (it) would create a risk of arising of damages or it could cause such damages in the field of the national security, defence, foreign policy or the protection of the constitutionally established order.;
4. "For official use" – the information, classified as official secret.

The variety of the awarded public procurements draws the conclusion the at each procurement, awarded in the fields of defence and security it may arise a condition for provision of classified information to the applicants and participants in the course of the procedure as well as to the selected contractor upon the implementation of the public procurement contract. [4, 5]

The requirements, addressed to the applicants and participants (and the contractors), related to the protection of the classified information, can in no way be made in controversy with the principles for award of public procurements, envisaged in art. 2, para 2 PPA and in particular in controversy with the principle of publicity and transparency. The interests of the national and public security, the territorial wholeness, the prevention of disorders or crimes, the protection of health, moral, reputation or rights of the others, the prevention a secret information leakage and keeping the authority and objectivity of the justice are public values of a higher extent compared with the right to be obtained and spread information.

The requirement for the applicants and the participants to hold a certain level of access to classified information could restrict the participation of certain persons in the procedure. The principle of equality and non-admission of discrimination actually prohibits requirements to be imposed, which (to) unjustifiably restrict the participation in a certain procedure, but this does not mean, that the the contracting authority shall have no right to set conditions for participation, including specific ones, to the participants to hold particular qualification, capacity, certificate, license and others, when this is directly related and is required the subject of the procurement or it is required according to a special normative act. In such case these are justified. The contracting authority shall have the right to envisage further requirements to the participants in the procedure, insofar as these are not in controversy with the law, they appear in consistency with the

purpose of the public procurement and their aim is to guarantee its successful implementation.

Yet before the initiation of the procedure on award of public procurement in the fields „Defence” and „Security”, the contracting authority shall be obliged to take into account the motivated written opinion of the respective competent authority under the protection of the classified information act as regards the existence of classified information. [4]

In case of a positive answer the Contracting authorities shall specify in the announcement whether the public procurement shall contain or require classified information. Information of the announcement, the disclosure of which shall appear in controversy with a law, including in the field of the defence and security, may not be published in „Official Gazette” of the European union and the Public procurement register (PPR).

In such case in the documentation, which shall provide together with the invitation for participation, the contracting authority shall set to the participants and their subcontractors requirements in order to protect the classified information. As taking into consideration the principles of the new Public procurement act, which requires for the civil procurements to be submitted European single procurement document for public procurements also by the third parties, whose resource shall be used by the participant, it would be logic for protection of the classified information, requirements to be set to the third parties too.

Under these circumstances the contracting authority may:

1. require permission, certificate or confirmation for access to classified information by virtue of the Protection of the classified information act, including for the opportunity for processing, preservation and transmission of such information on the level of protection, required by the contracting authority;
2. to require submission of permission, certificate or confirmation for access to classified information by virtue of the Protection of the classified information act for the selected subcontractors (in my opinion also for the third parties, if the participant shall use their capacity and there is a possibility classified information to reach these third parties);
3. to include in the draft contract clauses, which shall oblige the contractor:
  - a) to submit the document under i. 2 also for the subcontractors, selected during the implementation of the procurement;
  - b) to keep the classified information, which became known to him in the course of the procedure, at the time of and after completion of the procedure implementation;
  - c) to envisage clauses under letter „b” for preservation of the classified information in the contracts with subcontractors, selected before or during the procurement implementation.

Upon provision of the technical specifications to the applicants or the participants in the procedures and upon execution of the contract for public procurement, the contracting authority may put requirements for protection of the information of a confidential nature or of classified information. The contracting authority may require by the applicants or the participants to guarantee the observance of these requirements by their subcontractors too. The applicants or the participants, including their subcontractors shall have no right to disclose such information.

The requirement for access to classified information shall be defined as a selection criterion. According to art. 158, para 2, i. 3 PPA, for proving the technical and/or professional capacities, the contracting authority may envisage further conditions and it may require from the applicants or the participants to submit permission, certificate or confirmation for access to classified information by virtue of the Protection of the classified information act, including for the capacity for processing, preservation and transmission of such information on the level of protection, required by the contracting authority – in cases of procurements, which contain or require classified information. The contracting authority may determine an additional term in the announcement, during which the persons, who do not hold permission, certificate or confirmation for access to classified information, to submit the respective document. Within the term for receipt of applications for participation the persons shall submit to the contracting authority written consent for conduction of procedure on investigation and shall enclose the required documents according to the Protection of the classified information act, which documents shall be sent from the contracting authority to the competent security service. This way the contracting authority shall hold an active position in the procedure on issuance of the respective document for access. When the contracting authority has defined such additional term, it shall wait the result from the investigation for access to classified information, as if necessary it shall be obliged to extend the additional term till completion of the investigation.

In cases of applicants and participants, who are foreign persons, the contracting authorities shall acknowledge the permissions for access to classified information, issued in accordance with the legislation of the member state, in which the applicant or the participant is incorporated, upon the existence of effective international treaty or bilateral agreement for the classified information protection, under which Republic of Bulgaria is a party. Under the conditions and order of the Protection of the classified information act, the contracting authority may require further investigations to be made in the respective member state. Under the same way it may require the national security authority in the state, in which the applicant is incorporated, to check the correspondence of the premises or the installations, which eventually would be used, the manufacturing or administrative pro-

cedures, which would be followed, the information management methods and/or the condition of the personnel, which could be hired for the implementation of the procurement.

Access to classified information with the relevant level should have the members of the commission of the contracting authority, for realization of the selection of the applicants and the participants, examination and evaluation of the bids and conduction of negotiations as well as the officials, who shall have access to the documentation for the public procurement and the bids. [1, 4, 7]

Not on the last place, upon challenge of procedure, under a process of award in the fields of defence and security, containing or requiring classified information, the appointed employees by the chair of the commission for protection of the competition by an order, who appear members of the commission for realization of investigation under the appeal, should hold permission for access to classified information to the respective level according to the requirements of the Protection of the classified information act. When the procurement shall contain or require classified information, the members of the commission for protection of the competition, who shall take participation in the procedure on examination of the case, should also have permission for access to classified information to the respective level according to the Protection of the classified information act.

Per argumentum of the stronger grounds, upon existence of a classified information, the contracting authority shall also apply the confidentiality measures, envisaged in the law. [4]

## Requirements for security of the deliveries

The requirements for security of the deliveries shall be specified by the contracting authority in the announcement for public procurement. In such case it may set requirements to the participants in the procedure and to the participant, chosen as a contractor.

To the participants in the procedure may be set requirements their bid to contain also:

- a) licenses or other appropriate documents, issued in the respective member state, by which is proven that the participant shall be able to fulfill his obligations in relation to the export, transfer or transit of goods, related to the procurement;
- b) specification of all restrictions, related to the disclosure, transfer or use of goods and services or the results of them, which arise from control of the export or from agreements in the field of defence;
- c) evidence that the organization and location of the chain for deliveries of the participant shall allow observance of these requirements as well as a declara-

tion that possible changes in the chain for deliveries during the implementation of the procurement shall not cause an adverse impact;

- d) any accompanying documentation, obtained by the national authorities of the participant as regards the implementation of additional needs, required by the contracting authority, arisen as a result of a crisis;

Requirements shall be set to the participant, chosen for a contractor, by inclusion into the draft contract of clauses, which shall oblige the participant:

- a) to establish and/or maintain the capacity, required for meeting additional needs, required by the contracting authority as a result of a crisis, in accordance with agreed conditions and order;
- b) to perform the maintenance, modernization or adjustment of the deliveries, which are comprised by the procurement;
- c) to immediately notify the contracting authority for any change, arisen in its organization, the chain for deliveries or the industrial strategy, which (change) may affect the implementation of the procurement;
- d) in case of termination of the manufacturing to provide the contracting authority with all special appurtenances, required for the production of spare parts, components, assembly elements and special testing equipment, including technical drawings, licenses and instruction for use, under conditions and order, agreed upon occurrence of the respective circumstance.

The contracting authority may not set to the participant requirements, which may cause controversies with the license criteria for export, transfer or transit of the respective member state.

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