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# Construction Procurement: A View from Europe

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## Abstract

This paper examines the main characteristics of construction procurement and analyses the country's case of Serbia. With particular reference to the new Law on Public Procurement in Serbia and the European Union Directive on Public Procurement (Directive 2014/24/EU), this article describes some features of construction procurement regarding bidding documents, requirements for participation in public procurement and public procurement procedures. Furthermore, for the purpose of this analysis, the common definitions of work and public works contracts are included, as well as some specific situations. In addition, it gives an overview of the relevant legislative provisions to be taken into account when procuring construction works. Afterward, the paper points out the complexity and importance of construction procurement as well as the need to reduce irregularities in procurement procedures. Finally, concluding remarks are included.

**Keywords:** Construction, Public Works Contract, Work, Public Procurement, Directive on Public Procurement

## 1. Introduction

The aim of this article is to give a review of construction procurement from the point of view of the European Union Directive on Public Procurement (Directive 2014/24/EU)<sup>1</sup> and national legislation on public procurement in Serbia, as a country case. The paper includes an examination based on the legislative framework in the European Union and Serbia, concerning construction procurement, with special emphasis on the provisions on technical specifications, requirements for participation in public procurement and public procurement procedures. It should be stressed that the harmonization of national legislation with the EU Directive in the field of public procurement is a strategic goal of public procurement development in Serbia.<sup>2</sup>

In Serbia, the area of public procurement is regulated by the new Law on Public Procurement (“Official Gazette of the Republic of Serbia,” no. 91/2019).

This Law regulates: the rules of the public procurement of supplies, services and works, as well as the procedure of protection of the rights in public procurement procedures, and other issues relevant to public procurement. Namely, the new Law on Public Procurement governs: scope of application, public procurement procedures and techniques, centralization, preparation for conducting public procurement procedures (including public

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<sup>1</sup> DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

<sup>2</sup> See: The Public Procurement Development Strategy in the Republic of Serbia for the period 2014-2018.

procurement plan), technical specifications, requirements for participation in public procurement and contract award criteria, the utility activities, the Public Procurement Portal, manner of recording data and delivering reports.

In addition, the Law contains nine annexes, including Annex 1: List of activities in construction (such as construction of buildings, civil engineering, construction of highways, roads, construction of water projects, and other construction works).

Furthermore, according to the new Law on Public Procurement, it is envisaged that certain provisions should be applied from the day of the accession of the Republic of Serbia to the European Union.

In general, there is a need for further harmonization with the Directives in the area of public procurement (namely, Directive 2014/24/EU and Directive 2014/25/EU<sup>3</sup>), and significant progress should be made from the point of view of public procurement regulatory and institutional framework, as well as practice.

## 2. Explanation of Terminology

In the context of this research, relevant definitions are applied according to the EU Directive on Public Procurement, which is as follows:

- Public contracts are “contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;”<sup>4</sup>
- public supply contracts are “public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products;”<sup>5</sup>
- public service contracts are “public contracts having as their object the provision of services other than those referred to in point 6;”<sup>6</sup> (*point 6 of Article 2 concerns public works contracts*)
- public works contracts are “public contracts having as their object one of the following:
  - (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;
  - (b) the execution, or both the design and execution, of a work;
  - (c) the realization, by whatever means, of a work corresponding to the requirements specified by the contracting authority, exercising a decisive influence on the type or design of the work;”<sup>7</sup>
- a work means “the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfill an economic or technical function;”<sup>8</sup>
- economic operator means “any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings which offers the execution of works and/or a work, the supply of products or the provision of services on the market;”<sup>9</sup>
- bidder (tenderer) means an economic operator that has submitted a bid (tender);
- candidate means “an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, in a competitive procedure with negotiation, in a negotiated procedure without prior publication, in a competitive dialogue or in an innovation partnership;”<sup>10</sup>
- procurement document means “any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents“.<sup>11</sup>

<sup>3</sup> DIRECTIVE 2014/25/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

<sup>4</sup> Directive 2014/24/EU Art.2 (5)

<sup>5</sup> Directive 2014/24/EU Art.2 (8)

<sup>6</sup> Directive 2014/24/EU Art.2 (9)

<sup>7</sup> Directive 2014/24/EU Art.2 (6)

<sup>8</sup> Directive 2014/24/EU Art.2 (7)

<sup>9</sup> Directive 2014/24/EU Art.2 (10)

<sup>10</sup> Directive 2014/24/EU Art.2 (12)

<sup>11</sup> Directive 2014/24/EU Art.2 (13)

In addition, some more useful terminology explanations about public procurement are included,<sup>12</sup> such as the following:

- Utility activities are economic activities in the areas of water, energy, transport and postal services.
- Public procurement by lots is procurement whose subject is subdivided into several separate units of the same kind, and which is designated as such in the call for competition and bidding documents.
- Common Procurement Vocabulary is the reference classification system for subjects of public procurement, applicable to public procurement contracts, which simultaneously ensures conformity with other existing classifications.
- The life cycle means all consecutive and/or interlinked stages, including necessary research and development, production, trading and conditions of trading, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilization.
- Life cycle costing shall, to the extent relevant, cover parts or all of the following costs over the life cycle of a product, service or works:
  - costs borne by the contracting authority or other users, such as: costs of acquisition; costs of use, such as consumption of energy and other resources; maintenance costs; end of life cycle costs, such as collection and recycling costs;
  - costs imputed to external environmental factors linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified, and which may include the cost of emissions of greenhouse gases and of other pollutant emissions, as well as other climate change mitigation costs.

### 3. Bidding Documents

Bidding documents specify the detailed rules to be applied in the bidding. It should be noted that the term “tender documents” used by FIDIC<sup>13</sup> and “bidding documents” used by the International Bank for Reconstruction and Development<sup>14</sup> have the same meaning.

The International Federation of Consulting Engineers (FIDIC)<sup>15</sup> was founded in 1913 in Belgium. FIDIC adopted the first General Conditions for the Execution of Construction Works in 1957, and it adopted the General Conditions for the Relationships between the Contracting Authority and Consulting Engineer in 1963.<sup>16</sup>

In Serbia, as a country's case, the Rulebook on the Content of Tender Documentation in Public Procurement Procedures regulates in more detail the content of the tender documentation prepared by the contracting authority in the public procurement procedure.<sup>17</sup>

According to this Rulebook, the tender documentation in an open procedure depending on the nature of the subject-matter of procurement, contains: general information on the subject-matter of procurement (including a description of each lot, if the subject of the public procurement is formed by lots); type, technical characteristics (specifications), quality, quantity and description of goods, works or services, manner of control and provision of quality guarantee, deadline for execution, place of execution or delivery of goods, possible additional services; technical documentation and plans; criteria for qualitative selection of the business entity (grounds for exclusion and criteria for selection of the business entity), with instructions on how to prove the fulfilment of these criteria; data related to the contract award criteria (if the life-cycle cost is used, the data to be provided by tenderers and the method used by the contracting authority on the basis of that data to determine the life-cycle costs); data on the basis of which the bidders prepare the bid form; data on the basis of which the bidders prepare the form of

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<sup>12</sup> See: Joković, S. (2022). “Bidding to win-Detailed explanations” in *WINNING PUBLIC PROCUREMENT CONTRACTS IN SERBIA MANUAL – SECOND UPDATED EDITION*

<sup>13</sup> FIDIC.(1987). *Conditions of Contract for Works of Civil Engineering Construction*

<sup>14</sup> World Bank.(1996). *Guidelines - Procurement under IBRD Loans and IDA Credits*

<sup>15</sup> acronym of Fédération Internationale des ingénieurs - Conseils, fr.

<sup>16</sup>Vukmir, B. (1980). *Works contracts - International / Ugovori o izvođenju investicijskih radova – međunarodni*. Centar za informacije i publicitet, p. 43.

<sup>17</sup>Rulebook on the Content of Tender Documentation in Public Procurement Procedures (“Official Gazette of RS”, No 21/2021)

the statement on fulfilment of the criteria for qualitative selection of the business entity; forms of documents that are an integral part of the offer (including structure of the offered price); contract model; instructions to bidders on how to prepare a bid, etc.<sup>18</sup>

Concerning construction procurement, specifications usually define the materials and labor that are required for works execution. Because they do not include information regarding cost, quantity, or materialization (drawings), they have to be read in conjunction with the Bill of Quantities, Schedules, and Drawings. Since specifications provide basic requirements, they are produced in the first place. Therefore, they have the highest contractual priority among the above-mentioned documents.<sup>19</sup>

From the above definition of works (see: Section 2. Explanation of Terminology) derives their complexity and specific characteristics. The works include all activities related to the construction of a facility, so that the significant characteristics are especially concerning:

- great diversity of facilities and the works themselves, so that we can talk about each building as unique, even when two or more facilities are built on the same project, but on different locations - we can not talk about the same facility due to different, as field and climatic conditions, as well as conditions for the execution of works;
- individual production which in most cases is realized for a known customer (by order);
- the large volume and value of buildings that are long-lasting and have very different purposes, as well as the long-term performance of the work, all of which contribute to the extreme susceptibility to the effects of market trends;
- a large number of participants of different professions and occupations in the construction of the facility and its complexity, as well as the complexity of technological processes and coordination of work;
- significant differences in the organization and dynamics of work processes (and material and technical supply of construction sites) depending on the type of work (housing, industrial facilities, roads, bridges, tunnels, energy facilities, etc.);
- due to the exceptional complexity, scope, and long-term performance of obligations under the construction contract and the conditions in which the work is performed, various risks are associated with these activities (commercial, non-commercial);
- significant climatic, cultural and other differences in the area in which the works are performed, which lead to different working and living conditions on the construction sites.

Specifics and characteristics of the work indicate exceptional diversity and complexity in technical-technological, commercial, financial and organizational terms compared to other activities.<sup>20</sup>

#### **4. Requirements for Participation in Public Procurement<sup>21</sup>**

The criteria for selection of the economic operator in a public procurement procedure may relate to the following: fulfillment of conditions to perform the professional activity, as well as economic, financial, technical and professional capacities.

When determining the selection criteria, contracting authorities may only require a level of capacities that will ensure that an economic operator is capable of performing the public procurement contract.

According to the Law on Public Procurement in Serbia, as a rule, the bidder shall prove fulfillment of requirements for participation in public procurement procedures concerning economic, financial, technical and professional capacities by supplying corresponding evidence, such as:

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<sup>18</sup> Ibid Art. 2

<sup>19</sup> <https://construction-claim.com/sr/specifikacija-fidic/>

<sup>20</sup> Joković, S. (2010). *International market of capital projects and economic development*. Institute for Business Research MBA. p. 19-20.

<sup>21</sup> See: Joković, S. (2022). "Choice of participants" in *WINNING PUBLIC PROCUREMENT CONTRACTS IN SERBIA MANUAL- SECOND UPDATED EDITION*

- appropriate bank statements; financial statements or extracts from financial statements; report of the bidder's overall income and, if necessary, of the income of supplies, services or works covered by the public procurement contract, for the last three financial years;
- one or more of the following evidences:
  - a list of the works performed, accompanied by certificates of satisfactory execution and outcome for the most important works; a list of goods delivered or services provided, with the sums, dates and names of recipients; over at the most the past five years for works, or three years for goods and services;
  - an indication of the key technical staff or technical bodies involved, who will be responsible for quality control;
  - a description of the bidder's technical equipment, quality assurance measures, and research and development capacity;
  - the educational and professional qualifications of the service provider or contractor or of its managerial staff, provided that such qualifications are not evaluated as a contract award criterion;
  - an indication of the supply chain management and tracking systems that the bidder will be able to apply when performing the contract;
  - a declaration of the bidder on accepting the quality control to be performed by contracting authority or authorized body in the country in which the bidder is established;
  - an indication of the environmental protection management measures that the bidder will be able to apply when performing the contract;
  - a statement of the average annual number of employees of the service provider or contractor, and the number of managerial staff for the last three years;
  - a statement of the tools, plant or technical equipment available to the service provider or contractor for the performance of the contract;
  - an indication of the proportion of the contract which the bidder intends to subcontract where the relevant criterion for qualitative selection is proved by relying on the subcontractor's capacity;
  - with regard to the products which are the subject-matter of public procurement: samples, descriptions or photographs of products; certificates drawn up by the official quality control institutes or agencies of recognized competence, attesting the conformity of products clearly identified by references to technical specifications or standards.<sup>22</sup>

It should be noted that bidder which intends to subcontract a share of public procurement contract to subcontractor, in its bid shall indicate:

- which share of the contract it intends to subcontract (by subject-matter or in terms of quantity, value, or percentage),
- information about subcontractors,
- that the payment will be made directly to the subcontractor for the part of the contract it has executed, where the subcontractor requests that direct payments of due claims are made directly to it.<sup>23</sup>

Where the bidder has subcontracted a share of the public procurement contract to a subcontractor, the above information shall be included in the public procurement contract. In any case, the bidder is fully responsible to the contracting authorities for the execution of contractual obligations, regardless of the participation of subcontractors.

It is not necessary to have a local partner to win a public procurement contract in Serbia. Competition in public procurement procedures is open to any company or natural person from all countries. There are no additional requirements concerning the eligibility of foreign subjects as compared to those applying to national bidders.

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<sup>22</sup> Public Procurement Law, Art. 123-124

<sup>23</sup> Public Procurement Law, Art. 131

Pursuant to the European Union Directive on public procurement, as a general rule, proof of the economic operator's economic and financial standing, as well as technical ability may be provided by one or more of the means listed in Annex XII.<sup>24</sup>

Moreover, the contracting authority shall determine the criteria for the selection of an economic operator, bearing in mind the subject-matter of public procurement.

## 5. Public Procurement Procedures

When awarding public contracts, contracting authorities in the European Union shall apply the national procedures adjusted to be in conformity with the Directive 2014/24/EU on public procurement. According to this Directive, public procurement procedures are as follows:

- 1) open procedure;
- 2) restricted procedure;
- 3) competitive procedure with negotiation;
- 4) competitive dialogue;
- 5) innovation partnership;
- 6) negotiated procedure without prior publication.<sup>25</sup>

“There is a great need for contracting authorities to have additional flexibility to choose a procurement procedure, which provides for negotiations. Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. It should be recalled that use of the competitive dialogue has significantly increased in terms of contract values over the past years. It has shown itself to be of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing.”<sup>26</sup>

In Serbia, according to the Public Procurement Law, a public procurement contract is awarded in an open procedure or in a restrictive procedure as a rule. However, the public procurement contract may also be awarded in certain other, above mentioned procedures, provided that the requirements prescribed by this Law are met.

Pursuant to this Law, the contracting authority shall ensure that goods, services or works procured in public procurement are adequate by quality, value, purpose and intended use. Furthermore, the contracting authority shall ensure that the public procurement procedure is conducted and contracts are awarded within time limits and with minimum costs spent in conducting public procurement and implementing the contract.

Regarding the principle of ensuring competition, contracting authorities may not limit competition or prevent any bidder from participating in public procurement by unjustified use of the negotiated procedure or by using discriminatory requirements, technical specifications and criteria. In addition, contracting authorities shall set requirements for participation in the procedure in such a way that does not discriminate bidders and does logically relate to the subject-matter of public procurement.

Concerning the principle of proportionality, contracting authorities shall conduct public procurement in a manner proportionate to the subject-matter of public procurement and the objectives to be achieved. Moreover, criteria for qualitative selection of economic operators in public procurement procedures, technical specifications, contract award criteria and deadlines, as well as evidence, must be proportionate to the size, nature and complexity of a given public procurement and the resulting contract.

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<sup>24</sup> See: Directive 2014/24/EU, Annex XII MEANS OF PROOF OF SELECTION CRITERIA

<sup>25</sup> See: Directive 2014/24/EU, Art. 26-32

<sup>26</sup> Directive 2014/24/EU, recital (42) in the preamble

## 6. Concluding Remarks

The diversity and complexity of construction activities have an impact on the complexity and specific characteristics of construction procurement. Construction activities are listed in Annex II of the European Union Directive on Public Procurement (Directive 2014/24/EU).

Accordingly, construction covers the following: construction of new buildings and works, restoring and common repairs; site preparation; building of complete constructions or parts thereof; civil engineering; general construction of buildings and civil engineering works (including bridges, long-distance pipelines, communication and power lines, urban pipelines, urban communication and power lines, architectural and engineering activities, project management for construction); construction of highways, roads, airfields and sport facilities; construction of water projects, building installation, building completion, etc.

Specific characteristics of construction procurement can be pointed out concerning bidding documents, requirements for participation in public procurement and conducting public procurement procedures. As a general rule, contracting authorities apply open or restricted procedures. In specific cases and circumstances, contracting authorities may award public contracts by a negotiated procedure without prior publication. In the case of innovative projects, the implementation of major integrated transport infrastructure projects, as well as projects involving complex and structured financing, contractors may apply a competitive procedure with negotiation or a competitive dialogue.

When it comes to Serbia, the strategic objectives of public procurement reform include complete harmonization of the Serbian legislation with the EU *acquis* in the field of public procurement and its effective implementation in practice. Activities in the process of harmonisation with the *acquis communautaires* should be focused on specific issues such as: e-procurement; public procurement in the fields of water management, energy, transport and postal services, as well as public procurement in the field of defence and security.

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