Croatia: New modernised public procurement rules will enter into force on 1 January 2017

(Full) transposition of EU procurement package

On 9 December 2016, the Croatian Parliament adopted the eagerly awaited new Public Procurement Act (Zakon o javnoj nabavi; “PPA”) which enters into force on 1 January 2017. The PPA implements the new public procurement specific directives (2014/24/EU and 2014/25/EU) and brings about a number of significant changes to the Croatian public procurement legal framework.

All public procurement procedures launched as of 1 January 2017 are subject to the new PPA. Given the fact that the newly adopted law has been published in the Official Gazette only on 21 December 2016, both the contracting authorities and bidders have been given an extremely limited period of time in order to prepare for its application in practice.

What’s new under Croatia’s public procurement legal reform?

The current Croatian public procurement legal framework, as lastly amended in 2013, has already incorporated some of the new EU procurement rules. In particular, these relate to the electronic bid submission (fully mandatory as of 1 January 2016 for tenders above the EU thresholds, and as of 1 July 2016 for tenders below the EU thresholds), rules on in-house exemptions, rules and exemptions related to modifications of existing contracts, the possibility of providing clarification and supplementation of the relevant documentation to be submitted by economic operators, etc.

However, in order to ensure the full and effective transposition of the EU procurement rules, the new PPA provides for further comprehensive reform. The most important amendments include:

- **The most economically advantageous tender (“MEAT”) as the sole award criterion.** Although the old rules provided a choice between using MEAT or the lowest price award criterion, contracting authorities tend to base the awarding of contracts on the lowest price, in practice overwhelmingly in 98% of cases. With the amendment, the quality should become an important orientation in public procurement. This means that as of 1 July 2017, contracting authorities may not use price only or cost only as the sole award criterion. In such a case, the relative weights for price or cost cannot exceed 90% (except in cases of the negotiated procedure without prior publication, the awarding of the contract is based on a framework agreement or in the case of procurement involving defence and security aspects, etc.).

- **Introduction of the European Single Procurement Document (ESPD)** as a self-declaration form for bidders. The ESPD shall replace the various documents and certificates used to date to substantiate whether a bidder had met the exclusion and selection criteria. Only the preferred bidder needs to submit all or a selection of the accompanying documentation. This shall increase the efficiency of public procurement procedures and make it easier for companies to participate in public tenders. The law provides for the electronic submission of the ESPD to be applicable as of 18 April 2018.
Introduction of an obligation for contracting authorities to conduct prior market consultations with the interested economic operators on the draft procurement documents, in particular with respect to the subject matter of the tender, technical specifications, criteria for qualitative selection, contract award criteria and special conditions relating to the performance of a contract. Before launching an open or restricted procurement procedure for public works contracts or public service contracts above the EU thresholds, contracting authorities must conduct such market consultations for a minimum period of five days. Thereafter, a report on all the comments and proposals received and accepted shall be prepared by the contracting authority and published on its website. With this approach, the Croatian legislator aims to ensure clear and unbiased tender documents and equal treatment of bidders. Yet in practice, this is expected to prolong the duration of the procurement procedures.

Introduction of new types of procurement procedures - in particular, innovation partnerships, a competitive procedure with negotiation procedure - and rules with regard to particular procurement regimes (e.g., awarding of contracts for social and other specific services).

Revised rules for financial guarantees required from economic operators. The new law prohibits a contracting authority to request from economic operators a cash deposit as the only type of guarantee. Furthermore, the tender guarantee must not exceed 3% (instead of the current limit of 5%) of the estimated tender value. The PPA explicitly stipulates that the performance guarantee must not exceed 10% of the value of the contract (excl. VAT).

In contrast to the current law, the PPA introduces the single time limits for lodging an appeal with the State Commission for Supervision of Public Procurement Procedures (Državna komisija za kontrolu postupaka javne nabave; "DKOM"). The new law no longer makes a distinction between high value and low value contracts. In principle, depending on the stage reached in the procurement procedure, the appeal must be lodged within the single deadline period of 10 days.

Introduction of a fixed fee for lodging an appeal against the procurement documents in the amount of HRK 5,000 (approx EUR 670) and elimination of the administrative fee (stamp duty).

The High Administrative Court of the Republic of Croatia (Visoki upravni sud Republike Hrvatske) as the first and last instance court became competent to rule on actions brought against decisions taken by DKOM in appeal proceedings.

Revised rules and exemptions for modifications of the contract during its term. Contracts and framework agreements may be modified without a new procurement procedure given that specific conditions provided under the law have been fulfilled. Unlike under the EU rules, the PPA provides that any increase in price shall not exceed 30% of the value of the original contract or framework agreement. Where several successive modifications have been made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

Final remarks
At first glance, the new PPA is far more comprehensive and complex than the previous law. It includes around 452 provisions, which is more than double in comparison with the old law. The full and effective application of the new law is also dependent on its implementation of by-laws, which still remain to be adopted in the next six months, mostly by 1 July 2017.

Against this background, the question arises whether the Croatian legislator has managed to ensure that the new procurement rules are simplified and made more business friendly as this remains one of the main aims of the EU public procurement reform. Hence, it remains to be seen how the new law will be enforced in practice.