

BACKGROUND NOTE

on problems identified in the public works procurement process and summary of recommendations and solutions following meeting No 1 of 19.12.2023

Public works procurement is one of the most complex public procurement procedures. Below are a number of problems identified by most participants in public works procurement:

Issue 1 - The use of costing standards for the preparation of both, cost estimates prepared by design firms for contracting authorities, and cost estimates submitted by economic operators as part of their technical and financial offers.

Rationale: In the [Catalogue of Building Regulations for the year 2023](#) issued by the Ministry of Infrastructure and Regional Development several building regulations and codes of practice are presented. These are used by both design firms and economic operators, in particular compartment **L - Construction Economics**. According to the same catalogue, when drawing up cost estimates, both contracting authorities and economic operators are guided by a set of practical building codes. The most frequently used are:

1. NCM L.01.01-2012 Rules for determining the value of construction works.
2. CP L.01.01-2012 Instructions for the preparation of cost estimates for construction assembly works using the resource method¹.

Use of cost estimate rules/standards that are out of date and/or have not been updated. Outdated cost estimate standards/rules result in frequent submission of procurement complaints to the National Agency for the Settlement of Disputes (ANSC) by economic operators, who allege incorrect use of costing rules/standards.

Solution: Draw up a list of outdated costing standards/rules and submit it to the Technical Committees/Ministry of Infrastructure and Regional Development

¹ In a market economy, when value factors are extremely unstable, the determination of the estimated value of an investment is established on the basis of resource indices highlighted in the design and estimate documentation: materials, labor, construction and assembly equipment and market prices of these resources. Such an acquisition is called the resource method, it makes it possible to determine with great accuracy, at any date, the value of works based on current prices of material, energy and manual resources. This method is used for construction, assembly, special construction, adjustment-start-up, repair (capital and current repairs of buildings and structures) and restoration works (hereinafter - construction and assembly works).

During the National Platform for Public Procurement (NPPP) meeting, the Ministry of Infrastructure and Regional Development (MIRD) representative specified that the solution to the problems related to the cost estimate rules/standards is to draw up a centralized list of costing rules/standards and send it to the Technical Committees. During the same meeting, another proposal was formulated to make the standards used to draw up a cost estimate more flexible, letting manufacturers/suppliers of building materials develop their own quotation standards/rules depending on the construction material produced/supplied.

Issue 2 - Demonstrating similar experience in procurement procedures.

This is a key requirement in the evaluation of tenders for public works contracts. Nevertheless, establishing whether bidders meet this requirement is not always straight forward. For example, a frequently encountered case is the presentation of the works completion report with the conclusion/opinion of the National Inspectorate for Technical Supervision (INST). The issue is whether it should be mandatory to submit the minutes with the insertion of the INST Conclusion/opinion.

Solution: The National Agency for the Settlement of Complaints (ANSC) pronounced itself on this issue in its decisions.

The ANSC representative stated that this case has been examined in the decisions issued which resolved to treat this issue uniformly, by not requiring the INST stamp on the works completion report under the current legislation.

Concerning what constitutes “similar work”, it was proposed to include this case in an instruction on public works contracts.

Issue No. 3 – Inclusion of third-party supporter in a bid.

Given that the submission of bids including a third-party supporter is a fairly recent change, to date there is no mechanism/guidance on the correct way to submit bids with the help of a third-party supporter.²

Solution: the National Agency for the Settlement of Complaints has pronounced itself on this issue in its decisions.

The ANSC representative stated that this case was examined and resolved by ANSC’s Decision No 342/2022 which stated that this issue should be treated in a uniform way.

² . According to the law, a bidder has the right to bid in any form provided in the law. Having a third-party supporter, providing technical and/or financial support is one of these forms. As part of the bid the third-party supporter has to provide a formal commitment of its support. If the tenderer is awarded the contract, both the tenderer and the third-party supporter will be jointly and severally liable for the performance of the contract.

Issue 4 - Minimum weighting of the price element as an award criterion to obtain the best ratio price/quality.

According to art. 26 of LP 131/2015 the minimum mandatory weight for price as a public procurement contract award criterion is 80%. Consequently, the application of the award criterion best value for money is quite complex, as the weight of price is quite significant and the quality-related evaluation factors are only 20%.

Solution: Examination of the appropriateness of amending Art. 26, para. (12) of LP 131/2015

During the meeting, participants discussed the possibility of changing the 80% weight for price by introducing an amendment to the national legislation to increase the weight of quality.

Problem No 5 - Lack of methodological rules for public works procurement

In the procurement process there are several rather narrow cases, which make it difficult to run the procurement procedure from the drafting of tender documentation to evaluation and contract award. Below are some of the most relevant ones:

1. Lack of a clear definition of the validity period of public works contracts.
2. The difference between the performance guarantee and the post-acceptance guarantee.
3. The issue of pluriannual contracts in light of Art. 74 of LP 131/2015.
4. Classification of types of works (e.g. civil works/linear works).
5. How to amend works procurement contracts, including excluded works and included/additional works.
6. How to demonstrate similar experience in different fields.
7. Timeliness of implementing FIDIC contracts in national legislation.

Solution: Develop a methodological guide/instruction on public procurement of works

At the meeting it was proposed to split the issues into two parts. A normative part to be addressed in national legislation and a technical part to be addressed in a binding public works procurement procedures guide for contracting authorities/economic operators.