

Chapter 5: Public procurement

The *acquis* on public procurement is based on the general principles deriving from the Treaties and from the jurisprudence of the European Court of Justice such as transparency, equal treatment, free competition and non-discrimination. These principles apply to all procurement procedures including those falling outside the scope of the EU procurement directives for example in view of their value (procurement below the EU thresholds) or subject matter (service concessions, Public private partnerships - PPP).

The award of public contracts (public works, public supply and public service contracts) is coordinated by two specific directives: Directive 2004/18/EC regarding the so-called "traditional contracting authorities" (the "classical sector") and Directive 2004/17/EC concerning the authorities and entities operating in the fields of water, energy, transport and postal services (the "utilities sector"). In addition, Directive 2009/81/EC stipulates coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the field of defence and security.

The respective scope of application of the directives is defined in terms of the contracting authorities/entities and contracts covered, application thresholds and specific exclusions. Within this framework, specific requirements are laid down to guarantee full respect of the general principles in the course of the procurement process. In particular, specifications and contract documents, different types of procurement procedures, advertising and transparency, as well as the conduct of the procedure including qualitative selection and contract award are regulated. Specific requirements apply to design contests and - in the "classical sector" – for public works concessions as well.

The directives also provide a framework introduced in 2004 for electronic procurement including electronic means of communication, dynamic purchasing systems and electronic auctions. The rules on the contracts covered and on advertising are complemented by separate regulations on the Common Procurement Vocabulary (CPV) and on standard forms for publication.

Compliance with the procurement directives requires an adequate implementation capacity. In particular, there is need for appropriate administrative structures at central level to ensure the key functions of policy-making, drafting of primary and secondary legislation, provision of operational tools, help-desk, monitoring and statistics as well as controls in a coherent manner for all areas related to public procurement. Moreover, main purchasers at all levels have to possess the necessary administrative capacities to allow for an effective implementation of the procurement rules.

The effective application and enforcement of EU legislation depends on the existence of an appropriate administrative and judicial system. The procurement *acquis* entails two directives on remedies: Directive 89/665/EEC regarding the "classical sector" and Directive 92/13/EEC concerning the "utilities sector", recently modified by Directive 2007/66/EC. The remedies directives contain requirements for the establishment of effective review procedures against any action or inaction of contracting authorities/entities liable to produce legal effects in tenders covered by the directives. The procedures need to guarantee access to independent review, including the powers to adopt interim measures

and award damages. Review bodies have to be equipped with the adequate capacity to guarantee the effectiveness of the system as a whole. Furthermore, in line with the principle of judicial protection deriving from the Treaties, the availability of remedies is also required outside the scope of application of the directives.

The Stabilisation and Association Agreement already lays down specific obligations in the areas covered by this Chapter. When answering the questions below, please make reference to the state of implementation of such obligations.

I General principles

1. How does the Serbian regulatory framework incorporate the general Treaties' principles of transparency, equal treatment, free competition and non-discrimination?

The Law on Public Procurement (*Official Gazette of RS* No. 118/08) (hereinafter: the Law) does incorporate the general Treaties' principles of transparency, equal treatment, free competition and non-discrimination, and they are defined in the following manner:

The principle of transparency of any public procedure implies that public procurement procedures must be open, which is provided for by publishing a call for the selection of the most advantageous bid in the *Official Gazette of the Republic of Serbia* and by posting it on the web-page of the administrative authority competent for public procurement – the Public Procurement Office (hereinafter: the Office) or on the Public Procurement Portal, in the manner prescribed by the Law. As well, contracting authorities may publish on the Public Procurement Portal notices of public procurements for low-value contracts. If value of any procurement exceeds 150,000,000 dinars for goods and services or if it exceeds 300,000,000 dinars for work assignments, public procurement notices shall be published as well in the language that is commonly used in international trade. In the same manner, notices of concluded public contracts as well as notices of termination of public procurement procedures, notwithstanding their values, shall be published in the *Official Gazette of the Republic of Serbia* and posted on the Public Procurement Portal. While bids are being opened, persons participating in public procurement procedures are entitled to examine information from the bids that is being entered in the minutes of the opening of bids. Under this Law, any bidder who has taken part in a public procurement procedure is entitled to examine and receive information concerning the conducted procedures of public procurement, after rendering decisions on the recognition of qualification in the restricted procedure, on the termination of the procedure and on the selection of the most advantageous bid.

The principle of facilitating competition among bidders, which means that any contracting authority is obliged to take all the necessary measures to provide for competition among potential bidders in accordance with the law. Contracting authorities may not restrict competition among bidders; in particular, they are not allowed to prevent any bidder from participating in a public procurement procedure by way of unjustified employment of negotiated procurement procedure or by applying discriminatory requirements and criteria. Entities which produced tender documents or individual parts thereof may not appear as bidders or sub-contractors nor may they cooperate with bidders in the process of bid preparation. Therefore, the principle of competition implies that contracting authorities are under obligation to facilitate competition among potential bidders by publicly announcing and publishing calls for the collection of applications/bids in accordance with the Law and to provide for collecting of no less than three bids in instances of public procurements for low-value contracts. However, competitiveness does not suggest that contracting authorities are obliged to ensure that there are at least two correct bids which would be compared and evaluated in each public procurement procedure. The reason for this is that competitiveness is provided by the very publication of an open call, whereby all potentially interested bidders are given the right to take part in the procedure of public procurement subject to the open call. The restricted public procurement procedure stands for an exception, in which the legislator has envisaged that the principle of competition shall be adhered to by providing a list of at least three qualified bidders. For reasons mentioned above, the legislator has envisaged that contracting authorities may not restrict competition among

bidders, in particular when they achieve it by unjustified employment of the negotiated procedure or by applying biased requirements and criteria. In order to implement this principle, the legislator has provided for stringent requirements that must be met in order for a contracting authority to gain the right of employing the negotiated procedure for public procurement. In addition, the contracting authority may not apply criteria that are biased. The Law expressly prohibits the use of any trademark, patent, type or manufacturer in technical specifications, but there is an exception to this as well, when such references may not be avoided. In such instances, when a contracting authority is not able to give in its tender documents a description of the contract's subject matter using technical specifications that are sufficiently intelligible to bidders, the citing of elements such as trademarks, patents, types or manufacturers must be accompanied by the words "or the equivalent thereof". In order for competition among the bidders to be achieved, entities which produced tender documents or individual parts thereof may not appear as bidders or sub-contractors nor may they cooperate with bidders in the process of preparation of their bids because in such a way they would find themselves caught in a conflict of interests and would seriously compromise the equality and equal treatment of bidders.

The principle of equality of bidders, according to which contracting authorities must ensure that all bidders are put in the same position throughout all the stages of public procurement procedure. Conditions for participating in a public procurement procedure are the same for all the bidders, without regard to them being private or legal persons and notwithstanding the registered addresses of bidders (domestic or foreign), considering that all the bidders are equally treated in respect of exercising their rights in the public procurement procedure. This principle is binding upon the contracting authority so that it may not supply any of the bidders with information that it has not disclosed to other bidders, both during the stage in which it prepared an open call and tender documents and throughout the very procedure of public procurement, call for bids, public opening of bids, review, evaluation and comparing of bids and rendering a decision on the selection of the most advantageous bid or on the termination of the procurement procedure. In these terms, the principle of equality comes very close to the principle of transparency. This principle stands for the equality in the broadest sense of the word, i.e. it prohibits discriminating against bidders based on the territory of their origin, subject matter or their person as well as discrimination that would be the consequence of the category to which bidder's primary activity belongs.

It would be important to mention as well other principles contained in the Law, such as *the principle of economic and efficient use of public funds*, according to which contracting authorities are obliged to ensure that public procurement procedures are conducted and the selection of the most advantageous bid is made within the time limits and in the manner prescribed by the Law, with minimum costs incurred in the effecting of public procurement. Consequently, according to this principle any contracting authority shall ensure that using public funds in any public procurement procedure and selection of the most advantageous bids is done in an economic and reasonable manner, from which it can be deduced that all the other principles serve directly to the furtherance of this principle.

II Award of public contracts

Legislation

- 2. Please provide us with definitions of public contract and the contracting authority/entity, following your procurement legislation.**

Under the Law, **any public procurement** means the procurement of goods and services or the awarding of work assignments by any government body, organisation, institution or any other legal entity which, for the purpose of the Law, is considered a contracting authority, in the manner and under conditions prescribed by this Law. **A public contract** is a binding contract, concluded in writing between the contracting authority and a bidder pursuant to a conducted public procurement procedure, the subject matter of which is procurement of goods, rendering of services or performance of work assignments. A draft of contract – a model contract must form an integral part of tender documents so that all potential bidders can become familiar with the rights and obligations of contractual parties that arise from the specific public procurement procedure. Under legislation of the Republic of Serbia, provisions regulating contractual and obligation relations govern contractual relations between parties to any contract (Law on Contracts and Obligations). The Law on Public Procurement regulates public procurement procedures prior to the selection of the most advantageous bid, at which moment the Law on Public Procurement is no longer applied, id est, from the moment a decision on the selection of the most advantageous bid is final and legally binding, the Law on Contracts and Obligations starts to apply. **A bidder** is any domestic or foreign legal entity or natural person that offers to supply goods, render services or perform work assignments.

Under this Law, the procurement of goods and services and awarding of work assignments shall be conducted by **a contracting authority**, which may be:

- 1) a government body, an organisation, institution and any other direct or indirect budget beneficiary within the meaning of the law regulating the budget system and the budget itself, as well as a compulsory social insurance organisation;
- 2) any public undertaking;
- 3) any legal entity which is also engaged in an activity of common interest, provided that any of the following conditions has been met:
 - (1) more than half members of that legal entity's managing body are representatives of the contracting authority;
 - (2) representatives of the contracting authority have more than half the votes in the body of that legal entity;
 - (3) the operation of that legal entity is under the supervision of the contracting authority;
 - (4) the contracting authority holds more than 50% of the shares or stake in that legal entity;
 - (5) over 50% is financed from the funds of the contracting authority.
- 4) any legal entity founded by contracting authorities, provided that it is as well engaged in an activity of common interest and that it meets at least one of the conditions referred to in item 3) of this Article.

3. Does your current legislation cover all types of contracts (good, services and works; concessions and Private Public Partnership PPP)? Please list the contracts excluded from the scope of the procurement legislation.

The Law pertains to public contracts for goods, services and award of work assignments. The Law on Concessions (*Official Gazette RS* No. 55/03) is applied to contracts granting concessions.

The Law does not apply to procurements:

- 1) from organisations which, for the purpose of this Law, are considered contracting authorities and to which the Republic of Serbia, a territorial autonomy, or any local self-

government has, on the basis of a special law, by-laws, or any other regulation, granted a special or exclusive right to engage in activities such as rendering of services which are the subject matter of public procurement;

2) to which different procurement rules apply and which are conducted:

a) based on an international agreement which pertains to the supply of goods, performance of work assignments, rendering of services or to public design contests,

b) from the proceeds of foreign credits (loans) and in accordance with special procedures of international organizations;

3) conducted in order to provide for basic living conditions in the event of a natural disaster, other accidents or catastrophes, according to regulations governing the protection from such disasters, accidents or catastrophes;

4) for which a special regulation stipulates that can be defined as confidential and that have been defined as such by a decision of a competent body based on powers given to it by the special regulation, because any knowledge of any unauthorised person of such procurement being conducted, or knowledge of certain specifications of the subjects of such procurement or of them being executed by a specific bidder, would compromise the national security or the security of citizens;

5) of goods the contracting authority obtains for further sale, processing and sale, as well as for rendering of services to third parties on the market, provided that the contracting authority does not have exclusive or specific rights to resell or lease such goods or render services for which it would use such goods;

6) of goods that, with a prior approval from the Government, are procured from the Republic Commodity Reserves Directorate;

7) of immovable property or rights related to it, considering that provisions of this Law apply to the procurement of financial services necessary for the procurement of such property;

8) pertaining to the acquisition, development, production or co-production of radio or television programme or broadcasting time;

9) of services of voice telephony, telex, radio-telephony, paging, the Internet, and satellite services;

10) of arbitration or amicable settlement of disputes services;

11) of financial services relating to the issue, sale, purchase or transfer of securities or some other financial instruments;

12) which pertain to the conclusion of contracts of employment and to the conclusion of service contracts;

13) of research and development services, other than those where the contracting authority uses research results exclusively for its own purposes in order to conduct its own affairs, provided that the cost of such services is covered in full by the contracting authority;

14) of services of expert individuals, entrepreneurs or legal entities that perform, for and on behalf of the Privatization Agency, and under its supervision, the activities of a receiver.

For the purposes of the Law on Concessions, a concession is understood to mean the right to exploit a natural resource and goods in general use or to conduct activities of common interest which is granted by the competent government body (hereinafter: the Grantor) to a domestic or foreign person (hereinafter: the Concessionaire), for a specified period of time, under the terms laid down by the law and against the payment of a concession fee.

For the purpose of this Law, a concession shall also be understood to mean a B.O.T system concession, including all the forms of this system which is based on the construction or

reconstruction and financing of a complete building, installation or a plant, its exploitation and transfer of its title to the Republic of Serbia (hereinafter: the Republic) within the contracted term.

Concessions may be given to persons that satisfy the requirements provided for in the Law, a concession deed and a public tender.

The subject matter of a concession may be:

- 1) prospecting for and exploitation of all kinds of mineral raw materials;
- 2) construction, reconstruction, maintenance and exploitation of water management facilities, including dams and water storages, then of water supply and distribution systems, irrigation and drainage systems and sanitation systems;
- 3) construction, maintenance and exploitation of roads or reconstruction, development, maintenance and exploitation thereof;
- 4) construction, maintenance and exploitation of the public railway infrastructure and organization and control of railway traffic, or reconstruction, modernization, maintenance or exploitation of public railway infrastructure and organization and control of railway traffic;
- 5) construction, maintenance and exploitation of air transport facilities, equipment and airports or their reconstruction, modernization, maintenance and exploitation;
- 6) construction, maintenance and exploitation of river transport facilities and ports or reconstruction, modernization, maintenance and exploitation thereof;
- 7) construction, maintenance and exploitation of telecommunication facilities or reconstruction, modernization, maintenance and exploitation thereof;
- 8) construction, maintenance and exploitation of oil pipelines, gas pipelines, facilities for gas storage, conveyance and distribution, or reconstruction, modernization, maintenance and exploitation thereof;
- 9) construction, maintenance and exploitation of public utility facilities for the purpose of carrying out utility operations;
- 10) construction, maintenance and exploitation of energy-related facilities and other facilities for the purpose of generating, storing, transmitting and distributing electricity and heat or reconstruction, modernization, maintenance and exploitation thereof;
- 11) development, renewal or exploitation of riverbanks and lake shores;
- 12) construction, maintenance and exploitation of public health care institutions or reconstruction, modernization, maintenance and exploitation thereof and rendering of health care services;
- 13) construction of sports and recreational facilities, sports grounds and sports and recreational premises, including facilities for recreational, sports and cultural activities;
- 14) exploitation of thermal water springs for health care and production purposes;
- 15) construction of facilities, reconstruction, modernization and exploitation of the existing facilities in spas, localities rich in natural curative resources and in other natural values for the purpose of their exploitation ;
- 16) construction, maintenance and exploitation of tourist infrastructure facilities or reconstruction, modernization, maintenance and exploitation thereof;

The subject matter of a concession may be as well the conduct of some other operations which are defined by the law as operations of common interest.

A concession may not be granted to a foreign person for fields of activity in which and in localities at which, under the law governing foreign investments, a foreign person may not be a founder of an enterprise.

4. What are the legislative provisions preventing splitting of tenders in order to avoid more complicated procedures?

The Law on Public Procurement (hereinafter: the Law) allows for organization of the subject matter of public procurement in a number of separate units (lots) of the same kind, so that each unit may be a subject matter of a separate contract (public procurement by lots). Any potential abuse of this institute by any contracting authority is prevented in the following manner:

Information about organization of the subject matter of public procurement in a number of lots should be contained in a decision on instituting public procurement procedure (Article 28, paragraph 1, item 2 of the Law), in the open call for the collection of bids (Article 72, paragraph 2 of the Law), and in the tender documents (Article 30, paragraph 3, item 2 of the Law). Should any contracting authority fail to state in its open call for competition and in its tender documents that it has organized public procurement by lots, then such contracting authority may not select the most advantageous bidder nor may it conclude a separate contract for each separate procurement lot.

The condition for dividing any public procurement into lots is that units (lots) involved are of the same kind which can be contracted for individually (Article 36, paragraph 1 of the Law). Goods, services and work assignments of the same kind are those goods, services and work assignments whose classification, purpose and characteristics are of the one and same kind (Article 2, paragraph 1, item 22 of the Law). In this manner, it is determined that, in the first place, objects that do not possess the above mentioned common characteristics may not be procured within the scope of one public procurement, due to which it is not allowed to organize lots which in that respect have different subject matters.

When determining the estimated value of public procurement the subject matter of which is organised in lots, the value of all the lots over the time period for which the public contract is concluded is taken into account (Article 36, paragraph 2 of the Law). In other words, this means that lots, in view of estimated value, may not be approached separately, so that, as a possibility, due to values of certain lots that are below the statutory threshold, the Law does not apply. This also prohibits the application of public procurement for small-value contracts to certain lots although the estimated values of certain lots are below the amount prescribed as the threshold limit for such type of procedures, considering that the total value of all the lots is above that threshold. Moreover, Article 37, paragraph 1 of the Law stipulates that a contracting authority may not select any method for determining the value of any public procurement which would enable the avoidance of public announcement of notices due to its lower estimated value.

Any public procurement for small-value contracts, for the purpose of the said Law, is procurement for goods, services or award of work assignments of the same kind whose estimated value at an annual level is lower than the value set by the Law that governs the annual budget of the Republic of Serbia (Article 26, paragraph 1 of the Law). For the purpose of the Law on Public Procurement, any procurement for low-value contract is procurement whose estimated value is between 290,000 and 2,900,000 dinars.

Public contracts concluded contrary to provisions of the Law governing the method and procedure for public procurement, that is, those in which the contracting authority has acted contrary to provisions regulating how the value of public procurement by lots is determined, are null and void (Article 120, items 1 and 2 of the Law). Contracts that are null and void are such contracts that do not produce any legal effect whatsoever, that is, contracts which are considered as never to have been concluded.

5. Please list the relevant thresholds stated in your legislation and explain what procedure shall be followed. Are all tenders above a certain threshold published before the launching of the procedure? What are the types of information that your legislation requires to be included in notices of invitation to tender?

Subject to value of public procurement, procedures are divided into two value scales:

I value scale, comprising the conduct of open, restricted, negotiated procedures with or without a prior notice, pertains to cases in which the value of public procurement is above the threshold limit which is every year stipulated in the Law on the Budget of the Republic of Serbia. Under the Law on the Budget of the Republic of Serbia for the year 2010 (*Official Gazette of the RS* No. 107/10), public procurement for a low-value contract is the procurement whose value falls below 2,900,000 dinars at the annual level.

II value scale, comprising public procurements for low-value contracts, is applied in cases when under the Law on Budget for the Year 2010, the value of public procurement ranges between 290,000 and 2,900,000 dinars.

According to the provisions set forth in the Law, all public invitations for the collection of applications/bids, other than those for the conduct of negotiated procedures without a prior notice and those for public procurement procedures for low-value contracts, shall without fail be published in the *Official Gazette of the Republic of Serbia* as well as posted on the Internet website of the Public Procurement Office as the appropriate governing body – on the Public Procurement Portal.

Contracting authorities may post their notices for public procurements for low-value contracts on the Public Procurement Portal. If value of any procurement exceeds 150,000,000 dinars for goods and services or if it exceeds 300,000,000 dinars for work assignments, public procurement notices shall be published as well in the language that is commonly used in international trade. In the same manner, notices of contract awards as well as notices of termination of public procurement procedures, notwithstanding their values, shall be published in the *Official Gazette of the Republic of Serbia* and posted on the Public Procurement Portal.

Open calls for competition in open procedures, in negotiated procedures with a prior notice, and in procedures by means of a contest shall contain information about the contracting authority, the subject matter of the procurement, requirements for taking part in the procedure, criterion and criterion elements for the selection of the most advantageous bid, time and place for the review of tender documents, conditions for obtaining tender documents, time and place for the submission of bids, time and place for the opening of bids, the time limit for rendering the decision on the selection of the most advantageous bid, as well as information about the name of the person to be contacted for further information.

Open calls for competition in the first phase of restricted procedures and in qualification procedures (the first phase of a restricted procedure in the water management, energy, mining, telecommunications and transport sectors) shall contain information about the contracting authority, the subject matter of the procurement, requirements for qualification recognition, time and place for the review of tender documents, conditions for obtaining tender documents, time and place for the submission of an application, the time limit for rendering the decision on qualification recognition, as well as information about the name of the person to be contacted for further information.

A public invitation may contain as well some other data necessary for providing bidders with information.

6. Please provide a general description of your existing procurement, concession and PPP procedures. Are interested entities allowed to proceed to negotiations? If yes, under which conditions?

Under the Law, any contracting authority may employ:

- 1) an open public procurement procedure;
- 2) a restricted public procurement procedure;
- 4) a negotiated public procurement procedure including a prior notice;
- 4) a negotiated public procurement procedure without a prior notice;
- 4) a public procurement procedure for low-value contracts;

The Law recognizes as well a special case of public procurement procedure, which is the public procurement procedure by means of a design contest.

As a rule, contracting authorities shall opt for the open procedure.

The open public procurement procedure is the main and the most transparent procedure for public procurement.

Such a procedure entails a public announcement of a call for competition. All persons having a beneficial interest in concluding a public contract may submit their bids in the manner and under the conditions provided for in the open call for competition and in the tender documents.

As a rule, contracting authorities should always employ this procedure, considering that it ensures that all the principles of public procurement are adhered to to the greatest extent. In such procedures, the majority of bidders is in the position to submit their bids to the contracting authority, whereby competitiveness is achieved and the bidders are encouraged to compete on the market. It is in the interest of any contracting authority to conduct open procedures for public procurement since in such procedures, when compared to the restricted procedures or to the negotiated ones, lower prices and more favourable conditions are achieved.

An open procedure for public procurement implies that it is not necessary to predetermine if bidders are qualified, as opposed to the restricted procedure for public procurement, nor are transparency and competitiveness restricted as they are in negotiated and restricted procedures, in which only a certain number of bidders is invited to submit their bids in the second stage. Legislative provisions applicable to the open public procurement procedure also apply to the restricted and negotiated procedures, unless otherwise provided for by the Law.

The restricted procedure for public procurement has been provided for by the legislator as an exception to the open procedure for public procurement and it may be applied only if conditions stipulated by the Law have been fulfilled.

This procedure is quite a complex and lengthy one, so it is assumed that contracting authorities would opt for it only when, in addition to the fulfilment of the conditions laid down, the procurement is of high value and of great importance for the contracting authority. The restricted public procurement procedure is conducted in two phases.

In the first phase, the contracting authority is bound to publicly announce an open invitation for a public competition in the *Official Gazette of the Republic of Serbia* and to post it on the public Procurement Portal of the Public Procurement Office in the manner laid down by the law.

In its public call for bids, the contracting authority is bound to specify, in addition to mandatory requirements prescribed by the Law, the requirements for qualification recognition.

The aforementioned requirements are elaborated in detail within the scope of tender documents. Requirements for qualification recognition are particularly related to bidder's legal status, his economic and financial capacity, his technical qualifications and the qualifications of his personnel, given that contracting authority is obliged to ensure that in this stage as well

principles of equal treatment and non-discrimination of bidders are consistently applied. Following the procedure of public opening of applications, the contracting authority shall, pursuant to the provisions quoted above, determine the qualification of bidders based on requirements that have been previously defined in the open notice and tender documents.

For a procedure to be successful, it is necessary that the contracting authority recognizes qualification for at least three bidders or draws up a list of qualified bidders, comprising at least three bidders (candidates).

In the second phase, the contracting authority shall send an invitation for the submission of bids to all the qualified bidders (candidates).

A request to submit the proofs of suitability is not mentioned in the invitation, given that such proofs have been submitted in the previous phase of qualification recognition.

In the second phase of a restricted procedure, the contracting authority shall select the most advantageous bid based solely on the criteria contained in the call for bids and in the tender documents.

The procedure for the protection of bidders' rights is provided for as well for the duration of any restricted public procurement procedure, in such a way that the legislator has established an obligation on the side of the contracting authority to inform the bidders by submitting his decision on the qualification recognition to all the bidders and by citing reasons for the rejection of applications in the decision's statement of grounds.

Those reasons may be based solely on the qualification requirements.

Any bidder has the right to submit his request for the protection of rights against any decision on rejecting his request for qualification within eight days from the date he received any such decision in the manner that is elaborated in detail in the chapter pertaining to the protection of bidders' rights and public interest.

The contracting authority may exclude a candidate from the list of candidates only for reasons based on the requirements defined in the tender documents for the first phase of a restricted procedure, on which exclusion the authority shall make a decision containing a statement of grounds for exclusion of such candidate and which shall be delivered to all the candidates pursuant to the Law. Naturally, the Law also implies that any bidder is obliged to notify the contracting authority in a timely fashion of any and all changes that have taken place with regard to his status or business operations and that might affect his qualification and further course of the procedure for the selection of the most advantageous bid.

The qualification procedure does not represent any special type of procedure, but instead stands for the manner in which the first phase of a restricted procedure is conducted when contracting authorities come from the field of water management and the energy, mining, telecommunications and transport sectors. Only issues that have been defined in a manner different from that for general rules for a restricted procedure have been regulated for that purpose, that is, rules for the restricted procedure (three candidates in order for a list to be valid, time limits for the submission of bids/applications, rules governing the second phase of the procedure, etc.) are to be applied to the issues that have not been regulated by the rules pertaining to the qualification procedure.

The distinction between a qualification procedure and a restrictive one lies in the time period during which lists of qualified bidders are valid: in cases of restricted procedures, such lists are valid for two years, and in cases of qualification procedures, they are valid for four years. Furthermore, the distinction pertains to the possibility of updating or amending the list of candidates competing in a qualification procedure, to the updating of qualification requirements,

in which case the contracting authority is obliged to invite candidates to submit new applications that comply with the updated requirements, to the possibility of using lists of candidates belonging to some other contracting authorities, or in other words, it is allowed to conduct only the second phase of the procedure, provided that a system of qualification has been worked out, a list of candidates of some other contracting authority which meets the requirements of the contracting authority obtained and a reasoned decision on taking over the list of candidates from some other contracting authority rendered.

Negotiated procedure including a prior notice Any contracting authority may conduct a negotiated procedure that includes a prior publication of a notice:

- 1) if all the bids it has received in an open procedure or in the second phase of a restricted procedure are incorrect and/or unacceptable, on condition that the originally defined requirements for participation in the procedure, technical specifications and criteria for the selection of the most advantageous bid are not to be altered. In the event that a contracting authority decides to invite to the negotiated procedure only all the bidders that have taken part in the open procedure or if in the second phase of a restricted procedure it invites them to supplement their bids so as to make them correct and acceptable, it shall not be obliged to publish an open call for competition. Prices quoted in such negotiated procedures may not be higher than those quoted in open or restricted procedures;
- 2) in exceptional cases, when due to the nature of work assignments, goods or services, as well as risks associated to them, it is not possible to estimate the value of the public procurement in advance;
- 3) in cases of public procurement for work assignments conducted exclusively for the purposes of research, development or experiment, and not for the purpose of making profit or recovering research and development costs.

The contracting authority shall ensure that a price contracted in a negotiated procedure does not exceed the comparable market price and shall check the quality of the subject of public procurement with due diligence.

The contracting authority shall define in the tender documents the contractual elements to be negotiated and the manner of conducting negotiations as well as of keeping the minutes of the negotiations.

In order to receive the best possible bid, the contracting authority shall negotiate the submitted bids with bidders so as to modify them to comply with the requirements set out in the call for competition and in the tender documents.

A negotiated procedure without prior notice, as the least transparent procedure, may, exceptionally, be conducted by the contracting authority:

- 1) if it has not received a single bid in an open procedure or in the second phase of a restricted procedure, or if it has not received a single application in the first phase of a restricted procedure, or if all the bids are inadequate, provided that the originally defined subject matter of the public procurement and requirements for the participation in the procedure as well as technical specification and criteria for the selection of the most advantageous bid are not to be altered;
- 2) in cases of public procurement for goods intended exclusively for the purposes of research, development or experiment, and not for the purpose of making profit or recovering research and development costs;

- 3) if, for technical or artistic reasons related to the subject matter of the public procurement, or for reasons related to the protection of exclusive rights, the procurement may be executed only by a particular bidder;
- 4) if, due to an extreme urgency brought about by some exceptional circumstances or unforeseen events whose occurrence by no means depends on the will of the contracting authority, the contracting authority was not in a position to observe the time limits set out for the open or restricted procedure;
- 5) for additional deliveries by the original supplier of goods intended for a partial replacement of products, materials or installations or for expanding the range of the existing products, materials or installations, which would, due to a change in suppliers, obligate the contracting authority to obtain materials that have different technical characteristics, which would in turn cause disproportionate technical difficulties with regard to operation and maintenance, provided that the total value of all additional deliveries of goods may not exceed 25% of the total value of the originally concluded contract;
- 6) in cases of public procurement of goods offered and purchased on commodity exchanges;
- 7) in cases of additional works or services that have not been included in the original project or in the first public procurement, but which, due to unforeseeable circumstances, have become necessary for the performance of a public contract, on condition that the contract is concluded with the original service provider or contractor and that the total value of all the additional services or works does not exceed 25% of the total value of the originally concluded contract, as well as that:
 - (a) such additional services or work assignments may not be separated, in technical or economic terms, from the first public procurement, without thus causing the contracting authority to experience disproportionate technical difficulties or incur disproportionately high costs;
 - (b) such services or works, which the contracting authority might obtain separately from the performance of the original contract, are required for the subsequent phases in rendering services or performing of works;
- 8) in cases of new services or works comprising the repetition of similar services or works assigned to the original service provider or contractor, provided that such services or work assignments conform to the original project for which a public contract was concluded upon publishing a call for competition, that such possibility has been mentioned in the first announcement of the call for competition and that no more than three years have passed since the conclusion of the first contract;
- 9) for purchase of goods under particularly advantageous conditions from bidders that are going through winding-up procedures, with the consent from other creditors and pursuant to regulations governing the winding-up of companies;
- 10) in cases of procurement of services that are part of a follow-up to a design contest organized pursuant to this Law, provided that a contract was concluded with the contest winner or winners and provided that the contracting authority includes each of them in the negotiation process;
- 11) in cases of procurement of services or goods from enterprises dealing with work-related training, professional rehabilitation and employment of people with disabilities, provided that such procurement is directly connected with the activity of work-related training, professional rehabilitation and employment of such people and on condition that all the participants in a joint bid and all the subcontractors must come from the aforementioned group of enterprises and the

quality, price and time limits for the delivery of goods or the rendering of services must meet the requirements set out by the contracting authority.

The Law also recognizes *public procurement procedures for low-value contracts*, namely, the direct collection of bids – in which case a public call for competition is not published.

From the aforementioned it follows that, pursuant to regulations on public procurement in force in the Republic of Serbia, it is possible to enter into direct negotiations in public procurement procedures only in the case of negotiated procedure with or without prior publication of a notice, which is the least transparent public procurement procedure, provided that all the requirements laid down by the Law have previously been met and the matters to be addressed in the course of the negotiations have been defined in advance, i.e. a negotiation scenario worked out in order to ensure that the principles of non-discrimination and equal treatment of all the bidders are consistently adhered to.

A contracting entity may conduct a procedure for public procurement of goods by way of a contest in the fields of urban planning, architecture, construction industry, engineering, design and data processing. A plan or design shall be selected by an independent jury. Only natural persons who are not related to the participants in a contest may be members of that jury. Should the contracting authority request that participants in a contest possess particular professional qualifications or experience, at least one third of jury members must possess at least those same qualifications or experience. Such jury shall be autonomous when making decisions and deliberating on anonymous plans or designs. A contest for plans or designs, including prize awards and payments to participants, may be conducted independently or as an integral part of some other public procurement procedure.

The 2003 Law on Concessions provides a fair amount of detail to interested bidders about the conditions by which Concessions in their various guises might be awarded. The Law acknowledges the *'principles of equal and fair treatment, free market competition'*.

Furthermore these principles are defined and described in the Law. The principles of *'autonomy of the contracting parties volition'* as described appears to provide a flexible framework for the contracting parties to agree on the Project Agreement although it should be pointed out that the same words may appear to permit some element of post tender negotiation.

Institutional arrangements – the law refers to *'the government'* instead of the specific responsible entity. This may imply to interested bidders, particularly international investors, a higher degree than normal of politically based decision making rather than decision based on objective economic and technical criteria.

Two Stage Tendering – the present law does not provide explicitly the possibility of Two Stage Tendering even though it is permitted in the Public Procurement Law (PPL).

With regard to the field of *concessions*, a proposal for granting a concession is brought forward to the Government of the Republic of Serbia (hereinafter: the Government) by the ministry competent for the relevant field (hereinafter: the competent ministry).

A proposal for granting a concession may be put forward to the Government by the competent body of an autonomous province when the subject of that concession is situated on the territory of that autonomous province as well as by the assembly of a unit of local self-government on the territory of which the subject of the concession is situated.

Any interested party may file a motion for granting a concession with an authorised proposer.

A proposal for granting a concession shall contain in particular: the subject matter of the concession, investment feasibility and its cost, an expected duration of the concession period, basic requirements for the exploitation of the concession, recommendation for a fee to be paid

and purpose for which the subject matter of the concession would be exploited, and when a motion is filed by an interested person, it shall contain as well particulars related to that person (their registered name, their personal name, proof of registration).

The Government shall notify the submitter of the proposal of its position on the proposal for granting a concession no later than four months from the date of the receipt of that proposal. If the subject matter of a concession is the construction, maintenance and operation of facilities that have strategic importance for the Republic of Serbia or to which international importance is attached, the Government shall present its proposal for granting a concession to the National Assembly of the Republic of Serbia.

The National Assembly of the Republic of Serbia shall notify the Government of its position on the proposal for granting a concession no later than three months from the date of the receipt of that proposal and the Government shall notify the submitter of the proposal accordingly.

The competent ministry shall, based on the position of the Government or on the position of the National Assembly on whether they intend to grant a concession and based on economic, financial, social and other indicators, draw up a proposal for the issuance of a concession deed that shall be submitted to the Government no later than six months from the date the position of the Government or the notification on the position of the National Assembly was delivered.

A proposal for the issuance of a concession deed for prospecting for and mining of all kinds of mineral raw materials on the territory of an autonomous province shall be drawn up by the competent body of that autonomous province in order for it to be submitted to the Government.

The competent body of a unit of local self-government shall draw up a proposal for the issuance of a concession deed for the construction, maintenance and exploitation of facilities designated for public utility purposes and submit it to the Government together with the opinion of the competent ministry.

A concession deed shall be issuable by the Government.

The concession deed shall be published in the *Official Gazette of the Republic of Serbia*. A concession is granted based on a public tendering procedure conducted beforehand. Exceptionally, a public tendering procedure may be excluded if the conduct of such procedure would pose a threat to national defence and security, the matter on which shall be decided by the Government.

The body competent for drawing up proposals for issuing concession deeds referred to in the present Law shall publish the notice of a public tender in the *Official Gazette of the Republic of Serbia* and in at least one more domestic daily newspaper, and when the subject matter of the concession are the construction, maintenance and operation of facilities that have strategic importance for the Republic or to which international importance is attached, in one international newspaper as well.

If the subject matter of a concession is situated on the territory of an autonomous province, the competent body of an autonomous province may publish the notice of a public tender in an official gazette of that autonomous province. In such an event, time limits are calculated from the publishing date in the *Official Gazette of the Republic of Serbia*.

Tender bids may be submitted in response to a public tender based on the notice of a public tender, directly to the competent ministry or by registered mail. If a bid has been sent by registered mail from the territory of the Republic, the mailing date shall be regarded as the date of its submission. If a bid has been sent by registered mail outside the territory of the Republic, the date of bid receipt shall be regarded as the date on which it was received by the competent ministry.

A public tender shall be conducted by a tender commission, appointed by the minister competent for the field concerned (hereinafter: the Commission).

Commission members shall be appointed from the ranks of prominent specialists in the fields of importance for the subject matter of the concession (the fields of finance, law, engineering, and so forth).

The competent ministry may, on the basis of a separate tender or by invitation, commission consultants to perform duties and give assistance in making preparations for a public tender, in conducting it and in the selection of the best bidder. One of the Commission members shall be appointed by the National Assembly of the Republic of Serbia.

If the proposal for granting a concession is put forward by a competent body of an autonomous province, that body shall appoint one of the Commission members as well. If the subject matter of a concession is the construction, maintenance and exploitation of public utility facilities for the purpose of rendering utility services, one Commission member shall be appointed by the assembly of a unit of local self-government on the territory of which the concessionary activity is taking place.

The National Assembly of the Republic of Serbia, a competent body of an autonomous province or an assembly of a unit of local self-government shall appoint Commission members no later than 7 days before the date of opening of bids.

Should the National Assembly of the Republic of Serbia and/or the competent body of an autonomous province and/or the assembly of a unit of local self-government fail to appoint a Commission member at least 7 days before the day of opening of bids, the Commission shall work and make decisions as composed by the minister who is competent for the field concerned. The Commission shall make decisions by a majority of votes of the total number of its members. Any person who is in any kind of a business relationship with any of the tenderers, as well as any person whose spouse, direct relative of any and every degree and a collateral relative up to the third degree is submitting a tenderer, may not be appointed to the Commission.

The Commission shall keep a record of the tendering procedure, in which they shall register remarks made by attending representatives of the tenderers concerning the work of the Commission and the course of the procedure. Such record shall be signed by members of the Commission and by the duly authorized representative of the tenderer attending the opening of tenders. Should the duly authorized representative of the bidder refuse to sign the record, a note to that effect shall be made in the record.

Untimely and incomplete tenders shall not be taken into consideration and the Commission shall accordingly notify the tenderers concerned within five days from the date of opening of bids. The Commission shall make a rank-list of bidders on the basis of provisions contained in the concession deed and in the invitation to tender.

The Commission shall, within 60 days from the date of opening of tenders, present to the Government its report on the conducted public tendering procedure, including a reasoned recommendation for the selection of the tenderer who has made the most advantageous tender.

Such report shall be presented to the competent body of an autonomous province if the subject matter of a concession is located on the territory of that autonomous province. The Commission shall present its report accompanied by the record as well as by other documents pertaining to the conducted tendering procedure.

The Government shall render a decision on appointing the Concessionaire within 30 days from the date of the receipt of Commission's report on the conducted public tender.

As an exception, when the subject matter of a concession is located on the territory of an autonomous province, the Government shall render its decision within 30 days from the date on which the executive body of that autonomous province presented its opinion. Such executive body of an autonomous province is obliged to present its opinion to the Government not later than 30 days from the date it received the Commission's report on the conducted public tender. Should the executive body of an autonomous province fail to present its opinion within 30 days, the Government shall render its decision without the opinion of such executive body. A decision on appointing the Concessionaire shall be published in the *Official Gazette of the Republic of Serbia*.

If only one party submits their tender, for which the competent ministry finds that it meets the requirements and criteria set out in the public tender, the Commission may, on the recommendation of the competent ministry, decide to repeat the public tender or to recommend to the Government, based on the negotiations conducted with the tenderer, that the tenderer concerned be granted the concession.

Should the tenderer named as the Concessionaire based on a public tender desists from concluding the contract or fails to conclude a concession contract within the stipulated time limit, the Commission shall recommend that the next most advantageous tenderer on the rank-list be named the Concessionaire, unless, given the circumstances, the Government decides to repeat the tender process under the same conditions and using the same procedure.

7. Please list qualification criteria which may be deployed in tender procedures.

Qualification criteria which may be deployed in tender procedures (public procurement procedures) are defined by the Law as mandatory and additional requirements for participation in public procurement procedures. A bidder participating in a public procurement procedure *is obliged to prove (mandatory requirements)* that:

- 1) it has been registered with the competent body, i.e. registered in the appropriate Register;
- 2) it has been founded as well with the aim of undertaking the activity which is the subject matter of public procurement;
- 3) no final court or administrative measure prohibiting it from undertaking the activity that is the subject matter of the public procurement has been imposed on it in the period of two years prior to the publication of open call for competition;
- 4) it has paid its due taxes and other public duties pursuant to regulations that are in force in the Republic of Serbia or some foreign country if its registered address is in its territory;
- 5) it holds a valid licence issued by the relevant authority to perform the activity which is the subject matter of public procurement, provided that such licence is stipulated by a special regulation;
- 6) it possesses the necessary financial and economic capacity;
- 7) it possesses sufficient technical and personnel capacities;

The contracting authority shall define in the tender documents what it considers as the necessary financial and economic, as well as the sufficient technical and personnel capacities.

A contracting authority shall publish in an open call for competition and in the tender documents the requirements that must be met by bidders so that they may enter in the public procurement procedure.

Any contracting authority may set out some other additional requirements for participation in a public procurement procedure, especially if they pertain to social and environmental issues.

A bidder shall prove that mandatory requirements have been fulfilled by submitting the following evidence along with its bid:

- 1) an extract from the register maintained by the competent authority;
- 2) bidder's founding act;
a certificate issued by the competent body to the effect that no measure prohibiting the bidder from undertaking the activity has been imposed on it;
- 4) a certificate from the competent taxation authority or a certificate from the competent body to the effect that the bidder is going through a privatization process;
- 5) valid licences for undertaking the relevant activity, issued by the competent body.

A bidder shall prove that requirements pertaining to its financial and economic capacity have been fulfilled by submitting the following evidence along with its bid:

a balance sheet, along with an opinion of an authorized auditor, or extracts therefrom, or a statement of the bidder's overall turnover and income generated from his products, work or services, to which the public contract pertains – for no longer than three previous financial years, as well as opinions and statements from banks or other specialized institutions or the proof referred to in the call for competition or in the tender documents. The contracting authority shall specify in a call for competition or in the tender documents which proof from this item it has selected and which other proof evidencing its financial and economic capacity the bidder shall enclose.

A bidder shall prove that requirements pertaining to its technical and personnel capacity have been fulfilled by submitting the following evidence along with its bid:

one or more proofs relevant to the subject matter of the contract, its quantity and intended use, such as:

- (a) a list of its principal deliveries of goods, works performed or services rendered for the period of the previous five years for works or three years for goods and services, including the amounts, dates and lists of purchasers or contracting authorities. If the purchasers or contracting authorities are entities which, for the purpose of this law, are considered to be the contracting authority, the said proof must be in the form of a certificate issued or signed by the competent authority, and if the purchasers or contracting authorities are other legal entities or entrepreneurs, such certificates must be issued or signed by that purchaser or that contracting authority.
- (b) a description of bidder's technical equipment and machinery, quality assurance measures, and research and development capacities,
- (c) a statement on key technical personnel and other experts working for the bidder who will be responsible for contract execution, as well as on the persons responsible for quality control;
- (d) a sample, a description or a photograph of products and a description of works or services that the bidder will perform or provide. In case of doubt, the contracting authority may request a proof of authenticity of the samples, descriptions or photographs,
- (e) a declaration of compliance, a certificate, accreditation and some other result of compliance assessment according to standards and related documents for compliance assessment or any other appropriate instrument by which the bidder proves the compliance of its bid with technical specifications or standards requested in the tender documents.

The proofs of fulfilment of mandatory requirements may be submitted in the form of uncertified copies.

A bidder whose bid has been assessed as the most advantageous one shall deliver the original of its proofs of fulfilment of the mandatory requirements or certified copies thereof within an adequate time limit set out by the contracting authority, but which may not exceed three days from the date of receipt of a written invitation from the contracting authority. The contracting authority shall send an invitation to the bidder whose bid has been deemed to be the most

advantageous one prior to making a decision on the selection of the most advantageous bid. Should the bidder whose bid has been deemed to be the most advantageous one fails to deliver the original proofs or certified copies thereof within the aforementioned time limit, the contracting authority shall reject his bid as incorrect.

A certificate from the competent body with which bidders substantiate that no measure prohibiting them from undertaking their business activities has been imposed on them must be issued after the date of publication of the open call for competition or after the date on which the invitation for the submission of bids was sent.

A certificate from the competent tax authority or a certificate from the competent body substantiating that a bidder is going through a privatization process may as well be issued prior to the publication of an open call for competition, provided that no more than six months have passed from the date of its issuance until the publication of an open call for competition or until the day of sending the invitation to tender.

If bidder's registered address is in another country, the contracting authority may verify whether the documents substantiating that the bidder meets the requested requirements have been issued by the competent authorities of such country.

The bidder shall without delay and not later than five days from the date on which a change occurred in any piece of information referred to in this Article notify in writing the contracting authority of any such change and document it in the prescribed manner.

Should the bidder fail to provide any of the evidence substantiating its fulfilment of mandatory requirements for participating in the public procurement procedure that have been set out in the open call for competition and in the tender documents, such bidder's offer shall be rejected as incorrect.

Considering the fact that foreign legal entities and private persons may figure in public procurement procedures taking place in the Republic of Serbia, there is a possibility that in some countries there are no institutions that could issue some of the proofs substantiating the fulfilment of mandatory requirements for participation as stipulated by the Law. In such circumstances, the legislator has provided an opportunity for bidders that do not have registered address on the territory of the Republic of Serbia, i.e. to foreign bidders, to enclose, instead of the proof, their written statement given under oath and penalty of perjury or statement certified before a judicial or administrative authority, a notary public or some other competent body of such country. For all that, the contracting authority cannot immediately accept the bidder's statement as an adequate substitute for the requested proof, but it shall be obliged to verify whether the requested proof is not indeed issued in the country in which the bidder has its registered address.

8. What are the rules/possibilities for defining technical specifications?

Technical specifications constitute an obligatory part of tender documents, i.e. a part of technical documents in which technical requirements pertaining to the subject matter of the public procurement are defined. They serve the purpose of precisely describing the subject matter of public procurement so that potential bidders would be able to submit correct and adequate bids.

Technical specifications may not discriminate against any of the potential bidders and they must be laid down in such a manner as to provide for fair and active competition.

Contracting authorities shall lay down technical specifications by citing Serbian, European, international or some other standards and related documents, but in such a manner as that each reference to a standard must be followed by words "or an equivalent thereof".

This means that bidders are not obliged to offer goods, services or works that formally meet those requirements in terms of standards, but that it would suffice that such goods, services or works meet in its essence the requirements of the requested standard. As an exception, if a technical regulation cites a Serbian standard, then goods, services or works offered must meet requirements in terms of standards in their form as well.

However, in such cases, any contracting authority shall be obliged to accept as well some other standard that meets the requirements of the Serbian one as well as corroborative evidence to that effect.

The other manner in which technical specification may be laid down is by describing the desired functional characteristics or requirements for the performance of work. Such technical specifications must be precise and clear.

Well defined technical specifications are of importance to bidders so that they could be able to submit correct and adequate bids and to the contracting authority so that it could reject goods, services or works that do not meet its requested and objective requirements and needs.

A contracting authority may not use or cite technical specifications that denote goods, services or works of specific make, source or of particular construction if such a designation would favour a particular bidder or if it would unwarrantedly eliminate other bidders.

The contracting authority may not include in its tender documents any provision the result of which would be the favouring or elimination of particular bidders, unless such specification is justified in terms of the contract's subject matter.

The contracting authority may not cite in its tender documents any particular trademarks, patents or types or any specific origin or production.

Where a contracting authority is not able to give in its tender documents a description of the contract's subject matter using specifications that are sufficiently intelligible to bidders, the citing of elements such as trademarks, patents, types or manufacturers must be accompanied by the words "or the equivalent thereof".

9. What are the award criteria used in tender procedures, are they dependent on the type of procedure used? Can you provide us with data?

A contracting authority is obliged to lay down the criteria for the selection of the most advantageous bid in an open call for competition in open procedures and in negotiated procedures including prior publication of notices, as well as in an invitation to the second phase of a restricted procedure and in the tender documents.

The legislator has provided an opportunity for the contracting authority to opt for one of the two criteria for the selection of the most advantageous bid in the procedure of public procurement and these are: the most advantageous bid in economic terms and the lowest price quoted.

Based on the character and specifics of the public procurement concerned, the contracting authority shall be obliged to establish in an open call for competition and in the tender documents the criterion for the selection of the most advantageous bid and if necessary, criterion elements (in cases of economically most advantageous bids) to provide for the optimal supply.

The criteria and criteria elements for which the contracting authority opts clearly reflect how well it understands the market. Imprecision in establishing the criteria and insufficient objectivity thereof often means that the contracting authority is going to receive bids that are either inferior in quality or incorrect, or that it might not receive even a single bid.

Should any bidder find that the criterion and its sub-criteria (criterion elements) selected are not logically connected to the subject matter of public procurement concerned or that they have not been described with sufficient clarity or that they are biased, he shall, over the span of the public

invitation, be entitled to challenge the selection of such criterion and elements thereof by filing a request for the protection of rights.

The contracting authority is entitled to select the subject matter of public procurement and selection criteria.

Depending on the specifics of the subject matter of public procurement, the criterion of economically most advantageous bid is based on various sub-criteria, such as:

- 1) price quoted;
- 2) terms of payment;
- 3) delivery period or date of completion of services or works;
- 4) running costs;
- 5) cost-effectiveness;
- 6) quality;
- 7) technical and technological merits;
- 8) after-sale services and technical assistance;
- 9) warranty period and types of warranties;
- 10) obligations concerning spare parts;
- 11) post-warranty maintenance;
- 12) aesthetic and functional characteristics and so forth.

Mandatory requirements for participation in a public procurement procedure may not be imposed as criterion elements.

In its tender documents the contracting authority shall assign relative significance (weight) to each criterion element in such a way as that the sum total of all weighted points adds up to 100. The contracting authority shall conduct bid selection based on the criterion of economically most advantageous bid by ranking the bids on the basis of weighted points assigned to each criterion element

As an exception, when a price quoted has been selected as a sub-criterion for the procurement of goods, it shall be determined based on the dominant number of points, while the remaining number of points shall be divided to other sub-criteria considering their relevance for the selection of the most advantageous bid.

When the criterion for selection is the lowest price quoted, the contracting authority shall, based on the examination, evaluation and comparison of bids, select the most advantageous bid of the bidder who quoted the lowest price.

Price as a criterion is used regularly in practice, either as the sole criterion or as a sub-criterion within the scope of the criterion of economically most advantageous bid.

When applying the price criterion to the selection of the most advantageous bid and depending on the subject matter of procurement, prices quoted by bidders whose bids have been deemed as correct provide the basis for evaluation.

According to this criterion, the maximum number of points is awarded to the bidder who quoted the lowest price, while other points shall be awarded proportionally, in relation to the lowest price quoted.

10. Does your legislation require that award criteria, other than price, must be linked to the subject matter of the contract?

Criteria for awarding contracts – assessment of bids must logically be linked to the subject matter (content) of public procurement.

A clear and intelligible description of criteria and sub-criteria – criterion elements (*in cases of economically most advantageous bids*) must be provided (in an open call for competition and/or

in tender documents) so that each bidder can be able to interpret them in an identical manner and so that they may also have a good grasp of the methodology of sub-criteria application to be employed when comparing and evaluating the bids.

The criteria and sub-criteria must be clearly expressed in words and in the maximum number of points that can be awarded based on each individual criterion and sub-criterion, provided that the sum total of points for the criterion established may not exceed 100 points.

As already noted, the number of points for individual sub-criteria shall be determined depending on the relevance such sub-criterion bears for the subject matter of public procurement, in the process of which a contracting authority shall be obliged to provide for appropriate proportion between the number of points awarded for individual sub-criteria, at the same time taking into account the importance and link of the selected sub-criterion to the subject matter of public procurement and reasons which guided the contracting authority in its establishment of sub-criteria.

Contracting authorities are obliged to ensure that principles of equal treatment and competitiveness of bidders are consistently applied and thus the criteria and sub-criteria that they establish may not be discriminatory against bidders and they must be logically connected with the content of public procurement subject matter.

When evaluating and assessing bids, contracting authorities are obliged to apply only criteria and sub-criteria that are contained in a call for competition and in the tender documents, in the manner set out therein.

Therefore, it is not allowed to alter criteria and sub-criteria nor the methodology of application thereof throughout the stage of public procurement procedure following the opening of bids since that would result in the violation of principles of competition and equal treatment of bidders.

Thus, a contracting authority shall carefully select the criterion for the selection of the most advantageous bid, provide its description and define the methodology of its application, but the most important and challenging task is that of establishing their order based on their relevance.

In order for the principle of cost-orientation to be applied, the key stage in the procedure of public procurement itself is the recognition of how much importance each criteria bears.

The contracting authority shall select among the submitted bids based on the criterion of economically most advantageous bid by ranking the bids on the basis of sub-criteria and points awarded for each sub-criterion.

As well, contracting authorities may establish some other sub-criteria (that have not been explicitly specified in the Law on Public Procurement) within the scope of the criterion of economically most advantageous bid.

11. Does your legislation require a clear distinction between the qualification and awards criteria?

The distinction between the qualification criteria and the criteria for contract award in public procurement procedures is clearly defined in the Law. Qualification criteria stand for requirements that must be met in advance in order that a bidder could take part in the subsequent procedure of public procurement – the process of evaluating and comparing of bids.

Qualification criteria – requirements are clearly defined by the Law and have been stated in our answer to question number 6, while the criteria for contract award – criteria for the assessment of bids, which are also clearly defined by the Law, have been stated in our answer to question number 8 contained in this section of the Questionnaire. Contracting authorities have no doubts with regard to their application in public procurement procedures.

12. Do you have any local, regional or national preferences schemes? What do they consist of?

The Law provides for preferential treatment of domestic businesses.

Namely, in cases where the criterion of economically most advantageous bid is applied and in situations when there are bids by a domestic bidder and a foreign one rendering services or performing works, contracting authorities must select the bid of the most advantageous domestic bidder, provided that difference in the sum total of weighted points between the most advantageous bid by the foreign bidder and the most advantageous bid by the domestic bidder is not higher than 20 in favour of the bid of the foreign bidder.

In cases where the criterion of economically most advantageous bid is applied and in situations when there are bids of bidders offering goods of domestic origin and bids of bidders offering goods of foreign origin, contracting authorities must, as the most advantageous bid, select the bid of bidder offering goods of domestic origin provided that difference in the sum total of weighted points between the most advantageous bid by bidder offering goods of foreign origin and the most advantageous bid by bidder offering goods of domestic origin is not higher than 20 in favour of the bid of the bidder offering goods of foreign origin.

In cases where the criterion of the lowest price quoted is applied and in situations when there are bids by domestic and foreign bidders rendering services or performing works, contracting authorities must select the bid of the domestic bidder, on condition that the price he quoted is not more than 20% higher than the lowest price quoted by any foreign bidder.

13. Does your legislation include a specific regulatory framework for the utilities sector, including private undertakings with special or exclusive rights?

According to existing legislation of the Republic of Serbia, public procurement in the utilities sector (procurement in the water management, energy, mining, telecommunications and transport sectors) is regulated by a special chapter within the Law.

14. Do you have any plans to modify/integrate existing legislation? If so, please give all relevant details and timetables.

It is expected that in the forthcoming period a Strategy for the development of public procurement in the Republic of Serbia would be drawn up covering a specific time span (hereinafter: the Strategy) and that it would involve determining the circumstances prevailing in the field of public procurement and measures to be taken for such development. An integral part of that Strategy would be, among other things, an action plan as well, which would include objectives, activities and entities in charge of such activities with regard to the implementation of the above-mentioned Strategy.

In addition, the application of legislative provisions should be improved pursuant to *acquis* regulations governing public procurement and EU good practice, in particular in terms of redefining the concept of contracting authority, procurements to which provisions of the Law are not applied, conditions under which the restricted procedure of public procurement is implemented as well as procurements in the sectors of water management, energy, mining, telecommunications and transport (procurements in the utilities sector).

15. How are corruption/conflict of interest aspects and related questions taken into consideration by existing legislation? Please list the exclusion criteria in tender procedures and state whether they are mandatory or their deployment depends on the contracting authority.

Provisions contained in the Law particularly emphasize the anti-corruption rule, which contracting authorities and other participants in the procedure are obliged to obey throughout the procedure of public procurement. All of them are under obligation to take effective and efficacious measures aimed at preventing corruption activities, starting with those in the strictest sense of the notion, such as the acts of corruption.

Any contracting authority shall reject a bid if it has credible evidence that a bidder has, either directly or indirectly, given, offered or alluded to a gift or some other sort of benefit to a member of the Public Procurement Committee, to a person who participated in the preparation of tender documents, to a person who is involved in planning of public procurement or to any other person so that such person would influence them with the aim of obtaining confidential information or with the aim of influencing the actions of contracting authority or its decision making in any phase of the public procurement procedure.

As well, any contracting authority shall reject a bid if it has credible evidence that a bidder has, either directly or indirectly, threatened to a member of the Public Procurement Committee, to a person who participated in the preparation of tender documents, to a person who is involved in planning of public procurement or to any other person so that such person would influence them with the aim of obtaining confidential information or of influencing the actions of contracting authority or its decision making in any phase of the public procurement procedure.

In addition to the above-mentioned, it would be relevant to emphasize a legislative provision according to which every contracting authority is under obligation to provide all interested parties with access to and to supply them with relevant information concerning any conducted public procurement procedure. In such a manner, the principle of free access to information is singled out, whereby the very development of anti-corruption rules or reduction in corruption in public procurement procedures is asserted.

16. In how many cases did contracting authorities reject a tender/cancel the procedure/withdraw from the conclusion of the contract for the reasons of corruptive practices over the last 5 years? Are there any statistical data or examples available? What are the most frequent reasons for the said actions?

Statistical and other data on the procedures conducted, public contracts concluded and on the efficacy of the public procurement system as a whole is gathered by the Public Procurement Office (Article 99, paragraph 1, item 10 of the Law).

Namely, during each calendar year, contracting authorities are under obligation to submit to the Public Procurement Office quarterly reports on public procurement procedures, which among other information contain data on the number of cancelled and rejected procedures, reasons for cancellation and rejection, in particular for public procurements and public procurements for low-value contracts (Article 94, paragraph 4 of the Law). Based on quarterly reports of contracting authorities, the Public Procurement Office shall produce a cumulative annual report on public procurement (Article 96, paragraph 1 of the Law).

The Public Procurement Office does not have available data on the number of such cases over the previous five (5) years.

17. In how many cases did public officials dealing with procurement signal the existence of a conflict of interest over the last 5 years? Are there any statistical data or examples available?

Pursuant to Article 99, paragraph 1 of the Law, within the purview of the Public Procurement Office fall monitoring public procurement procedures (item 3), submission of requests for

protection of rights in cases of violations of public interest (item 4), as well as notifying the body competent for public fund auditing, budget inspection and other bodies competent for initiating infringement proceedings on irregularities in conducting public procurement procedures and delivering reports on public procedures that it has identified while performing activities for which it is competent (item 5).

However, establishing whether a conflict of interests exists or not does not lie within the purview of Public Procurement Office, nor are institutions in the purview of which such duties fall under obligation to notify the Public Procurement Office accordingly. For reasons mentioned above, the Public Procurement Office does not have available the statistical data that you requested.

Moreover, the institution within the purview of which fall the establishing and resolution of the conflict of interests is the Anti-corruption Agency.

18. How does Serbia regulate the award of public contracts in the area of defence and security?

The Law does not apply to procurements for which a special regulation provides that may be declared confidential and which have been declared confidential on the basis of a decision rendered by the competent authority based on powers granted to it by such special regulation.

As a rule, confidential procurements are defined as procurements in the field of armed forces and the police. Procurements in other fields may as well be defined as confidential provided that it has been deemed that they must have a certain degree of confidentiality because any knowledge of any unauthorised person of such procurement being conducted, or knowledge that subject matters of such procurement have certain specifications or of them being executed by a specific bidder, would compromise the national security or the security of citizens.

With regard to this, we would like to mention that the Government has adopted: Decree on special purposes funds (*Official Gazette of RS* No. 29/05 and 7/10), by which it has allocated special purpose funds and provided for the way and method of securing such funds for the needs of the ministry competent for internal affairs; Decree on allocating special purpose funds for the needs of Security-Information Agency (*Official Gazette of RS* number 21/09) prescribing in more detail the procurement of special purpose funds for specific needs of the Security-Information Agency, the character of which is confidential and the manner and method of securing and alienating such funds and the Decree on special purpose funds (*Official Gazette of RS* No. 82/08 and 47/10), prescribing in more detail special purpose funds of confidential character for the ministry competent for defence matters and for Serbian Armed Forces and prescribing the manner and method of securing and alienating such funds.

The Security-Information Agency, as a civilian security-intelligence service, conducts a number of procurement procedures for goods, services and work assignments.

Taking into consideration the nature of work carried out by the Security-Information Agency and depending on the value of goods, services and work assignments that are subject matter of procurement as well as depending on their intended use, a specific public procurement, in an annual plan for procurement shall be defined as **public procurement, public procurement for low-value contracts or confidential procurement** pursuant to provisions contained in the Law on Public Procurement and Law on Confidentiality of Information.

Procedures of public procurement and public procurement for low-value contracts at the Security-Information Agency are conducted pursuant to the Law on Public Procurement (*OG* No. 116/2008), i.e. pursuant to the *Rulebook on procurement procedures for low-value contracts* (*Official Gazette of RS* No. 50/2009).

Procedures for confidential procurements are prescribed by the Decree on allocating special purpose funds for the needs of Security-Information Agency (*OG of RS* No. 21/09) and by Agency's internal guidelines regulating the manner of conducting procurements and keeping records on how special purpose funds are obtained.

According to Agency's procurement plan and plan for implementation of its budget for specific fiscal year, confidential procurement procedures for special purpose funds are launched by Agency's Director or any member of the Agency whom the Director authorizes to that effect. Specific procedures are conducted by confidential procurement committees which send invitations for submission of bids only to bidders that meet the prescribed conditions. When the procedure of opening of bids has been concluded, a report on expert assessment of bids is drawn up. Based on the report, the Director of the Agency or its member authorized by the Director to that effect render a decision on the selection of the most advantageous bid, i.e. on the award of contract.

The law in force in the Republic of Serbia is the **Law on Public Procurement** (*OG of RS* No. 116/08). It is a regulation that in a systematic and comprehensive manner governs the field of public procurement. Pursuant to the provisions of the above-mentioned Law, the subject matter of public procurement is the delivery of goods, rendering of services or performance of work assignments. Based on the LPP, a package of by-laws that also apply to the field of public procurement has been adopted, including:

1. *Rulebook on public procurement procedures for low-value contracts;*
2. *Rulebook on criteria for appointing commissions for public procurements;*
3. *Rulebook on prescribing evidence based on which it will be established that a bid has been submitted by a domestic bidder and for identifying goods of domestic origin;*
4. *Rulebook on procedure for issuing certificates to public procurement officers;*
5. *Rulebook on procedure for opening of bids and on the model used for keeping the minutes of opening of bids;*
6. *Rulebook on mandatory elements of tender documents in public procurement procedures;*
7. *Rulebook on manner in which records of public procurements shall be kept;*
8. *Rulebook on the form and content of credit application and the form and content of documents pertaining to creditworthiness of contracting authority in cases of public procurement for credit as a type of financial service;*
9. *Rulebook on the code of conduct with regard to electronic bids and the manner of conducting electronic bidding as part of public procurement procedures;*

One of the basic principles of public procurement is the principle of transparency of any public procurement procedure which is materialized in the first place by way of imposing the obligation of publishing, i.e. announcing notices of public procurements whereby competition among bidders is facilitated to the greatest possible extent.

Subject matter of any procurement may be all goods, services or work assignments that have not been exempted from procurement pursuant to provisions contained in the LPP. Procurements that have been under special regulations defined as confidential shall be conducted in accordance with provisions contained in the **Decree on special purpose funds** (*OG of RS* No. 82/08 and 47/2010). The goods in question are such as set out in the **Decree on defining the national list of controlled weapons and military equipment** and in the **Decree on defining the national list of controlled dual-use goods** (*OG* No. 60/09).

Regarding procurement procedures for goods that have specific intended use (confidential procurements), the Committee shall act in accordance with Article 8 of the said Decree.

Procurements of weapons and military equipment within the country are conducted pursuant to regulations governing the production and circulation of weapons and military equipment and abroad only when it is not possible to make an acquisition in the country, while procurements from foreign manufactures are conducted with manufacturers or legal entities that have been founded and registered for such operations by competent authorities of the supplier's country of origin.

Institutional set-up (administrative capacity)

19. Who is responsible for managing the various aspects of public procurement policy (at central and local level)?

Relevant duties in the field of public procurement are discharged by the Ministry of Finance, Public Procurement Office and the Commission for the Protection of Rights.

Pursuant to general regulations on public administration in the Republic of Serbia, policy formulation in the field of public procurement falls within the purview of the Government. The Ministry of Finance and Public Procurement Office take part in the shaping of Government's policy in this field. The Ministry of Finance exercises the supervision of how the Law is enforced, while the Public Procurement Office undertakes expert activities whereby conditions for competitive and transparent activities of all those that participate in public procurement processes are ensured as well as conditions for specialized and general education on public procurement and for creating conditions for introduction of electronic system of public procurement. The Public Procurement Office was set up under the Law on Public Procurement, and it started its work in 2002.

Protection of bidders' rights and public interest with regard to public procurement procedures lies within the purview of the Commission for the Protection of Rights. The Commission for the Protection of Rights that was appointed in 2003 has continued to work in accordance with the existing law.

20. What are the tasks and powers of this (these) body (bodies)? Please provide information on the organization chart and the number of staff.

Public Procurement Office – total number of employees 18

Director

Department of public procurement affairs;

Group for expert-level tasks in the field of public procurement – 3 employees

Group for monitoring public procurement procedures – 3 employees

Department of development and improvement of the system of public procurement – 6 employees

Group for financial and monetary services – 2 employees

Group for human resources and general services – 3 employees

21. Could Serbia inform about the activities which the relevant authorities conducted in the area of guidance and training?

Over the past two years since the Law on Public Procurement came into force, experts from the Public Procurement Office have participated in seminars that were attended by some 3,000 participants and organized by various sponsors.

Public Procurement Office provides daily consultations for contracting authorities and bidders for the purpose of resolving practical problems that arise in the course of implementation of regulations.

In order to allow for correct implementation of the Law on Public Procurement, the Public Procurement Office has prepared the following models: 1) *Forms of decisions and other acts*, 2) *Forms of tender documents – goods, services and work assignments* and 3) *Forms of procurement plans*.

Experts from the Public Procurement Office have held numerous seminars at which they instructed contracting authorities and bidders on how to use the Public Procurement Portal. In addition, the Public Procurement Office gives daily consultations to those who use the Portal.

Experts from the Public Procurement Office have taken part in the production of *Guidelines for using a software application for conducting public procurement procedures*, as well as in the training of users coming from the ranks of local self-governments.

In order to establish and further professionalism in the field of public procurement, the Public Procurement Office has, in cooperation with European organizations, held six-month training seminars divided in modules, which were intended for large-scale contracting authorities, such as: the National Bank, EPS /Electric Power Industry of Serbia/, PTT /Post, Telegraph, Telephone/ and so forth. In addition, the Office has, in cooperation with the TAIEX programme, organized training seminars for the purpose of familiarising with and accepting European standards in the field of public procurement that infrastructure systems and local self-governments called for and that focused on the topics of centralization and introduction of electronic public procurements.

With regard to training of public procurement officers, direct cooperation between the Ministry of Finance, Public Procurement Office and the Republic Commission for the Protection of Rights in public procurement procedures has resulted in the setting up of a Commission for preparing certification examinations for public procurement officers and organising administration thereof (hereinafter: the Commission). Among other things, the Commission has adopted a Manual for training and sitting for certification examination for public procurement officers (hereinafter: the Training Manual) and determined examination questions for testing the knowledge of regulations pertaining to the field of public procurement and candidates' professional competence.

Questions concerning conditions and manner of organization of and sitting for examinations are regulated by a Cooperation Agreement that was concluded between the Ministry of Finance and Public Procurement Office.

Performance of the said Agreement provided for posting relevant information concerning public procurement officers on the web-presentation of the Public Procurement office, such as: information on the regulatory framework (the Law and the Rulebook); training (training programs, lecturers and training organizers), as well as on the examination itself (acquisition of certificates, application forms for taking the examination, date and time of the examination and its results). The Training Manual has been posted on this web page as well.

As of 15 November 2010, it has been made possible to file applications for the examination to the Public Procurement Office.

The first date for certification examination for public procurement officers was scheduled for 15 December 2010.

Publication

22. Where do entities publish tender notices? Is there an electronic portal where the procurement opportunities are published?

Contracting authorities publish their notices of public procurements in the *Official Gazette of the Republic of Serbia* and they post them on the Public Procurement Portal of the Public Procurement Office.

Public Procurement Portal is an electronic portal intended for announcing public procurement opportunities. As well, any contracting authority may post free of charge its notices of public procurements on the Public Procurement Portal, whereby great financial savings have been achieved.

Owing to the existence of the electronic Public Procurement Portal, all interested legal and natural persons may search and scan notices of public procurements free of any charge, which contributes to the increased transparency and cost-effectiveness in the field of public procurement.

The Public Procurement Portal is highly structured so that it facilitates the search and review of notices of public procurements by various criteria. For instance, an interested party may check for notices posted by a particular contracting authority, check notices by type of subject matter of the procurement, by date on which it was published, by municipality and place of origin of the contracting authority, by type of notice or type of procedure that the contracting authority has employed. If interested parties do not know the full name of the contracting authority or subject matter of some procurement, there is also a possibility of searching notices by the so-called key words, which allows them to enter only a part of the contracting authority's name or a part of the word denoting the subject matter of procurement.

In addition to notices of public procurements, posted on the Public Procurement Portal as well are decisions rendered by the Republic Commission for the Protection of Bidders' Rights and all the contracts concerning concluded public contracts which are by means of quarterly reports submitted to the Public Procurement Office, which is a statutory obligation of any contracting authority.

23. Please provide us with data, in particular the number and type of notices published.

Information concerning the number and type of notices published

Within the time span following the entry into force of the Law on Public Procurement, or since 6 January 2009 until today, **2,028** contracting authorities have been registered on the Public Procurement Portal.

60,447 notices of public procurements have been published, of which:

- periodic indicative notices: 618 notices
- notices of concluded contracts: 26,448 notices
- notices of termination of procedures: 3,727 notices
- decisions on extensions of time limits: 544 notices
- open calls: 22,151 notices
- contract award notices: 6,959 notices

In terms of **the type of procedures**, they are structured as follows:

Open calls: (22,151 notices)

- open procedures: 13,406 or 61%
- first phase of a restricted procedure: 868 or 4%
- qualification procedures: 784 or 4%
- negotiated procedures without a prior notice: 1,835 or 8%
- negotiated procedures including a prior notice: 763 or 3%
- public procurement procedures for low-value contracts: 4,476 or 20%

- procedures implemented by means of a contest 19 or 0%

Notices of concluded public contracts: (26,448 notices):

- open procedures: 15,315 or 58%
- first phase of a restricted procedure: 755 or 3%
- qualification procedures: 703 or 3%
- negotiated procedures without a prior notice: 4,821 or 18 %
- negotiated procedures including a prior notice: 1,109 or 4%
- public procurement procedures for low-value contracts: 3,752 or 14%
- procedures implemented by means of a contest: 6 or 0%

Notices of termination of procedures: (3,727 procedures):

- open procedures: 2,494 or 67%
- first phase of a restricted procedure: 115 or 3%
- qualification procedures: 66 or 2%
- negotiated procedures without a prior notice: 393 or 11%
- negotiated procedures including a prior notice: 140 or 4%
- public procurement procedures for low-value contracts: 515 or 13%
- procedures implemented by means of a contest: 4 or 0%

In respect of **decisions of the Commission for the Protection of Rights**, **540** decisions have been published, of which:

- 398 decisions
- 142 conclusions

III Remedies

24. Please outline Serbian review and remedies system, including the appeal bodies. What review procedures are available in the event of an infringement of public procurement rules? When and to whom are they available?

In the event of an infringement of public procurement rules, legal protection is provided for by means of a procedure for the protection of rights. The protection procedure is initiated by filing an initial act – a request for the protection of rights.

A request for the protection of rights may be filed by any bidder who finds that certain actions taken by the contracting authority at any stage of any public procurement procedure do not comply with the law. A special provision lays down that those bidders who were prevented from taking part in any negotiated public procurement procedure without a prior notice shall have the right to file requests for protection of their rights and they shall have at their disposal more time to obtain redress than generally prescribed time limits. Claimants empowered to file requests for the protection of rights in the event of violation of public interest are the Public Procurement Office, the complaints commissioner and all the state authorities and public organisations empowered to conduct the supervision of operations of contracting authorities.

Any request for the protection of rights may be filed against any and every action taken by the contracting authority for the entire duration of any public procurement procedure. This means that subject matter of any request for the protection of rights may be all and every actions taken by the contracting authority, beginning with the manner in which it acted during the preparation of an open call for competition and tender documents, then the question whether the contracting authority had any legal basis to initiate the public procurement procedure (which particularly

pertains to negotiated procedures), to actions taken in the course of opening of bids, the manner in which bids were evaluated and ranked, etc.

If filed in order to challenge the legality of content of an open call for bids or of tender documents, any request shall be considered timely provided that it is received by the contracting authority before the deadline for the submission of bids has expired notwithstanding the manner of submission.

After a decision on terminating any public procurement procedure has been made, the time limit for filing of requests shall be eight days from the date on which the bidder received such decision.

If a public procurement procedure was conducted employing the negotiated procedure without a prior notice, bidders who were prevented from taking part in the said procedure shall have eight days to file their requests for the protection of rights, counting from the date on which the award notice was published in the *Official Gazette of the Republic of Serbia*.

Requests for the protection of rights shall be submitted to the contracting authority conducting the public procurement. In the first instance, the contracting authority shall decide whether a request for the protection of rights has foundation or not. Filing a request for the protection of rights has a delaying effect on all the actions of the contracting authority. From the moment a request for the protection of rights has been filed, any contracting authority shall be obliged to stop all of its activities with respect to the public procurement concerned until a decision on the filed request for the protection of rights has been rendered. The only exception to the general delaying effect of any filed request for the protection of rights is provided for instances in which the request for the protection of rights is filed in the negotiated procedures without a prior notice that are being conducted as urgent.

The delaying effect of the filed request may be cancelled out solely by a decision of the Republic Commission rendered at the recommendation of the contracting authority. The decision whereby a delaying effect of the request for the protection of rights is cancelled out is rendered by the Republic Commission solely in cases when such a delay of actions of the contracting authority would result in jeopardizing the interest of the Republic of Serbia.

If a bidder who has initiated the procedure for the protection of rights is not satisfied with the decision of the contracting authority, he has a statutory possibility to file a so-called written statement regarding continuing the procedure for the protection of rights and thus initiate the actions of the Republic Commission for the Protection of Rights in public procurement procedures (hereinafter: the Republic Commission). The Republic Commission shall conduct a review of the lawfulness of the conducted public procurement procedure in such a way that by deliberating on the request for the protection of rights in the second instance it shall make a decision on the foundation of allegations pointing to illegal actions that the contracting authority took while conducting the procedure of public procurement.

Should the Republic Commission find that the request for the protection of rights is well-founded, it may overturn the decision of the contracting authority in part and order that a new decision be made in accordance with orders given in the decision of the Republic Commission. In addition, the Republic Commission is empowered to completely cancel any public procurement procedure provided that it is not possible to redress the violations of the law, i.e. of regulations governing public procurement procedures whose existence has been established.

In addition to a request for the protection of rights, bidders have at their disposal another legal remedy. Namely, bidders have a possibility provided for by the Law to lodge appeals against decisions that the contracting authority has made in the procedure of previous examination of

whether there are procedural presumptions for rendering decisions on requests filed for the protection of rights in the first instance. If the contracting authority based on its conclusion rejects the request on grounds of inadequate legal capacity, lapsed deadline or irregularity, bidders may lodge an appeal that is lodged directly with the Republic Commission, which shall then, depending on the established facts, either uphold or overturn the challenged conclusion.

An administrative dispute against the decision of the Republic Commission may be initiated before the Administrative Court. Also, any bidder who believes that he has suffered financial damage caused by actions of the contracting authority while conducting a public procurement procedure may bring an action for damages before the regular civil court of competent jurisdiction.

25. What bodies are responsible for the review procedures in the field of public procurement? Are they of administrative or judicial character? Is their independence from the contracting authorities ensured, if so how?

The review procedures in the field of public procurement come within the purview of the Republic Commission for the Protection of Rights in Public Procurement Procedures (hereinafter: the Republic Commission). The Republic Commission conducts the review of the lawfulness of the conducted public procurement procedure by rendering decisions on requests filed for the protection of rights in the second instance. The Republic Commission shall decide on matters raised in the request for the protection of rights, as well as on violations of which the claimant did not know or could not have known, but which did influence the decision rendered by the contracting authority in the course of the public procurement procedure.

The Republic Commission is an independent and autonomous body of the Republic of Serbia (administrative in character), which is composed of a Chairman and four members. The Republic Commission has the status of a legal entity and funds for its operation are provided for in the budget of the Republic of Serbia. The Republic Commission answers for its work to the National Assembly.

The Chairman of the Republic Commission and its members are elected and relieved from duty by the National Assembly at the recommendation of the Government of the Republic of Serbia. The Chairman and members of the Republic Commission are appointed for a period of five years.

Under the Law, the Chairman and members of the Republic Commission may not perform any other public function in terms of the law governing the conflict of interests, they may not hold any office in any political party or perform or hold any other function, post, duty or activity that might influence their independence in work and actions or which might diminish their reputation or the reputation of the office of a member or the Chairman of the Republic Commission.

The Law lists, item by item, conditions under which the Chairman or a member of the Republic Commission may be relieved from his/her duty before his/her term of office has expired. The procedure for any potential dismissal has been arranged so that the Government of the Republic of Serbia must, along with a recommendation for the dismissal of the Chairman or a member of the Republic Commission, submit evidence to that effect to the National Assembly. The Law prescribes that the Chairman or a member of the Republic Commission must be given an opportunity to give a statement concerning the grounds for his/her dismissal before the National Assembly.

26. What are the powers conferred on these review bodies?

The Republic Commission shall, within its competence:

- decide on requests for the protection of bidders' rights and public interest
- decide on appeals lodged against procedural decisions that contracting authorities rendered in view of the requests for the protection of rights.
- decide on recommendations given by contracting authorities that requests for the protection of rights should not delay the activities pertaining to the public procurement procedure
- decide on the expenses incurred in the course of procedures for the protection of rights
- monitor the implementation of its own decisions
- cooperate with foreign institutions and experts in the field of public procurement

In particular, the Law requires that the Republic Commission may request from contracting authorities to submit their reports and documents concerning the implementation of public procurement procedures in which there have been requests for the protection of rights or a report and documents concerning repeated procedures.

The Law lays down that contracting authorities have an obligation to submit the aforementioned report and documents within a deadline determined by the Republic Commission, but which may not be longer than six months counting from the date on which they received a decision whereby the Republic Commission adopted a request for the protection of rights and thus cancelled that public procurement procedure.

Should the Republic Commission, based on the report and documents, establish that irregularities have not been eliminated or that instructions given by the Commission itself have not been observed or should a contracting authority fail to submit its report and documents within the set time limit, the Commission shall notify accordingly the body competent for public funds auditing, the budget inspection, the National Assembly and the Government.