The Legal 500 Country Comparative Guides

Croatia: Public Procurement

This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Croatia.

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1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL)

Public procurement is regulated by the Public Procurement Act (Official Gazette 120/16, further in text: PPA). However, Article 29. of the PPA specifies that it does not apply to public contracts and design contest which the contracting authority is obliged to award or organize in accordance with the procurement procedures, which are different from those laid down by the PPA and are established either by a legal instrument creating international law obligations, such as an international agreement, concluded in conformity with the EU Treaties, between a Member State and one or more third countries or subdivisions thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories, or by an international organisation.

Also the PPA does not apply to public contracts and design contests which the contracting authority awards or organizes in accordance with the procurement rules provided by an international organization or international financing institution, where the public contracts and design contests concerned are fully financed by that organisation or institution.

In the case of public contracts and design contests co-financed for the most part by an international organisation or an international financing institution, the parties shall agree on applicable procurement procedures. The PPA obliges the Republic of Croatia to inform the EU Commission of any legal instruments which may result in the application of different procurement regime than that laid down in the PPA, as described above.

Therefore, depending on the financing of the procurement, contracting authorities shall use either one of the procurement procedures laid down in the PPA or a different legal procurement regime under the circumstances described above.

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements?

According to the PPA there are two types of contracting authorities in Croatia, namely, public contracting authorities and contracting entities.

Public contracting authorities are: the Republic of Croatia, regional and local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law. Bodies governed by public law means bodies that have all of the following characteristics:

- they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- they have legal personality; and
- they are financed, for the most part, by the State, regional or local authorities, or by
other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Contracting entities are: public contracting authorities or companies under the real or potential dominant influence of a public contracting authority and other subjects which operate in one of the defined sectorial activities. Sectorial activities, according to the PPA are: gas and thermal energy; electrical energy; water management; transport service; airports, sea ports and river ports, postal services, oil and gas extraction and exploration or extraction of coal or other solid fuels.

The distinction between those two general types of contracting authorities is relevant as they can apply different public procurement regimes in terms of procedure, both of which are regulated in the PPA.

According to the PPA there are different types of public tendering procedure:

- Open procedure
- Restricted procedure
- Competitive procedure with negotiation. It is important to note that this type of procedure can only be used by the public contracting authority. The contracting entity cannot use this type of procedure, but instead can use the negotiated procedure with prior publication.
- Competitive dialogue
- Innovation partnership
- Negotiated procedure without prior publication

According to the PPA, special procurement regime applies if it is related to military, defence and security. This procurement regime is regulated in the PPA and more specifically in Regulation on public procurement for defence and security purposes (Official Gazette 19/2018 (28/2/2018)).

Also, special procurement regime, according to the PPA applies for social and other special services. Such services are specified in Schedule X of the PPA and include e.g. religious services, prison services, hotel services etc.

It should also be mentioned that there are special rules in the PPA which apply to design contests.

3. **Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction?**

The PPA specifies financial thresholds at which public procurement regulation applies but
they do not differ depending on the nature of procurement.

Pursuant to the Article 12 of the PPA, the Act does not apply to procurements:

a) of goods and services and design contests with an estimated value less than HRK 200,000.00

b) works with an estimated value less than HRK 500,000.00.

Also, the PPA does not apply to procurement for purposes of diplomatic and consular offices:

a) of goods and services and design contests with an estimated value less than HRK 950,000.00

b) works with an estimated value less than HRK 4,000,000.00.

4. **Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.**

   The procurement procedures below the financial thresholds determined by the PPA and to which, therefore, the PPA does not apply, are prescribed by the general act of the contracting authority.

5. **For the procurement of complex contracts*, how are contracts publicised? What publication or journal is used for these purposes?**

   The obligation of the contracting authority to publish the procurement contract in the tender documentation/invitation to submit requests to participate is not prescribed, however, the tender documentation has to contain the conditions of the procurement contract. In case of complex procurement the provisions that are not the subject matter of negotiations are part of the tender documentation.

   Also, the PPA does not prescribe the obligation to publish the content of the final wording of the contract. However, pursuant to Article 333 of the PPA the contracting authority/entity is obliged to enable access to the tender documentation and the concluded contracts in accordance with the act regulating the right to access to information.

   All notices in relation to public procurement procedures are published in the Electronic Public Procurement Classifieds. If these are high value procurement procedure (see question 3), all notices will be published both in the Electronic Public Procurement Classifieds and the EU Official Journal.
Typical period from the publication of the advert that bidders have to respond to the advert is 30 days.

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders?

The purpose of the selection conditions is to identify those economic operators who are capable of performing and completing the contract to be awarded. When setting the conditions for participation, the contracting authority may fix minimum levels of capacity that economic operators must satisfy (alone or, where appropriate, dependent on the capacities of third parties). According to the PPA criteria are limited to an assessment as to whether the grounds for exclusion (mandatory or optional) have been satisfied as well as an assessment of the economic operator’s suitability to perform services, its financial and economic standing, and its technical and/or professional capacity. When defining the selection criteria, the contracting authority can request only minimal levels of capacity which ensure that the economic operator will be capable of fulfilling the public procurement contract.

The principles and criteria for the selection of the economic operator are equal for both contracting authorities and contracting entities.

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so what are those grounds of mandatory exclusion?

According to the PPA, the contracting authority shall exclude from participation in a public procurement procedure any candidate or tenderer if the economic operator and/or the person authorised under law to represent the legal person of the economic operator has been the subject of a conviction by final judgment for one or more of the following criminal acts: (a) participation in a criminal organisation, (b) corruption, (c) fraud, (d) terrorist offences or offences linked to terrorist activities, (e) money laundering or terrorist financing , (f) child labour and other forms of trafficking in human beings.

Mandatory grounds for exclusion also include failure to fulfill the obligation to pay all outstanding tax liabilities and contributions for pension and health insurance, unless the economic operator was granted delayed payment of the said obligation under special regulations.

However, the contracting authorities may derogate from the mandatory exclusion grounds as stated above, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

Regarding the discretionary exclusion grounds, the Contracting Authorities may exclude from
participation in a procurement procedure any economic operator in any of the following situations: 1) where the contracting authority can demonstrate by any appropriate means a violation of applicable national and international obligations related to the environment, social or labour law; 2) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations; 3) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable; 4) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition; 5) where a conflict of interest cannot be effectively remedied by other less intrusive measures; 6) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure cannot be remedied by other, less intrusive measures; 7) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions; 8) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfillment of the selection criteria, has withheld such information or is not able to submit the required supporting documents and 9) where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Discretionary exclusion grounds are applicable only if the contracting authority lists them in the tender documentation.

8. Please described a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures.

Procurement procedures used for complex contracts are: competitive procedure with negotiation, competitive dialogue or innovation partnership. The competitive procedure with negotiation and the competitive dialogues are used when the contracting authority, considering the complexity of the subject matter of procurement, is of the opinion that it will be necessary to negotiate with the tenderers in order e.g. to confirm certain conditions set forth in the tenders. The difference between these procedures is that the contracting authority is obliged to negotiate with the tenderers when conducting a competitive dialogue, and in the case of a competitive procedure with negotiation, the contracting authority can award the public procurement contract on the basis of initial tenders without conducting negotiations. The innovation partnership is used when the needs of the contracting authority cannot be met by solutions that are already available on the market.
All procedures commence as of the day of announcing the invitation to tender under which all economic operators can submit their request for participation within the period for the submission of requests. The time period for the submission of requests has to amount to at least 30 days as of the day of announcing the invitation to tender, however, in certain circumstances this period can be reduced.

The next phase is the evaluation of timely submitted requests for participation by the contracting authority and the drawing up of minutes. There are no legally prescribed time limits for this phase but they are determined by the contracting authority.

This phase is followed by the invitation to qualified tenderers to submit their initial tender in the event of a competitive procedure with negotiation or an innovation partnership, and negotiation on the submitted initial bids, i.e. a dialogue with the selected tenderers with the aim of defining one or more solutions that best suit the needs of the contracting authority in the case of a competitive dialogue. When implementing a competitive dialogue and innovation partnership, the contracting authority defines the appropriate time limit for the submission of initial and all subsequent bids, and in a competitive procedure with negotiation the minimal time limit for the submission of tenders amounts to 30 days (i.e. in the case of electronic submission, 25 days) as of the sending of the invitation to submit tenders and this time limit can be reduced in accordance with the legally prescribed conditions.

After the conclusion of negotiations i.e. dialogue, the contracting authority invites the tenderers to submit their final bids, i.e. in the case of an innovation partnership, to submit the research or innovation project, it checks the compliance of the final tender with the procurement documentation, evaluates the tenders and based on the tender selection criteria passes the decision on the selection and signs the contract. The time limit for the passing of the selection decision is defined by the contracting authority in the tender documentation. Also, the contracting authority is obliged to apply a 15-day standstill period as of the day of the delivery of the selection decision until the day of concluding the public procurement contract.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured?

For the procurement of a low-value contract the procedure is the same, however the time limit for the submission of the request to participate is 20 days as of the day the invitation to tender has been send, and it is not reduced in the case of electronic submission.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

In relation to the potential selected bidder, the best practice for ensuring compliance with the relevant regime includes technical capacity, capacity to perform activities, and the
predefined supervision of the implementation of all segments of the contract.

In relation to the procurement process itself, best practice is reflected in the PPA and concerns provisions on conflict of interest and distortion of market competition.

11. **Please explain any rules which are specifically applicable to the evaluation of bids.**

As a result of alignment with the acquis communautaire, the PPA introduced the criterion most economically advantageous tender (ENP) as the sole criterion of evaluation and selection of bids.

Pursuant to the PAA, the most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

According to the PPA, in the process of examination and evaluation of tenders, the contracting authority shall verify the following in the stated order:

- a) if the tenderer failed to submit the tender guarantee, if required or if the submitted guarantee is not valid
- b) if the tenderer which meets the exclusion criteria is excluded
- c) if the suitability criteria are met
- d) if the requirements related to the description of the subject-matter of procurement and technical specifications are fulfilled, if the requirements and criteria stated in the contract notice and procurement documents are fulfilled, taking into consideration, if applicable, variant bids
- e) if the calculations in the tender are accurate

12. **Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder.**

The reasons for the acceptance or refusal of a tender, i.e. all relevant data in relation to the scoring of tenders, are mandatorily contained in the Minutes of the review and evaluation of tenders which is publicly published in the Electronic Public Procurement Classifieds. The content of the Minutes of the review and evaluation of tenders is prescribed in detail in the
13. **What remedies are available to unsuccessful bidders in your jurisdiction?**

Pursuant to the PPA, any natural, legal person and a group of natural and/or legal persons having or having had an interest in obtaining a particular public procurement contract or a framework agreement and who has been or risks being harmed by the alleged infringement of subjective rights shall be entitled to lodge an appeal with the State Commission.

According to the PPA, in the appellate procedure the State Commission shall cancel a public procurement contract or framework agreement in full or in part if the contracting authority/entity has concluded:

1. a public procurement contract or framework agreement without conducting a prior public procurement procedure, without this being permissible in accordance with this Act,
2. a public procurement contract or framework agreement during the standstill period when it has to be applied,
3. a public procurement contract or framework agreement contrary to Article 422 of the PAA which prescribes preventing continuation of public procurement procedures or awarding a public contract and a framework agreement
4. a public procurement contract or a framework agreement contrary to Article 424 of the PAA which regulates interim measures,
5. a public procurement contract based on a framework agreement contrary to Article 153 paragraph 4 of the PAA which regulates a situation where a framework agreement is concluded with several economic operators.
6. a contracts under a dynamic purchasing system contrary to Articles 161 and 162 of the PAA.

Pursuant to the PPA, an appeal is not allowed against the decision of the State Commission but a procedure can be initiated before the High Administrative Court of the Republic of Croatia.

The High Administrative Court has to pass the decision in the period of 30 days from the date on which case file was completed, and if the Court overturns the decision of the State Commission, it will decide upon the appeal that was lodged with the State Commission in the public procurement procedure.

Also, according to the PPA, any person who has suffered damage due to violations of the PPA shall have the possibility of awarding damages before the competent court under the general indemnification regulations.
14. Are public procurement law challenges common in your jurisdiction?

According to the Annual Report of the State Commission for the year 2018, 11,847 public procurement procedures have been published and in 839 procedures (7.08%) an appellate procedure has been initiated, so appeals in the public procurement procedures are not rare.

There is not any perception that bidders, who initiate appellate procedures in public procurement procedures, suffer reputational harm.

Regarding the costs of the appellate procedure, according to the PPA the appellant shall pay a fee for initiating the appellate procedure in the amount of:

1. HRK 5,000.00 for the estimated value of procurement up to HRK 750,000.00,
2. HRK 10,000.00 for the estimated value of procurement from 750,001.01 to HRK 1,500,000.00
3. HRK 25,000.00 for the estimated value of procurement from HRK 1,500,001.01 to 7,500,000.00
4. HRK 45,000.00 for the estimated value of procurement from HRK 7,500,001.01 to HRK 25,000,000.00
5. HRK 70,000.00 for the estimated value of procurement from HRK 25,000,001.01 to HRK 60,000,000.00
6. HRK 100,000.00 for the estimated value of procurement higher than HRK 60,000,000.00.

Besides that, the State Commission shall decide on the costs of an appellate procedure, determine who shall bear the costs of the procedure and the amount thereof, and to whom and by when they must be paid. The party, at whose detriment the procedure was terminated, shall reimburse the other party for all justified costs incurred by its participation in the appellate procedure.

15. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case).

Pursuant to the PPA, the State Commission shall pass its decision within a period of 30 days from the date on which the case file was completed, unless otherwise provided in the PPA.

In accordance with the Annual Report of the State Commission for the year 2018., it takes, on average, 26 days for the State Commission to pass its decision as of the date on which the case file was completed.

In case of initiating a procedure against the State Commission decision before the High Administrative Court of the Republic of Croatia, the decision will be passed in the period of 30 days as of the date on which case file was completed.
Taking into consideration the above mentioned, a procurement dispute should be resolved in the period of 2 months.

16. **What rights/remedies are given to bidders that are based outside your jurisdiction?**

Pursuant to the PPA, in the implementation of public procurement procedures under the PPA, in relation to all economic operators, contracting authorities/entities shall respect the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and the principles deriving therefrom, such as the principle of competition, the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.

In accordance with the PPA, public procurement must not be designed with an intention to give particular economic operators an advantage or to put them at a disadvantage.

Also, economic operators who, under the law of the state in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Republic of Croatia, they would be required to be either natural or legal persons.

So, foreign bidders have the same rights and remedies as bidders based in the Republic of Croatia.

The abovementioned is especially evident in terms of the obligation that all requirements are non-discriminatory (e.g. if the Contracting Entity requires the delivery of the documents and the confirmations as per Croatian laws, it also needs to indicate that, instead, the confirmations and documents issued in the country of establishment of the economic operator are also valid and have the equivalent value).

It should also be mentioned that the PPA specifically prescribes that the states that are parties to the Agreement on the Government procurement (GPA) and other international agreements signed by the EU are to be treated as Member states of the EU.

17. **Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract?**

Pursuant to the PPA, in the implementation of public procurement procedures under the PPA, in relation to all economic operators, contracting authorities/entities shall respect the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and the principles deriving therefrom, such as the principle of competition, the principle of equal treatment, the principle of non-discrimination,
the principle of mutual recognition, the principle of proportionality and the principle of transparency.

In accordance the PPA, public procurement must not be designed with an intention to give particular economic operators an advantage or to put them at a disadvantage.

Also, economic operators who, under the law of the state in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Republic of Croatia, they would be required to be either natural or legal persons.

Therefore, an overseas-bidder who has a subsidiary on the territory of the Republic of Croatia has the same rights and remedies as all other bidders.

18. **In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues?**

Pursuant to the PPA and the Act on the State Commission for Supervision over Public Procurement Procedure (Official Gazette 18/2013, 127/2013, 74/2014, 98/2019) any natural, legal person and a group of natural and/or legal persons having or having had an interest in obtaining a particular public procurement contract or a framework agreement and who has been or risks being harmed by the alleged infringement of subjective rights shall be entitled to lodge an appeal with the State Commission.

In accordance with the PPA, an appeal is not allowed against the decision of the State Commission but a procedure can be initiated before the High Administrative Court of the Republic of Croatia.

The High Administrative Court has to pass the decision in the period of 30 days as of the date on which case file was completed and, if the Court overturns the decision of the State Commission, it will decide upon the appeal that was lodged with the State Commission in the public procurement procedure.

Also, any person who has suffered damage due to violations of the PPA shall have the possibility of awarding damages before the competent court under the general indemnification regulations.

19. **Are post-award contract amendments/variations to publically procured, regulation contracts subject to regulation in your jurisdiction?**

The amendments to the public procurement contract and the framework contract have been regulated under the PPA, which stipulates under which conditions the contracting entity is permitted to amend the contract during its duration without having to conduct a new public
procurement procedure.

The PPA also stipulates the option to amend the public procurement contract with the objective to replace the initial contractor with a new contractor, which is a consequence of a general or partial legal succession of the initial contractor, by another economic operator who meets the initially stipulated criteria for the selection of the economic operator.

20. **How common are direct awards for complex contracts (contract awards without any prior publication or competition)?**

It is not possible to award a complex contract directly.