



LEGAL INSTRUMENTS HOW TO INVOLVE END USER OR PUBLIC IN THE PUBLIC PROCUREMENT CONTRACT ADAPTATION TO FUTURE NEEDS

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ABSTRACT

For procurement items with a long life cycle, it is very important to be able to achieve the efficiency of the result not only at the moment of acceptance of the performance, but also during its entire life cycle. Because in such a changing and dynamic development of the world, as it is now, it is impossible today to accurately predict the needs of the future consumer, or society. Thus, to ensure efficiency, it is essential that the customer has the opportunity to impact the execution of the contract not only during the procurement planning phase, but also during the life cycle of the procurement item. It is even more important not only in the procurement planning phase, but also during its implementation to ensure compliance of the performance with the needs and interests of the existing end users, or society. In practice, various ways are used to influence or amend the direction of execution of a civil contract, depending on whether the traditional public procurement or the Public-Private partnership (hereinafter - PPP) procedure is applied. The purpose of the study is to reveal the practical and legal aspects of how the end user, or society, can be involved in decision-making related to changes or additional works necessary for the effectiveness of the contract, thus ensuring their compliance with real-time needs.

Methods/Approach The methodology of the research includes a conceptual research using the critical literature review, analysis of normative, evaluation of the dominant consensus, synthesis of possible solutions to legal and practical shortcomings of end user involvement in public resources spending procedures.

Results: Authors come to conclusion that the involvement of the public through NGOs is essential so that its interests are taken into account throughout the procurement subject during the life cycle and it would also be possible to introduce innovations based on the needs of the society throughout the contract execution period. Reasonable way how to involve the end user (society) as a participant during whole life cycle of public procurement contract for to be able to contract adaptation for future needs could be PPP based on QHC – where institutional partnership includes NGO as representative of society.

Keywords: Quadruple Helix concept, public-private partnership, corporate governing, society involvement

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INTRODUCTION

Previously, the author (Velve, 2016) has already analyzed and explained the content framework of the concept of quality, using a multidisciplinary approach. Analogously, when developing PPP contract conditions and contract award evaluation criteria, this multidisciplinary approach is important, i.e., all quality dimensions must be taken into account, not only from a legal and economic perspective, but focusing on areas important to the end user, i.e. society's needs. Thus, already in the planning phase, the participation of the public is necessary in order to be able to determine and include in the contract the quality requirements that are essential for the public. Undeniably, a practical question arises as to how justified and effective such public involvement in the state administration would be and whether the goal justifies the means.

The need for public involvement is also justified by the need to ensure sustainability by evaluating the quality of public contract execution in all quality dimensions, including significantly more aspects that have so far been defined in the Public Procurement Directive and applied in public procurement practice. For long-term contracts (longer than 5-10 years) it is essential to ensure legal flexibility for updating and implementing the (changing) needs of society. However, when implementing such PPP contracts within the framework of public procurement, it is not possible to define the future needs of all society when awarding the contract. Accordingly, there must be a legal solution, how the needs of society can be integrated throughout the entire period of execution of the PPP contract, i.e., in fact, the society should be one of the participants of the PPP.

METHODOLOGY

The methodology of the research includes a conceptual research using the critical literature review, analysis of normative, evaluation of the dominant consensus, synthesis of possible solutions to legal and practical shortcomings of end user (society) involvement in public resources spending procedures.

DISCUSSION AND RESULTS

It should be noted that the activity of the state administration is strictly regulated, with limited opportunities for experimentation, design thinking and co-creation. A transformation and reinterpretation of the legal base is needed to develop innovative governance models, implementing effective, community-driven management and sharing of public resources, not focusing on the cost factor, but on other forms of shared value, e.g. public benefits or environmental impact, including those not directly related to the execution of the specific procurement contract. It should be taken into account that the revenue from the performance of the public procurement contract includes not only direct costs, but also profit, which will also be used for other needs of the company's economic activity (Avena, 2019), thus ensuring sustainability of the public resource spending.

Several countries around the world have included sustainable public procurement (Thomson & Jackson, 2007) as a priority in their development policies. For example, Japan is one of the leaders in the field of



sustainable public procurement, while the Philippines has developed regulations on the implementation of eco-procurement, which obliges federal government departments and agencies to adopt sustainable public procurement programs. Canada, on the other hand, is committed to implementing a sustainable public procurement policy. The UNEP (UN Environment - Global Review on Sustainable Public Procurement, 2017) recognized that changing existing production and consumption patterns will require fostering collaboration between stakeholders across the value chain. Rather than focusing solely on the procurement procedures of public organizations, moving the procurement sector towards sustainability will require significant public-private collaboration. The creation of platforms for multi-stakeholder collaboration and knowledge sharing at local, national and international levels will be essential to achieve this goal.

A study carried out before showed that Sweden tops the list of countries applying sustainable public procurement in the EU, followed by Denmark, Germany, Austria, the United Kingdom and the Netherlands (Melissen & Reinders, 2012). Some of the sectors analyzed in the literature on sustainable public procurement include ICT (Igarashi et al., 2015), manufacturing and transport industries (Bratt et al., 2013), energy (Hannon et al., 2015), construction (Alvarez & Rubio, 2015; Liu & Cui, 2016), higher education (Bala et al., 2008), chemical (Stoughton & Votta, 2003) and food industries (Thomson & Jackson 2007).

Researches on sustainable public procurement are basically focused on the procurement process (Liu & Cui, 2016), product-service linking system (Hannon et al., 2015; Varnäs et al., 2009), eco-design (Byggeth & Hochschorner, 2006), environmental management systems (Testa et al., 2016), supplier selection (Igarashi et al., 2015), the influence of cultural and political structures (Smith et al., 2016), obstacles to change and driving forces of cooperation between procurement process participants (Uttam & Le Lann Roos, 2015; Walker & Preuss, 2008), the need to conduct research on social and cultural issues (Mosgaard et al., 2013) and the link between sustainable public procurement and the commercial sector (Alvarez & Rubio, 2015)), as well competitive dialogue procedure for sustainable public procurement (Uttam & Le Lann Roos, 2015).

The authors, evaluating the ability of the modern public sector to implement sustainable public procurement in all its quality dimensions (Velve, 2016), can conclude that without interdisciplinary cooperation with specialists in the field of procurement at a scientific level, it is impossible to define an algorithm of quality criteria in such a way as to evaluate the best price-quality ratio not only on the delivery moment, but also in a long-term perspective. Especially for procurement items with a long life cycle, i.e. 10 years and more, which is also typical of construction contracts. A critical factor to consider when developing a quality assessment algorithm is to be able to define the elements of quality in all its dimensions for the future society. In fact, the creation of such an algorithm requires modeling, developing assumptions and forecasts in the long term not only regarding the material and technical aspects, but also for the socio-economic and geopolitical aspects, for the development of which the Authority's procurement commission simply do not have such professional



capacity, accordingly, the involvement of scientific competence would be not only desirable, but even critical important.

Although some research focuses on multi-party collaboration (Witjes, Lozano; 2016) the novelty of QHC and multi-party collaboration means that there is still a limited amount of research on collaborative procurement systems that considers more than just the supplier and customer. The research examines both the triple helix, quadruple helix, and also the quintuple helix cooperation approach (Thomson & Jackson, 2007).

Within the framework of this Research, the possibilities of involvement of the public, as one of the participants of the cooperation model based on the Quadruple Helix concept (hereinafter - QHC), in the planning and implementation of public procurement have been evaluated.

As a result of the public procurement procedure, a public contract or a general agreement is concluded by tender, and their content is determined by the Law on Public Procurement and the Law on Procurement of Public Service Providers, which incorporate the requirements of Directive 2014/24/EU and other EU directives.

When applying traditional public procurement, it is actually possible to identify several ways in which the customer can change, specify, supplement or in any other way adjust the contract performance requirements:

- Amendments to the contract in accordance with a predetermined procedure
- The right of the Authority to initiate changes according the contract
- The right of the Authority to make changes arising from the law, if they are economically and legally justified

Regarding the possibility of contract amendments, a number of restrictions in the regulatory framework of public procurement must be taken into account. If the Civil Law stipulates the right of the parties to freely agree on the terms of contract performance, including to make amendments and changes freely upon the agreement of the parties, then the normative regulation of public procurement determines specific cases, volumes and conditions under which any amendments are generally permissible.

The procedure for amending the contract and the basic principles of application are determined by Directive 2014/24/EU of the European Parliament and the Council of February 26, 2014 on public procurement and which repeals Directive 2004/18/EC. The document applies to the EEA (hereinafter - Directive 2014/24/EU), Article 72 taken over from Article 61 of the Law on Public Procurement. In accordance with the mentioned regulation, the contract or general agreement must clearly state to the customer the possibility of amendments, the conditions under which amendments are allowed, the scope and nature of the amendments. It is not permissible to only refer to the possibility of making amendments, but in principle their possible extent must be determined quite precisely. Amendments may be related to the need for additional work, revision of contract prices, deadlines and other provisions that may affect the successful execution of the procurement contract or general agreement. However, the amendments cannot, in essence, provide for such changes in the technical



specification that would fundamentally affect the initial offer and, accordingly, the range of potential suppliers, i.e. the changes could not be such that would adversely affect the existence of fair competition. It is also recognized in jurisprudence that the Authority is not entitled to make such changes in the public procurement contract that affect the economic balance in favor of the contractor.

Accordingly, after evaluating the requirements of the Public Procurement Law, Directive 2014/24/EU, etc. binding regulatory acts regarding the amendment of a public procurement contract, the authors can conclude that within the framework of the mentioned regulations, the Authority does not have legal instruments to influence the performance of a contract concluded as a result of public procurement, as the admissibility of amendments basically results only from such circumstances that the Authority could not foresee in advance. The permissibility of amendments would not be based solely on the fact that the customer, like an investor, has analyzed the market, made forecasts of changes, evaluated trends and, in order to maintain profitability, it is necessary to make appropriate improvements or adjustments.

The aforementioned can also be concluded on the Authority's right to make changes, if such rights are reserved in the contract, because again the same regulatory is binding the making of amendments.

The Authority's legal rights to make changes, if they are economically and legally justified, follows from other special legal norms, for example, if *force majeure has been established*, a state of emergency has been declared in the country, etc. circumstances that do not depend solely on the Authority. However, making such changes is basically permissible only in certain cases and to the extent. Thus, the authors can conclude that the impact of the performance of the contract concluded as a result of traditional public procurement with the aim of improving the result and benefit of the society as a result of the performance of the contract is not legally possible.

Thus, when planning the implementation of long-term projects with a long life cycle and multifactorial impact on economic efficiency and the realization of public interests, the PPP procedure is suitable. However, after evaluating the classic PPP variations and risk redistribution mechanisms, the authors concludes that the Authority's options and rights to modify the terms of the contract are still legally limited, if such a need arises from the development trends of the economic situation and other factors, because it is actually impossible to forecast for such a long period of time, what is the life cycle of the procurement item, i.e., only the society itself can define the needs of the future society in the relevant period of time. Thus, a PPP based on QHC modification could be justified and essential for the long-term provision of public needs.

As already analyzed above, in practice there are various ways to involve the public as a participant in the implementation of the PPP project, but until now this participation has been more formal, for example, by conducting a public consultation or ascertaining the opinion of the public in the planning phase of the project. However, it does not include the identification of future needs and implementation options. Thus, the involvement of society, as a real PPP participant, should not be formal, but actual. It is possible to involve the



public in a PPP based on the QHC approach in several ways. The simplest of them is the involvement of an organization representing public interests in an institutional partnership, for example, if an organization representing specific interests joins as one of the participants in the PPP contract. There are no legal obstacles to such involvement, however, such an organization actually represents the interests of a certain group of society, as only the most civically active part of society is usually involved as members in such organizations. An individual who is not a member of such a society has limited opportunities to get involved. Of course, participation can be ensured if the individual is admitted to the relevant NGO as a member. However, how legally justified is such a condition to become a member of a legal entity, so that a representative of society can participate in the realization of his interests? By analogy, if one evaluates the possibilities of realizing the individual's legal interests in the field of general human rights, then the first part of Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms states that every person has the right to peaceful assembly and freedom of association, including the right to form and join trade unions in order to defend their interests. Thus, the right of a person to participate in organizations representing his interests in order to defend his interests is determined by the mentioned convention. Authors believe that such an individual's initiative and the need for active involvement cannot be considered disproportionate or otherwise restrictive, because a person can withdraw from the membership of the association at any time, simply by submitting a relevant application, and membership of an NGO as a member does not create any legal consequences or obligations. Accordingly, no obstacles can be identified that would prevent any member of society from realizing their interests by joining the NGO as a member, thus gaining the opportunity to actively participate in decision-making.

Evaluating the possibilities of an individual in the society to participate in the PPP institutional partnership individually, it comes to the conclusion that, although it is legally possible, in practice it would create a significant burden even if several persons wanted to do so, because it accordingly means that the mentioned persons would also become legal participants of the institutional partnership with all legal consequences and obligations arising therefrom. For example, if a new legal entity is founded as a result of an institutional partnership, such an individual is mistaken for the founder of the legal entity, and if there are several dozen or hundreds of such individuals, rational and effective planning of economic activity and decision-making is not possible. Thus, the involvement of an individual as a member of an institutional partnership is not suitable for QHC PPP implementation.

There is also an opportunity for an individual to get involved in financing the activities of a legal entity established as a result of such an institutional partnership for the implementation of a specific goal with a crowd funding instrument. Hong R. and Ryu J. (2019) have evaluated the potential of crowdfunding in the implementation of public projects. Hong S. and Ryu J. (Hong & Ryu, 2019) investigated whether collaborative projects between public and private organizations are more successful in raising funds than projects initiated



by private organizations alone. The authors argue that government involvement in crowdfunding provides a kind of accreditation or certification that certifies that the project aims to achieve public rather than private goals, thereby reducing information asymmetry and improving mutual trust between the client (i.e., private sector organizations) and funders (i.e., the crowd). The authors suggest that governments can take advantage of crowdfunding to “co-finance” public projects with citizens.

Crowdfunding is an increasingly popular and widespread form of online fundraising where anyone can make small individual contributions and pool resources to fund a specific project to achieve a specific goal. Research shows that crowdfunding is raising rapidly in many parts of the world (Agrawal, Catalini & Goldfarb, 2014; Belleflamme, Lambert & Schwienbacher, 2014; Burtch, Ghose & Wattal, 2013; Mollick, 2014; Hong & Ryu, 2019).

Research shows that many crowdfunding projects are successful in raising funds, even if their expected returns are very low or even negative. This means that the compensation structure of many crowdfunding projects closely resembles charitable donations; people make voluntary contributions to the provision of public goods through crowdfunding platforms (Boudreau et al., 2015). Some researchers have suggested that crowdfunders may derive intangible benefits from their participation (Burtch et al., 2013). Such an observation is not limited to philanthropic crowdfunding, but in a broader sense applies to various types of projects, including business projects (Boudreau et al., 2015).

Evidence that crowdfunding resembles charitable giving suggests that it could potentially be used not only for private projects but also for public projects. Recognizing this potential, governments in many countries around the world have begun to actively collaborate with the non-profit sector to launch projects using crowdfunding platforms (Hong & Ryu, 2019).

de Vries, V. Bekkers and Tummers (2016) defined four specific types of innovation: (1) process innovation, (2) product or service innovation, (3) management innovation, and (4) conceptual innovation. Accordingly, public sector crowdfunding can be classified as an example of process and governance innovation as it offers a new process as well as a new form of governance to solve societal problems.

Crowdfunding offers a new process where the government can ask non-profit organizations (NGOs) for a solution to a specific social problem. It also enables a new form of collaborative governance where stakeholders pool their innovation resources to develop shared solutions to social problems. In particular, the government oversees the entire process, while guiding the overall direction of social investment and stating that the project aims to achieve social rather than private goals. Thus, NGOs can use their experience to offer creative and concrete solutions to the social problems raised by the government. The financiers evaluate the proposed solutions by contributing to the projects that are valuable to them. The use of crowdfunding by governments can be considered a public sector innovation with economic benefits. First, crowdfunding can be compatible with democratic values because it “democratizes” funding. Crowdfunding allows citizens to “vote



with their money” online to turn ideas into reality. Second, crowdfunding can be particularly useful for governments to deliver politically controversial public services (Hong & Ryu, 2019).

Previous research has identified a number of strategies that public sector organizations can implement to promote innovation (Hartley et al., 2013), for example, collaborative or corporate governance, involving both public and private actors, can promote and sustain public sector innovation. This type of strategy is often called "collaborative innovation". The rationale for collaborative innovation comes mainly from theories of network management and organizational learning, which emphasize how collaborative processes involving a wide range of actors contribute to finding innovative solutions to complex problems (Gascó, 2017; Lindsay et al., 2018). A key driver of collaborative innovation may be that such participatory governance opens innovation processes to a wide range of stakeholders facing common challenges (Bommert, 2010; Hartley et al., 2013; Lindsay et al., 2018). These stakeholders, who have comparative advantages in different innovation assets, are integrated into the innovation cycle to combine their assets and develop joint solutions (Bommert, 2010; Hartley et al., 2013; Hong & Ryu, 2019)

While scientists generally agree on the benefits of a collaborative approach to innovation, they also point to the difficulties of creating a well-functioning partnership. Previous research finds that a lack of trust among participants is a major barrier to collaboration. Collaborative governance may not be sustainable if the organizations involved are concerned about the actual goals of the other actors (more formally, “moral hazard”). Moral hazard is a serious concern, especially when asymmetric information exists between the organizations involved (Hölmstrom, 1979). Therefore, building a successful collaborative partnership depends on whether and how information is shared between partners. Since building trust among participants is not always possible entirely because it is too time-consuming, maintaining a high level of information transparency is crucial to the expansion of any collaborative governance network. Government participation in crowdfunding projects promotes the formation of cooperation, reducing the information asymmetry between the creator and the financiers (Hong & Ryu, 2019).

CONCLUSION

Summarizing the above, the authors can conclude that the attraction of crowd funding for the implementation of the public-private partnership agreement is possible and in some cases even desirable, because in this way not only additional funding is attracted for the implementation of the project, but also the implementation of the project takes place in accordance with the priorities set by the society by "voting" with their financial resources. However, since crowd funding is in principle possible only at the start of the project, as the public will not want to finance the implementation of some state functions in the long term, financing not only the implementation but also the operation phase, the involvement of the public through NGOs is essential so that its interests are taken into account throughout the procurement subject during the life cycle and it would also



be possible to introduce innovations based on the needs of the society throughout the contract execution period. Thus, a reasonable way how to involve the end user (society) as a participant during whole life cycle of public procurement contract for to be able to contract adaptation for future needs could be PPP based on QHC – where institutional partnership includes NGO as representative of society.

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Conflict of interests

The authors declare no conflict of interest.

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