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MATTERS OF COMPLAINTS REGARDING VIOLATIONS OF THE PROCUREMENT PROCEDURES IN BALTIC STATES

Lolita Edolfa*

ABSTRACT. Upon Latvia, Estonia and Lithuania joining the European Union and implementation of the provisions of the European Union Directives on public procurement into national law the harmonization process of review and remedies systems was also commenced in order to create effective and professional institutional and judicial system of review and remedy in national level of each country. The paper is giving the insight into the systems of the examination of the complaints regarding violations of the public procurement procedures in the Baltic States, looking at the theoretical and practical side of the issue and particularly focusing on the institutional review and remedies system established in Latvia as well as existing problems in this area.

INTRODUCTION

Public procurement field comprises an essential segment of economical activities of each European Union Member State influencing the growth of national economy of each country thereby advancing joint development of the European Union. Therefore, very important aspect is formation of effective and professional system to solve disputes arising in public procurement process in each EU Member State with main task to introduce and enforce practical implementation of public procurement based on common underlying principles by ensuring that violations of this legislation, as well as mistakes in practical implementation and realization process can be corrected.

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* *Lolita Edolfa, MScs. in Law, is Senior Consultant, Parliament of the Republic of Latvia. Her research interest is in development and implementation of public procurement legislation and institutional systems on States levels and creation of modern and effective internal public procurement systems within the institutions*

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The public procurement review and remedies systems of EU member States, including in the Baltic States, are established and developed on the basis of the requirements of the *EU Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts* (89/665/EEC) and *Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts* (Remedies Directives), the EC Treaty and the case law of the Court of Justice of the European Union (ECJ).

Above mentioned legal enactments and legal norms as well as other international standards have established fundamental principles which should be in a base of existing review and remedies system of each EU Member State. So, remedies must be rapid, effective, transparent and non-discriminatory (Directive 2007/66/EC, 2007). Member States upon forming national systems have considerable chances to chose particular models of the systems but this, of course, is affected by already existing peculiarities of legal system in each country. Therefore, while being compliant with underlying principles and objectives prescribed in EU Directives, review and remedies systems are different in each Member State.

Although legal systems of the Baltic States: Latvia, Estonia, Lithuania belong to Continental European (Roman – Germanic) Law, public procurement review and remedies institutional systems as well as normative regulation and process of practical implementation are different. Thus, the purpose of this paper is to give an insight in existing systems looking at characteristic features and peculiarities of each system.

The present paper gives an insight regarding general fundamental principles and normative documents accepted in the European Union which regulates formation of review and remedies system of each Europe Union Member State as well as looks at existing systems and models of review and remedies in Member States, examining them from the viewpoint of traditional procurement field. The paper provides an analysis of existing institutional systems of review and remedies in the Baltic States as well as legislation basis for

examining complaints giving detailed analysis of Latvian public procurement system of review and remedies.

The study was performed using document analysis, comparative and generalisation methods. It is expected that the results will be valuable for improvement of the institutional public procurement review and remedies system of Latvia.

PUBLIC PROCUREMENT REVIEW AND REMEDIES SYSTEMS IN EUROPEAN UNION MEMBER STATES

National public procurement system of each EU Member State shall be created in accordance with underlying principles of EU Remedies Directives and for utmost effectiveness it must include:

1) set of legal norms on public procurement including "*adequate review and remedies procedures, rules on costs, scope and on the effect of filing a request for review, rules on the remedial actions: possibility to set aside individual decisions including the award decision, damages, and interim measures"(ECJ,* Case C-92/00, 2002, C-390/98, 2001, Case C-453/99, 2001);
2) institutional base in order to implement and review public procurement process.

WTO Agreement on Government procurement (1994) and the UNCITRAL Model Law established fundamental requirements for the public procurement review and remedies procedures, where, *inter alia*, is mentioned the "*right of the tenderer to seek a review, a dedicated remedies system, an independent body, authorised to sanction remedial action, access to judicial review and access to alternative dispute resolution, in particular when public contract has been signed*" (Colman & Newiadomska, 2012).

Types of Remedies Systems and Bodies

All review and remedies systems existing in all the EU Member States may be divided into two groups: *single system or dual system.* Countries which have a single system (called *judicial system*) have "one path of review bodies" (OECD, 2007) in which only courts or tribunal decide on whole remedy procedure whereas countries with dual system (called *mixed: administrative-judicial system*) characterise "*two separate paths of review*" (OECD, 2007), in which appeals are firstly reviewed by bodies (mainly not-judicial in

character) before the appeal is subject to review by a court or tribunal. The main factor that separates the two paths in dual systems is the conclusion of the contract.

There are a number of different models for the establishing a review and remedies body and anyway the determinant aspect is existing traditions based on legal system in a particular country and already existing institutional system. Directives also offer an opportunity to provide different tasks concerning remedy procedure to separate bodies responsible for particular parts of the procedure.

Thus, remedies function in EU Member States may be assigned to:

1) regular court (commercial/civil/administrative);
2) a specialised administrative body (judicial/quasi judicial);
3) alternative dispute settlement bodies (administrative tribunal/ arbitration panel/ombudsman);
4) combination of the above mentioned (which is the most widespread practise).

Every of these remedies bodies, of course has its own advantages and disadvantages.

Thus, *regular court* (commercial or civil) is capable to solve disputes regarding public contracts in general because it understand the broader commercial context and respective legal framework. As a disadvantage it must be mentioned that sometimes there is a lack of special knowledge regarding public procurement procedures. In its turn, *administrative court*s are capable to provide more specialised expertise in the field concerning public procurement. The courts being the third independent pillar of the state, in fact, are more independent than any other state or local government authority and therefore are treated with higher trust among entrepreneurs. As a disadvantage must be mentioned the following: possible slowness of examining cases and higher process costs.

In Member States mainly do exist specialised public procurement review bodies. These bodies are *non-judicial or quasi judicial* nature [1] and have the function of a first instance review body which decisions can be appealed. In many Member States the second instance is the last one but in some of the Member States including the Baltic countries there is a third instance to examine disputes regarding public procurement.

Specialised public procurement review body can be a successful choice examining disputes of the first instance and as it is created only for examining disputes concerning public procurement it can provide simpler and faster procedure with lower costs, besides ensuring highly qualified decisions. The last is possible only on condition if the professionals who are reviewing the cases and taking decisions are as highly qualified lawyers as judges at courts and they are enjoying the same privilege of being highly independent thereby ensuring that decisions are not influenced, by any means, by officials of institution nor by the parties involved in the case.

As there are situations that specialised public procurement review bodies in Member States mainly are not judicial in character, EU Remedies Directives determine that decisions shall be prepared in written form and there should be a possibility to review them in institution with judicial character, for instance, in courts (EEC Treaty, 1957).

This necessity of judicial character for a specialised review body has been emphasised also by Court of Justice of the European Union (ECJ, Case C-54/96), where Court has established the main requirements "on the basis of which a body responsible for providing remedies should be considered as having a judicial (or quasi-judical) character" (SIGMA, 2013):

The Body Established by Law

The fact of the establishment of the body as well as other legal provisions (functionality of the body, competences, the appointment/dismissal of its members, procedural requirements etc.) can be included in the Public Procurement Law or in a special law.

Permanency and Independency

Institution should be permanent which means it should have permanent financing to ensure its functioning, employees for the most part should be recruited permanently. Exception could be persons holding a position at complaints examination commissions. Taking into consideration aspects of proficiency as well as corruption risks these persons could be employed or appointed/ elected for a fixed term.

Institution should be institutionally independent which means that "the review body carries out its task independently and under its own responsibility" (SIGMA, 2013).

Compulsory Jurisdiction

Decisions taken by institution should be compulsory for both sides – public and private - that means that all the decisions taken by a specialised review body when examining submitted complains on revoking the decision taken by the commission of commissioning authority as well as on reexamining taken decision, must be obeyed. Certainly tenderer shall have the rights to appeal every decision of institution to the next instance.

Procedure Inter Partes

All the interested parties in the process should have equal rights and possibilities to submit evidence (orally and in writing) and to justify one's position as well as equal right to acquaint themselves with the materials of the the process.

The Rules of Law

Decisions in public procurement cases must be taken according to legal norms in force in particular Member State which should be harmonised with regulation determined in EU Directives on public procurement.

As mentioned already before Member States as the first instance mainly use *specialized public procurement review bodie*s as review institutions, decisions of which can be appealed by tenderers to the next instance – ordinary or specialized courts. However, there are Member States which also practise direct complaints to the contracting entity [2] and this can be used as the first remedy process stage as well as an additional action taken to submision on possible infringement in the instance of first stage which is determined by state.

Special public procurement senates or chambers in these ordinary or specialized courts "have only a minority of countries" (OECD, 2007).

Although the disputes after concluding a contract mainly are being solved at courts, in recent years as an alternative method to solve public procurement disputes[3] mediation has gained

popularity[4]. Advantages of it compared with traditional dispute solving methods are: flexibility of the process; rapid case reviewing and, of course, saving of financial resources. This is an important gain for both parties involved in the process because it ensures greater proportionality of resources invested in opposition to acquired outcome. It is proved in practise that *„costs of procedure and legal expenses are quite a relevant issue affecting the effectiveness of remedies"*(Caranta, 2011) and in many cases exactly the high costs of legal procedure is a reason why the private party involved in public procurement takes no action for established infringements to be examined at court. Mediation is an appropriate dispute solving method also in cases of complicated and immense procurements because it gives maximum flexibility and speed therefore ensuring the highest possible level of effectiveness. There are examples in practise when it has been enough with 16 hours to find a solution in dispute which in traditional way could be solved in a year (Lang, 2013)! CEDR's Fifth'Mediation Audit (May 2012) noted that public sector is one of the areas *„that would see most growth in mediation usage"* (Lang, 2013) in the future. Taking into account that mediation process offers possibilities to maximize effectiveness of solving disputes on public procurement this process should be seriously evaluated to adjust it for solving disputes also in period before concluding a contract.

SYSTEMS OF REVIEWING COMPLAINTS IN THE BALTIC STATES

Procurement reviewing procedures are important not only from the viewpoint of protection of person's rights but also from the viewpoint of state interests. All these aspects are unified and expressed in Section 2 of Public Procurement Law of Latvia – purpose of the law. Procurement procedures reviewing mechanisms are one of the most important tools to ensure openness of the procurement procedure, free competition of suppliers, as well as equal and fair attitude and effective use of public authority funds, reducing the risk of the commissioning authority to the minimum. The aims included in Public Procurement Laws in Lithuania and Estonia are practically the same.

There is a state level authority supervising public procurement field in all the Baltic states as well as examination of taken decisions in court is provided, thus ensuring that decisions may be appealed.

Public procurement systems in Latvia, Lithuania and Estonia, of course, has been established on unified EU principles, however, public procurement reviewing system in each country differs a little.

Thus, there is a single review and remedies system in Lithuania according to which all the disputes should be solved in Civil Court, whereas Latvia and Estonia have dual or mixed system, having a specialised review body as the first instance to solve disputes and decisions of which can be appealed to the court.

Latvia

As already mentioned before there is *a dual review and remedies system* in Latvia.

The first instance, where tenderer should seek for a remedy in case one thinks one's rights and interests have been infringed (upon) is The Procurement Monitoring Bureau of the Republic of Latvia (PMB), which ensures reviewing complaints before court. This function has been delegated to PMB in order to relieve the courts, to ensure faster and more flexible reviewing of complaints.

A decision of the Procurement Monitoring Bureau may be appealed in the Administrative District Court in accordance with the procedures prescribed by the Administrative Procedure Law (APL, 2001), which decisions may be appealed in accordance with cassation procedures in the Department of Administrative Cases of the Senate of the Supreme Court. This is the second level to review public procurement complaints.

The Procurement Monitoring Bureau is a State direct administration institution supervised by the Ministry of Finance[5] and it is *functionally the highest authority in relation to* reviewing procurement procedure infringements. This function has been delegated to PMB according to Public Procurement Law (PPL, 2006, Section 65).

The Procurement Monitoring Bureau of the Republic of Latvia functions include:

1) monitoring the conformity of the procurement procedures with the law,
2) drafting proposals on political documents and projects of regulatory enactments,

3) providing methodological assistance to public and private entities, consultations and organising training for commissioning authorities and suppliers,
4) publishing the notices and compiling statistical information regarding procurements according to EU and national law,
5) cooperation with EU and other foreign authorities,
6) as well as, starting from 2015, drawing up statements of administrative infringements and applying punishments.

Constitution of the Republic of Latvia provides that institutional system of the state is based on seperation of powers principle (Buka&Jarinovska, 1999; Levits, 2002), which means that all the functioning of the state basically has been devided into three ways or state power functional branches – legislature, executive and judiciary. These three branches of state power are also called three powers – legislative power[6], executive power[7] and judicial power[8].

Thereby, a practical example may be seen where in competence of one authority legislature, executive and judicial functions are given. Besides, it provides consultations and trainings (paid service) to a private sector as well. Situation as this, firstly, cannot be considered as a good governance principle in state administration. Secondly, public procurement field as such already is under the risk of being highly coruptive and the fact that there is a posibility that the same employees may provide consultations to commissioning authority, as well as to supplier and afterwards as a member of complaints examination commission evaluates conformity with a law of procurement procedure and eligibility of qualification, taking compulsory decisions on particular procurement procedure, it doubles this corruption risk.

Some uncertainties lay on the fact that meanwhile regarding to reviewing the complaints PMB is considered as extrajudicial instance, it is also a part of state administration hierarchical structure which is regulated by State Civil Service Law (SCSL, 2001). In compliance with PPL Section 65 paragraph three it is *functionally the highest authority*" in relation to examine complaints regarding infringements of the procurement procedure. „*Functional subordination*" definition derives from State Administration Structure Law (SASL, 2002) Section 7 which specifies two possible forms of subordination – control or supervision. Taking into consideration that by law the Procurement Monitoring Bureau in examining disputes is given a

basic function to be an extrajudicial instance then, practically, it is impossible for commissioning authority as institution to become under subordination of PMB in case the decision taken by commissioning authority in the process of public procurement has been appealed in PMB.

Next essential aspect which may be concluded from above mentioned is – members of complaints examination commission who take part in extrajudicial decision taking are – *public officials*. Employees are recruited according to State Civil Service Law, respectively stating qualification requirements and these requirements are hardly equal to requirements the judges shall conform. For example, PMB as the first compulsory requirement asks to comply with Section 7 of State Civil Service Law[9], frequently higher education in law is just desirable. As to experience in public procurement field, usually these requirements are lower that judges should conform.

On the contrary, Law on Judicial Power (LJP, 1993) stipulates strong requirements a person who may work as a judge should meet. As it is of great importance for a judge qualification and reputation only highly qualified and honest lawyer may wok as a judge. Thus, as a judge of a district (city) court (first instance court) may be appointed a person who:

1) has attained at least 30 years of age;
2) has acquired a higher vocational or academic education (except the first level vocational education) and a lawyer qualification, as well as a Master or Doctor degree;
3) has at least five years length of service in a legal speciality after acquiring a lawyer qualification or has been working in position of assistant to a Chief Judge or assistant to a judge for at least five years;
4) has passed qualification examinations, which the candidate for a judge position should take after one to six months apprenticeship period.

The process of nominating and appointing candidates for judge also differs, the Minister for Justice nominates candidates to be appointed to or confirmed on the basis of the opinion of the Judicial Qualification Board, but appointed to Office by the Parliament (Saeima) for three years. If the work of a Judge is unsatisfactory, the Minister for Justice, on the basis of an opinion of the Judicial

Qualification Board in the evaluation of the professional work of the judge, shall not nominate the judge as a candidate for a repeated appointment to or confirmation in office.

We can see that both PMB employee as well as a judge performs basically identical functions taking decisions which affect the rights of public as well as private entity and has a direct influence on state and local government functions, tasks to be performed in timely manner and good quality, as well as on development of entrepreneurial environment in the state and extensive state fund expenditure. However, requirements of the qualification and experience for these persons differs substantially. Accordingly professional and quality level of taken decisions differs substantially.

Examination of Complaints

Complaints received in the Procurement Monitoring Bureau are examined by A complaints examination commission (hereinafter – commission) consisting of three members (PPL, Clause 67). All the members of commission are officials of PMB. In addition, commissions are not permanent formations, according to decision by head of PMB, they are established for each case separately.

In order to ensure higher quality of taken decisions, the Procurement Monitoring Bureau may invite a procurement specialist or expert (PPL, Clause 67). Although a specialist and an expert participate in meetings of the commission without the right to vote as stated in section 67 in Public Procurement Law they have right to express an independent professional opinion to the commission regarding the facts established during examination of the complaint or provide a statement regarding questions asked by the commission. Unfortunately none of the external regulatory enactments regulating PMB operation provides requirements which a person should meet in order to be qualified as an expert or specialist of procurement. There is also no clearly defined differences between these definitions. Thus there is a risk in practise to invite as an expert/specialist persons whose professional qualification and experience is not satisfactory to ensure professional advice to members of commission therefore professional aspect of decision may be affected.

Relatively feeble requirements regarding education and specific experience of members of complaints examination commission are asked. Requirements and criteria regarding legal education stipulated

in law are asked just for two members of commission (PPL, Section 67), including the chairperson of the commission who should have academic or a second level higher vocational education in law or management or economics, as well as at least one-year experience in examination of complaints regarding infringements of the procurement procedure. The second member of commission only should have a higher education in law, without any experience in public procurement field. As to the third member of commission there are no criteria required.

Taking into account degree of elaboration and complexity of legislation on public procurement and necessity for decisions to be taken legally objective and precisely (in order procedures should not be delayed unjustifiably which is connected with direct or indirect loss of funds), and necessity to ensure contracts to be concluded in timely manner in order to reach the aim of public procurement, requirements for education and experience members of commission should meet are *not high enough and are not correspondent to degree of importance of decisions to be taken.*

As contribution in fighting corruption, Public Procurement Law stipulates that a person who has previously provided consultations regarding a procurement referred to in a complaint or is interested in acquiring the right to entering into the procurement contract or framework agreement, or is connected to the submitter of the complaint or another tenderer, may not be a member of the commission, specialist or expert (PPL, Clause 67)[10]. Prior to examination of the complaint, all the mentioned persons shall sign a respective attestation. However, taking into consideration that members of commission are appointed from different departments of PMB it is practically impossible to find out if some of the members of commission has provided consultations to tenderers.

Subject of Complaint

As stipulated in PPL Clause 68 right to submit a complaint regarding infringments of the procurement procedure has a person who is or has been interested in acquiring the right to enter into a procurement contract or a framework agreement or who is qualifying for winning and who, in relation to the specific procurement procedure, to which this Law applies, regards that his or her rights have been infringed upon or infringement of these rights is possible.

Subjects of complaints are:

(1) the provisions for selection of candidates or tenderers, technical specifications and other requirements, which relate to the specific procurement procedure,

(2) the activities of the commissioning authority or the procurement commission during the course of the procurement procedure.

Complaints may be submitted to PMB, if the estimated contract price of public supply contracts or service contracts is 42 000 EUR or more and the estimated contract price of public works contracts is 170 000 or more. But the complaints regarding decisions taken in so called „small procurements" (if contract price of public supply contracts or service contracts is 4000 EUR or more but less than 42 000 EUR, but contract price of public works contracts is 14 000 EUR or more but less than 170 000) (PPL, 2006) may be submitted directly to Administrative District court.

If the subject of the complaint derives from the interpretation of procurement procedure, invalidation of amendments or provisions, or general agreement the dispute should be solved at the court of general jurisdiction.

A complaint should be submitted to PMB within 10 to 15 days from the day when decision has been sent to the relevant person. Submission of complaints regarding technical specifications may vary (within 2-10 days prior to the expiry of the deadline for the submission of tenders), which depends on the type of public procurement procedure.

The Process of Examining Complaints

Within a one day after the complaint regarding infringements of the procurement procedure has been received PMB shall inform commissioning authority regarding initiation of an administrative case as well as insert information about it on the Website. Thus, the commissioning authority shall not enter into a procurement contract until a decision of the commission on results of examination of the complaint or termination of the administrative case is received. The submitter of a complaint is entitled to revoke the complaint submitted, in writing at any time while the commission has not taken a decision on the relevant complaint. Such cases are not rare. Approximately 24% of all complaints received in a year are revoked.

PMB evaluates received submission and takes a decision to proceed with examining the case or leave a complaint not proceeded with, informing about it the both parties involved. The complaint is left not proceeded with, in cases if:

(1) complaint is submitted by a person which is not entitled to do it by law[11], the complaint does not conform the requirements of deadlines or information included in complaint is incorrect/ incomplete;

(2) the information included in the complaint is evidently insufficient to satisfy the requirements of the submitter or the complaint itself is evidently inadmissible, etc.

The new edition of the law stipulates that the complaint should be left without examination also in cases a deposit has not been paid. It should be mentioned that this is already second attempt to introduce deposit system. Until 2010 a guarantee fee had to be paid upon submission of complaint, which depended on the amount of public procurement. Constitutional Court in its judgement No 2009-77-01 taken in 19 April, 2010 stated that such a fee is against Constitution of Republic of Latvia and it restricts ones rights to fair trial disproportionally and the mentioned fee was cancelled.

The new edition of law plans that the deposit to be paid is 2% from the contract price offered in the tender but not more than 10 000 *euro*. If the contract price is not fixed then the deposit should be fixed in amount of 3400 *euro* for public works contracts and 840 *euro* for public supply contracts or service contracts. It is provided that the deposit should be paid back if: submitter has withdrawn the submission before examining it in commission or the judgement which cancels decision of commission on submitter's submission on results of procurement or the court imposes an obligation to pay back the paid deposit.

The Process of Examining Complaints

The commission shall examine a complaint within one month after receipt. If due to objective reasons it is not possible to observe this time period, the commission may extend the time period. Examining the complaint regarding infringements of the procurement procedure, the commission may:

1) allow/ prohibit to enter into a procurement contract or framework agreement and to leave/ revoke the requirements specified in the procurement procedure documents or the decision of the commissioning authority completely or in some part;

2) leave the decision of the commissioning authority or the procurement commission on termination or discontinuation of the procurement procedure in effect, if the complaint is not justified, or revoke it, if the complaint is justified.

The commission may take a decision on the measures for elimination of the infringements established. The commission may assign the commissioning authority to discontinue the procurement procedure only in case if it is not possible to otherwise eliminate the infringements of the procurement procedure committed by the commissioning authority.

Commission work is organised in two parts: *open meeting and closed meeting*. In open meeting opinions of all parties arrived are being heard after this commission continues its work without participants. It should be mentioned that sometimes in practise participants arrive together with their lawyers/ sworn attorneys if the process regards legal aspects. Experts who have been involved in preparation of professional part of tender or specification preparation/evaluation are also invited. In practise there are situations when experts and specialists invited by participants of the meeting are higher level professionals in particular field than those invited by commission. Thereby there are reasonable doubts on proficiency level of possible commission decision and the risk is higher that the the decision which is not satisfactory for submitter of the submission will be appealed.

The commission shall evaluate a complaint on the basis of the facts referred to by the submitter thereof and participants, the explanations of the contracting party and the opinion or statement of the expert. If participants do not attend the examination of the complaint, the commission shall examine the complaint on the basis of the facts available thereto. Decision is prepared in written form indicating the justification of the decision, the legal norms applied and information where and within what time period such decision may be appealed.

When submitting a complaint to the Procurement Monitoring Bureau it is not asked to compensate losses caused to commissioning authority. It may be asked when submitting appeal to Administrative court or addressing commissioning authority in accordance with the procedures prescribed by the Law on Compensation of Losses Caused by Public Administration Institutions (LCLCPA, 2005).

The Second Step of Complaint Examination

A decision of the commission may be appealed in the Administrative District Court in accordance with the procedures prescribed by the Administrative Procedure Law (APL, 2001). The matter shall be reviewed by the court in the composition of three judges, in a timely manner. A court, upon selecting the type of the judgement shall evaluate, which type of the judgement is sufficiently reasonable, effective and preventive in the particular case in order to ensure that the commissioning authority would not commit such infringements of the law, meanwhile evaluating the interests of society.

Precise time limits to examine the case is impossible to set because it is next to impossible to predict difficulty level of the case and the character. Long terms to settle the cases is the main reason in Latvia why tenderers decide not to initiate dispute solving at all or do not continue to appeal decision taken by PMB.

A decision of the Administrative District Court may be appealed in accordance with cassation procedures in the Department of Administrative Cases of the Senate of the Supreme Court. It should be mentioned that the appeal of a decision of the commission shall not suspend the operation thereof.

In cases when contract is already concluded, an application regarding recognition of a procurement contract or framework agreement as invalid, amending or repealing of the provisions thereof or reduction of the term of operation of a contract or framework agreement may be submitted to Administrative District court in cases of severe infringements on procurement rights, for example, in cases commissioning authority failed to obey prohibition to enter the contract or it has concluded the procurement contract without waiting time to be passed, and other cases. An application should be submitted within six months after the day when the procurement

contract or framework agreement was entered into. The case is examined in the composition of three judges in accordance with the procedures prescribed by Administrative Procedure Law. At the same time with submitting an application or during examination of a case the tenderer may, in the cases and in accordance with the procedures specified in the Administrative Procedure Law, request for interim measures to be applied, as the means for it specifying a prohibition to perform specific activities related to implementation of the procurement contract or framework agreement. If, upon submitting before mentioned application, the claim is not based on cases referred in this Law, a claim shall be submitted to a court of general jurisdiction in accordance with the procedures specified in the Civil Procedure Law (CPL, 1998).

There is a situation in Latvia that a state institution cannot appeal at the court a decision made by other state institution which has been taken on the first institution's decision even in cases when the second institution has made a mistake. According to the judgement in case No SKA-306 taken by the Department of Administrative Cases of the Senate of the Supreme Court of the Republic of Latvia in 23 May 2006 it was stated that commissioning authority acting according to Public Procurement Law is not entitled to appeal decision of PMB.

The judgement mentioned above is based on the ECJ Judgement taken on 21 October, 2010 in case EST C-570/08 *Symvoulio Apochetefseon Lefkosias v Anatheoritiki Archi Prosforon[12]*, the note that the Member States in cases it is needed may provide such rights in national law was not taken into account.

Estonia

Directive 2007/66/EC has been transposed by amendments to the Public Procurement Act (PPA) which came into force on 1 July 2010, and partly on 01 January, 2014. The PPA is the principal transpositional instrument for all remedies Directives (including 89/665/EEC) covering the procedural requirements and review procedures.

As mentioned before Estonia the same as Latvia has dual review and remedies system**.** However, Estonian model has significant differences which makes it the most effective public procurement review and remedies system in the Baltic states.

In 2009 the public procurement monitoring sphere in Estonia was reorganized separating legislation and executive functions from judicial functions. The Procurement Monitoring Bureau was reorganized incorporating it into the Ministry of Finances as Public Procurement and State Aid Department, which *„exercises state supervision over organisation of public procurement and extrajudicial proceedings of misdemeanours in accordance with the procedure and to the extent provided by law, gives advice in matters concerning implementation of the PPA and organise training in public procurement as well as publishes relevant information about public procurement on its website"*(PPA, 2007, § 104). Currently there are just 14 employees, however, the scope of functions are wider than before rorganization.

Meanwhile, complaints regarding possible infringements of public procurement are being examined in separate public institution as the first compulsory instance - the Public Procurement Appeals Committee (PPAC) what is an extrajudicial dispute settlement body which carries out the appeal procedure provided for in the PPA on the bases of an pursuant to the procedure provided by law. The main function of the Appeals Committee is to carry out the appeal procedure, including appeals and applications for compensation for loss pursuant to the procedure provided by law (unlike in Latvia where Commission does not examine applications on compensation of losses).

Thus, dispute solving on public procurement has been transfferred to a separate, indipendent institution which in some extent may be considered as „specialized public procurement court". This is a professional approach to solve extrajudicial disputes ensuring indipendent and maximally proficient expertise in shortest time possible avoiding all risks which are present in Latvian model.

Unlike in Latvia in Estonia operational principles and functions of Public Procurement Appeals Committee are stated in external regulatory enactments in more detailed way – Public Procurement Act (2007, § 119) and *Statutes of the Public Procurement Appeals Committee (*Statutes of the protest, 2007). Thereby, PPAC operation principles are clear and open beginning with its functions and tasks, appointing PPAC members, etc., and including provisions on complaint management and examination procedure. This is a significant factor which establishes clear and transparent functioning

of commission and its members ensuring openness and proficiency of commission.

So, PPAC consists of three members which are being appointed for 5 years term. Members of Public Procurement Appeals Committee are appointed by *„Government on a proposal from the Minister of Finance"* (Statutes of the protest, 2007, §7). Also the chairman of the Review Committee representing and managing the Review Committee will be appointed from among the members of the Review Committee by the Government of the Republic on the proposal of the Minister of Finance.

Thereby, the act of appointing the members of PPAC is a public decision, before of which the aspect of proficiency and experience, etc., is evaluated. In Latvia Members of commission are appointed by head of PMB with an internal order from employees of PMB.

Taking into account above mentioned, level of proficiency in PPAC in Estonia differs significantly. Its members should meet requirements the same as judges do. PPA § 119 (2) states, that a member of the Review Committee *„ must be independent and make their decisions solely based on law and other legislation as well as international agreements binding on Estonia"*, and they may not work elsewhere beside the service in the Review Committee, except pursue academic or research work. It means they do not take part in supervision, providing consultations or methodological assistance.

PPA § 119 (5) states that *„the provisions provided for in § 47 of the Courts Act (2002) apply to the requirements established for a member of the Review Committee"*. And they are: person has to have in the field of law at least an officially certified Master's degree, he/she is of high moral character and has the abilities and personal characteristics necessary for working as a judge. PPA states cases when a member of the Review Committee could be released from office before the prescribed time - *„if the fact provided for in § 47 of the Courts Act becomes evident, which precludes the appointment of the person to the position of a member of the Review Committee in accordance with law"*(PPA, 2007, § 19).

All provisions of the Public Service Act (2012), regarding employment in service, and all the conditions applicable, do not apply to a member of the Review Committee.

It is also important to mention that the salary level of PPAC members is on the same level as judges have and which is higher than salaries in civil service. This way possible corruption risk is reduced as well as posibility to take unobjective decisions.

Subject of Complaints

Practically all the documents on which procurement procedure is based as well as all decisions of commissioning authority taken during procurement procedure can be appealed. There is an opinion established in Estonia that tenderer has a reasoned interest to initiate a dispute in procurement if the result of settling dispute can lead him to concluding a procurement contract. If it is not this way the complaint should be refused due to the lack of motivation.

It should be mentioned that claims on declaring contracts invalid as well as claims on compensation the losses are relatively rare.

Persons who are entitled to submit the claim on possible infringement of public procurement procedure are the same that in Latvia. There are also no requirement to notify the contracting authority of the applicants intention to seek review or to first seek review by the contracting authority.

Submission of the Claim

Usually the claim should be submitted in written for within 10 days from the day when submitter of the claim got to know or he had to get to know about his/her infringement of the rights or harm of interests but not after the public procurement contract had been concluded (except cases when the claim is on total termination of the contract). In these cases or in cases compensation of losses is being asked, claim to PPAC may be submitted within 30 day or 6 month period depending on moment when submitter of claim got to know or he had to get to know about his/her infringement of the rights.

Application Fees

There is a state fee of 1,278 EUR (State Fees Act, 2015) in the event of submission of a request as well as application for compensation of loss to the PPAC or Administrative Court in the case, when future procurement contract price is equal or exceeds internationally determined/ established threshold. If the price of procurement contract is below this threshold state fee is 639,11 EUR.

If the case is examined in the Supreme Court, legal costs and procedure expenses have to be covered.

Examination of the Claim

An appeal can be reviewed in the written procedure by the member of the appeal commission alone or the appeal commission of three members depending on the nature of the case (IMF Country Report, 2009).

Within seven days after receiving the claim, judges of PPAC have a duty to organise an oral procedure hearing both parties involved in dispute and to take a decision within 10 days after settling the case in oral procedure. In case the claim is being examined in written procedure PPAC has a duty to take a decision within 10 days after the complaint has been submitted. As mainly these terms have been obeyed appeal process is fast. Mainly decisions taken by PPAC are not appealed (Gunvaldis, 2015), which indicates high proficiency level of this institution

It should be mentioned that claims on declaring contracts to be invalid as well as claims on compensation the losses are relatively rare in Estonia. However, if tenderer is not satisfied with decision taken by PPAC, he has rights to appeal it to Administrative court and afterwards to Supreme Court.

On average the appeal of a procurement ready for contract takes no more than 6 months (going through all possible stages). In comparison it takes 10 months in Lithuania but 2-5 years in Latvia (Tamme, 2013)!

In Estonia there is a possibility to solve public procurement disputes also in Arbitral tribunals, what can decide in cases of civil matters that haven't been settled in court before. This possibility, in the case when the agreement is in force, is usually employed because it is less time consuming and cheaper than court settlements.

Lithuania

Also in Lithuania legal norms on public procurement review and remedies are harmonized with with demands of EU Remedies Directives. However, Lithuania, unlike Latvia and Estonia has taken different path and has created *single review and remedies system*. This means that in functions of Public Monitoring Bureau are not

included the function of examining complaints on public procurement. These complaints are being examined only in court.

Lithuanian Public Procurement Office (PPO) is an independent body, financed from the state budget and its task is to implement the public procurement policy and supervise compliance with the Law on Public Procurement (LPP, 1996) and other relevant legislation. The Head of PPO is appointed by the president of the state and after proposal of Prime Minister.

The PPO is rather wide (97 employees; 13 structural units, including the Training and Consulting Division, Control Division, Prevention Division, Risk Management Division, etc.) (Gunvaldis, 2015). Latvian PMB is smaller – just 61 employees (with wider functions, responsibilities and amount of work).

Submission of the Claims

Lithuanian LPP Article 93 states that *„a supplier wishing to dispute the decisions or actions of the contracting authority prior to awarding of a public contract must first file a claim against the contracting authority*". In the case of claim, the contracting authority must examine claim and take a reasoned decision not later than within five days of the receipt of the claim. Decision has to be given in written form and all interested candidates and tenderers have to be informed about that not later than on the next working day (LPP, Article 94[1]).

In the case the final decision of the contracting authority is adopted, a supplier have the right to file a claim with the contracting authority:

1) *within 15 days from dispatch to suppliers of a written notice of the contracting authority of the decision adopted by it;*
2) *within ten days (for simplified procurement procedures – within five working days) from publication of a decision adopted by the contracting authority, where this Law does not require to give suppliers a written notice of the decisions adopted by the contracting authority* (LPP, Article 94).

Also a supplier shall have the right to bring a lawsuit for nullification of a public contract within six months from awarding of the public contract.

Tenderer who thinks that actions of a contracting authority have not been in accordance with provisions of LPP and thereby it has infringed or will infringe his lawful interests, he has rights to appeal the decision of contracting authority and ask for revoking it or amending it. The claim should be submitted in Regional Court (as first instance).

Tenderer may also request a compensation for loss caused by contracting authority's actions (inactions) or decisions, as well as to submit a claim against contracting authority on interim measures to be taken until the final judgement has been taken by court.

Interesting is the fact, that the court is entitled not to terminate public procurement contract and to apply alternative sanctions if contracting authority has infringed provisions of Public Procurement Law but conclusion of public procurement contract is necessary for the interests of society including economical interests which are not connected with conclusion of public procurement contract in result of which termination of the contract would lead to unproportional result. Economical interests closely related with public procurement contract *inter alia* include expenses which arise from delaying implementation of public procurement contract, initiation of a new public procurement procedure, change of supplier and legal consequences arising from termination of public procurement contract. The law establishes that the alternative sanctions imposed by a court must be effective, proportionate and dissuasive and shall be:

1) shortening of duration of the public contract or

2) a penalty imposed on the contracting authority which must be not more than 10% of the value of the public contract, or in the particular cases -10% of the value of the performed portion of the public contract (LPP, Article 95[2]).

Article 423-8(4) of the Code of Civil Procedure of the Republic of Lithuania (CCP, 2003) provides that the court shall adopt its decision within 60 calendar days after the lawsuit has been admitted to the court.

First instance decisions may be appealed to the Court of Appeals within 14 days after adoption of the first instance decision. A decision of the court of second instance can be challenged before the cour of cassations within one month after the decision of the court of second instance becomes effective.

According to the Code of Civil Procedure, claims regarding public procurement are examined in written process without a court proceeding. Besides Code of Civil Procedure states shorter terms for examining claims thus in practise examination takes 3 to 6 months in the first instance.

Application Fees

There is no state fee when submitting a claim to contracting authority but upon applying to court against contracting authority a state fee in amount of 290.-EUR should be paid.

A TOUCH OF STATISTICS

A small insight into numerical characteristics of claims in the Baltic States is provided by data based on statistics from 2013 to 2015.

In Latvia during the time period from 2013 to 2015 the number of submitted claims in PMB is relatively stable. Thus, in 2013 there were 937 claims received from which 744 claims were proceeded to be examined and from these claims in 552 cases decision on the merits was taken but regarding 147 submissions cases were closed (submissions were called back or contracts were already concluded)(PMB, 2014).

In 2014 there were 975 submissions from which 748 submissions were proceeded to be examined and from these claims in 587 cases decision on the merits was taken (196 cases were closed)(PMB, 2015).

But in 2015 bureau received 952 submissions from which 763 submissions were proceeded to be examined and in 546 cases decision on the merits was taken (198 cases were closed (submissions were called back, contracts were concluded)(PMB, 2016).

Regarding submitted appeals on decisions taken by bureau in 2013 there were 50 decisions appealed to the court (PMB, 2014). Compared to 2012 when only 30 decisions were appealed to court the growth was by 60%. Such a sudden increase of the number of appeals may be explained with a financial crisis when protecting the rights became important factor for entrepreneurs to continue their business. Court cases were initiated despite of investing funds and

time needed which might be quite a long in Latvia. Probably this is a factor proving that already before when financial situation was not as critical there was a percentage of decisions of commission which might had been appealed but were not appealed because of the factors mentioned before. Instead of that an entrepreneur invested time and finances to develop new projects and prepare public procurements.

In 2014 there were 53 decisions taken by bureau which were appealed to the court (9% from all PMB decisions), respectively in 2015 – 38 decisions (6,9% from all decisions).

In Estonia there were 275 claims received and fully or partly examined in 2015 (Riigihangete, 2015). This was for 16,9% less than in 2014 when commission received and examined 331 claims. In 2013 there were 287 claims examined number of which in comparison with 2012 (272 claims) was increased for 5,5% (Riigihangete, 2013; Riigihangete, 2014).

In Lithuania 98% from all the public procurements are centralised by using electronic procurement system (Gunvaldis, 2015). This is one of the best rate in the EU. Considering above mentioned the number of claims which are examined in court is relatively small.

CONCLUSION

The present paper provides an overview of the existing review and remedies systems and models in EU Member States, looking at requirements and provisions determined in European Directives and other international documents providing more detailed analysis of public procurement review and remedies systems in the Baltic States: Latvia, Estonia and Lithuania.

Review and remedies systems in the Baltic States are formed in accordance with above mentioned provisions and provide examining of complaints according to law ensuring protection of interests of both parties and successful implementation of public procurement procedures. However, although legal systems of the Baltic states belong to one – Continental European (roman-germanic) Law, review and remedies system set up in practice in each country is different thereby giving different results both in terms of quality and quantity. Evaluating systems of the Baltic States it is possible to conclude that dual review and remedies system established in Estonia maximally

relates the proficiency level of the Public Procurement Appeals Committee to one of the courts as well as establishing divided (oral/written) examining process depending on difficulty level and specifics, has forwarded Estonia in the vanguard, ensuring process of dispute solving on public procurement to be the fastest and of the highest quality among the Baltic states.

Public procurement field is sphere which changes and develops continuously following developments in science and technologies and implementing their achievements into national economics. This development process should follow flexibly the review and remedies systems and corresponding legislation of Member States, introducing necessary structural and normative changes in order entirely to be able to put into practice fundamental principles of public procurement review and remedies field stipulated in EU Directives and to ensure effective and professional process of dispute solving on public procurement thereby advancing economical growth of the European Union and each EU Member State.

NOTES

[1] Namely similar to courts in the meaning of TFEU art.267;

[2] It must be mentioned that such an action is not prescribed by EU Directives as a compulsory first stage review process;

[3] For the present, mainly in the period after concluding the contract;

[4] Mediation, as used in law, is a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to negotiate a settlement;

[5] Procurement Monitoring Bureau started on 1 January 2002;

[6] Legislation is state action in result of which generally binding positive legal norms are being created, revoked, announced invalid or amended

[7] Meanwhile, so far there is no precise definition on operation of executive power given in positive manner. These operations are extremely wide therefore it is difficult to give one united definition although basically these operation of executive power

are prescribed by legislator. Thus aproximate (but satisfactory for everyday use) definition for operations of executive power may be defined that exacutive operation is to fulfill tasks prescribed by legislator. On contrary precise definition may be given only in negative form: executive power actions are all those which are not legislature nor hearing court cases;

[8] Hearing court cases is a state activity in result of which in independent and objective institution the dispute on the rights in the process with parties involved (contradictory process) is being solved among legal entities. Precise definition may be given only in negative form: executive power actions are all those which are not legislature nor hearing court cases.

[9] State Civil Service Law Section 7. Mandatory Requirements for Candidates (1) A person may be a candidate for a civil service position 1) who is a citizen of the Republic of Latvia; 2) who is fluent in the Latvian language;3) who has a higher education, etc;

[10] Within the meaning of the law a person is connected to the submitter of the complaint or another tenderer, if he or she is:

1) a relative or owner's or official's relative of the natural/legal person - submitter of the claim;

2) the current or former employee of the legal person – submitter of the complaint or another tenderer, official or owner, who has discontinued employment relations or ownership relations with the submitter of the complaint or another tenderer within a period of time, which is less than 24 months, or is a relative thereof;

[11] For example, subcontractors who take part in the process of implementation of the contract do not enjoy subjective right to initiate a court case including appealing decision on commissioning authority's consent to change subcontractor because subcontractors themselves do not claim to conclude a contract in procurement procedure/ see Supreme Court decision taken on 19 October, 2010, in Case No SKA-853/2010 Clause 13 – 16;

[12] EST 2010/10/21, Case No C70/08 Judgement *Symvoulio Apochetefseon Lefkosias v Anatheoritiki Archi prodforon, which*

states that the interpretationof Article 2(8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and contracts for work performance for state needs (public supply and public works contracts), as amended by Council Directive 92/50/EEC of 18 June 1992 must be interpreted as not requiring the Member States to provide, also for contracting authorities, a right to seek judicial review of the decisions of non-judicial bodies responsible for review procedures concerning the award of public contracts.

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