

PROBLEMS OF THE WARRANTIES IN THE PUBLIC PROCUREMENTS IN THE FIELD OF CONSTRUCTION

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***Abstract:** Subject of the present report appear the warranty terms as an index for evaluation upon assignment of public procurements for construction. The authors make analysis of the practical issues upon conduction of the procedures and point instruments for reducing the negative practices.*

***Key words:** public procurements warranty terms, control, contracts*

Upon evaluation of the bids of the tenders in the procedures for assignment of public procurements in Republic of Bulgaria, the legislator has envisaged two criteria:

- The lowest price;
- Most economically advantageous tender.

According to art. 28a, para 1 from PPA, when the criterion for evaluation appears Most economically advantageous tender, through the selected indices and their relative weight in the complex evaluation it has to be ensured that shall be chosen the tender, offering the best correlation quality-price. With the indices for evaluation are evaluated independently only the characteristics of the subject of the the public procurement as regards quality, price, technical advantages, aesthetical and functional characteristics, characteristics, related to the environment protection, current costs, profitability, service maintenance and technical aid, date of delivery and period of delivery or period for implementation etc.

Based on the above, in the course of developing the documentation for participation in the procedure, many contracting authorities envisage for the warranty to be one of the indices for evaluation of the tenders under the criteria „Most economically advantageous tender. This motivates the participants to compete to offer more and more long warranties in pursuance of the goal – to win the tender, without considering the fact how they will transfer to their heirs warranty service in the course of fifty, eighty, one hundred and fifty years.

If we take a serious look to the modern construction, no matter how modern construction technologies and materials are used by the contractor, after expiration of a certain period, especially as far as the public buildings are concerned (municipality buildings, schools, kindergartens, hospitals) it is necessary to be made again repair works. Is it possible then the contracting party to find again the old contract, if it still knows from which record to take it and whether it will find the successor of the present constructor in the future commercial register?

This is definitely not the intention of the legislator. Upon envisaging warranty service as an index for evaluation, the legislator had an explicit idea to ensure quality implementation of the construction-assembly works and one relatively continuous period, during which it won't be necessary for the contracting authorities to spend public finances for elimination of defects.

For sorry this good idea typically in Bulgarian manner was melted into the reality. In fact the participant, who offers 50 years of warranty and the participant, who offers 100 years of warranty shall hardly implement any activity on warranty service in the respective building after the fifth or tenth year. When applied methodology for evaluation, the higher grade shall be for the participant, who offers the longer period. This does not mean that he is the better constructor. He just has been more quick-witted or he knew better the weak point of the law.

In some of the cases the contracting authorities eliminate the participants, who has offered relatively high warranty period, as considering that these are unreal. For sorry such practice is not in conformity with the law. As states the Commission on protection of the competition „it ought to be stressed that in Regulation № 2/31.07.2003 for putting into operation of the constructions in RB and minimum warranty periods for realized construction-assembly works, installations and constructions sites /art. 20, para 4, i. 3 and i. 4/ are only envisaged the minimum warranty terms: for the heating-insulation works related to buildings and installations in non-aggressive environment – 5 years, for all types of construction, assembly and finishing works as well as for internal building installations – 5 years. **It does not envisage anything about the maximum warranty periods or other conditions, which to limit the traders in determination of the term, proposed by them.** So the legislator let the entrepreneurs, doing such kind of activities, to determine on their own the warranties for the respective types of construction-assembly works as the only restriction is that the terms may not be shorter than those, stipulated in the regulation.”¹

Similar understanding is stated in another decision : „As far as the motives for extreme increase of the provided warranty periods by the participants in the procedure, the CPC considers that as long as the contracting party has not provided upper limit and as long as such is not contained in legal or sub-legal provision, the participants alone may determine the period of the warranty term in their tenders” (Decision № 951 dated 27.07.2010 issued by CPC under correspondence № CPC - 563/19.07.2010)

By the amendments in the Public procurement Act in 2010² was amended art. 70, para 1, according to which: „When the tender by a participant contains

¹ Decision № 1079 dated 20.10.2009 issued by CPC under correspondence № K3K - 764/24.08.2009

² SG issue 52 dated 09.07.2010

proposal with digital expression, subject to evaluation and it is with more than 20% more favorable from the average value of the tenders from the other participants under the same index of evaluation, the commission have to require from this particular participant detailed written justification for the way it has been formed” .

So the commission for conduction of the procedure shall be obliged to require justification when the warranty period in the proposal of particular participant is with 20% more favorable, compared to the average value of the proposals by the other participants. In such case the the participant, who has offered warranty period, which is with 20% and more longer than the average value of the warranty terms, proposed by the other participants, shall have to justify in details the duration of this warranty period in accordance the Art. 70, para. 2 from PPA through:

1. original decision for implementation of the public procurement;
2. the proposed technical solution;
3. the existence of extremely favorable conditions the participant;
4. economy in implementation of the public procurement;
5. state aid granted.

It is obvious that for justification of the duration of the warranty period mmay be used only the first and second motive/reason, because it is hardly to believe that the economy upon implementation of the public procurement would motivate the application of a longer period of warranty service.

According to para 3 Hof art. 70 from PPA when the participant has not submitted the written justification with the term or if the commission has decided that the pointed circumstances are not objective, the commission shall suggest the participant to be eliminated from the procedure.

This appears the only one chance for the commission to eliminate participant from the procedure for the fact that he has proposed warranty terms, which duration is much more than the duration of the warranty periods, proposed by the other participants.

This opportunity though poses two new issues:

It can't be used if all or most of the participants propose extremely long warranty terms and the average value is also too high, compared with the normal warranty period.

Second, the assessment of the commission for objectiveness of the proposed circumstances, justifying the continuous warranty period is an assessment for eligibility and it is not subject of control on behalf of the CPC and Supreme administrative court (SAC), which only exercise control on legality. „It was further ascertained that according to the submitted tender of the participant, who won (the public procurement) and the written justification, submitted by him in regards to the proposed warranty period of 600 months (fifty years) for warranty maintenance, the latter has engaged himself to

eliminate on his own account failures, arisen in connection with the implementation of the realized construction-assembly works as well as to replace deformed pipes. For clarification of the above-mentioned facts and circumstances it has to be explained that the warranty period for service, proposed by the participant is not equal to and should not be made equal to the warranty period of the materials, ensured by the producer of these. So lack of specific requirement by the contracting authority for a maximum period of warranty service for the pipe system and the radiators, gives opportunity for the participants to point maximum term in accordance with their capabilities (technical and qualified personnel) as the CPC considers that stating of 600 months, made by the participant, classified on the first position, is eligible period for a warranty service, within which the participant shall be obliged to eliminate any failures on his own account, which failures happened on relation to the realized construction-assembly works as well as (the same shall be obliged) to replace deformed pipes. In connection with the above, as it was ascertained, all participants upon development of their tenders and particularly upon development of the offered terms of warranty service have completely met the stipulated requirement of the contracting authority in the Announcement and the documentation for participation. In support of the above findings it ought to be noted that within the members of the commission there are people with the respective professional qualification and therefore **CPC considers that the assessment whether the proposed extended warranty terms are real and possible for implementation appears within the frameworks of its discretion** and as long as these terms satisfy to the highest extent the requirements of the contracting authority. In view of the above-stated the CPC finds that the contracting party has correctly done the classification of the participants as it has selected for a contract the participant, who won the public procurement.”³

This appears prerequisite for corruption and opportunity for elimination of “unhandy” candidates as well as for admitting candidates, proposing obviously unreal terms.

The possibilities of the contracting authority to avoid the “traps” of the extremely long terms are several:

The most radical suggestion is the warranty period to be excluded from the indices for evaluation.

Weak point of the above suggestion is that in such case all participants shall be limited to the minimum warranty terms according to Regulation № 2/31.07.2003⁴ and the contracting party won't have the chance to receive longer

³ Decision № 358 dated 31.03.2010 of CPC under correspondence № K3K - 84/08.02.2010)

⁴ REGULATION № 2 dated 31.07. 2003 for putting into operation of the constructions in Republic of Bulgaria and for minimum warranty periods for realized construction and assembly works, installations and construction sites, prom. in SG issue 72 dated 15.08.2003; amended in SG issue 49 dated 14.06.2005.; amended., Sg issue 98 dated 11.12.2012

warranty periods from them, regardless of the opportunities of the selected participant.

Particular practice, applied now is that the contracting authority states maximum eligible warranty period, as all participants, who have proposed period, longer than the above period, shall receive equal evaluations under that index.

The positive thing in the above practice is that the participants do not offer extremely long warranty periods with the only aim to win the procurement, but orient themselves in the proposed by the contracting authority maximum duration.

But almost all participants point exactly this maximum duration, which makes its existence meaningless. This way they receive equal evaluation under the index for duration and actually the classification is made only under the other indices.

Probably the most inadequate provision according to us is the stipulation of requirements for proving the proposed warranty period.

The good thing in this idea is that it makes the participants careful in setting too long warranty periods.

Essential weak point is that the judgment to what extent the proposed warranty period appears real is given to the commission for conduction of the procedure, and in many cases this judgment is made dependent from subjective factors. As we already mentioned, this is judgment for appropriateness and it is not subject of control by the CPC and the court.

The second important issue is connected with the fact how is proven the warranty period. As a rule the contracting authorities require certificates for proving the proposed warranty period, which certificates certify the warranty period of the used materials. The warranty period, proposed by the participant may not be made equal to the warranty period of the materials. The term for warranty service, proposed by the participant means that within that particular term the latter shall be obliged to eliminate on his own account failures, arisen upon implementation of the construction-assembly works, which failures are not due to improper operation.

The warranty service, which the participant proposes included also replacement on his account of defected materials, regardless whether such failure has arisen before or after expiration of the warranty period, given by the producers of the materials. In such case the warranty, given by the producer, covers only the respective participant in capacity of his counter-party, and the participant himself guarantees in front of the Contracting authority the longer period, proposed by him in his contract for execution.

By its nature the warranty period appears not a period, within which won't arise any failures in connection with the facility, but a period, within

which such failures shall be removed by the contractor on his own account. By virtue of art. 20a from the Law on obligations and contracts, the contracts have the power of a law for these, who have concluded them and for any failure to act, including in case of non-observance of the proposed warranty period, there are envisaged enough statutory mechanisms for sanctioning the guilty contractor, save the contracting party has willing for that.

Is is disputable the issue on what grounds the contracting party would eliminate participant, who failure to prove his warranty term according to the criteria, set by the contracting authority. (We exclude the cases, in which applied art. 70 from PPA). The only possible use is that of art. 69, para 3 from PPA – the commission suggests to be eliminated from the procedure participant, who has submitted a tender, not corresponding to the preliminary advanced conditions of the contracting authority. But here the commission shall fall in its own trap. On one hand it shall breach art. 25, para 9 from PPA, because the warranty period **is stipulated as index for tender evaluation in view of which in this particular case shall apply the imperative provision of art. 25, para 7 from PPA.**

The above provision envisages PROHIBITION in case of selected criterion “Economically most advantageous tender/offer”, which is the present case, to be included as indices for evaluation the criteria for selection of offers under art. 25, para 2, i. 6 from PPA. **Per argumentum a contrario, as considering that the warranty period is envisaged as an index for evaluation and taking into account the circumstances that in the documentation for participation in the procedure does not exist requirement for its maximum duration, the same does not appear criterion for eligibility of the offer and respectively is not a reason for elimination from participation in the procedure.**

One interesting solution of the problem is to be sought an outcome in binding the warranties with the guarantee for good performance. According to art. 63 from PPA, the conditions and terms for forfeiting and releasing the performance guarantee shall be arranged into the contract for assignment of public procurement. Taking into consideration that it is within the power of the contracting authority to propose the clauses of the contract for assignment of public procurement, the latter has the opportunity in such contract to arrange the forfeit of guarantee for good performance, which may be to the amount of up to 5% from the procurement cost, till expiration of the warranty period, proposed by the participant, selected for contractor, or till expiration of another period, but which is also bound with the offered duration of the warranty.

The issues concerning the warranties are many. In the present article we examined only one of them – the duration. It is important not only for the fact that it specifies the period, during which the contractor has to make on his own account maintenance of the respective facility, but also the period (the one,

which was already mentioned above) during which **the contracting party should not spend public funds for such maintenance, nor it should announce a new public procurement for new repair works.** If a public procurement would be announced for a new repair works, this shall mean that the warranty has not been observed. This means further that the contractor has not implemented the contract and the contracting party has not realized the respective legal liability.

With the last legislative changes the Bulgarian legislator envisaged some restrictions regarding the offered extremely long warranties. It ought though *de lege ferenda* to be considered also real sanctions on behalf of an independent state authority for failure to be met the agreed warranties. The above sanctions have to be for incorrect contractors, but also for incorrect contracting authorities, which do not undertake measures for realization of the warranty. This is the only way for elimination of the bad practice of arrangements between contracting authorities и contractors.