



20 May 2011

## **Position Paper on the Proposals for the Amendments to Public Procurement Regulation**

### **1. Executive Summary**

Considering that the proportion of actual expenditure in 2009 arising from public procurement contracts accounted for 9.8% of the GDP, public procurement provides for an important part of the Latvian economy. The public procurement contracts in 2007 even accounted for 17% of the GDP.<sup>1</sup>

Considering the economic proportion of public procurement it is of utter importance for the further positive development of the national economy that public procurement is conducted in line with the underlying principles for public procurement effective in the European Union (the principle of transparency, the principle of non-discrimination, the principle of equal treatment, the principle of mutual recognition and the principle of proportionality) and pursuant to the purposes specified under Section 2 of the Public Procurement Law (PPL):

- 1) to ensure openness of the procurement procedure;
- 2) to ensure free competition for the suppliers, as well as equal and fair treatment thereof;
- 3) to ensure efficient utilisation of state and local government funds by reducing the contracting authority's risk to the minimum.

The FICIL Public Procurement Issues Group arrived at the conclusions regarding the necessary changes to the public procurement regulation in order to provide better compliance with the underlying principles of public procurement and the aims provided by the PPL, which would in their turn improve the business environment in Latvia and contribute to the reduction of the proportion of "black economy".

The FICIL expresses gratitude to the representatives of the Ministry of Finance and Procurement Monitoring Bureau (PMB) for their participation at the meetings of the Public Procurement Issues Group and explanations of the public sector position. The discussions during the meetings significantly contributed to the formulation of the proposals described hereunder, with consideration of the position of both private and public sectors.

### **2. Recommendation/Suggestions**

Having evaluated the existing public procurement regulation in Latvia, FICIL has concluded that the following changes are necessary in the further stated areas of public procurement regulation:

#### **I. IMPROVEMENT OF THE QUALITY OF THE PROCEDURE**

##### **1.1. Availability of Information**

<sup>1</sup> Summary of Statistical Reports Regarding Public Procurement in the Republic of Latvia in 2009, [http://www.iub.gov.lv/files/upload/2010\\_statistisko\\_parskatu\\_apkopojums.pdf](http://www.iub.gov.lv/files/upload/2010_statistisko_parskatu_apkopojums.pdf)

### 1.1.1. Timely availability of the information regarding the planned procurement

- FICIL proposes **introduction of relevant amendments to the PPL, providing for that:**
  - 1) the PIN is published with respect to **all increased complexity procurement procedures** (e.g. procurement requiring complex technical solutions or purchases of extensive scope that call for the preparation of such technical tender where additional investigation is necessary, as well as procurement where certain sections of the technical tender require innovative work), except where the negotiated procedures are applied without prior publication of the contract notice regardless of whether:
    - a) the contracting authority applies the shortened tender submission term;
    - b) over the next 12 months the total contract prices of public procurement reach those indicated in Articles 2.5 and 2.6 of the Cabinet of Ministers Regulations No. 519 “Regulations on the Public Procurement Contract Price Thresholds” (Contract Price Regulations);
  - 2) in the PIN information is provided with respect to each procurement procedure, indicating the expected scope and contract price.
- By means of the relevant guidelines PMB should promote the practice that the public procurement sections in the contracting parties’ Internet webpages are easy to find for and comprehensible by the suppliers. The contracting authorities should publish in these sections not only the PIN but also the public procurement plans to the extent possible.
- FICIL proposes introduction of respective amendments also to the Cabinet of Ministers Regulations No. 171 of 6 March 2007 “The Procedure for Placement of Information on the Internet by Contracting Authorities” where Article 11.13 provides that “information on the public works, supply and service contracts entered into by the contracting authority in writing should be included (according to the sample provided in Annex 1 of these Regulations) in the Section “Public Procurement””. **FICIL recommends indication in the Regulations of the Cabinet of Ministers that information on the planned procurement (the PIN and public procurement plans, where available) should also be included in the Section “Public Procurement” of the contracting authority’s webpage.**
- FICIL suggests that in its communication with suppliers PMB should inform them on the option, specified by Section 18 Paragraph one of the PPL, for the interested suppliers to request the contracting authority to issue for the suppliers the technical specifications which the contracting authority intends to apply to the contracts in respect to which the PIN has been published.

### 1.1.2. The scope of the information regarding the procurement procedure results

- **FICIL recommends supplementation of Article 18.13 of the Cabinet of Ministers Regulations No. 698 “Regulations Regarding the Contents of the Public Procurement Notices and the Procedure of Preparation Thereof” specifying that the notice on the procurement results should also indicate the particular subcontractors attracted by the tenderer for the performance of the contract, quoting the specific contract prices and the part of the procurement for which each subcontractor agreement will be entered into. Moreover, the winning tenderer should also publicise information on the cases of substitution of subcontractors and the newly attracted subcontractors as a result thereof.**
- Section 35 Paragraph four Clause 10 of the PPL should also be amended, specifying that the **notice on the procurement procedure** should contain information on the part of the contract or framework agreement that the winning tenderer has planned to transfer to

subcontractors, by indicating specific subcontractors and specific contract prices and the part of the procurement for which each subcontractor agreement will be entered into.

## 1.2. Qualification of Subcontractors

- FICIL believes that for the purposes of effective utilisation of the state and local government funds by reducing the contracting party's risk to the minimum, it is necessary to make the above clause more specific through determining that the **provisions of exclusion of tenderers and candidates stipulated by Section 39 Paragraph one of the PPL refer also to the attracted subcontractors.**

## 1.3. Meeting of the Interested Suppliers (MIS)

- **FICIL suggests amendments to Section 55 Paragraph one of the PPL which would determine that:**
  - 1) the contracting authority should organise MIS not only upon its own initiative, but also after receiving proposals thereof from at least 2 interested suppliers;
  - 2) minutes of the MIS should be taken and the information provided by the contracting authority/procurement commission during the MIS is binding on the contracting authority.

## 1.4. Passing the Decision Regarding the Procurement Procedure Qualification Results

- FICIL recommends supplementing Section 37 of the PPL by stipulating that **the procurement commission must pass the decision regarding compliance of the candidate in a restricted procedure with selection criteria within 1 month or a shorter period after the date of submission of applications, at the same time ensuring that the decision is passed before expiry of the certificates submitted by the candidates.** The above term may be extended provided the contracting authority presents a material reason thereof.

## 1.5. The Preferable Form of the Submitted Documents (certifications, CV)

- FICIL proposes to **develop model forms for the documents most often included in tenders** that will be included in separate recommendations developed by the PMB which will be referred to in the PPL and deviation from which by the contracting authority should be reasoned in each particular case.
- In addition FICIL proposes to oblige PMB to summarise the most frequent procurement procedure errors arising in its practice and the questions most frequently asked by the contracting authorities and suppliers and the answers provided by the PMB in relation to the procurement procedure, including the submitted documents. It is advisable to place such summary of information in the Internet webpage of the PMB. It will improve the understanding of both the contracting authorities and tenderers with respect to a correct procurement procedure, the submitted documents and other issues related to the procurement procedure.

## 1.6. Obtaining Information from State/Local Government Authorities

- FICIL suggests amendments to Section 37 paragraph four of the PPL, stating that ***it is the obligation of the contracting authority to verify the necessary information at the competent authority, publicly available databases or other publicly available sources.***

## 1.7. Development of the List of Qualified Suppliers

- FICIL proposes development of a **list of qualified suppliers** for participation in public procurement procedures. Such list would comprise the suppliers which, having participated in procurement procedures for a particular time (for example, over three years), have proved that the provisions of exclusion indicated in Section 39 of the PPL are not attributable to them. Thus, when participating in procurement procedures after being included in the list of qualified suppliers, the above suppliers would not have to prove repeatedly that what is stated in Section 39 of the PPL is not attributable to them. Maintenance of the list of qualified suppliers would be the competence of the PMB and suppliers would be included in the list on the basis of their applications, provided they could prove their compliance with the above criteria (the conditions of exclusion of tenderers/candidates indicated in Section 39 of the PPL were not attributable to them during participation in public procurement procedures in the previous three years) and such compliance has not been justly disputed by contracting authorities or third parties. A supplier might be excluded from the list if compliance with any of the tenderer/candidate exclusion conditions indicated in Section 39 of the PPL is established. A supplier may be repeatedly added to the list after lapse of the next period of three years during which the supplier must conduct its business so that the conditions of exclusion from participation in procurement procedure indicated in Section 39 of the PPL do not apply. Furthermore, FICIL considers that the suppliers to be included in the list of qualified suppliers could be divided in 3 groups on the basis of the size of the supplier – 1) natural persons and small enterprises; 2) medium enterprises and 3) large enterprises.
- At the same time FICIL also supports the initiative of the Ministry of Finance, the State Revenue Service (SRS), Employers' Confederation of Latvia and Latvian Chamber of Commerce and Industry for the performance of the assignment set forth under the “black economy” combating and fair competition provision plan to launch **the pilot project of the introduction of the list of reliable businesses (the White List)**. **FICIL joins the initiative to develop the White List whereby the companies included therein would enjoy eased requirements in relation to the submission of selection documents for procurement procedures.** In this way the suppliers would not have to confirm their compliance with those qualification requirements under the PPL the compliance with which is already proved by the fact of being listed in the White List, e.g. with regard to relevant payment of taxes.

## II FACILITATION OF COMPETITION

### 2.1. Minimum Number of Tenderers

- **FICIL proposes to supplement Section 37 of the PPL, specifying that an open procedure is deemed valid provided at least two tenderers which comply with all the qualification requirements have submitted their tenders thereto.** If a tender has been submitted by only one tenderer, the contracting authority should be able to prove in order to deem the procedure valid that a sufficient number of suppliers is not available on the market and that the qualification requirements of the tender regulations are objectively justified with the object of procurement and needs of the contracting authority.
- Within the scope of monitoring procurement procedures PMB should control the cases where only a single supplier submits tenders for the procurement procedures organised by a particular contracting authority.
- PMB should likewise by means of relevant guidelines facilitate the practice whereby the contracting authority informs the professional organisations of a particular sector on the

procurements planned for that sector, thus making the procurement information available within the scope of the entire sector and achieving a larger number of tenderers for the procurement procedures.

## 2.2. Criteria of the Financial Capacity of the Supplier

- **FICIL proposes to include the principle indicated in Article 44 Clause 2 of the Directive 2004/18/EC of the European Parliament and the Council stipulating that the minimum financial capacity required in relation to a particular contract should be related and proportionate to the subject-matter of the particular contract, in Section 41 of the PPL, thus achieving legal predictability and making the scope of financial requirements clearer for the contracting authority.**

## 2.3. Average Remuneration of Employees

- **FICIL recommends deletion of Section 39 Paragraph One Clauses 6-9 and Section 39 Paragraphs 6 and 7; to amend Section 39 Paragraph 5 by deleting reference to Section 39 Paragraphs 6 and 7 of the PPL; and to delete Clause 17 of Transitional Provisions, as well as to introduce the relevant changes to other provisions of the PPL.** The mentioned PPL Paragraphs refer to the exclusion of candidates and tenderers from the participation in a procurement procedure if the monthly remunerations of their employees are lower than 70 percent from the average remunerations in the particular country during the period prescribed by PPL in the respective area according to NICE 2 Rev. two sign level.

## III CONTROL OF PERFORMANCE OF PROCUREMENT CONTRACTS

- **FICIL recommends supplementing the PPL by specifying that in the event of material amendments to the contract the contracting authority should organise a new procurement procedure.** Explanation of the material amendments to the contract should be developed as the PMB guidelines.

## IV LIABILITY FOR VIOLATIONS OF THE PROCUREMENT PROCESS

- **FICIL recommends to supplement the descriptions of the violations indicated in the Latvian Administrative Offences Code with the descriptions of violations regarding evasion of conducting the procurement procedure and inadequacies related to the control of the performance of the awarded procurement contracts.**
- FICIL believes that taking into account the importance of the public procurement procedures and relevant performance of contracts with respect to due utilisation of state and local government funds, **the scope of the administrative penalties specified in the Latvian Administrative Offences Code is unreasonably low.** Consequently, **FICIL suggests a considerable increase of the specified administrative penalty (the fine) and to replace the warning as a measure of penalisation for violations in the area of public procurement with deprivation of the entitlement to occupy certain offices (for example, a prohibition to work as a member of the procurement commission).**
- FICIL agrees to what is mentioned in the letter No. 7-2-01/1832 of the Corruption Prevention and Combating Bureau, dated 2 March 2010, addressed to the State Secretary for the Ministry of Finance Mārtiņš Bičevskis that “an adequate mechanism of determining liability would not only serve as a measure of penalisation for the guilty person, but also as a measure of prevention of the guilty person or other persons from committing further

offences. Thus, inevitability of penalisation for violations committed within the public procurement process would serve as an effective preventive measure”.

- **FICIL considers that the PMB as the central supervisory body with regard to public procurement in Latvia should be granted the right to impose administrative penalties for violations of the public procurement.**

## V FUTURE INOVATIONS

### 5.1. Experts

#### 5.1.1. Experts in procurement commissions

- FICIL suggests **establishing an independent institute of professional procurement experts** (Procurement Expert Council). Persons with special knowledge in particular industries (construction, medicine, IT, road transport, etc.) will work at this organisation. Only persons with relevantly high qualification will be permitted to work at the organisation (persons with relevant higher education and professional qualification and also with flawless reputation). The members of the Procurement Expert Council could be both Latvian and foreign experts with relevant qualifications.
- The contracting authority in its turn will be obliged to attract experts from the Procurement Expert Council for specialised procurements exceeding the specific estimated contract price thresholds. Furthermore, in such cases experts will be granted all rights of the member of the procurement commission in the process of the development of the procurement documentation and in passing the decision on the selection of the particular tender.

#### 5.1.2. Experts at the PMB complaints examination commissions

- FICIL recommends introduction of respective amendments to Section 82 of the PPL, specifying that in the cases where the object of the procurement is not related to the professional qualification of the PMB officials, the PMB **is obliged** to invite a procurement specialist or expert. In addition, in such case the specialist or expert participates at the meetings of the PMB’s complaints examination commission **with the voting rights**.

### 5.2. Establishing an Electronic Platform for Organisation of Procurements

- **FICIL recommends introduction of respective amendments to the PPL to increase the application of the electronic procurement process by transferring gradually to the completely electronic public procurement.**

## 3. Rationale

### I IMPROVEMENT OF THE QUALITY OF THE PROCEDURE

#### 1.1. Availability of Information

##### 1.1.1. Timely availability of the information regarding the planned procurement

The effective public procurement process obliges the contracting authority to publicise particular information regarding the particular procurement procedure before the commencement of the procurement procedure only in the case established under Section 26 of the PPL – publication of

the notice regarding the contract by means of which the procurement procedure is already announced – thus, maximum 52 days remain until the submission of proposals according to Section 29 Paragraph two of the PPL.

Chapter IV of the PPL “Provisions of Announcement and Compliance with Openness” stipulate provisions regarding the informing the public on the planned procurement and procurement procedures. Section 25 of the Law specifies provisions for the prior information notice (PIN), studying of which is the only possibility for the suppliers to obtain information regarding the planned procurement prior to the announcement thereof and application of the respective term for the submission of proposals.

Section 25 Paragraph one of the PPL prescribes that the contracting authority publishes the PIN as provided for by Section 28 of this Law at least once a year or publishes the same in the buyer’s profile. **Publication of the above notice is mandatory only in the case the contracting authority applies the shortened proposal submission terms** as provided for by Section 29 Paragraph eight of this Law (proposal submission term – 36 days, but in especially urgent cases – 22 days for open and restricted procedures), except where the negotiated procedure applies without prior publication of the notice regarding the contract.

According to Section 25 Paragraph one of the PPL, the following information shall be included in the PIN:

1) for public supply and service contracts – **the total estimated contract price of the contracts or framework agreements that the contracting authority intends to award within the next 12 months with respect to a particular group of products or category of services** [with reference to the common procurement vocabulary (CPV)] pursuant to Schedule 2 Part A of this Law, provided the total estimated contract price of these contracts or framework agreements is **LVL 527 325 or above**;

2) for public works contracts – **the general description of the contracts or framework agreements that the contracting authority intends to award within the next 12 months**, provided the total estimated contract price of these contracts or framework agreements is **LVL 3 406 520 or above**.

**The contracting authority submits the PIN for publication at the PMB’s webpage or publishes it at the buyer’s profile** (webpage of the contracting authority publicly available on the Internet) immediately after the adoption of the planned annual budget – with regard to the public supply and service contracts, and within the shortest practicable term after passing a decision regarding the need to conduct the procurement procedure or award a public works contract or framework agreement – with regard to the public works contracts.

The above provisions of the PPL comply with the European Parliament and Council Directive 2004/18/EC of 31 March 2004 (the Directive) and particularly with Article 35 Paragraph one. Article 2 of the preamble of the Directive should be considered though, which provides for that the award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the compliance to the principles of the Treaty, in this case particularly – **transparency**.

According to the experience of suppliers, obtaining the information regarding the particular procurement according to Section 26 of the PPL is frequently too delayed to prepare a relevant tender. This especially refers to complex procurements where preparation of a quality tender requires considerable funds and attraction of sufficiently qualified experts. If the notice of the contract is published 52 days prior to the tender submission deadline, the suppliers, especially in

the event of complex procurement, may experience considerable difficulties to attract the necessary funds for the preparation of a quality tender and participation in the procurement within the above term, although, if having been informed on the procurement earlier, the supplier could have provided all the necessary funds for the participation in the procurement procedure and in the case of the award of the contract – for due performance thereof.

### **1.1.2. The scope of the information regarding the procurement procedure results**

In line with Section 27 Paragraph one of the PPL the contracting authority submits for publication the notice regarding the procurement procedure results in the event of the decision on the award of the procurement contract or framework agreement or termination or suspension of the procurement procedure. Section 28 Paragraph one of the PPL provides that the contents of the above notice is specified by the Cabinet of Ministers.

Subject to what is stated in the PPL, on 27 July 2010 the Cabinet of Ministers issued Regulations No. 698 “Regulations Regarding the Contents of the Public Procurement Notices and the Procedure of Preparation Thereof” which, among other things, determines the contents of the notice on the public procurement results. Article 18.13 of the Regulations provides that the notice on the public procurement procedure’s results contains *an indication to the winning tenderer’s planned subcontractor agreements with third parties and the information related thereto (contract price and the part of the contract for which subcontractor agreements will be entered into with third parties).*

**The present regulation, however, does not provide for the indication of specific subcontractors.** FICIL considers that for the purposes of reducing “black economy” it is necessary to apply the principle of transparency to a wider extent, thus providing the market participants with the opportunity to express their opinions regarding the qualification of the attracted subcontractors and the actual capacity thereof to perform the procurement contract.

## **1.2. Qualification of Subcontractors**

Section 39 Paragraph one Clause 11 of the PPL stipulates that the provisions of exclusion of tenderers and candidates stipulated in Paragraph one of this Section shall apply to the person indicated by the tenderer or the candidate on whose capacity the tenderer or candidate relies to confirm that its qualification corresponds to the requirements set forth in the notice on the contract or the documents of the procurement procedure. For the purposes of effective utilisation of the state and local government funds by reducing the contracting authority’s risk to the minimum, the **provisions of exclusion should refer also to the attracted subcontractors.**

## **1.3. Meeting of the Interested Suppliers (MIS)**

Section 55 Paragraph one of the PPL stipulates that if the **contracting party has planned** convening a meeting of interested suppliers (MIS) then the time and venue thereof is indicated in the open procedure’s regulations or the restricted procedure’s invitation. The meeting should be organised at least 10 business days before the opening of tenders. The contracting authority will provide additional information and answer any questions raised during the meeting.

FICIL considers that **face-to-face (or telephone-conference or video-conference) meetings** are a good way of specifying information regarding the subject of the procurement and the procurement procedure for the interested suppliers (suppliers who have obtained the open procedure’s regulations or received the restricted procedure’s invitation) through directly contacting the contracting authority’s representatives and thus avoiding the risk of submitting an inadequate tender due to incorrect understanding of the requirements of the tender regulations.



Therefore, **obtaining of accurate information** regarding the subject of procurement, the tender regulations and the procurement procedure **will provide for the situation where as many as possible adequate tenders will be submitted for the procurement procedure**, thus boosting competition and the achievement of the aims specified in Section 2 of the PPL.

#### **1.4. Passing the Decision Regarding the Procurement Procedure Qualification Results**

PPL does not prescribe a particular period of time for passing the decision regarding the results of candidate selection under restricted procedure.

Absence of such term may lead to a situation when due to extended actions by the procurement commission the data regarding the candidate's qualification criteria cease to be valid (the certificates issued by state authorities do not represent the latest data regarding the candidate, as they change during the selection process).

#### **1.5. The Preferable Form of the Submitted Documents (certifications, CV)**

Presently **there does not exist any particular regulation regarding the requirements of the form of different documents**, for instance, the description of the course of life of the attracted persons (CV), certifications, etc. As a result suppliers tend to make mistakes and submit the above documents in the form that is not compliant with the contracting authority's requirements. Consequently, the particular supplier is excluded from participation in the procurement procedure and the submitted tender is deemed inadequate. If the incompliance with the requirements regarding the form is the only reason for the contracting authority not to examine the tender of the particular tenderer, there is a risk that due to a minor inadequacy the contracting party may lose an opportunity to acquire quality supplies/services/works for the lowest price. In this situation the aims of PIL indicated in Section 2 thereof are not complied with.

#### **1.6. Obtaining Information from State/Local Government Authorities**

Section 37 Paragraph four of the PPL states a general principle whereby in selecting tenderers/candidates, as well as verifying and choosing the tender **the contracting authority may verify the necessary information at a competent authority, in publicly available databases or other publicly available sources**. In the cases when the contracting authority has obtained information in this manner the respective tenderer or candidate may submit a certificate or another document regarding the respective fact if the information obtained by the contracting authority fails to reflect the actual situation.

Considering the above formulation of Section 37 Paragraph four of the PPL, the contracting authority may impose on the tenderer/candidate the obligation to submit information from state/local government authorities in the form of certificates. **Taking into account that state/local government authorities are bodies governed by public law and as such they operate within a unified system, they also exchange information among themselves**. To oblige the supplier to submit to the contracting authority (a state/local government authority) a certificate from another state/local government authority means to oblige the supplier to perform the function of an intermediary – a data carrier – among the members of the public administration structure.

Considering the aforesaid, FICIL believes that such information carrier function, among others, in the procurement matters, should be performed by the public sector authorities themselves and among themselves.

## 1.7. Development of the List of Qualified Suppliers

Considering the initiative included in the formerly mentioned FICIL position papers to provide positive incentives for the entrepreneurs to conduct their business so as to reduce to the minimum the proportion of “black economy” in the country, FICIL believes that it is possible to apply such initiatives also in the area of public procurement. FICIL therefore proposes development of **a list of qualified suppliers** for participation in public procurement procedures.

At the same time FICIL also supports the initiative of the Ministry of Finance, the State Revenue Service (SRS), Employers’ Confederation of Latvia and Latvian Chamber of Commerce and Industry for the performance of the assignment set forth under the “black economy” combating and fair competition provision plan to launch **the pilot project of the introduction of the list of reliable businesses (the White List)**. According to the information available on the webpage of the Ministry of Finance, major businesses which have so far correctly fulfilled their tax obligations towards the State will participate in the pilot project on the voluntary basis<sup>2</sup>. Such lists of reliable businesses are available in 10 EU Member States. The lists also comprise requirements following from the public procurement regulations of the respective countries, for example, with respect to compliance for performance of professional operation, economic and financial standing and technical and professional capacity.<sup>3</sup>

## II FACILITATION OF COMPETITION

### 2.1. Minimum Number of Tenderers

Presently **PPL does not specify the minimum number of tenderers over the entire period of the procurement procedure**. Therefore there are situations when a single tenderer is being evaluated during the tender evaluation stage and such situation does not facilitate free competition of suppliers.

Section 37 Paragraph six of the PPL provides that in the cases of the negotiated procedure with publication of a prior notice regarding the contract, the restricted procedure and the competitive dialogue the contracting authority may estimate in advance the number of candidates to be invited for the negotiations, submission of tenders or participation in the competitive dialogue, **on the condition that the sufficient number of relevant candidates is available**. Paragraph seven of the same Section states that in the event of the restricted procedure the contracting authority invites at least five candidates. If the negotiated procedure with prior publication of the notice regarding the contract or the competitive dialogue is exercised, the contracting authority invites at least three candidates. **In any case the number of candidates should be sufficient for ensuring competition**.

The same principle should be applied even more so for the open procedure, where in order to ensure at least the minimum competition not less than two tenderers should participate.

Preparation of relevant tender regulations that indicate such properties of the procurement object that are objectively necessary for the contracting authority, which at the same time do not unreasonably restrict competition, is crucial for the expansion of the range of suppliers. To ensure the development of such regulations the procurement commission must be competent in the sector for which the respective procurement is conducted. If the employees of the particular contracting authority – the members of the procurement commission – are not competent in the respective sector, such procurement commission must exercise its entitlement to invite experts to work in the

<sup>2</sup> <http://www.fm.gov.lv/?lat/aktualitates/jaunumi/50403/>

<sup>3</sup> List of Reliable Businesses. Ministry of Finance, Riga, 2011  
[http://www.fm.gov.lv/preses\\_relizes/dok/20110221\\_prezentacija-1.pdf](http://www.fm.gov.lv/preses_relizes/dok/20110221_prezentacija-1.pdf)

procurement commission as provided for by Section 22 Paragraph two of the PPL.

Moreover, the necessity to receive tenders from at least two tenderers which are able to comply with the qualification requirements would reduce the risk that the contracting authority includes such qualification requirements in the tender regulations that cannot be objectively justified with the object of procurement and that can practically be complied with by a single tenderer, thus planning participation of a single tenderer already in advance and consequently – lack of competition in evaluating the tenders. The requirement of tenders by at least two tenderers in open procedure would likewise improve the competition conditions among the tenderers and stimulate the contracting authority to rely more heavily on the criteria of evaluation of the technical and financial tender rather than the qualification requirements. These benefits would in their turn provide for tenders that are essentially closer to the contracting authority's needs and for the procurement results of a higher quality.

## 2.2. Criteria of the Financial Capacity of the Supplier

Section 41 Paragraph one of the PPL prescribes the ways in which a supplier may confirm compliance of its financial standing with the contracting authority's requirements. **The PPL does not, however, specify what requirements the contracting authority may set forth for the financial standing of the supplier.** The provision of the mentioned requirements would allow achieving legal predictability and making the scope of financial requirements clearer for the contracting authority.

## 2.3. Average Remuneration of Employees

Since 1 October 2010 amendments to the PPL are effective with regard to Section 39 of the PPL "Provisions for Exclusion of Tenderers and Candidates", namely, regarding Section 39 Paragraph one Clauses 6-9 (hereinafter referred to as the Provisions) that prescribe the following:

*„(1) The contracting authority shall exclude a tenderer or a candidate from further participation in the procurement procedure and will not examine the tenderer's tender in any of the following cases: [...]*

*6) the average monthly remuneration of the employees of a candidate or tenderer registered in Latvia (location of the permanent place of residence) over the first three quarters of the year within the period of the last four annual quarters before the date of submission of the tender or application is less than 70 percent of the average remuneration of employees in the country within the above period in the respective industry according to the two-digit level of NACE Rev. 2 classification on the basis of the data summarised by the State Revenue Service published in the Internet webpage of the State Revenue Service. Where the candidate or tenderer has been registered as a taxpayer during the period of last four annual quarters before the date of submission of the tender or application, the average monthly remuneration of the employees within the period from the month following the registration to the date of submission of the tender or application are considered;*

*7) one twelfth of the declared taxable income from operating activities of a candidate or tenderer – a natural person whose permanent place of residence is in Latvia and who does not employ other persons and is registered as performing operating activities - within the year for which the annual income return should be filed is less than 70 percent of the average remuneration of employees over the first three quarters of the year within the period of the last four annual quarters before the date of submission of the tender or application in the respective industry according to the two-digit level of NACE Rev. 2 classification on the basis of the data summarised by the State Revenue Service published in the Internet homepage of the State Revenue Service;*

*8) the average monthly remuneration of the employees of a candidate or tenderer registered*

*abroad (location of the permanent place of residence) over the first three quarters of the year within the period of the last four annual quarters before the date of submission of the tender or application is less than 70 percent of the average remuneration of employees in the country in which the candidate or tenderer is registered (location of the permanent place of residence) within the above period in the respective industry according to the two-digit level of NACE Rev. 2 classification. Where the candidate or tenderer has been registered as a taxpayer in the respective foreign country during the period of last four annual quarters before the date of submission of the tender or application, the average monthly remuneration of the employees within the period from the month following the month of registration to the date of submission of the tender or application are considered;*

*9) one twelfth of the declared taxable income from operating activities of a candidate or tenderer – a natural person whose permanent place of residence is abroad and who does not employ other persons and is registered as performing operating activities - within the year for which the annual income return should be filed is less than 70 per cent of the average remuneration of employees in the country in which the candidate's or tenderer's permanent place of residence is located over the first three quarters of the year within the period of the last four annual quarters before the date of submission of the tender or application in the respective industry according to the two-digit level of NACE Rev. 2 classification; [...]"*

The purpose of these Provisions was to “achieve that the probability of the suppliers who pay “under-the-table wages” become parties to public contracts is made as low as possible” (Initial Impact Assessment Report (Abstract) for the Cabinet of Ministers Regulations No. 761 “Regulations Regarding Surveying, Preparation and Publication of the Information on the Average Remunerations and Declared Annual Taxable Income”).

**The provisions introduced by the above amendments should be deleted from the PPL due to the following reasons:**

1. The Provisions contradict the provisions of the Directive which determine the grounds for exclusion of candidates/tenderers. The Court of Justice of the European Communities has concluded that the Directive does not prohibit a Member State to provide other grounds for the exclusion from participation in addition to the prohibition to participate contained in the Directive, however:
  - the objective thereof should be ensuring compliance with the principle of equal treatment and transparency, and
  - unless such measures exceed what is necessary to achieve this objective.

The purpose of the amendments was combating “black economy”, which does not comply with the objectives of additional grounds for exclusion indicated in the Directive.

In examining a case the Court has also indicated that “Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure” (Case No. C-538/07).

The Provisions in their turn do not ensure an individual approach as, for example, **a company which has started its operations recently or which has not so far received big orders and is not able to ensure remuneration equal to that provided by the leading companies working in the industry is automatically excluded from further procurement procedure without granting an opportunity to provide reasons for the eventually objective incompliance with the Provisions.**

2. Latvia has quoted the minimum monthly wage and the minimum hourly rate (Cabinet of Ministers Regulations No. 791). The provisions of the PPL in question in their turn present legitimately unjustified additional requirement regarding the amounts of salaries for the tenderers/candidates.
3. In practice **the company code under NACE Rev. 2 could differ from the actual sector of business of the company as this classification has been established for statistical purposes.** Thus, NACE Rev. 2 is the statistical classification of economic activities (the development thereof is based on the European Parliament and Council Regulation (EC) No. 1893/2006 of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains).

Moreover, on 16 March 2011 the 1<sup>st</sup> Division of the Constitutional Court started proceeding in the case No. 2011-05-01 "Regarding Compliance of Section 39 Paragraph One Clause 6 of the Public Procurement Law (PPL) with Sections 91 and 105 of the Constitution (Satversme) of the Republic of Latvia". The complainant considered that the above clause of the PPL is contradictory to the principle of equality and non-discrimination contained in Section 91 and to the right to property stipulated by Section 105 of the Constitution of the Republic of Latvia.<sup>4</sup>

### III CONTROL OF PERFORMANCE OF PROCUREMENT CONTRACTS

The Directive does not provide regulation of the performance of the public procurement contracts. Performance of contracts and supervision of the performance thereof is not regulated by the PPL either. Thus, the process of performance of the procurement contract (including compliance with quality requirements, scopes of works, completion deadlines and compliance with financial provisions) is left exclusively at the discretion of the contracting authority. Taking into account that during the procurement contract performance process the contracting authority operates in the capacity of the subject of private law, this could be generally acceptable. However, **complications arise in the event the terms and conditions of the contract are amended during the period of performance of the public procurement contract. This refers especially to change of the contract price.**

In the case *Commission v France*<sup>5</sup> the Court of Justice of the European Communities indicated that amendments to a public contract are deemed to be such that require organisation of a new procurement procedure, if such amendments **demonstrate the intention of the parties to renegotiate the essential terms of the contract.** The following conditions are deemed important (material) amendments that demonstrate the intention of the parties to renegotiate the essential terms of the contract, according to the case *Pressent Nachrichtenagentur*<sup>6</sup>:

- 1) amendment to the contract specify such provisions, which, if included in the initial procurement procedure documentation, would have permitted a wider range of suppliers to participate in the procurement procedure, or would have permitted selection of another tender instead of the one presently designated;
- 2) amendments to the contract considerably expand the range of purchased services (and the supplies, respectively) – the area of validity of the contract is considerably expanded;

<sup>4</sup> Regarding Starting proceedings for the Case No. 2011-05-01. *Latvijas Vēstnesis*, 18.03.2011 44 (4442), <http://www.latvijasvestnesis.lv/?menu=doc&id=227362>

<sup>5</sup> Case C-337/98, *Commission v France* [2000] ECR I-08377, para 44, 46

<sup>6</sup> Case C-454/06, *Pressent Nachrichtenagentur<sup>6</sup> GmbH v Republik Osterreich (Bund), APA-OTS Originaltext-Service GmbH, APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung*, para 30

- 3) the economic balance in the contract performance process is being inclined towards the supplier, which was not provided for in the initial wording of the procurement contract.

#### **IV LIABILITY FOR VIOLATIONS OF THE PROCUREMENT PROCESS**

As a result of violation of the PPL the purposes specified under Section 2 of the PPL are not achieved:

- 1) to ensure openness of the procurement procedure;
- 2) to ensure free competition for the suppliers, as well as equal and fair treatment thereof;
- 3) to ensure efficient utilisation of state and local government funds by reducing the contracting authority's risk to the minimum.

Considering the importance of the achievement of the above PPL purposes to ensure relevant public procurement procedure, it is necessary to persuade the persons who are responsible for the lawful conducting of public procurement procedures to perform duly their obligations within the scope of procurement procedures and in relation thereof.

Presently the most widespread violations of the public procurement procedure are:

- 1) evasion from the application of the public procurement procedures stipulated under the PPL (division of the estimated contract price in parts, unsubstantiated reference to conduct of procurements under Part B of the PPL);
- 2) preparation of the procurement documentation (tender regulations) with the aim to ensure that only a single particular supplier is able to provide compliance with the requirements of the above documentation.

Moreover, violations can be also established after the completion of the procurement procedure – during the performance of the contract when the contracting authority permits that the supplier fails to comply with what has been stated as a result of the procurement procedure (contract breaches, increasing of the contract price, etc.).

Presently Sections 166<sup>22</sup>-166<sup>25</sup> of the Latvian Administrative Offences Code stipulate administrative penalties with respect to the public procurement procedures for the following violations:

- unjustified narrowing of the range of tenderers;
- creation of unequal conditions for tenderers;
- failure to ensure openness or confidentiality;
- incomplete or misrepresented documenting of the procurement procedures.

The penalty stipulated for the above violations is either a warning or a fine not exceeding LVL 200.

#### **V FUTURE INOVATIONS**

##### **5.1. Experts**

##### **5.1.1. Experts in procurement commissions**

Section 22 Paragraph two of the PPL stipulates that when establishing the procurement commission the contracting authority should ensure that this commission is competent within the area of procurement for which the contract is awarded. **The procurement commission may**

**invite experts for the performance of its duties.** Experts, in their turn, are not the members of the procurement commission. It follows from the PPL regulation that experts are invited as third parties to the procurement whereby they express their opinion in the area of their specialisation while this opinion is not binding on the procurement commission when it passes the decision.

Not being the members of the procurement commission the experts are not public officials in the understanding of the Law on Prevention of Conflict of Interest in Activities of Public Officials. At the same time, however, with respect to the prevention of the conflict of interest, experts are governed by what is stated in Section 23 of the PPL that the members of the procurement commission and experts must not represent the interests of a tenderer or candidate and must not be related to a tenderer or candidate, and that they have an obligation to sign a confirmation that there are no such circumstances due to which it may be deemed that they are interested in the selection or operations of a particular tenderer or candidate, or that they are related to the same in the understanding of Paragraph one of this Section.

In the understanding of the PPL the procurement commission is the main body driving the procurement procedure. The procurement commission provides for the development of the procurement documents, documents the progress of the procurement process and is responsible for the progress of the procurement procedure. The procurement commission selects candidates and tenderers and evaluates the tenders submitted thereof. **The decision of the procurement commission is binding on the contracting authority if the procurement contract is awarded.** It follows that conducting of the procurement and consistently due performance of a function by the contracting authority in relation to the procurement object and efficient utilisation of state funds over a period of 5 years (in the case of supply and service contracts) or over a much longer period in the case of a works contract will depend on this decision. Therefore it is of national importance and essential for the achievement of the purposes of the PPL (especially for effective utilisation of state and local government funds by reducing the contracting authority's risk to the minimum) to ensure that **any procurement commission is competent in the area of procurement it has to conduct.**

### **5.1.2. Experts at the PMB complaints examination commissions**

Section 82 Paragraph one of the PPL specifies that complaints regarding violations of the procurement procedure are reviewed by a complaints examination commission consisting of three members, established by the PMB. **The members of the commission are the PMB officials.** To examine complaints the PMB **may invite** a procurement specialist or an expert. Paragraph four of the same Section states that the specialist or the expert participates at the meetings of the PMB's complaints examination commission **without the voting rights** and expresses for the commission an independent professional opinion regarding the facts established during examination of the complaint or provides an opinion regarding any questions made by the commission. Considering that part of the public procurements are of a technically specific nature, calling as a result, for special knowledge in assessing their compliance with the legal requirements, FICIL recommends introduction of respective amendments to Section 82 of the PPL.

### **5.2. Establishing an Electronic Platform for Organisation of Procurements**

According to the Green Paper on expanding the use of e-procurement in the EU (SEC(2010) 1214)<sup>7</sup> (Green Paper), **e-procurement is used with growing frequency.** Several Member States and regions have introduced the e-procurement systems that are suitable for all electronic procurement procedure stages at least with regard to standard supplies and services. Other systems are more intended for the implementation of the first procurement stages – it is possible to publish

<sup>7</sup> Green Paper on expanding the use of e-procurement in the EU (SEC(2010) 1214)

[http://ec.europa.eu/internal\\_market/consultations/docs/2010/e-procurement/green-paper\\_lv.pdf](http://ec.europa.eu/internal_market/consultations/docs/2010/e-procurement/green-paper_lv.pdf)

advertisements and provide access to the procurement documentation online in 25 Member States. Several well-functioning systems are based on a model of e-procurement provided by third parties using the net. Such platforms often offer their e-procurement services to several organisations. Separate contracting authorities have access to a private place on the web where they can define their users, processes and results. Administration of some systems is provided by public sector agencies while administration of others is ensured by private sector companies; the contracting authorities pay for those services according to a standard rate or per each instance of use.

Portugal can be mentioned as a positive example of general implementation of e-procurement, with application of electronic devices in organisation of the stages of the procurement procedure up to awarding of the contract having been made mandatory for the majority of public procurements since 1 November 2009. Thus, **the contracting authorities conduct procurements faster and it is expected that the administrative savings will reach EUR 28 million annually.** According to the calculations made by the European Commission, if e-procurement was fully available and more widely used, it could save even up to 30% of the public procurement expenditure.<sup>8</sup> Other Member States have also made certain stages or instruments of the e-procurement procedure mandatory at the national level, for example, Cyprus, Belgium and the Netherlands have implemented or plan to implement mandatory announcement of procurement opportunities via certain platforms. More extensive unofficial data show that many contracting authorities and market participants have implemented transfer to e-procurement. A transitional period was also introduced in Lithuania during which it was advised to use the electronic procurement form.

**E-procurement in Latvia is presently being implemented in the form of a dynamic procurement system**, specified by Section 66 of the PPL. However, according to the definition of the dynamic procurement system presented in Section 1 Clause 2 of the PPL, this system is applicable for purchases that are frequently used, compliant with the contracting authority's requirements and widely available on the market. It follows from the definition that the dynamic procurement system (an entirely electronic procurement process) may be used for standardised procurements, which is a situation analogous to the obligation specified in Section 16 Paragraph 2<sup>1</sup> of the PPL for the direct public administration authorities to purchase products and services by choosing the same from the **electronic catalogue** of the state information system managed by a centralised procurement institution, namely, the State Regional Development Agency. According to Annex 1 of the Cabinet of Ministers Regulations No. 1241 of 28 December 2010 "Regulations of Centralised Electronic Procurement" the groups of products purchased according to such procedure are office equipment, software, office paper, medicine, computer hardware and accessories for printing equipment. Considering the abovementioned, **application of electronic procurement is comparatively narrow, though.**

According to what is stated in the Green Paper, **application of the above e-procurement presents the following positive aspects**, which FICIL also agrees with:

- 1) *Better accessibility to procurement processes and transparency thereof*

E-procurement systems may be configured so as to inform the suppliers on the procurement opportunities within a particular area and ensure immediate access to the procurement documentation. In this way the procurement process becomes more transparent. As a result, not only a comfortable situation is created for suppliers but it also helps to improve supervision of public procurement and general effectiveness thereof.

<sup>8</sup> *European Commission: Regarding Online Use of Public Services.* Latvijas Vēstnesis, 04.03.2011 36 (4434)  
[http://www.vestnesis.lv/index.php?menu=doc&id=226748&laidiens\\_id=9992](http://www.vestnesis.lv/index.php?menu=doc&id=226748&laidiens_id=9992)



2) *Reduction of administrative expenditure and acceleration of the procedure*

By abolishing the “paper” system it is possible to accelerate the public procurement procedure and to make it more effective both costs- and time-wise.

3) *Effective procurement management*

4) *More extensive engagement of foreign (other EU Member States) suppliers in the procurement procedures*

E-procurement can reduce obstacles related to the distance and lack of information and facilitate wider participation thus extending the range of prospective suppliers and expanding markets. Easier access to information on the procurement opportunities and a rationalised organisation of the procurement procedure will facilitate participation of foreign suppliers in the online procurement procedures.