**Actions of public contracting authorities regarding the application of Article 14, paragraph 1, item 3) of the Law on Public Procurement**

The Law on Public Procurement (“Official Gazette of the Republic of Serbia”, No. 91/19, hereinafter referred to as: the PPL/2019) provides for situations in which contracting authorities are not obliged to conduct public procurement procedures provided for in this law when procuring certain goods, services or works.

One of these exceptions refers to situations when the need for procurement is available to legal entities, which, in addition to having the status of a contracting authority, perform certain activities or a larger number of them in conditions of real market competition. PPL/2019 prescribes under which conditions these procuring entities are not obliged to conduct public procurement procedures when procuring procurement items that are intended exclusively for their participation in the market. The purpose of this exception is to create conditions for public contracting authorities to be competitive on the market, i.e., for other legal entities, which do not have the status of contracting authorities, not to have an advantage, because they are certainly not obliged to act in accordance with PPL/2019.

Namely, Article 14, paragraph 1, item 3) of the PPL/2019 stipulates that the provisions of this Law shall not apply to public procurement for procurement intended for processing and sale, resale or rental to third parties on the market, provided that the contracting authority does not have exclusively or separately the right to sell or rent the subject of procurement and that other entities may, under equal conditions, sell, resell or rent the subject of procurement to third parties.

Based on the above provision of the PPL/2019, it follows that the application of this exception requires cumulative fulfilment of several conditions, namely:

- that the procurement is done for the purpose of processing and sale, resale or rental to third parties on the market,

- that the contracting authority does not have exclusive or special rights to sell or rent the subject of procurement and

- that other entities may, under equal conditions, sell, resell or rent the subject of procurement to third parties.

Exclusive or special rights, in terms of the PPL/2019, are rights that are granted or derive from a law, bylaw or individual act and which restricts the performance of a certain activity to one or more contracting authorities.

On the other hand, Article 7, paragraph 1, item 6) of the Law on Public Procurement (“Official Gazette”, No. 124/12, 14/15 and 68/15, hereinafter referred to as: PPL/2015) provided that the provisions of this Law, the procuring entities do not apply to the procurement of goods and services that the procuring entity procures for resale, processing and sale, as well as for the provision of services or works on the market, provided that the procuring entity does not have exclusive or special rights to resell or lease services or works for which these goods and services will be used.

It follows from the above provision of the PPL/2015 that the application of this exception required the cumulative fulfilment of several conditions, namely:

1. that it is a matter of procurement of goods and services;
2. that the contracting authority procures goods and services for the purpose of further sale, for the purpose of processing and sale, as well as for the purpose of providing services or performing works on the market;
3. that the contracting authority does not have the exclusive or special right to resell or rent those goods, i.e., to provide services or perform works for which they will use those goods and services.

Article 3, paragraph 1, items 24) and 25) of the PPL/2015, defined an exclusive or special right.

It follows from the above that the conditions for the application of the exception from Article 7, paragraph 1, item 6) of the PPL/2015 were met when the contracting authority procures goods and services for resale, processing and sale, or for providing services or performing works on the market, when the subject of procurement is closely related to the activity of the procuring entity that it performs in conditions of market competition, i.e., that it does not have exclusive and special rights to perform the activity in question. Therefore, for each specific procurement, it was necessary for the contracting authority to have the position of a market participant. This meant that the same type of activity was performed by other participants in accordance with the applicable regulations for performing the activity concerned, provided that market participants are free to perform the subject activity in the same geographical area, i.e., that competition exists.

Bearing in mind the above, the main difference between Article 14, paragraph 1, item 3) of the PPL/2019 and Article 7, paragraph 1, item 6) of the PPL/2015 is in the purpose of the subject of procurement that the contracting authority procures. Therefore, in accordance with the provisions of the PPL/2019, the contracting authority is not obliged to apply the provisions of this law if the subject of procurement is procured for processing and sale, resale or rental to third parties in the market. However, if the contracting authority procures the subject of procurement for the purpose of providing services or performing works on the market, there is no basis for the application of this exception, i.e., the contracting authority is obliged to apply the provisions of PPL/2019.