

Pravri

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***The Concession Awarding Procedure for Nautical Tourism Ports
under Croatian Law***

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Applicable law on concession granting procedure

Concession Act / 2017  Maritime Domain and Seaports Act / 2003

Lex posterior derogat legi priori.

Lex specialis derogat legi generali

Lex posterior generalis non derogat priori specialis



Applicable law on concession granting procedure

MDSPA:

insufficiently detailed *lex specialis*

- no special provisions on concession granting procedure for ports of marinas
- appropriate application of general provisions on concession granting procedure on maritime domain

CA:

- legislator's intention to make it umbrella law
- concession granting procedure is transparent and regulated in a very detailed manner
- envisages subsidiary application of special laws only in the matters not regulated by itself
- **transposes the EU Directive 2014/23 on the award of concession contracts**

Applicable law on concession granting procedure

- national court is obliged to construe the national law in accordance with the directive
 - regardless of whether a national piece of legislation has been enacted before or after the directive
 - regardless of whether a piece of legislation is intended to transpose the directive into the national law or not
 - with the view to obtain the result in accordance with the objective which the directive strives to achieve
- correct approach requests applying the provisions of the MDSPA only to the extent to which such provisions do not contravene the objective and the purpose of the Directive 2014/23/EU

Applicable law on concession granting procedure

- Directive 2014/23/EU
 - applicable only to the concessions of estimated value above 5.225.000 EURO
 - concession for performing works and concession for providing services

Recital 15. of the Directive:

- certain agreements having as their object the right of an economic operator to **exploit certain public domains** or resources under private or public law, such as land or any public property, in **particular in the maritime**, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, should not qualify as concessions within the meaning of this Directive

CA → SPILL OVER EFFECT

Conclusion on the applicable law on concession granting procedure

- the procedure of awarding of concessions for ports of nautical tourism should be carried out **in accordance with the CA**
- **appropriate application of the provisions of MDSPA and Regulation** on the Procedure of Granting a Concession on the Maritime Demesne only **where these provisions do not contravene the objective and the purpose of the Directive**
- **Public Procurement Act** (when so indicated by the CA)

How to initiate the concession granting procedure?

1. initiative for concession granting procedure – any natural or legal person
2. initiative of the concession grantor
 - 2.1. county government (from 5 to 20 years)
 - preliminary procedure carried out by the county body
 - 2.2. Government of the Republic of Croatia (up to 50 years)
 - preliminary procedure carried out by the Ministry of the sea, transport and infrastructure
 - 2.3. Government of the Republic of Croatia with a consent of the Croatian Parliament (up to 90 years)
 - preliminary procedure carried out by the Ministry of the sea, transport and infrastructure

Preparatory actions

- appointment of the expert committee (**CA**)
- examining special preconditions for granting a concession according to MDSPA and Regulation (**CA, MDSPA**)
 - resolved proprietary issues as a prerequisite for granting a concession (**CA**)
 - determined border of the maritime domain (**MDSPA**)
 - inscription of the maritime domain in the land register (**MDSPA**)
 - compliance with the physical planning documents (**MDSPA**)
- preparation of the feasibility study for granting a concession (**CA**)
- calculating the estimated value of the concession (**CA**)
- preparation of the bidding documentation (**CA, MDSPA**)
 - duration of the concession (**CA, MDSPA**)
 - bid selection criteria (**CA, MDSPA**)
 - concession fee (**CA, MDSPA**)

Concession awarding procedure

– notice of intent to award concession

- A concession for economic exploitation of maritime domain shall be granted on the basis of a **public tender** (Art. 17/1 MDSPA)
- Concession for marinas will, as a rule, exceed the threshold from CA
 - Heading IV of the CA is applicable (complex procedure)
 - Concession notice in the Official Journal of the European Union
- **BUT**, with regard to concessions for economic use of maritime domain provisions on the publication of the notice of intent to award concession (as well as decision) will not apply, and the notice will be published in the Electronic Public Procurement Classifieds of the Republic of Croatia (provisions from the Heading III – simple procedure)
- contravene the objective and the purpose of the Directive 2014/23/EU
- not in compliance with the basic principles of the EU (transparency and opening of the internal market)



Concession awarding procedure

– submission of applications and bids

- time limit determined by the notice, not shorter than 30 days
 - site visit
 - direct review of the bidding documents
- in writing, in Croatian language, Kunas, in a sealed envelope with “do not open” remark
- the bidder may modify, supplement or withdraw the bid until the time limit for submission
- after that period only clarifications are possible

Concession awarding procedure – form of the bid

- **MDSPA** - concession viability study
 - contains the amount of investments and the mode of depreciation
 - proves that the tender has adequate technical, professional and organizational capacities for realization of the concession
 - proves that the tender has the guarantee for realization of the plan and program for realization of the concession

Shall be drawn up in accordance with the content and in the form set out in the bidding documentation.

Concession grantor may require detailed study but does not have to.

Concession awarding procedure

– opening of the bids

- at the place and time designated in the concession notice and bidding documents (**CA**)
- the bids received after the deadline for submission of the bids shall be returned unopened to the senders (**CA**)
- opened by the **expert commission** for the concession (**CA**) **≠** the body competent for carrying out the preliminary procedure (**MDSPA**)
- public opening (**MDSPA**) **≠** authorized representatives of the bidders (**CA**)
 - public opening has to be indicated in the bidding doc.
- minutes will be distributed only to delegated representatives, and other upon a written request (**MDSPA**) **≠** duty to inform all candidates and bidders (**CA**)

Concession awarding procedure

– review and the evaluation of the bids

- review and the evaluation of the bids based on the conditions and criteria from the bidding documentation (**CA, MDSPA**)
- WHO?
 - the expert committee appointed in the preparatory stage (**CA**)
 - ≠
 - the expert committee (**MDSPA**)
 - did not participate in the preparatory stage
 - have to examine the whole set of conditions which are already examined in the preparatory stage according to the CA

Concession awarding procedure

- criteria for the evaluation of the bidders (CA)

- bid selection criteria and significance of a specific criterion need to be specifically indicated in the bidding documents.
- non-discriminatory and related to the object of the concession
- the concession grantor is free to determine the criteria for selecting the **economically most favourable bid**, which criteria are, as example only, indicated in Article 48 of the CA (quality, including technical achievement, aesthetical, innovative, functional and ecological features, operating costs, management costs, efficiency, post-delivery servicing, amount of the concession fee...)
- **when determining the bid selection criteria, the elements provided by the special law need to be taken into consideration**

Concession awarding procedure

Criteria for the evaluation of the tenders set by the Regulation

	until 2/2017	from 2/2017
1. offered amount of fixed part of concession fee,	20%	30%
2. offered amount of variable part of concession fee,	10%	30%
3. offered amount of total investment according to feasibility study	25%	40%
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4. revenues from main business in previous year	15%	
5. profit made in previous year	15%	
6. number of newly created jobs	5%	
7. tender's experience in performing activities in a field for which concession is granted	10%	

Concession awarding procedure – the evaluation of the bids (**CA**)

- when two or more bids are ranked equally, the concession grantor would elect the bid that has been received earlier (Article 49/4 of the CA).



Concession awarding procedure

– concession award decision

- the concession award decision is an administrative decision (**CA**)
- the **MDSPA** does not provide that the concession award decision is an administrative decision, but the **judicial practice** has evaluated it as such
 - decision shall contain the explanation on the grounds for selection
 - other relevant data in accordance with the bidding documents
 - or the reasons for rejecting the bid and reasons for not awarding the concession for which the concession notice has been published
- deadline for passing the award decision must be appropriate and unless otherwise stated in the bidding documents, the decision shall be passed within 30 days (**CA**) **≠** 8 days!!! (**MDSPA**)

Concession awarding procedure – legal remedies



- provisions of CA and MDSPA are fundamentally different
- **MDSPA:** the jurisdiction of the **Ministry of the Sea, Transport and Infrastructure** for dealing with all issues and resolving any and all disputes concerning the award, execution, implementation, revocation or modification of the decision to award a concession on maritime demesne.
 - may be challenged in an administrative dispute
- **CA: State Commission for Supervision of Public Procurement Procedures**
- administrative court has the exclusive jurisdiction to resolve the disputes arising from the concession agreement
- arbitration, if the special law does not provide otherwise, but exclusively with application of Croatian law

Concession awarding procedure – legal remedies

State Commission for Supervision of Public Procurement Procedures:

- rejecting *a limine* the appeals submitted against the concession award decisions relating to the maritime domain, declaring that it does not have jurisdiction in this type of matters
- MDSPA – *lex specialis*

Thank you for your attention!

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