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Public Procurement in Broadband Infrastructure Projects in the Republic of Croatia

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Abstract

This paper investigates public procurement in Broadband Infrastructure Projects in the Republic of Croatia, the funding of which is provided by the European Regional Development Fund for the period 2014-2020. Since successfully implemented procurement procedure for the infrastructure solution is one of the key factors for grant approval and the start of project implementation, the question arises as to which public procurement techniques contribute best to achieving the goals and meeting the objectives of these specific projects. It is estimated that the available literature and legal cases are not sufficient to make a decision on the selection of the procedure. Therefore, a conclusion of possible procedures was reached on the efficient and effective process through a comparison, as well as multicriteria analysis, leading to the successful completion of the procurement process.

Keywords: Broadband infrastructure in the republic of croatia; Next generation access; Public procurement; Public procurement techniques; Types of public procurement procedures; Open procedure; Restricted procedure.

1. Introduction

By launching the Digital Agenda for Europe (hereinafter: DAE) initiative in 2010 within the framework of the Europe 2020 Strategic Framework (European Commission, 2010), the European Union has strongly focused on establishing preconditions for a sustainable functioning of the single digital market. In addition to the incentives to increase e-commerce, public e-services and higher Internet usage rates among EU citizens (European Commission, 2014), one of the key goals is to build infrastructure to enable Internet access for all households. Specifically, DAE encourages the provision of the Next Generation Access (hereinafter: NGA) with minimum speeds of 30 Mbit/s for 100% households across the EU, of which at least 50% should have speeds greater than 100 Mbit/s.

The Republic of Croatia took over the goals of the DAE and transferred it into the national strategic document - Strategy for the development of broadband access in the Republic of Croatia in the period from 2016 to 2020 (hereinafter: SBBIARC) (Government of the Republic of Croatia, 2016). Furthermore, the goals are also embedded in the partnership agreements between the EU and the Republic of Croatia, resulting in that the construction of broadband access infrastructure in the Republic of Croatia is anticipated by the multi-annual financial framework 2014-2020, with financing coming mostly from the European Regional Development Fund (hereinaftner: ERDF) and to a smaller extent from the national budget.

Within the Competitiveness and Cohesion Operational Program 2014-2020 (hereinaftner: CCOP) (Ministry of Regional Development and Funds of the European Union, 2017), one of programming documents triggering the utilization of the EU Structural Funds in the Republic of Croatia in respective period, a total of EUR 150.000.000 were reserved for. This type of infrastructure is largely lacking in rural and less developed areas, where operators and providers have no commercial interest in their own investments in building or improving the existing situation (Požarnik *et al.*, 2017b).

Beside compliance with the procedural requirements of the CCOP, the structural rules of the Framework Program for the Development of Broadband Infrastructure (hereinafter: FPDBBI) (Government of the Republic of Croatia, 2015) are also binding in the preparation and implementation of this type of projects. The FPDBBI is aimed at meeting the goals of the SBBIARC and DAE, particularly in the domain of ensuring the availability of fast and ultra-fast broadband access across the entire territory of the Republic of Croatia. All projects within the FPDBBI are subject to the following structural rules:

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- the eligibility of the area,
- making significant step forward in relation to the existing situation,
- communication with interested parties,
- selection of infrastructure solution through public procurement procedures,
- determining and overseeing wholesale conditions and access fees for broadband networks built with support,
- rules for monitoring and reimbursement of excessive state aid,
- the rules of transparency and reporting on project implementation.

Structural rules of the FPDBBI are also aligned with the provisions of the EU Guidelines for the Application of State Aid Rules in Relation to the Rapid Deployment of Broadband Networks (hereinafter: EUGASABBN) (European Commission, 2013), with particular emphasis on adherence to technological neutrality in the implementation of public procurement.

The overall process of developing a broadband access project is lengthy and complex, a question arises as to how to make project preparation procedures faster, simpler and more efficient (Taras *et al.*, 2015). Given that these are very high value-added public investments, financed by limited resources of EU taxpayers, one of the key steps to success is the implementation of public procurement procedures resulting in long-term provision of adequate infrastructure and technology.

Public procurement is an extremely important segment of public spending, therefore the basic objective of the regulatory framework in all EU member states is to ensure efficient and transparent procedures. This encourages a positive interaction between the public sector and economic entities, which generates value for society as a whole (Požarnik *et al.*, 2017a). The subject of procurement within broadband infrastructure projects, alongside with design and works includes a technological solution for Internet access at speeds greater than 30 Mbit/s. The client is the local self-government unit appointed leading partner of consortium in most of cases composed of several municipalities.

The purpose of this paper is to present which type of public procurement procedure or technique is most appropriate for the selection of an infrastructure solution that will lead to the fulfillment of all project objectives.

2. Defining the Problem

According to national legislation (Croatian Parliament, 2016), public procurement can be carried out in the Republic of Croatia by applying 6 types of procedures:

1. An open procedure,
2. Restricted procedure,
3. Competitive procedure with negotiation,
4. Competitive dialogue,
5. Partnership for Innovation,
6. Negotiation procedure without prior publication of a call for tenders.

In case of the open and restricted procedure, the public contracting authority has the freedom to choose. In the open procedure, each interested economic operator may submit a tender. The restricted procedure is characterized by two phases. First, a request for participation is submitted, and then, in case of proven ability, it is followed by an offer.

Competitive procedure as well as competitive dialogue is permitted in the foreseen law when the needs of a public contractor can not be met without the adaptation of easily accessible solutions or when innovative solutions are needed. Application is also possible when a contract cannot be awarded without prior negotiation on specific circumstances relating to the nature, complexity, legal and financial conditions or it is not possible to establish technical specifications with sufficient precision in respect of the prescribed standards. Finally, it is permissible even in the case that all the tenders were either incorrect or unacceptable in a previously conducted open or restricted procedure.

Partnership for innovation is used for new, innovative and developmental solutions to meet the needs of the contracting authority for a specific procurement object which, due to its nature, risk or circumstance, is not on the market.

Negotiating procedure without prior publication may be used only in exceptional cases prescribed by law, ie if no tender has been submitted in the open or restricted procedure or if only a particular economic operator may offer the subject of procurement or for reasons of extreme urgency and circumstances on which the contracting authority had no influence.

The availability of procurement items on the market has been established, as there are a number of different solutions in offer for enabling Internet access at speeds greater than 30 Mbit/s. Due to the principle of technological neutrality and the mandatory characteristics of solutions solely with minimal speed, the innovation dimension is not necessary. Also, in relation to the principle of technological neutrality, it is desirable not to establish detailed technical specifications. It is possible to reason about specific circumstances that relate to the nature, complexity or legal and financial conditions and the risks associated with them. However, since the Development Plan of Broadband Infrastructure (hereinafter: DPBBI), being a cornerstone document for launch of individual project, contains a list of all addresses and potential users per category as well as the required minimum speed (Požarnik *et al.*, 2016), it is assumed that there is enough information to adapt the solution and risk assessment during bidding.

Resulting from the above means that in the procurement within broadband infrastructure projects, there are no legally prescribed conditions under which competitive procedures can be used for negotiation, competitive dialogue, partnership for innovation and negotiation without prior publication of a call for tenders.

2.1. Hypothesis

Given the fact that the introductory part defines procedures that are not applicable, the question is whether it is more appropriate to have an open or restricted procedure.

We argue that the restricted process is more appropriate than the open public procurement process in broadband infrastructure projects since it is more efficient, more effective and more likely to bring a decision on choosing the optimal solution the first time.

2.2. Methods

For the purposes of this article, a method of comparing an open and restricted procedure in terms of mandatory procedural steps and duration was used, as well as an analysis of their general and specific advantages and disadvantages. Furthermore, multicriteria analyses includes administrative, technical and legal factors influencing the outcome of the process, which led to a final conclusion on a more appropriate public procurement technique in broadband infrastructure projects.

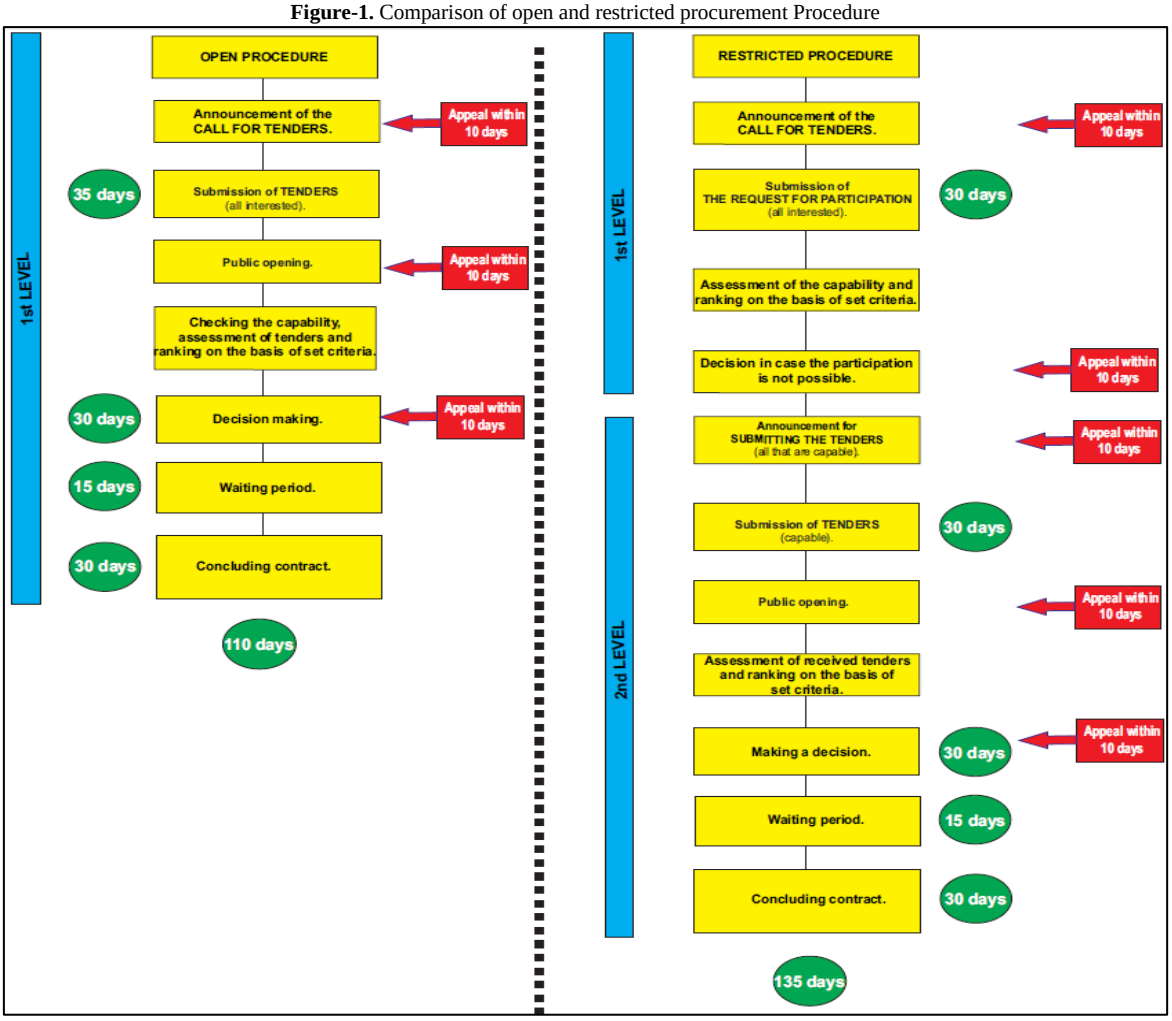
Data sources include a valid legal framework for public procurement and EU funds utilitization in the Republic of Croatia, together with accompanying regulations and expert opinions. At the same time, the assumptions that derive from the practical experience of the authors of this article collected during the preparation of broadband infrastructure projects and the public sector procurement have also been applied.

3. Results

3.1. Comparison of Open and Restricted Public Procurement Procedures in Broadband Infrastructure Development Projects

Figure 1 gives a comparative view of the steps for carrying out an open and restricted public procurement procedure, starting with the publication of a call for tenders. In addition to the sequence, the minimum duration of each process step is shown in terms of the statutory deadlines, which condition the transition to the next step if all conditions for continuing the procedure are met. The comparison also shows in which process steps complaints are possible.

Figure-1. Comparison of open and restricted procurement Procedure



Both procedures begin in the same way, that is, by public announcement of a tender documenation, which is published in the Electronic Public Procurement Portal of the Republic of Croatia. However, assuming the receipt of at least one valid tender, the absence of appeals, subsequent modifications to the tender documentation and the application of the statutory exception of shortening deadlines, it is apparent from the outline that the conduct of the open procedure lasts for at least 110 days and the open procedure lasts 135 days (Šperanda, 2016).

The reason for this is that, unlike the open procedure, the restrected procedure is performed in two stages. In the open procedure the call for tenders implies the submission of tenders by all interested parties within a minimum of 35 days. In the restricted procedure, all interested parties are invited to participate in the first stage solely for the submission of requests for participation within a minimum of 30 days to demonstrate their legal and business capability. After being ranked according to the prescribed criteria, eligible bidders are invited to submit final tenders within an additional minimum of 30 days, while the ineligible ones receive the decision on the inadmissibility of the futher participation (Šperanda, 2018a). Upon receipt of the final tenders, the steps leading up to the conclusion of the contract, as well as the related deadlines, are the same in both procedures.

In addition to the overall duration, the other fundamental difference lies in the possibility to appeal to the State Commission for Control of Public Procurement Procedures (hereinafter: State Commission). Namely, in a restricted procedure, an appeal may be filed with five process steps in the overall workflow, while in an open procedure it is possible to file a complaint with three process steps (Šperanda, 2018b). An additional circumstance that makes restricted procedure riskier for a client is the possibility of appealing to the content of tender documentation on two occasions, as well as the possibility of appealing to a decision on the inadmissibility of further participation. By the occurrence of the above-mentioned situations, the continuation of the proceedings is prevented until the arbitrament of State Commission, which further extends the time for the proceedings to be terminated.

The advantage of an open procedure lies in a simpler proceeding and a not so extensive tender documentation that needs to be prepared, which requires less time and human resources for the client. It is also preferable to have a lower risk of suspension and prolongation of the procedure due to appeals.

The potential disadvantage, specifically related to the FPDBBI structural rules, lies in the fact that, in the case of receiving only one tender, an additional analysis of all the parameters of the tender documentation is needed. The analysis process requires involvement and consultations with the Croatian Regulatory Authority for Network Industries (hereinafter: HAKOM), the body of public authority that is the holder of FPDBBI and as such has power to decide on the annulment of associated procurement procedure. Annulment is in any case an undesirable outcome which significantly slows down the implementation of the project and may also call for change of the project goals and basic planning document DPBBI. However, given that the subject of procurement is being acquired in a competitive telecommunications market, the other extreme is possible in the form of a large number of tenders. Then, the process of assessing the legal and business capability of the bidders and the features of the offered procurement item requires greater effort in terms of time and the necessary expertise.

The advantage of a restricted procedure is an insight into the bidders'interest in the initial stage of the procedure. This enables a quick response to the improvement of documentation if this is the reason for the poor response. Furthermore, due to the legal obligation to make available objective and non-discriminatory criteria for assessment of legal and business cability, as well as the open option to limit the number of capable bidders to be invited to the second round, the appeals grounds linked to elimination of those not capable or less cable to fulfill contract are significantly narrowed. This is not negligible because in the broadband infrastructure projects, apart from the procurement of solutions, the contractual relationship stems from public procurement, regulates the partnership between the cliend and the bidder in the futher preparation and implementation of the project. Good co-operation, in which both parties carry out the commitments, is key to success in all subsequest steps, ie. applying for EU funding, building the infrastructure and maintaining it in the post-project period. It is also expected that potential bidders will be encouraged by the fact of limited competition in the second stage and the longer period for the preparation of tenders in relation to the open procedure. In addition to the early signaling on the interest of the bidder, the advantage in the second stage is full focus of the better conclusion of the procedure, in terms of selecting the optimal solution and the partners according to the principle of best value for the available money, without dealing with capability matter any longer.

The disadvantages of this two-stage public procurement technique are significantly higher administrative burden, a longer time period required for the preparation and implementation of the procedure, and a greater amount of uncertainty due to possible appeals and potentially unwanted legal repercussions.

3.2. Multicriteria Analysis of the Open and Restricted Public Procurement Procedure in Development Projects of Broadband Infrastructre

To find the best possible alternative, a Multiple-criteria-decision-analysis (MCDA) weighted sum model (WSM) algorithm was used, based on data from table 1.

The considered alternatives are:

$$A_i^m \in \{open\ procedure, restricted\ procedure\},$$
$$m = 2. \tag{1}$$

For each alternative, the same set of criteria, grouped in three basic sets, were applied:

$$C_j^n \in \{Administrative\ aspects \cup Technical\ aspects \cup Legal\ aspects\},$$

$$n = 11. \quad (2)$$

All the criteria are benefit criteria - the higher the values are, the better it is. When formulating the criteria, potential risks (Lynch, 2017) and the most common errors in the procurement process (European Commission Directorate-General for Regional and Urban policy, 2015) have been considered. Also, the specific nature of the project and the FPDBBI structural rules were taken into account. Criteria also reflect the fact that EU grants are not unlimited in the amount and availability period, as well as that the public procurement procedure and the overall implementation of the projects, co-financed by EU funds are subject to ex-post controls by the grant provider as long as 7 years after the project has been completed.

Relative weights w_j were used to quantify the importance of each criterion. They depend on the estimated importance of a particular criterion for making a decision on choosing a satisfactory solution at first. Legal aspects have the greatest impact (45%), followed by technical aspects (30%), while administrative aspects have the smallest impact (25%).

A performance value of each alternative A_i, when evaluated in terms of criterion C_j, is set to a value from 1 to 5, where value 5 is assigned when estimating the maximum possible contribution to efficient and effective implementation of the procedure. It is believed that efficiency means achieving the goal with the least investment and the effectiveness of the action achieving the desired outcome.

With this, the total importance of alternative A_i, the weighted sum model score, denoted as $A_i^{WSM-score}$, is defined as follows:

$$A_i^{WSM-score} = \sum_{j=1}^{n} w_j a_{ij}, for\ i = 1..m \quad (3)$$

and the winning alternative of the MCDA, WSM as:

$$\max(A_i^{WSM-score}), for\ i = 1..m \quad (4)$$

Table-1. Multicriteria analysis of open and restricted procedures

Criterion (C_j)		**Weight (w_j)**	**Open procedure (A_1)**		**Restricted procedure (A_2)**	
			Performance value (a_{1j})	**Total**	**Performance value (a_{2j})**	**Total**
Administrative aspect	Complexity related to preparation of the tender procedure and documentation	0,05	5	0,25	1	0,05
	Time to prepare tender documentation	0,05	5	0,25	1	0,05
	Total duration of the tender procedure	0,15	5	0,75	1	0,15
Technical aspect	Good practice regarding the nature of the project and the sector	0,01	3	0,03	5	0,05
	Interest of capable bidders	0,04	3	0,12	5	0,2
	Number of received tenders	0,1	3	0,3	5	0,5
	Quality of received tenders	0,15	2	0,3	5	0,75
Legal aspect	Proper execution of the contract	0,15	3	0,45	5	0,75
	Post-contract relationship	0,05	3	0,15	5	0,25
	Risk of appeals	0,1	5	0,5	2	0,2
	Management of appeals	0,15	3	0,45	5	0,75
Total		1	-	3,55	-	3,7

3.2.1. Administrative Aspect

Regarding administrative burdens, the restricted procedure requires the engagement of considerably more human resources and a longer time, but also procedural expertise compared to the open procedure. This is manifested through the need to take more action, such as producing multiple forms, minutes and decisions, setting two different sets of criteria, implementing and documenting two evaluation sessions, potentially preparing multiple appeal responses, etc. Also, human resources should be available over a longer period of time compared to the open procedure. Therefore, in the administrative sense, the use of an open procedure contributes more to the efficient completion of the procedure.

3.2.2. Technical Aspect

Although both procedures are allowed in the case of broadband infrastructure projects, it is advised to select a restricted procedure in case of strong competition and large and complex contracts (Mesarić, 2017). Until the launch

of public procurement, the level of competitiveness and the response of the potential bidders can be anticipated only by their participation in the public discusson on DPBBI and prior consultation on the tender documentation. However, at the beginning of 2019, HAKOM recorded 49 economic entities registered in the Republic of Croatia for the activity of providing access and joint use of electronic communications infrastructure and related equipment (Hakom, 2019). Since it is not known whether the grants for the construction of broadband infrastructure will be made available to Croatia in the EU's multi-annual financial framework 2021-2028, it is likely that more financially potent domestic entities, ie. Those who can provide enough investment on their own, seize the opportunity and engage in upcoming competition in the current financial perspective 2014-2020. A call for tenders will be open to business entities throughout the EU, where foreign telecommunications giants can recognize the benefits of expanding into other markets through building their own modern infrastructure that generates revenue through wholesale revenues in the long run.

Using a restricted procedure can be further leveraged to create an interest in capable and serious bidders who will be more motivated to compete, knowing that competition is in the second stage limited and that they have more time to prepare tender, supply guaranty, etc. (Mesarić, 2017). It is also expected that bidders of the required profile will submit high quality tenders, which has a positive effect on the conclusion of the procedure, namely in the form of the absence of problems related to invalid tenders and cancellation of the procedure. In the same way, those who are not capacitated enough will be discouraged for bidding.

Based on the above, it is not unrealistic to prepare for a high-competitive procedure where, from a technical point of view, the application of a restricted procedure contributes more to an effective conclusion of the process in relation to the open procedure.

3.2.3. Legal Aspect

Regardless of the characteristics and the price of the bids, due diligence must be paid to the series of prerequisites for a successful completion of the contracts and the long-term sustainability of the project. Respect for deadlines is of crucial importance, which requires a proven high level of operational capacity and internal expertise. Furthermore, it is crucial to establish the financial capability for pre-financing and co-financing as well as overall project implementation capacity in accordance with the set objectives, the national regulatory requirements and the EU funds procedure. Otherwise, EU support may be returned, or similar unwanted consequences could occur resulting from non-compliance.

In the open procedure, the contribution to the proper execution of contract and post-project obligations is considered lower due to the less detailed approach in examinating bidders' legal and business cability. This mid-step takes place after official opening of tenders and before the review and bid evaluation. Practical example demonstrating potential challenge on this matter derives from public discussion on DPBBI, ie. one of mandatory process steps during this essential document preparation. Namely, before determining the final number of addresses to be included in the project, project leader should verify plans of private investors to roll out their own infrastructure in the respective area. Investment plans are to be announced during public discussion period in the form of "commercial interest", in which case addresses with "commercial interest" are taken out of the project scope. There exists the risk that a mere expression of interest by a private investor could delay delivery of broadband services in the target area if subsequently such investment does not take place while at the same time public intervention has been stalled. Thus, the project leader can insist on credible financing proof and contract commitment to ensure the investment. However, this have shown to be problematic in case of market-less-represented entities, although such requests were legitimate in accordance with EUGASABBN. Project leaders lacked in proper advisory support from authority body and in most of cases had accepted the "commercial interest" under pressure of possible appeals. It is yet to be seen consequences of those decisions.

Since it is necessary to have a strong evidence of long-term financial and operational capacity of bidders in these projects, as well as securing their own pre-financing and co-financing investments, the project leaders should be rigorous in scrutinizing legal and operational capability. Notwithstanding, this enables an appeal after the public opening of the tender, which increases the risk of delays in awarding the contract, until State Commission' s decision on the merits of the appeal. Hence, this potential issue also can have impact to overall planned timeline. In case that the bidder meets the conditions of legal and business capacity in a borderline way, it is doubtful that his tender will be evaluated in the same way as in case of a tenderer with significantly more capacity. This can be prevented by incorporating the elements of capability into the criteria for the evaluation of the tender.

In contrast to the open procedure, in a restricted procedure, the client has been subjected to a detailed assessment and comparison of the capacity between multiple bidders, among which only tenderers are invited to compete in the further competition who meet the highest possible criteria level. For this reason, a restricted procedure is attributed to a higher contribution to the proper execution of the contract and other obligations.

On the other hand, in a restricted procedure, the possibility of appeal through even five process steps reduces the contribution to successful implementation of the procedure. Despite the fact that the interest of the complainants would have the entities with ability to allocate enough of their own financial and other investment resources, it is assumed that due to the nature of the restricted procedure, sufficient written material will be produced to prove the validity of decisions rendered in accordance with transparent, objective and predefined criteria.

Therefore, from a legal point of view, it is estimated that a restricted procedure generates a more positive effect on the successful completion of the overall procedure and all related activities.

4. Conclusion

The rate of utilization of EU funding for financing broadband infrastructure projects in the Republic of Croatia will largely depend on the outcomes of public procurement of infrastructure solutions in about 60 projects under preparation. In this context, it is necessary to consider the selection of public procurement techniques, which will increase the chance of choosing the optimal solution, but also of a long-term reliable private partner, from one attempt only. After elimination of conditionally unacceptable techniques, the remaining possibilities - open and restricted procedure have been analyzed. Considering the scarcity of literature, practice and State Commission's decisions regarding the application of restricted procedure to current legislation, an overview of the procedural steps, duration, advantages and disadvantages of both procedures is carried out by reviewing the legal provisions. The open procedure is characterized by shorter deadlines and simpler procedures, although it leaves space for improperness that can have negative consequences on the process itself or the project at a later stage. The restricted process requires more engagement in terms of time and expertise, but also leads to the gathering of top tenders and the conclusion of quality contracts. Furthermore, multicriteria analysis illustrates the administrative, technical and legal factors that influence the choice of a satisfactory solution at first, resulting in a conclusion on a more efficient and more effective technique. When setting the criteria and weight factors of the analysis, specific projects and sectors have been considered as well as applicable rules for preparation and funding from the EU Structural Funds. From an administrative point of view, the open procedure is much more convenient, while the advantage of the restricted procedure is in technical and legal factors, which also resulted in the final overturn in favor of the restricted procedure.

The research did not include a detailed consideration of the statutory requirements under which other techniques could be applied, thus leaving the possibility of inclusion other procurement techniques in the said analysis.

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