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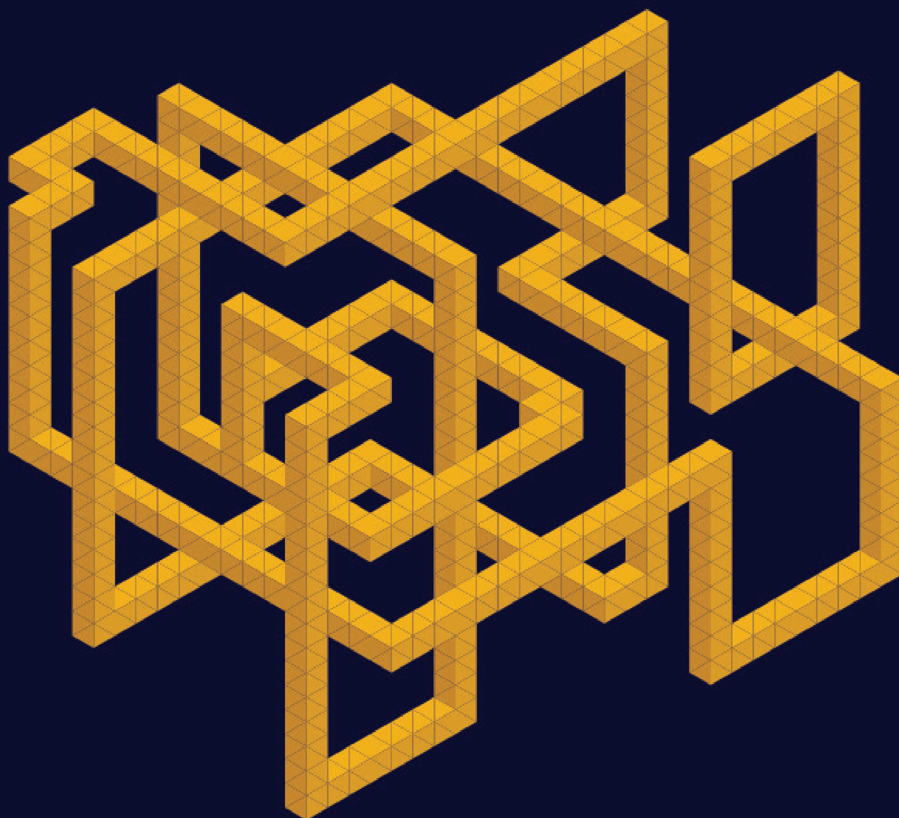
UDRUŽENJE PROFESIONALACA U JAVNIM NABAVKAMA REPUBLIKE SRBIJE

ALARM REPORT on the State of Play in Public Procurement in Serbia 2021



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PROJECT: **Towards a Sound Public Procurement System in Serbia**

ALARM REPORT ON THE STATE OF PLAY IN PUBLIC PROCUREMENT IN SERBIA 2021
May 2021

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Introduction

This issue of Alarm Report for Chapter 5 on the state of play and findings in the field of public procurement is published under the three-year project "Towards a Sound Public Procurement System in Serbia", which has been implemented by the Centre for Applied European Studies (CPES) and the Association of Public Procurement Professionals (UPJN), with the support of the European Union Delegation in Serbia, since December 2018.

Alarm Reports had to be published as double issues in 2019 and 2020, but in 2021 this will not be necessary. Here is a quick reminder: in 2019, the adoption of the law on public procurement and the public procurement development strategy was delayed, which was supposed to be the subject of one of the two Alarm Report issues in 2019, whilst in early 2020, the COVID-19 pandemic was declared, significantly affecting all fields of life, including public procurement.

As regards public procurement, no progress was made in the first half of 2021. Old problems concerning lack of transparency, absence of competition, conflict of interest and violations of the integrity of the procedure, were still present, and as a result of the application of the new law on public procurement, some new problems arose.

We have therefore divided this issue of the Alarm Report into four thematic chapters that, in our opinion, are extremely important for combating corruption and introducing accountability in public spending.

In Chapter 1, we look into the conflicts of interest and violations of the integrity of the procedure as logical sequels of the previous

issue of the Alarm Report, which concludes with the statement of the European Commission that there were no developments in these areas.

Considering Serbia's enormous problems in the field of environmental protection (air pollution, illegal landfills, inadequate water treatment) and the fact that ecological criteria are hardly ever (or not at all) considered in the public procurement of goods, services or works, Chapter 2 is dedicated to sustainable green procurement.

Chapter 3 explores (primarily from the aspect of opportunities for corruption) the significantly increased possibilities to modify public procurement contracts, the insufficient transparency of contract performance and the absence of any kind of control of this stage of the procurement procedure.

Last but not least, Chapter 4 focuses on the lack of transparency in public procurement reflected in the abuse of negotiated procedure without prior publication and "strictly confidential" public procurement. The lack of transparency has been particularly conspicuous during the coronavirus pandemic, and it continues in 2021.

In each chapter, we look into the cases examined in case studies that focused on public procurement in the fields of infrastructure, healthcare and environmental protection (the case studies are available at https://cpes.org.rs/towards-sound-public-procurement-system-in-serbia/?lang=en).

Key findings

As the Introduction suggests, the key findings of this Alarm Report will not be much different from those in previous years. In short, there has been no progress in any segment of public procurement in the first half of 2021.

To describe the current state of play without repeating what we said in the previous issue of the Alarm Report ("Serbia only made progress in regressing"), we will borrow Lenin's book title – one step forward, two steps back. The adoption and application of the new law on public procurement, with all its strengths and flaws, was certainly a step forward in regulating this area and harmonising our legislation with the EU acquis. However, the circumvention of its application in big infrastructure projects, the disrespect of its basic principles and the absence of contract performance control, most certainly constitute many steps back.

The level of development of public procurement in a country can be determined using the seven stages model[1]. According to this model, the role of public procurement in the early stage is to enable the

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1 Jan Telgen, Christine Harland and Louise Knight, "Public procurement in perspective" in: Louise Knight, Christine Harland, Jan Telgen, Khi V. Thai, Guy Callender, Katy McKen (eds.), *Public Procurement: International Cases and Commentary*, Oxford, 2007, Routledge, pp. 16–24.

procurement and delivery of goods, services and works. Later, the state uses public procurement to ensure rational spending of public funds, the accountability of contracting authorities and value for money. Finally, public procurement becomes a vessel for achieving broader social goals through opening new jobs, encouraging innovation, increasing the participation of small and medium-sized enterprises, improving the environment and public health, etc.

Sadly, judging by what we have seen so far, we can only conclude that public procurement in Serbia is slowly but surely regressing to the early stages of development, characterised by the sole existence of the law on public procurement. It is, therefore, no wonder that more often than not the media headlines warn about "the extinction" of public procurement in Serbia.[2]

It looks like it is high time that we got our act together and tried and established a sustainable public procurement system that will benefit all, first and foremost the citizens of Serbia.

2 https://www.danas.rs/ekonomija/tenderi-u-srbiji-pojava-u-izumiranju/ (Available in Serbian only)

1. Conflict of Interest and Violation of the Integrity of Procurement Procedure

The previous issue of the Alarm Report concludes with the European Commission's statement in Serbia Report 2020[3] that there were no developments in integrity and conflicts of interest in Serbia.

Just a quick reminder: Article 50 paragraph 1 of the law on public procurement stipulates that the contracting authority must take all necessary measures to determine, prevent and remove conflicts of interest concerning public procurement procedure to avoid the violation of the principles of ensuring competition and equal treatment of business entities. Under paragraph 2 of the same Article, a conflict of interest is any situation where the members of staff of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest. Under paragraph 3 of Article 50 of the law on public procurement, a conflict of interest includes the following situations in particular:

1) If a staff member of the contracting authority is involved in the management of an economic operator, or
2) If the contracting authority holds more than 1 % of shares or stocks in an economic operator.

3 Available (in Serbian only) at: https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/serbia_report_2020.pdf

However, these are not the only situations where a conflict of interest occurs in public procurement. These are just situations that are, "in particular" (the wording used in the provision) deemed to constitute a conflict of interest, which does not mean that there is no such conflict in many other situations. In fact, any situation where anyone who may influence the outcome of a public procedure and has, directly or indirectly, a financial, economic or other personal interest that might be perceived as compromising their impartiality and independence, is significant.

Conflict of interest in public procurement is also addressed in the law on the prevention of corruption, but it concerns public officials. Under Article 53 paragraph 1 thereof, if a legal entity in which a public official or their family member holds over 20 % of shares or stocks during the public official's term of office or two years after their term of office has ended takes part in a public procurement or privatisation or another procedure resulting in signing a contract with a public authority, a Budget beneficiary or another legal person in which the Republic of Serbia, autonomous province or local government holds more than 20 % of capital, such legal entity must inform the Anti-Corruption Agency about it within 15 days following the date of the completion of the procedure.

Numerous legal entities have informed the Anti-Corruption Agency about the public officials' conflicts of interest in public procurement procedures. The information is available on the Agency's website, in the Public Procurement, Privatisation and Other Procedures search box. However, the question is whether the Anti-Corruption Agency has investigated those claims – or at least those that clearly showed that conflict of interest had led to favouring certain tenderers – and whether it has requested proceedings before competent authorities, where necessary.

Listed below are several examples[4] of the public officials' conflicts of interests concerning public procurement on which the decisions of

4 https://www.pravniportal.com/neki-primeri-sukoba-interesa-funkcionera-u-vezi-sa-javnim-nabavkama-objavljeni-u-2020-godini/ (Available in Serbian only)

the Anti-Corruption Agency were published in the Official Gazette of RS in 2020 (the examples are quoted excerpts from the rationales behind these decisions):

- A conflict of interest occurred when the headteacher awarded the contract to the firm owned by his relative. Subordinating a public interest to a personal one and taking advantage of public office for an associated person's gain constitutes a conflict of interest. The headteacher also failed to disclose the conflict of interest to the Anti-Corruption Agency about when he decided who to award the contract to;[5]
- The company owned by the member of the municipal assembly was awarded public service contracts by the local mayor and the head of administration of the same municipality, as associated persons;[6]
- The firm owned by the mayor participated in the local public procurement procedure and was issued a purchase order based on which it received funds from the municipal budget. Subordinating a public interest to a personal one and taking advantage of public office for personal gain constitutes a conflict of interest;[7]
- The general manager of the public enterprise signed a decision on the award of public procurement contract to the business whose director is the local mayor's brother. As there is a relationship of dependency, supervision and control between the mayor and the general manager of the public enterprise, this constitutes a conflict of interest.[8]

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5 From the Decision of the Anti-Corruption Agency No. 014-012-00-0561/19-11 of 25 May 2020, published in the Official Gazette of RS 144/2020 of 27 November 2020. (Available in Serbian only)

6 From the Decision of the Anti-Corruption Agency No. 014-07-00-0330/16-11 of 6 October 2017, published in the Official Gazette of RS 136/2020 of 13 November 2020. (Available in Serbian only)

7 From the Decision of the Anti-Corruption Agency No. 014-020-00-0080/18-11 of 25 December 2019, published in the Official Gazette of RS 98/2020 of 10 July 2020. (Available in Serbian only)

8 From the Decision of the Anti-Corruption Agency No. 014-07-00-0112/19-11 of

In its decisions, the Anti-Corruption Agency ordered that the decision on the breach of law and the recommendation to remove the public official from office be made public. However, the question is whether the police and the public prosecutor's office have investigated and processed these cases further to determine whether there was criminal responsibility, i.e. elements of a criminal offence. We have no information about it, but the Anti-Corruption Agency should inform the public about any initiatives it may have taken in this regard.

These cases of conflict of interest could be perceived as (seemingly) less serious because the individuals involved were holding lower-ranking public offices. However, we have often witnessed cases of conflict of interest (particularly in 2020) at a high level in Serbia. For example, the media alleged that the companies owned by the relatives of high-ranking public officials (e.g., the Prime Minister, the Minister for Justice, the Deputy Director of the Public Health Institute, the Provincial Health Secretary) were favoured in procurement procedures and awarded public contracts. As these cases received a lot of media attention, there is no need to address them in too much detail here.[9] The information is abundant and comes from various sources. The reports contained irrefutable facts that the implicated high-ranking officials did not even try to deny. The reports claimed that close relatives (brother, sister, spouse) of high-ranking officials owned or were actively involved in the management of economic operators that were awarded lucrative contracts with the contracting authorities that could be influenced, directly or indirectly, by those same high-ranking officials. However, public officials did deny having any influence on procurement procedures or having anything to do with their relatives

27 December 2019, published in the Official Gazette of RS 14/2020 of 21 February 2020. (Available in Serbian only)

9 https://www.transparentnost.org.rs/index.php/sr/aktivnosti-2/pod-lupom/11429-javne-nabavke-od-firme-ministarkinog-supruga-ima-li-sukoba-interesa-i-sta-je-glavno-pitanje, https://rs.n1info.com/biznis/a653090-kompaniji-premijerkinog-brata-40-miliona-evra-od-drzave-obezbedjenje-napalo-n1/, https://rs.n1info.com/vesti/a655704-agencija-za-sprecavanje-korupcije-andquotcesljaand-quot-zorana-gojkovica/ (Available in Serbian only)

getting lucrative jobs. It seems, though, that some government bodies did help with their information and guidance.

For instance, the Director of the Serbian Information Technology and Electronic Government Office said that he had contacted the Public Procurement Office before signing a high-value agreement with Asseco SEE (where Prime Minister Ana Brnabić's brother was employed at the time)[10] and that it had confirmed that there was no conflict of interest there. The Public Procurement Office did not deny this claim. Even the Prime Minister herself insisted that she had told (as she put it) the Vice-Chairman of the Anti-Corruption Council to look into her relationship with her brother given his status in Asseco SEE, but the Vice-Chairman said that it would not be necessary. *However, the Anti-Corruption Council made the following statement: This happened over a year ago, and back then it was said that the relationship belonged in the conflict-of-interest domain and that, under the Anti-Corruption Agency Act, it was the Agency's responsibility to establish the conflict of interest and take legal measures to remedy it, not the Council's. There is no point in the Council analysing a company's business operations because a conflict of interest is not determined based on a company's turnover but on the relationship between the individuals suspected to be associated persons. If the Council finds that a relationship constitutes a conflict of interest, it has no significance or consequences unless the Agency comes to the same conclusion.*[11] The Anti-Corruption Agency did not comment.

As regards the Provincial Health Secretary Zoran Gojković, the Anti-Corruption Agency broke silence only after the persistent media reporting on the case, stating that a procedure had been initiated against Zoran Gojković to assess whether the conditions for instituting a proceeding on the grounds of violation of the anti-corruption law were met. The Centre for Applied European Studies has analysed the case in the case study "Procurement of Medical Supplies and

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10 https://www.slobodnaevropa.org/a/ana-brnabic-asseco-vlada-budzet-tender-korupcija-srbija/30857881.html (Available in Serbian only)

11 https://rs.n1info.com/vesti/a654810-savet-za-borbu-protriv-korupcije-o-andreju-vucicu-i-firmi-aseko/ (Available in Serbian only)

Equipment"[12] and in the previous Alarm Report. The Anti-Corruption Agency has not reached a decision yet.

In all these cases, the absolute inertia of the Anti-Corruption Agency, the Public Procurement Office and competent prosecutors' offices, is evident. We believe that the (non-) existence of conflicts of interest in these cases is extremely important, but it is even more important whether and in what way the implicated tenderers got help in getting the contracts, as this is no longer a conflict of interest but blatant corruption. Bearing this in mind, the following needs looking into:

- If the procurement of the specific goods/services/works was necessary in the first place;
- How the estimated values were established;
- How the technical specifications for the subject matter of the procurement contract were determined;
- How the participation terms and conditions were determined;
- Who comprised the committee that drafted tender documents and performed the expert evaluation of the tenders;
- Who was responsible for the control of contract performance, and how they performed it.

Answers to these questions will be essential in establishing whether contracting authorities and tenderers, as well as implicated public officials, bore any criminal responsibility. Public prosecutors' offices should have an absolute initiative and play a key role. Instead, they are silent.

In addition to the provisions of the law on public procurement concerning conflict of interest, the provisions regulating the integrity of the public procurement procedure are also important. Under Article 90 paragraph 1 of the law on public procurement, if a tenderer, a candidate or associated person within the meaning of the law that regulates income tax of economic operators, is in any way involved in

12 https://cpes.org.rs/sanitetski-i-medicinski-potrosni-materijal/?lang=en

the preparation of a public procurement procedure, the contracting authority must take appropriate measures to ensure that the participation of such tenderer or candidate does not result in competition violation. Conflict of interest and violation of the integrity of the procedure sometimes go hand in hand, i.e. occur simultaneously. For instance, the experts who are involved in drafting the technical part of tender documents and answering the questions of potential tenderers (and who are also likely to take part in the evaluation of tenders) are not members of the contracting authority's committee but they can have a lot of influence on the outcome of the procedure because they have a proprietary interest in tenderers and thus a financial, economic or another personal interest that compromises their impartiality and independence in the procedure. This creates a link between the conflict of interest and the violation of the integrity of the procedure, devaluing the basic principles of public procurement, especially the principle of equal treatment of tenderers (economic operators) under Article 9 of the law on public procurement. One such case is analysed in the case study "The Construction of the Biosense Institute in Novi Sad (2020/2021)", published by the Centre for Applied European Studies.[13] We will briefly present the case below.

The contracting authority for the construction of Biosense Institute in Novi Sad was the Public Investment Management Office. As the project was funded from the European Investment Bank (EIB) loan, the procurement of works was not subject to the Serbian law on public procurement but to the Guide to Procurement for projects financed by the European Investment Bank. Although the Serbian law on public procurement did not apply to the procurement procedure, under the law ratifying the Amendment Agreement in Relation to the Finance Contract between the Republic of Serbia and the European Investment Bank, it did apply to the protection of rights. The estimated value of the procurement was EUR 8,200,000. Technical specifications were drafted by the economic operator whose logo is visible

13 See: https://cpes.org.rs/izgradnja-instituta-biosens-u-novom-sadu-2020-2021/ (Available in Serbian only)

on the pages of that part of the procurement (tender) documents. According to the information presented in the complaint procedure, the same economic operator helped the contracting authority's committee answer the questions of potential tenderers concerning technical specifications and was therefore likely to have helped evaluate the tenders, especially their technical elements. An important part of the procurement documents was the requirement that tenderers submit references directly relating to the technical specifications of the procurement subject matter. In particular, the contracting authority requested references for the works that did not make a significant part of the procurement value-wise, but they were complex and, it seems, critical in deciding which tenderer to award the contract to. More precisely, the contracting authority required references for the construction of cleanrooms. A cleanroom is a room with extremely low levels of pollutants. It must be built in compliance with special hygienic and other standards, using special materials, equipment and building technology. As the work performed in them involves handling sensitive materials, cleanrooms must not be penetrated by particles that might contaminate their environment. They are used for the manufacture of active substances in the pharmaceutical industry, for handling hazardous biological substances in laboratories or for the manufacture of semiconductors and microchips. Operating theatres are built as cleanrooms, but they can also be found in research institutions (such as the Biosense Institute) using nanotechnologies in the research and development of extremely small particulates, where even the lowest level of contamination may jeopardise the entire process. They can also be used for the synthetic growing of biological material or handling highly infectious dangerous substances.

In the case of Biosense Institute, the problem occurred when a tender was submitted (and was ultimately awarded the contract) by a group of economic operators whose subcontractor was the economic operator co-owned (50 %) by the same economic operator that drafted technical specifications for the procurement procedure and helped answer the questions of potential tenderers. The subcontractor was hired to build cleanrooms and the aforementioned group of economic

operators provided the references for this work. So, when it came to the technical aspect of the tender, the references of this economic operator were a deciding factor in selecting this group of economic operators.

The conflict of interest and violation of the integrity of the procedure are evident in this case. The subcontractor's co-owner participated in the drafting of tender documents, was involved in answering the questions about those specifications and therefore likely to have been involved in the evaluation of tenders, i.e. their fulfilment of technical requirements and references concerning the construction of cleanrooms. So, was this economic operator able to act impartially and independently? What is more, this economic operator had also published the references for the subcontractor it co-owns on its website. Two out of three required references submitted by the selected tenderer were contracts concluded between the subcontractor and its co-owner, i.e. the economic operator that drafted technical specifications for this procurement, including unverified bills (in construction, a supervising authority must verify all the bills) that the subcontractor and its co-owner had issued to each other. This also indicates that the economic operator involved in the drafting of procurement documents has tried to hide behind the subcontractor it co-owns so that the conflict of interest is not so glaringly obvious. However, it has all come to light anyway, and the argument of the contracting authority that the subcontractor will perform a minor part of the construction works and that the economic operator that drafted technical specifications is not a 100 % owner of the subcontractor, sounds ludicrous.

Particularly worrying is the fact that the competent government body, the Republic Commission for the Protection of Rights in Public Procurement Procedures, steered clear of carefully considering the complaint against the competent authority claiming the breach of rights and the conflict of interest, submitted by one of the tenderers in the public procurement procedure. In its 24-page-long Decision No. 4-00-88/2021 of 17/3/2021, the Republic Commission addressed the complaint in just a couple of sentences, saying that none of the claims for the breach of rights (which the Republic Commission quoted in

over 20 pages) were taken into consideration because the complainant did not have the right to request the protection of rights after the contract award decision was made without first challenging the decision on qualification was made after the opening the technical part and before opening the financial part of the tenders. However, in our opinion, the complainant had the right to challenge expert evaluation of tenders by challenging the contract award decision, as stipulated in the Guide to Procurement for projects financed by the European Investment Bank, issued in September 2018.[14]

By not considering the alleged irregularities in the public procurement procedure, the Republic Commission failed to look into how the funds, i.e. the taxpayers' money, was going to be spent (Serbia will be paying off the EIB loan with interest). We believe that there were serious irregularities. Had the Republic Commission considered the complaint, questions could have been raised about the criminal responsibility of the contracting authority and the tenderer in this procurement procedure.

Undoubtedly, there are more similar cases of procurement procedures waiting to be discovered and processed by competent authorities. Until then, the civil society organisations, the media and the entire non-government sector are left to collect the information and bring these cases to the public attention. This may not have the same effect as penalising those who abuse the procedures, but it might force competent authorities to react eventually, even if it is when the responsible parties are no longer close to the ruling political structures (be it because their relationships have changed or the structures themselves).

14 See section *4. When to complain?*, Annex 8 of the Guide, available at https://www.eib.org/attachments/strategies/guide_to_procurement_en.pdf. EIB encourages complaints prior to the expiry of the standstill period. The EIB Guide sets a deadline of 10 days of the day of announcing (exclusively) a contract award decision as a period in which the contracting authority must not sign the contract. The EIB Guide to Procurement does not set a deadline for filing a complaint against the pre-qualification decision, nor does the law on public procurement.

2. Green Public Procurement in Serbia

Considering that the public sector is the biggest spender in any economy, it has to take the responsibility for the impact its activities have on the environment. Using its position and objective need to procure the goods, services and works with reduced impact on the environment whenever possible, contracting authorities may significantly contribute to the local, regional, national and international sustainability goals. Before that, they need to adopt the concept, take opportunities and weed out the evident resistance to green procurement. Green public procurement can yield financial savings at all levels of the state, especially if the cost of the entire life cycle of the subject matter of public procurement is taken into account and not just the initial, purchase price, which is insufficient from the aspect of the total estimated cost borne by the contracting authorities when the product they have purchased reaches the end of its life.

Even with the current legal framework, green procurement/energy efficiency has multiple uses and benefits at all levels of state:

- Environmental benefits: enables the state to achieve environmental protection goals, raises awareness of environmental issues in everyday life, increases the energy efficiency of products and manufacturing processes, uses renewable sources of energy, uses non-toxic materials and materials made from renewable raw materials, uses sustainably processed and manufactured products and materials and saves natural resources, uses degradable materials, reusable products and packaging that minimise

environmental pollution, takes heed of noise pollution, saves energy, reduces the emission of greenhouse gasses;

- Social benefits: improves the quality of life, establishes specific standards for products and services, utilises less hazardous chemicals, reduces health risks;
- Economic benefits: creates economic incentives, promotes green products and technologies, the life cycle of products yields savings, i.e. cost estimate covers the purchase costs, use costs and the post-use costs, etc.;
- Political benefits: an efficient way to show the responsibility of the State towards the environment.

As the Republic of Serbia has opened negotiations with the European Union on Chapter 5: Public procurement, it is important to bear in mind the obligation to adopt the rules on green procurement through laws and regulations, but also in practice, drawing primarily from the practice of the EU Member States. Inseparable from Chapter 5, and generally of great importance for the entire accession process, is Chapter 27: Environment and climate change. As this is financially the most demanding chapter, how this area will be financed and how it will be harmonised with the EU acquis by 2030 is one of the key issues in the accession process. Nearly one-third of the EU acquis governs this area.

The subject matter of Chapter 27 is the environmental acquis. The environmental acquis is incorporated in the constituent treaties that set out the responsibilities of the Union, the principles governing its policies, the directives, regulations and decisions adopted by the EU institutions, rulings of the Court of Justice of the EU and the international treaties signed by the Union and binding for its Member States. This primarily means transposing over 200 pieces of EU legislation (horizontal legislation, climate change, air quality, water quality, waste management, nature protection, industrial pollution control and risk management, chemicals, noise), applying all these pieces of legislation and providing financial instruments for their sustainability.

Green public procurement in the EU

Public Procurement for a Better Environment is an EU document that defines public procurement as “a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured”.[15]

As numerous publications reiterate, green public procurement is an important instrument of sustainable development and the development of a green economy. Green procurement is one of the priorities of Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth[16]. Green procurement plays an important role in achieving the goals of sustainable development defined in the 2030 Agenda for Sustainable Development, in particular Goal 12 – Ensure sustainable consumption and production patterns (12.7 Promote public procurement practices that are sustainable, in accordance with national policies and priorities). [17]

The EU objectives in this area are set out in u Article 191 of the Treaty on the Functioning of the European Union (former Article 174).[18] The EU policy aims to achieve a high level of environmental protection by pursuing the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;

15 European Commission: Communication “Public procurement for a better environment” (COM (2008) 400), 16/7/2008. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008DC0400

16 Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52010DC2020

17 Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E

18 Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

- promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Public procurement in the Union is predominantly governed by public procurement directives,[19] which is why law on public procurements are quite similar in all Member States regardless of their different legal systems. The EU has adopted a principle whereby each actor must take a role in environmental protection. The problems that need addressing at a global level are addressed at the level of the European Union, whilst the Member States and local governments implement the adopted guidelines through instruments for environmental protection. The European Union's legal framework for public procurement is governed by the Treaty on the Functioning of the European Union, public procurement directives, and the practices of the Court of Justice of the European Union (below: Court of Justice). Besides the general EU legislation on public procurement, there is also sector-specific legislation that regulates specific types of procurement.

When it comes to green procurement, court practices have significantly shaped the text of the directives regulating public procurement. The best-known case in the practice of the Court of Justice is the Concordia Bus Finland case (2002) concerning a disputed procurement of buses by the Municipality of Helsinki. The Court of Justice addressed the question concerning the extent to which a contracting authority may integrate ecological criteria into public procurement as (secondary) considerations. The Court of Justice established a legal standard, ruling that, when it comes to sustainable procurement,

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19 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC and Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

the contracting authority is allowed to incorporate ecological criteria, provided that:

- the ecological criteria are linked to the subject matter of the contract,
- the ecological criteria do not confer an unrestricted freedom of choice on the authority,
- the ecological criteria are expressly mentioned in the contract documents or the tender notice,
- the ecological criteria comply with all the fundamental principles of Community law.

In the EVN Wienstrom case (2003), concerning the procurement of electricity from renewable sources of energy, the Court of Justice went a step further. It ruled that the contracting authority could apply ecological criteria although they did not have an immediate economic advantage and allowed the criteria to be linked to the production method (rather than the product itself).[20]

To promote and facilitate the inclusion of green public procurement mechanisms in the EU, the European Council developed 19 common criteria for green public procurement in 2012,[21] inviting contracting authorities to incorporate them in their public procurement procedures. The criteria may be incorporated directly in the tender documents. They include road transport, indoor cleaning services, road lighting and traffic signals, paints, varnishes and road markings, textiles products and services, computers and monitors, copying and graphic paper, furniture, electrical and electronic equipment used in the healthcare sector, electricity, food and catering services, gardening

20 “Smernice za zelene javne nabavke: Kako u javnim nabavkama primeniti ekološke aspekte” [Guide to Public Procurement: How to apply ecological aspects to public procurement], December 2019. Public Procurement Office, the document was written under the project “Support for further improvement of public procurement system in Serbia”, funded by the EU and implemented by the consortium led by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

21 http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm

products and services, imaging equipment, office building design, construction and management, road design, construction and maintenance, sanitary tapware, flushing toilets and urinals.

Under the EU acquis, each Member State should decide on the extent to which it will include ecological criteria in public procurement procedures. The EU invites the Member States to develop national action plans for green procurement to create a legal framework for integrating ecological criteria in public procurement procedures. To help its Member States develop national action plans, the European Commission has published Buying Green! – A Handbook on Green Public Procurement. National action plans for green public procurement should help the EU Member States to procure products and services with a lower negative impact on the environment (the so-called green products and services), i.e. define activities that would lead to such procurement. Most EU Member States (23) have adopted national action plans.

Serbia does not have a national action plan for green public procurement.

The legal framework in Serbia

The new law on public procurement implements the guidelines for green public procurement in line with the EU directives.

The long-term objectives of the public procurement policy of the Republic of Serbia are defined in the Republic of Serbia Public Procurement Programme 2019–2023, whilst the accompanying Action Plan addresses issues such as the dynamic of activities and the responsibilities for the realisation of specific activities. The Programme envisages the modernisation of the public procurement system in line with the public procurement priorities identified in the Public Procurement Strategy of the European Union, including, among others, ensuring wider acceptance of innovative, green, social procurement.

The law on public procurement enables contracting authorities to consider ecological criteria in public procurement procedures. They can do so when preparing and planning a public procurement procedure,

and whilst conducting the public procurement procedure and during contract performance. The rules concerning the exclusion and selection of economic operators aim to ensure that the service providers/ contractors and subcontractors respect a minimum of the environmental legislation. The criteria for the most economically advantageous offer – such as life cycle costing, the quality-price ratio, the sustainable manufacturing specification and the use of standards and other ecological criteria when awarding contracts – are there to help contracting authorities identify environmentally friendly tenders.

Under Article 13 of the old law on public procurement, the **contracting authority had the obligation to** procure goods, services and works that did not pollute or that had a minimal impact on the environment or that ensured appropriate reduction of energy consumption (energy efficiency) and, when they are justified as the criteria for the assessment of the most economically advantageous tender, to specify the ecological advantages of the procurement subject matter, the energy efficiency or the life cycle cost of the procurement subject matter (**the principle of environmental protection and energy efficiency**). There is no such provision in the new law on public procurement. Article 5 paragraph 4 of the new law on public procurement prescribes compliance with the environmental protection obligations, i.e. the provisions of the international law governing environmental protection, during contract performance. But this provision only applies to economic operators. Under the new law on public procurement, the contracting authority must exclude the economic operator from the public procurement procedure if it turns out that the economic operator has failed to comply with the environmental protection obligations in the two years preceding the expiration of the deadline for the submission of tenders, including the obligations stemming from international conventions listed in Annex 8 to the law on public procurement.[22] Furthermore, under the new law on public procurement, **contracting authorities may incorporate** ecological criteria in the technical specifications of the procurement

22 Article 111 paragraph 1 point 3 of the law on public procurement.

subject matter,[23] the selection criteria[24] and the criteria for the most economically advantageous offer (e.g. the cost of the emission of greenhouse gases and other pollutants and the cost of mitigating climate change[25]) comprising their contract award criteria. **So, the law penalises tenderers for not complying with the environmental protection legislation, but contracting authorities have no obligation to procure goods, services or works that do not pollute or that have a minimal impact on the environment or that ensure reduced consumption of energy (energy efficiency)**, as Article 13 of the old law on public procurement once prescribed. On the contrary, under the new law on public procurement, the contracting authority decides whether the ecological and energy efficiency criteria will be included in technical specifications, selection criteria and contract award criteria. Although other regulations (which will be mentioned later) lay down certain obligations for contracting authorities concerning environmental aspects of some procurement subject matters, the obligation for contracting authorities to procure environmentally friendly/energy-efficient goods, services and works, imposed in the form of a special public procurement principle under the old law, was a good solution. It reminded contracting authorities not to forget their obligation to protect the environment and to make sure and include energy efficiency in the procurement documents. We cannot help but wonder what the decision of the Republic Commission would be if a claim for breach of rights indicated that the contracting authority was procuring goods/services/works that were harmful to the environment or were not energy efficient. **We believe that without said principle from Article 13 of the old law on public procurement, the Republic Commission would reject the claim because the new law on public procurement does not prescribe a similar obligation for contracting authorities. The omission of this principle from the new law on public procurement hinders and probably**

23 Article 102 of the law on public procurement.

24 Article 126 of the law on public procurement.

25 Article 134 paragraph 1 point 2 of the law on public procurement.

prevents imposing penalties on the contracting authorities that breach environmental protection or energy efficiency regulations in public procurement procedures.

In addition to the law on public procurement, the following special laws and regulations govern environmental protection:

- Law on environmental protection;[26]
- Energy law;[27]
- Law on energy efficiency;[28]
- Rulebook on conditions, content and issue of certificates on the energy properties of buildings;[29]
- Regulation on the types of products with an impact on energy consumption requiring energy labelling,[30] (and accompanying rulebooks for specific groups of products);
- Rulebook on detailed conditions, criteria and procedure for obtaining the right to use eco-labels, and the elements and appearance of and the use of eco-labels on products and services;[31]
- Law on chemicals[32] (with accompanying rulebooks);
- Law on biocidal products[33] (with accompanying rulebooks);
- Law on waste management[34] (with accompanying bylaws).

26 Official Gazette of RS 135/2004, 36/2009, 36/2009 – state law, 72/2009 – state law, 43/2011 – CC decision, 14/2016, 76/2018, 95/2018 – state law and 95/2018 – state law.

27 Official Gazette of RS 145/2014, 95/2018 – state law and 40/2021.

28 Official Gazette of RS 25/2013 and 40/2021 – state law.

29 Official Gazette of RS 69/2012 and 44/2018 – state law.

30 Official Gazette of RS 80/2016.

31 Official Gazette of RS 49/2016.

32 Official Gazette of RS 36/2009, 88/2010, 92/2011, 93/2012 and 25/2015.

33 Official Gazette of RS 36/2009, 88/2010, 92/2011 and 25/2015.

34 Official Gazette of RS 36/2009, 88/2010, 14/2016 and 95/2018 – state law.

The current state of play in Serbia

The Serbian National Environmental Approximation Strategy (NEAS), adopted in October 2011, identified water and waste management and industrial pollution as the most challenging sectors in Serbia's accession negotiations.[35] We are going to present several procurement cases in these sectors, most of them analysed in the case studies of public procurement in the field of environmental protection that the Centre for Applied European Studies has done under the project Towards a More Efficient Public Procurement System in Serbia.

> What these procurement procedures have in common is that they either completely ignored the Serbian legislation (the law on public procurement, the law on public-private partnership and concessions, and the law on utilities) or favoured some tenderers over others. In all these procedures the contracting authorities and the tenderers were equally prepared to breach the law so that a specific tenderer would get the contract, which is one of the biggest problems in the public procurement system in Serbia. Such behaviour of contracting authorities degrades the very essence of public procurement whilst causing damage to the environment, public interest, budget and, ultimately, the citizens of Serbia.

Water treatment

The treatment of urban wastewater and industrial wastewater that enters wastewater collection systems is essential for ensuring public health and improving the quality of the environment. The objective of the Directive concerning urban wastewater treatment (91/271/EEC),

35 See: http://www.misp-serbia.rs/wp-content/uploads/2010/05/EAS-Strategija-ENG-FINAL.pdf.

and the relevant national laws of the countries acceding to the EU, is to protect the environment from the adverse effects of the discharge of surface wastewaters. Most places in Serbia, as well as many European cities and settlements, get drinking water from surface water resources. Over the past quarter century, the situation in Europe has changed significantly with the reduction of wastewater discharge from sewerage into waterways and lakes, the introduction of building rules and expansion of sewer systems, and the construction of wastewater treatment plants. In many Serbian cities, however, the quality of surface waters running through or past settlements is still at risk due to inadequate sewage systems and the lack of or inadequate wastewater treatment.[36] Wastewater treatment directly affects (the production of) drinking water.

Case Study: Construction of Wastewater Collection and Treatment Plant – Belgrade (2020)[37]

In January 2020, the Serbian Ministry of Construction, Transport and Infrastructure signed two cooperation agreements with the China Machinery Engineering Corporation (CMEC) for the collection and treatment of wastewater in Belgrade's central sewerage system. The contracts were awarded directly, without complying with the law on public procurement. So, the practice of signing contracts, especially those for capital infrastructure projects, without applying the law on public procurement continued (just like in the case of Morava Corridor).

However, in this case, the law on public procurement was not abrogated by a *lex specialis*. According to the Ministry, the deal was made under the Agreement on Economic and Technical Cooperation in Infrastructure that the Government of the Republic of Serbia and

36 https://www.sepa.gov.rs/download/radovi/2018/UrbanWastewaterTreatmentDirectiveInSerbia.pdf

37 https://cpes.org.rs/construction-of-wastewater-collection-and-treatment-plant-belgrade-2020/?lang=en

the Government of the People's Republic of China signed in 2009, rendering a public call and public procurement procedure unnecessary.

We must stress that no one questions the importance of the agreements for the construction of the first big wastewater treatment plant in Belgrade, especially bearing in mind that Belgrade is one of the rare European capitals without a wastewater treatment plant and that one-third of its citizens do not have sewers.

However, given Serbia's legal order, the issue is that the agreements were not awarded through a public procurement procedure or a public-private partnership procedure under the current Serbian laws, but only in compliance with the Agreement on Economic and Technical Cooperation in Infrastructure between the Chinese and Serbian governments, under no particular procedure. Another cause for concern is that the terms and conditions of these agreements and whether the contractor will comply with the Serbian and European environmental laws and standards remain unknown to the public.

In this regard, it should be pointed out that the European Commission has reiterated in its reports on Serbia's progress that some international procurement agreements signed with the non-EU countries are not in line with the EU acquis and Serbian regulations.

Case Study: Drinking Water Treatment in Zrenjanin[38]

The drinking water problem in Zrenjanin and the government's failure to provide safe drinking water to its citizens for over a decade goes beyond the Serbian public procurement issues and not only represents a paradigm of the government-citizen relationship but also shows the government's inability to guarantee its citizens one of the fundamental human rights, the right to safe drinking water, in the 21st century.

As of 14 January 2004, by the Decision of the Inspector of the Provincial Secretariat for Health and Social Policy, water from the public water supply system cannot be used for drinking and cooking because it contains higher than normal concentrations of arsenic.

38 https://cpes.org.rs/drinking-water-treatment-in-zrenjanin/?lang=en

It can only be used for sanitation and technical purposes. Although the problem is much older than the date of this decision, the citizens of Zrenjanin still do not have officially approved safe drinking water.

Meanwhile, the local government and the responsible public utility company (JKP Vodovod i kanalizacija [PUC Water Supply and Sewerage]) have tried to solve the problem in various ways: by trying and testing pilot plants, signing a contract with WTE Wassertechnik for the construction of a water treatment plant (the value of the contract was over EUR 25,600,000) and conducting a procedure for the procurement of water treatment services for Zrenjanin. It was all in vain. Pilot plants did not solve the problem, the agreement with WTE Wassertechnik in 2012 was unilaterally terminated by the local government in 2014, and the first attempt at a public procurement procedure failed miserably as the entire procedure was annulled by the Republic Commission.

This case study focused on the repeated procedure for the procurement of drinking water for Zrenjanin, i.e. the legality of the public procurement contract of 12/2/2015, which to this day has not been realised as the contractor has failed to deliver safe drinking water that meets the quality criteria agreed. The subject matter of the public procurement was drinking water treatment services, as mentioned in several places in the procurement documents and the contract document. The procurement contract was awarded to a consortium of one foreign and two private Serbian companies.

This in itself would not have been controversial if the law on public procurement had been the only one that applied to this procurement. However, given the subject matter of the procurement, the contracting authority should also have complied with the law on utilities in force at the time of the procurement. The then-law on utilities explicitly prescribed that water supply, including water treatment, was a utility service and as such could only be provided by a public company established by a local government or by a company whose sole owner is a public enterprise or a local government unit.

In this case, however, the water treatment contract was awarded to a consortium rather than a public company established by a local

government or a company whose sole owner was a public enterprise or a local government unit. So, the contract was awarded contrary to the provisions of the law on utilities and binding provisions of domestic legislation, and the public procurement was conducted contrary to the regulatory imperatives.

Although the repeated public procurement procedure was launched in 2014 and the contract was awarded in 2015, the issue of the service provider being in foreign ownership was raised as late as 2017, when the Sanitary Inspectorate, i.e. the Ministry of Health as the authority of the second instance, refused to issue a sanitary certificate, explaining that a consortium of private companies could not provide water treatment services. However, in 2018, the Administrative Court ruled that the Sanitary Inspectorate had acted beyond the limits of its power and that the Sanitary Inspector should either have issued or refused to issue the certificate based on the findings of the inspection rather than specify whether the applicant had the right to provide the utility service or not.

Incredibly, from 2015 to 2017, not a single local, provincial or state body noticed that water treatment, under the law on utilities, was not supposed to be done by a privately owned company. What is more, in 2016, the Serbian Government got involved by furnishing the contracting authority with financial guarantees for the payment of the delivered drinking water.

Instead of annulling the contract in accordance with the contract and tort law, the problem was "solved" in December 2018 by amending the law on utilities allowing public enterprises, i.e. companies owned by public enterprises or local governments, to hire other legal persons to perform certain water utility services, including water treatment, provided they had the founder's consent.

In this particular case, however, even if we said that hiring a foreign company to provide the utility service was not an issue, the legality of the contract remains a serious problem considering the utility law and the law on public-private partnership and concessions that were in force at the time. Under the utility law, water treatment, being a utility, can be transferred to another service provider exclusively in compliance

with the public-private partnership law. However, the contracting authority ignored this law and conducted a standard open procedure (exclusively) in compliance with the law on public procurement.

In truth, the law on public-private partnership and concessions does make a reference to the law on public procurement, i.e. the procedure for the procurement of public services, but it also lays down other complex rules and procedures to be implemented both before and after the public procurement procedure, and it changes some public procurement rules. For example, under the law on public-private partnership and concessions, the contracting authority has to submit a public-private partnership project proposal to the competent authority, i.e. the Commission for Public-Private Partnerships, and get the Commission's opinion and assessment of the project in terms of it meeting the public-private partnership criteria. If the contracting authority had complied with this obligation, there is no doubt that the issue concerning the provision of the water treatment service by companies that are not public utility companies would have been addressed. It is baffling that the contracting authority neglected to comply with the law on public-private partnership, especially considering that in its Decision to annul the first procurement procedure, the Republic Commission explicitly instructed the contracting authority to comply with this law and to request from the Commission for Public-Private Partnerships to give its opinion and assess whether the project could be realised as a public-private partnership.

Finally, we must highlight other irregularities in this case:

- The public procurement contract was entered into for an indefinite term, contrary to the law on utilities and the law on public-private partnership and concessions;
- Contrary to the law on public procurement, financial elements were significantly amended during contract performance compared to those determined in the original procurement documents. Had these modifications been incorporated in the original procurement documents, they would have likely encouraged more companies to to compete for the contract;

- The initial deadline for project realisation was 12/10/2015. It was later extended to 31/12/2016. The project has not been completed to this day.

Waste

Waste management includes waste collection, transport, disposal and treatment (selection and recycling). Under the basic Serbian legislation, waste management is the responsibility of municipalities.

Waste disposal sites (landfills and dumps) can have a significant negative impact on the environment. They are direct causes of air, surface water, groundwater, land and noise pollution. Communal landfills emit landfill gas, a natural by-product of the decomposition of organic material in landfills, composed of roughly 50 % methane. Landfills also emit strong unpleasant odours significantly affecting the quality of life of the people living in their vicinity.

Inadequate waste disposal in non-hygienic landfills causes soil and groundwater pollution. Precipitation filtered through the landfilled waste decomposes harmful substances and pollutes the soil and groundwater. As soil pollution is not limited to a single location but spreads to the land and groundwater across wider areas, it indirectly harms the flora and fauna under and on the ground. Pollution spreads even further when the waste is carried by the wind.

Case Study: Preparation of Technical Documentation for the Rehabilitation and Recultivation of Non-Sanitary Municipal Landfills (2019)[39]

This case study focused on yet another of many examples of ineffectively and illegally conducted procurement procedures, where the contracting authority openly favoured a group of economic operators comprised of Tahal Group B.V., the Novi Sad branch, Tahal consulting engineers ltd (Israel) and the subcontractors Hidrozavod DTD a.d. (Novi

39 https://cpes.org.rs/technical-documentation-for-rehabilitation-of-non-sanitary-landfills/?lang=en

Sad), Ehting d.o.o. (Belgrade) and 4WATERS d.o.o. (Belgrade) (below: favoured tenderer). Although the Republic Commission had accepted the claim for breach of rights, the competent authority made the same decision three times, awarding the contract to the favoured tenderer and rejecting the tender from a group of economic operators comprised of AG-UNS Institute d.o.o. (Novi Sad), VIA FACTUM d.o.o. (Biograd na moru), Hidroing d.o.o. (Osijek), IPZ Uniprojekt TERRA d.o.o. (Zagreb) and Inobačka d.o.o. (Novi Sad) (below: claimant). After the Republic Commission had accepted the claim for breach of rights for the third time, the contracting authority called off the procedure claiming that the subject matter of the procurement was no longer needed.

The estimated value of the procurement contract was RSD 191,666,600.00 (before VAT). It was one of the two most expensive public procurement contracts that the Ministry of Environmental Protection had planned to award in 2019. According to the decision to launch the procurement procedure, these funds were allocated for the preparation of preliminary designs and technical documentation for 14 municipalities with unsanitary landfills. The estimated cost of the favoured tender was RSD 188,731,040.00 (before VAT), while the estimated cost of the claimant's tender was half as much, RSD 91,250,000.00 (before VAT).

Taking advantage of the huge discrepancy between the estimated costs of the two tenders and set on awarding the contract to the favoured tenderer, the contracting authority rejected the tender of the claimant twice arguing that it was abnormally low. Despite the Republic Commission's decision, the contracting authority repeatedly dismissed the claimant's breakdown of the estimated cost and evidence that it did not deviate from the comparative market price, explaining its stance with rather dubious arguments. To justify the estimated cost of the procurement contract and show that the claimant's estimated cost was abnormally low, in its third contract award decision the contracting authority stated, among other things, that "during the planning stage of the procurement, detailed market research was performed and sufficient information gathered on the real costs in Serbia, the Adria region and the European Union, which is incorporated

in the calculation" without providing the alleged research data. When the claimant received the document (Rationale for the Public Procurement of 15/1/2019) containing the market research data (having formally requested the information of public importance and being granted access by the Commissioner for the Information of Public Importance), it turned out that the amount of RSD 191,666,600.00 before VAT was the estimated cost of preliminary designs and technical documentation for as many as 57 municipalities with unsanitary landfills rather than 14 for which the contracting authority had allocated the funds (and, amazingly, for which the favoured tenderer offered an almost identical price as that for 57 municipalities). On top of it all, if the cost of the procurement for 14 municipalities had been quoted properly, the claimant's estimated cost would have been twice as high rather than "abnormally low", while the estimated cost of the favoured tenderer would have been four times as high!

When the document was disclosed and the Republic Commission accepted the claim for breach of rights, this time also taking into consideration the content of the Rationale for the Public Procurement of 15/1/2019, the contracting authority called off the procurement alleging that the unforeseeable circumstances caused by the COVID-19 pandemic and the declared state of emergency had rendered the subject matter of the procurement unnecessary.

This case raises several questions. First, how come that the subject matter of the procurement was suddenly no longer needed, especially considering that environmental protection is a huge problem in Serbia and the opening of Chapter 27 in Serbia's EU accession negotiations is not even on the horizon? Second, how come that the coronavirus pandemic did not prevent the contracting authority to conduct other public procurement procedures during the state of emergency? And last but not least, did the competent authorities find that the cost estimate of the contract was a blunder or an illegal arrangement between the contracting authority and the favoured group of economic operators? Because, if the claimant had not doggedly complained about the competent authority's decisions, the rehabilitation of landfills in 14 municipalities would have cost nearly four times as much (over a million euros) as it should have done.

Case Study: Animal Waste Disposal in Vrbas (2017/2019)[40]

Like in the public procurement of animal waste disposal services in Bač, Beočin, Bačka Palanka, Titel and Novi Sad, conducted in 2020 (and covered by another case study that was mentioned in the previous double-issue of the Alarm Report[41]), in the public procurement procedures conducted from 2017 to 2019, Eko-Vet plus d.o.o. (Vrbas) was the only tenderer, and it got the contract. The tenderer took advantage of the absence of competition in the procurement procedures, offering prices close to the estimated procurement costs. In these procurement procedures, there were no clear parameters to determine the real cost of service or control the real quantities of animal waste disposed of during contract performance.

Considering all of the above, there is no doubt that Eko-Vet plus d.o.o. was favoured in the procurement procedures in Vrbas, and that the basic public procurement principles of efficiency, cost-effectiveness and ensuring competition were violated.

Our conclusion, which is based on the analyses of the public procurement procedures, has been confirmed by many online articles, indicating that Eko-Vet plus d.o.o. had both national and local support when it was established and that the support continued in the public procurement procedures conducted in many municipalities in Vojvodina, where it was awarded contracts as the only tenderer.

The online articles referred to the following facts:

- Immediately after it was established in 2017, Eko-Vet plus d.o.o. received, under mysterious circumstances, two mobile animal waste incinerators originally donated by the EU to the Veterinary Institute in Novi Sad;
- The Commission of Veterinary Administration of the Ministry of Agriculture verified that the Eko-Vet plus d.o.o. incinerator

40 https://cpes.org.rs/animal-waste-removal-in-vrbas-2017-2019/?lang=en

41 https://cpes.org.rs/removal-of-animal-waste-in-bac-beocin-backa-palanka-titel-and-novi-sad/?lang=en

shelter met the relevant veterinary and sanitary requirements before the facility had even been built;

- The Veterinary Administration Commission was established on 31 October 2017. On the same day, only 24 hours after Eko-Vet plus d.o.o. contacted it, the Commission went to inspect the non-existent facility and established that it met the requirements (the Vrbas Urban Planning Office granted Eko-Vet plus d.o.o. a building permit for the incinerator shelter a day later, on 1 November 2017, and Eko-Vet plus d.o.o. reported the commencement of works on 10 November, with the deadline of 30 November;
- Under the Founding Act of the Public Agency for Zoohygiene and Agriculture (JAZIP), established in Vrbas in 2010, the Agency is responsible for “the safe disposal of animal carcases from the surfaces and animal husbandry facilities” and “the transport of animal carcasses to the collection sites,” among other things;
- The food processing company Carnex donated a refrigerated truck for the collection of animal waste to JAZIP. In 2015, the Municipality of Vrbas procured a truck for animal waste transport and disposal for RSD 8 million, which has never been used;
- Over the past three years, the Municipality of Vrbas was paying Eko-Vet plus d.o.o. millions of dinars for the transport, processing and disposal of animal waste. JAZIP used to pay the state-owned veterinary institution VU Proteinka Sombor roughly RSD 200,000 a year for the same services;
- JAZIP terminated the cooperation agreement with the VU Proteinka Sombor claiming that it (JAZIP) was not “financially able” to meet its commitments. A month later, a much bigger contract was awarded to Eko-Vet Plus d.o.o.

Public procurement procedures conducted in Vrbas are blatant examples of competition restriction: only one economic operator participated in both procurements, both times offering the price that was close to the estimated procurement value, and it was awarded contracts both times. The support that this economic operator received

from its local government, which was the contracting authority in both procurement procedures (both the head office and the incinerator of the economic operator are located in the same municipality where the procurement was conducted), was evident both before and during the procurement procedures, indicating favouritism, and competent authorities should investigate it.

Industrial pollution

When it comes to industrial pollution, factories and thermal power plants must use filters that prevent the excessive emission of harmful gasses, and the most expensive equipment in this area is procured by the public utility company JP Elektroprivreda Srbije. According to the statement of the former Minister for Mining and Energy, Aleksandar Antić, made in February 2020,[42] the energy sector had primarily focused on and invested the most in environmental protection. He said that JP Elektroprivreda Srbije had invested EUR 475.6 million in environmental protection projects (he did not specify the period). As a result, electric filters in thermal power plants were either replaced or repaired, the emission of nitrogen oxides was reduced and intensive work was done on the flue-gas desulfurisation, ash and sludge disposal systems and wastewater treatment.

Case Study: Construction of Plant Rooms for Wood Chip Boilers in Osečina, Svilajnac, Kladovo, Majdanpek and Surdulica (2019/2020)[43]

The study focused on the procedures for the procurement of services including the design, delivery, construction of plant rooms and installation of equipment by local governments in Serbia in 2019 and 2020.

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42 http://rs.n1info.com/Vesti/a568012/Trivan-Zagadjenje-vazduha-podiglo-svest-drustva-o-znacaju-zivotne-sredine.html (Available in Serbian only)

43 https://cpes.org.rs/construction-of-boiler-rooms-with-burners-for-woodchips-in-osecina-svilajnac-kladovo-majdanpek-and-surdulica-2019-2020/?lang=en

All these procedures contained almost identical additional requirements concerning financial, operational, technical and staff capacities (the differences were negligible). As there was no real competition, the same tender was selected as the most favourable one in each procurement procedure.

In three out of five procedures, the same two economic operators submitted tenders, the awarded economic operator and Biomasa grupa (Belgrade), except that the latter submitted a practically empty tender in all three procedures. To be more precise, apart from the completed Tender Form and the Independent Tender Declaration Form, the application of this economic operator did not contain any evidence required. This company obviously did not seriously mean to participate in these procedures, i.e. it was not interested in getting the contract, which is why its tender cannot be considered as real competition. It was probably a quasi-tender, but without evidence, we cannot claim anything with certainty.

The contract was awarded to a group of economic operators. In three procurement procedures, the group consisted of the following companies: Energy Construction d.o.o. (Belgrade), Termomont d.o.o. (Belgrade), Gilles energie- und Umwelttechnik GmbH (Austria), Teming Electrotechnology d.o.o. (Niš), Porta Nova d.o.o. (Belgrade), Saša Milosavljević PR BP Consulting (Kruševac) and Iso Plus d.o.o. (Belgrade). In Kladovo, Gilles energie- und Umwelttechnik GmbH was replaced by another Austrian company, and in Majdanpek, by a Lithuanian company.

As there was no competition and the tender of this group of economic operators was remarkably close to the estimated value, it was selected as the most advantageous one.

The way in which these procurement procedures were conducted indicates a blatant breach of the procurement principle of ensuring competition under Article 10 of the law on public procurement that was in force at the time. However, these procurement procedures also indicate why there are so few tenders per procurement procedure in Serbia.

Construction of the Flue-Gas Desulfurisation Plant in the Thermal Power Plant Kostolac B

We are now going to present a case that was not included in the case studies simply because the procurement procedure itself was not a problem (according to the available information). The problem, and a serious one at that, was the procurement contract performance. The construction of the flue-gas desulfurisation plant in TPP Kostolac B cost Serbia USD 130.5 million. It was one of the main environmental projects of JP Elektroprivreda Srbije in recent years. The plant was not operational for three years because the environmental impact assessment was not conducted properly. After the performance testing in 2017, the existing environmental impact assessment had to be updated, but the job was completed as late as 2020. In the meantime, TPP Kostolac B was one of the biggest polluters not only in Serbia but in Europe, its emissions of sulfur dioxide continuing to harm human health. Why did it take as long as three years to update the environmental impact assessment? There is no official answer to this question.[44] Since 2017, when the performance test of the desulfurisation plant was done, to date, TPP Kostolac has been one of the biggest polluters. In the 2019 Bankwatch report, TPP Kostolac B was ranked top polluter in the region, emitting 14 times more sulfur dioxide (113,913 tons) in 2018 than envisaged in the National Emission Reduction Plan. According to the HEAL report based on the 2016 data and published last year, the Western Balkan coal-fired power plants caused over 3,000 premature deaths, over 8,000 cases of bronchitis in children and other chronic diseases, costing the European and Western Balkan healthcare systems and economy between six and eleven million euros. Had the desulfurisation plant in Kostolac been operational, the emissions of sulfur dioxide and its effects on human health would have been reduced significantly. Sulfur dioxide is a toxic gas with a pungent smell. It is a product of the burning of sulfur, and it attacks respiratory systems in humans and animals. The sources of

44 https://www.danas.rs/drustvo/tri-godine-azurirali-studiju-o-proceni-uticaja/ (Available in Serbian only)

sulfur dioxide are vehicles, metal processing and smelting facilities, and power plants. Sulfur dioxide is heavier than air and soluble in water. Sulphur dioxide emissions are a precursor to acid rain, which has harmful effects on plants, buildings and metal constructions. In the 1970s and 1980s, acid rains caused large woodland areas in Europe (and other developed regions) to dry out and deteriorate. So, this was costly public procurement the benefits of which have not materialised even after three years because the environmental impact assessment, which was a precondition for commissioning the plant, has been completed only recently. This public procurement was ill-conceived and ineffective. Why was the plant built without a proper environmental impact assessment? If the environmental impact assessment had to be done after the plant had been commissioned (which does not make sense because it raises the question of what would have happened if the plant had turned out to be harmful to the environment), why did it take three years and shutting down an expensive plant whilst Kostolac B continued to emit massive amounts of pollutants in the air? The answers are still pending.

3. Monitoring and Control of the Performance of Public Procurement Contracts

Although a public procurement procedure is officially and legally completed with the decision on the award of the public procurement contract and the signing of the contract, it is impossible to consider the contract performance stage as separate from the procedure in which it was awarded. If the contract is not realised in line with the conditions set out in procurement documents and the contract award decision, i.e. if during contract performance it was allowed to modify the elements based on which the contract award decision was made (price, delivery deadline, quality, etc.), the procurement procedure would be pointless. Similarly, contract modification during its realisation might indicate corruption, i.e. an illegal arrangement between the contracting authority and the economic operator that was awarded the contract.

The negative implications of an improperly conducted public procurement procedure on contracting authorities are twofold: on one hand, their costs increase, and on the other, the quality of services provided to citizens is below par. Ultimately, taxpayers bear the costs as they are the ones funding the contracting authorities and using their services.[45]

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45 Public Procurement Corruption Map in the Republic of Serbia, OEBS, 2014. Available at: https://www.osce.org/files/f/documents/8/e/126843.pdf

In practice, however, a limited modification of an existing public contract can be necessary. Contracting authorities and economic operators might face legitimate situations that require contract modification. Practical examples include situations where price indexes have changed, genuine unforeseeable circumstances have occurred, or technical difficulties have arisen during the operation or maintenance stage.[46]

Bearing this in mind, and to avoid abuse and corruption during public contract performance, it is quite important that this stage of the procedure is transparent and that appropriate mechanisms to monitor and control contract performance and contract modifications are in place.

This was confirmed when the Anti-Corruption Unit of the Criminal Police, in cooperation with the Special Anti-Corruption Division of the Higher Public Prosecutor's Office in Niš, arrested 13 individuals, all members of the public procurement commission of a contracting authority, for faking the certificates of acceptance for the works allegedly performed by the awarded tenderer, and invoicing and charging the works.[47]

Modifications of public procurement contracts and control of contract performance under the old law

Under the old law on public procurement (Official Gazette of RS 124/12, 14/15 and 68/15), which was effective until 1 July 2020, after contract award, the contracting authority could increase the volume of the procurement subject matter without the need to carry out a new procurement procedure, but the contract value could not increase by more than 5 % of the total value of the original contract and the total cost of the increase could not exceed five million dinars. Also, after

46 Brief 38 – Contract Modifications, SIGMA, 2016, p. 2. Available at: http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-38-200117.pdf

47 https://www.blic.rs/vesti/hronika/uhapseno-13-osoba-zbog-korupcije-osteti-li-sumsko-gazdinstvo-vranje-za-46-miliona/drn0rpn (Available in Serbian only)

contract award, the contracting authority could allow price modification and changes to other important elements of the contract on permissible grounds, which had to be set out clearly and precisely in procurement documents, procurement contract and special legislation. Where a contracting authority intended to modify a public procurement contract (regardless of the reason), it had to pass a decision on such modification, including mandatory information. The contracting authority had to publish the decision on the Public Procurement Portal and report it to the Public Procurement Office and the State Audit Institution.[48]

For the public procurement resources to be used as transparently as possible, in addition to their obligation to publish the decision on contract modification, contracting authorities had to send quarterly reports to the Public Procurement Office on the public procurement procedures they have conducted and the contracts they have awarded during the reporting period. Contracting authorities had to collect and register specific information on public procurement procedures and awarded contracts (whether the contract has been fully performed, when the works were completed, how much money was spent, why the contract was not fully performed, etc.) and use them to compile reports for the Public Procurement Office so that procurement procedure and related contracts could be monitored regularly and efficiently. The Public Procurement Office could then report any irregularities to the competent authorities (Budget Inspectorate, State Audit Institution, etc.).[49]

However, although the old law did envisage these mechanisms to monitor and control contract performance, this stage of procurement was neither transparent enough nor properly controlled.

48 Article 115 of the old law on public procurement (Official Gazette of RS 124/12, 14/15 and 68/15).

49 Articles 132 and 136 of the old law on public procurement (Official Gazette of RS 124/12, 14/15 and 68/15).

Modifications of public procurement contracts and control of contract performance under the new law

The new law on public procurement (Official Gazette of RS 91/2019) came into force on 1 July 2020. It allows for much more contract modifications without the need to carry out a new procurement procedure. Under certain conditions, the new law allows adding goods, services or works, making modifications due to unforeseeable circumstances, changing a contracting party, increasing the volume of the procurement and changing a subcontractor. The law, however, does not regulate the control of contract realisation, minimising the transparency of contract performance.

The new law on public procurement stipulates that a **procurement contract can be modified to add goods, services or works that were not included in the original contract but have become necessary, and the contract value may increase by as much as 50 % of the original contract.**[50] The old law on public procurement had a similar provision, but as grounds for a procurement procedure without prior publication and the value of additional goods, services or works was limited to 15 % of the original value. So, under the new law, a procurement contract may be modified, and its value may increase much more without the need to conduct a new procurement procedure.

Similarly, **the new law on public procurement allows for a contract modification due to unforeseeable circumstances, with the contract value increasing up to 50 % of the value of the original contract.**[51] The provision itself is quite broad as it neither specifies the modifications nor the unforeseeable circumstances. Under Directive 2014/24/EU on public procurement, unforeseeable circumstances may be a reason for a contract modification, and they are defined in the Preamble:

The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the

50 Article 157 of the new law on public procurement.

51 Article 158 of the new law on public procurement.

initial award by the contracting authority, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value.[52]

Of course, unforeseeable circumstances must be interpreted restrictively.

Additionally, under the new law, a public contract may be modified so that the **procurement value increases up to 10 % of the original contract value for the procurement of goods or services, or up to 15 % of the original contract value for the procurement of works**, provided that the value of the modification must not exceed RSD 15,000,000 for the procurement of goods or services or RSD 50,000,000 for the procurement of works.

For example, if the estimated value of the procurement of goods or services is RSD 200 million, the contracting authority may increase the procurement value by 9 %, or RSD 18 million (EUR 150,000). When it comes to the procurement of works, there are even more possibilities. It should be noted that no special grounds are required for this increase – it is enough that the contracting authority thinks that the modification is necessary.

Another important provision concerning contract modification is the one allowing for a **change of subcontractor** and even, under certain circumstances, the **introduction of one or more contractors**. It should be pointed out that this is a logical continuation of the provision stipulating that the economic operator is fully accountable to the contracting authority for the realisation of contractual obligations, regardless of whether there is a subcontractor or not. The old law also allowed for changing a subcontractor, under certain conditions[53], but it did not envisage introducing a new one.

Finally, the new law allows, somewhat logically, for **a change of contracting party** if the original contracting party has been succeeded by another party, or in the event of their restructuring.

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52 Point 109 of the Preamble of the Directive.

53 Under Article 80 paragraph 14 of the old law on public procurement (Official

Although the new law stipulates as many as five reasons for a contract change without a new procurement procedure, the contracting authority is required to publish a contract modification notice on the Public Procurement Portal only if the modification concerns adding goods, services or works, or unforeseeable circumstances. In all other cases, there is no such obligation. Also, under the new law, contracting authorities are no longer required to inform the Public Procurement Office about public contract performance.

Some might say that the provisions of the new law on public procurement are in line with the Directive. There is no doubt that they are. Not only are they in line with it – they are practically copied and pasted. However, harmonisation of national legislation with the EU acquis (to which Serbia has committed as a candidate country for the EU membership) means, first and foremost, adopting the principles and objectives set out in the directives. **Harmonisation does not imply an obligation to adopt (or copy) specific solutions provided for in the directives.** When it comes to specific solutions, the Member States must first take into account the local factors. **Bearing this in mind, and the degree of corruption in public procurement, Serbia should not have adopted a law that allowed for so many opportunities to modify a procurement contract with practically no supervision whatsoever**. By comparison, the Croatian and Slovenian laws on public procurement allow for an increase in contract value of up to 30 % (rather than 50 % stipulated in the Directive) for the procurement of additional goods, services and works or in the event of unforeseeable circumstances.

On 1 July 2020, the new and improved Public Procurement Portal was launched. It should facilitate the implementation of public procurement procedures under the new law on public procurement, i.e. enable electronic and fully transparent communication and data

Gazette of RS 124/12, 14/15 and 68/2015), the supplier was allowed to hire a person that was not specified in the tender if, after the tender was submitted, a long-term inability to pay has occurred on the part of the subcontractor, provided the new person has met all the requirements and a prior consent has been obtained from the contracting authority.

exchange in public procurement procedures. Among other things, it allows contracting authorities to publish public procurement plans, procurement documents and decisions on procurement procedures, and communicate with economic operators and the Public Procurement Office in accordance with law.

However, for no justified reason, the portal does not have an option that allows contracting authorities to publish information concerning contract performance. If it did, the principle of transparency in spending taxpayers' money would be complied with, while the abuse of contract realisation would be minimised. Additionally, this would significantly facilitate monitoring and supervision of public procurement contract.

Given that the new law on public procurement envisages much more possibilities for modifying a public procurement contract than the old one, it was to be expected that the new law would also prescribe appropriate supervision of contract performance to control the spending of public resources and prevent abuse. However, the new law has only one, quite ambiguous provision.

Under the new law, *the contracting authority controls contract performance, while the Ministry of Finance supervises contract performance.*[54]

It is still unknown how the Ministry is going to supervise contract performance, with what capacity and powers, and if it is going to adopt an internal act to regulate contract performance supervision in detail. It is also unclear which department of the Ministry will perform supervision. Although it would make sense if the Budget Inspectorate did it, this is not possible because the biggest contracting authorities, public companies, are not Budget beneficiaries .

54 Article 154 of the law on public procurement.

All this is even more surprising given the fact that one of the closing benchmarks for the EU accession negotiations for Chapter 5: Public procurement is that Serbia puts in place adequate administrative and institutional capacity at all levels and takes appropriate measures to ensure the proper implementation and enforcement of national legislation in this area in good time before accession, including, in particular, "the strengthening of control mechanisms, including **close monitoring and enhanced transparency of the execution stage of public contracts** and systematic risk assessments with prioritisation of controls in vulnerable sectors and procedures". So, although Serbia's progress will be evaluated based on its results in monitoring contract performance, it seems that not only has the country made no progress in the field of contract performance monitoring but, quite the opposite, it has made a few steps back in comparison with the situation in late 2016 when Chapter 5 was opened and the old law was in force.

After the new law was adopted, and before its application started, the Centre for Applied European Studies (CPES) sent two requests to access the information of public importance: one to the Ministry of Finance, asking how the Ministry was going to monitor contract performance, and another to the Public Procurement Office, asking if the information on contract performance was going to be published and, considering that the Public Procurement Portal was still under construction, whether it was possible to include an option for the collection and publication of the key data concerning contract performance in the new, upgraded version. Both the Ministry and the Public Procurement Office avoided giving direct answers to the questions. The Ministry replied that it would "adopt all bylaws necessary for the application of the new law on time, i.e. before the law comes into force," whilst the Public Procurement Office said that it "did not have the document that contained the information requested".

Having found flaws in the new law on public procurement concerning contract performance, CPES wrote to the Ministry of Finance in April this year, proposing a solution to the problem of contract performance supervision. CPES proposed creating simple e-forms for collecting basic contract performance information that would be filled

in periodically (monthly, quarterly or over another specific period) by contracting authorities and then publicly available on the Ministry's website or the Public Procurement Portal (except for contracts that are confidential under positive regulations). The e-forms would contain the information on:

- the public procurement contract;
- the contract value and the extent of contract performance (the value of delivered goods, services or works);
- payments made (how much was paid for the delivered goods, services or works);
- any other relevant payment information (e.g. any amounts paid in advance);
- meeting the performance deadlines;
- the penalties imposed on the contractor for failing to meet contractual obligations (charged contractual penalties, realised financial guarantees.).[55]

This would be a simple and effective way to facilitate the control of contract performance, whilst the availability of this information to the public would help achieve the transparency of this stage of the procurement, as the European Union insists on in the closing benchmarks for Chapter 5.

Modifications of public procurement contracts concluded before 1 July 2020

When the application of the new law on public procurement started, a question concerning modifications of public contracts concluded under the previous law but still binding after 1 July 2020 was raised. The regulator had overlooked this situation in the new law.

55 https://cpes.org.rs/initiatives/?lang=en

The transitional and final provisions of the new law do prescribe that the previous law on public procurement and bylaws adopted under that law will cease to have effect as from the date on which the new law is applied (1 July 2020), whilst *the public procurement procedures that were initiated before the new law came into force will be completed under the regulations that applied when the procedures were initiated*.

However, in line with its powers under Article 179 of the new law on public procurement (LLP),[56] the Public Procurement Office published an opinion saying that "as from the date of application of LLP/2019, modifications of public procurement contracts will be made in line with Articles 154–162 of LLP/2019, regardless of whether they were concluded in procurement procedures conducted under this law or LLP/2015". In the rationale behind its opinion, the Public Procurement Office says that the performance of a public contract (including its modifications) cannot be regarded as part of a public procurement procedure, and because of that the provision stipulating that the public procurement procedures initiated before the new law came into force will be completed under the regulations that were in force when the procedures were initiated does not apply to the contracts concluded under the old law. In other words, according to the Public Procurement Office, any public contract that was concluded before 1 July 2020 and is still binding, after that date can be modified in line with the provisions of LLP/2019 if necessary and if the conditions set out in this law have been met.[57]

Indeed, if we considered only the transitional and final provisions of the law on public procurement and regarded the contract performance stage as independent from the public procurement procedure, the above opinion of the Public Procurement Office would make sense. However, it is impossible to regard the contract performance stage as

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56 Under Article 179 paragraph 1 point 5 of the law on public procurement, the Public Procurement Office gives opinions on the application of this law and other public procurement regulations.

57 http://www.ujn.gov.rs/dokumenti/misljenja-i-objasnjenja/misljenja-i-objasnjenja-zjn-2019/ (Available in Serbian only)

independent from the procedure in which it was awarded. The award of public contract crowns the procedure that was conducted according to the rules stipulated in the legislation. When economic operators submit their tenders, they bear in mind the current law on public procurement not only when it comes to participation requirements but also contract performance. This is why the opinion of the Public Procurement Office that one law applies to the procedure and the other to the contract fully contradicts the principle of legal certainty.

The opinion of the Public Procurement Office has opened the door to corruption and illegal arrangements between contracting authorities and awarded contractors during contract performance, particularly if bear in mind that the new law allows for much more modifications than the old one and that those contracts can be performed under practically no supervision. It was practically an invitation to contracting authorities and contractors whose contracts were concluded under the old law but remain valid after 1 July 2020 to increase their contract value on the grounds of unforeseeable circumstances by up to 50 %, or to increase the procurement value by up to 10 % of the value of the original contract for the procurement of goods and services (or up to 15 % for the procurement of works), or to hire one or more new subcontractors.

Not surprisingly, contracting authorities and contractors accepted the "invitation" and, as soon as the new law entered into force, they modified the contracts they had concluded under the old law. Just a simple search on the new Public Procurement Portal reveals that many contracts awarded under the old law have been modified on the grounds of unforeseeable circumstances (e.g. the coronavirus pandemic) and added goods, services or works. As contracting authorities are under no obligation to publish a notice on contract modification on other

grounds, the number of contracts concluded under the old law and modified after 1 July 2020 under the new law is likely to be bigger.

For instance, let us look at public procurement JN OP 5/2019 concerning the adaptation and reconstruction of the secondary school Isidora Sekulić and the construction of a vertical extension. On 11/12/2019, the contracting authority signed a public procurement contract worth RSD 239,416,797.65 with a group of economic operators comprised of Tron tex d.o.o. (Novi Sad), Intec d.o.o. (Novi Sad), Buck d.o.o. (Belgrade) and Neo inženjering d.o.o. (Veternik).

On 29/3/2021, the contracting authority published a notice on contract modification due to additional works, under Article 157 paragraph 1 of the law on public procurement. In the rationale, the contracting authority said that works had emerged that could not have been foreseen when the contract was first signed. And that was all.

After the contract was modified, its total value was RSD 250,090,660.86, which means that it went up by RSD 49,558,737.67 or 21 %!

Under the old law on public procurement, additional works were grounds for using a negotiated procedure without prior publication. But even then, added goods, services and works could increase the value of the contract by up to 15 %.[58] So, in the case of public procurement JN OP 5/2019, contract modification, with or without negotiated procedure, would not have been possible under the old law. This is a typical example of contracting authorities taking advantage of the opinion of the Public Procurement Office to significantly increase contract value with practically no explanation or supervision. And possibilities are endless.

Similarly, the Secretariat for Education and Child Protection of the City of Belgrade changed its public contract for the reconstruction, adaptation and rehabilitation of the Zemun Grammar School, increasing the contract value by over 10 %.

58 Article 36 paragraph 1 point 5 of the law on public procurement (Official Gazette of RS 124/12, 14/15 and 68/2015).

4. Abuse of Negotiated Procedure without Prior Publication

Transparency is one of the key principles of public procurement, and its observance is a prerequisite for combating corruption. However, a procedure that deviates from this principle, for justified reasons, is negotiated procedure without prior publication. As a rule, in this type of procedure, competition is either restricted or completely absent.

Conditions for a negotiated procedure without prior publication are strictly prescribed by law and are interpreted restrictively. Despite this, contracting authorities often abuse this type of procedure.

Under Article 61 paragraph 1 of the law on public procurement (Official Gazette of RS 91/19) a negotiated procedure without prior publication may be used in several cases. In practice, however, the following two are normally used (and abused):

- If only a particular economic operator can supply the works, supplies or services that are being procured, and
- If it is strictly necessary, for the reasons of extreme urgency.

Whichever the case, the contracting authority must disclose the use of this procedure on the Public Procurement Portal and provide grounds for it. Simultaneously with (i.e. not before) publishing this notice, the competent authority must request the opinion of the Public Procurement Office on whether the negotiated procedure is justified. Under the new law, unlike the old one, the contracting authority addresses the Public Procurement Office simultaneously with the launch of the procedure, not before.

> Another big difference is that under the new law, the Public Procurement Office does not have an obligation to publish its opinion on the Public Procurement Portal. We believe that this a bad solution because a negotiated procedure is the least transparent public procurement procedure, and this is often taken advantage of. It would be extremely useful for the public to have access to the opinion of the Public Procurement Office. Otherwise, whatever the contracting authority's grounds for the negotiated procedure, it will be impossible to check whether the Public Procurement Office has given a positive or negative opinion, what its reasons were and whether the contracting authority asked for its opinion in the first place.

In either case, a negotiated procedure can be initiated if no reasonable alternative or substitute exists, and the absence of competition is not a result of an intention to unduly favour or disadvantage certain economic operators.

In Serbia, the absence of competition typically occurs in the procurement of medical supplies, where contracting authorities receive medical equipment as a donation, but under the donation agreement they must procure medical supplies for that equipment exclusively from the donor (often by a negotiated procedure without prior publication). Because of the monopoly price, the contracting authorities end up paying much more over the years than they would have done had they procured medical supplies (with the obligation to procure the supplies over a specific period) by a transparent public procurement procedure.

In addition to the aforementioned two (most common) cases, a negotiated procedure without prior publication may be used if no tenders or no suitable tenders have been submitted in response to an open procedure, provided that the initial conditions of the contract are not substantially altered. So, a contracting authority conducts a transparent and competitive public procurement procedure but for

some reason fails to attract economic operators to submit tenders or receives unsuitable tenders. The problem is that a contracting authority may intentionally conduct an "unsuccessful" open procedure creating an illusion of conducting a transparent, competitive procurement procedure, only to be able to eventually award the contract to the favoured economic operator. Public procurement procedures of high estimated values where no tenders are submitted initially that are followed by a negotiated procedure without prior publication confirm suspicions that this type of abuse of negotiated procedure happens in practice.

Negotiated procedure without prior publication for reasons of urgency

Negotiated procedure for reasons of urgency has become quite common in Serbia since the COVID-19 pandemic started. Contracting authorities have often abused the pandemic to procure medical supplies in non-transparent procedures, favouring certain economic operators. A contracting authority would either exercise discretion when deciding which economic operators to invite to negotiations or draft technical specifications that only a specific economic operator could meet.

Under Article 61 paragraph 1 point 2 of the law on public procurement, a contracting authority may use a negotiated procedure without prior publication in so far as is strictly necessary where, for reasons of extreme urgency caused by events that the contracting authority could not foresee, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with, providing that circumstances invoked to justify extreme urgency must not be attributable to the contracting authority.

So, to use a negotiated procedure for reasons of urgency, several conditions must be met cumulatively: (1) that there is extreme urgency, (2) that the extreme urgency is a result of the events that the contracting authority could not foresee or cause, (3) that due to these events it is not possible to use procedures that would be used

under normal circumstances, and (4) that the subject matter of the procurement is necessary, i.e. that there is no alternative for it.

If a negotiated procedure is used to procure basic living conditions in the event of natural disaster or technological accident that jeopardises human safety, health and lives, material goods or environment, the contracting authority is under no obligation to disclose it on the Public Procurement Portal or to request the opinion of the Public Procurement Office on whether the procedure is justified or not.[59]

Contracting authorities took advantage of these provisions, using the pandemic to justify taking extremely urgent action both during and after the state of emergency, although the urgency did not exist within the meaning of the law.

For instance, on 12 May 2021, the Republic Property Directorate published on the Public Procurement Portal a notice on initiating a negotiated procedure without prior publication for the procurement of reconstruction works for the Centre of Genome Sequencing and Bioinformation. The negotiated procedure for reasons of urgency was justified by the "current alarming situation concerning the global emergence of mutations of the SARS-CoV-2 virus, threatening population health and the efficacy of current vaccines", which is why it was "crucial to monitor the occurrence and movement of mutations in large population samples". With this "apocalyptic" description of the current situation concerning the virus and its mutations, the contracting authority tried to justify the necessity of the urgent reconstruction of a Centre of Genome Sequencing and Bioinformation facility although even a layperson understands that there were no justified reasons to urgently conduct a non-transparent and non-competitive negotiated procedure.

We must point out that Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis[60] differentiates between urgency and extreme urgency when it comes to choosing the procedure. In

59 This type of procurement was exempt from the previous law on public procurement.

60 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX-:52020XC0401(05)

the cases of urgency, the Commission recommends open or restricted procedures with shortened deadlines for the submission of tenders (this option is also envisaged under Serbian law[61]). Only if it is not possible to act within shortened deadlines, the Commission recommends negotiated procedure without prior publication. Even then, however, the conditions for the negotiated procedure are to be interpreted restrictively because this type of procedure does not observe the principle of transparency.

Bearing this in mind, as well as the epidemiological situation in Serbia since the pandemic was declared, it is clear that the negotiated procedure without publication for the procurement of medical supplies was not justified in a majority of cases it was used.

Most of these procedures were conducted when the epidemic was no longer a new or unexpected circumstance, and the subject matter of the procurement was not necessary to the extent that it had to be procured by a negotiated procedure without publication. Similarly, in most cases, there must have been alternative solutions or substitutes for the procured subject matter.

Even if the situation had been urgent, it was not urgent enough to justify a negotiated procedure without prior publication. Instead, contracting authorities should have used an open or a restricted procedure with shorter deadlines and procured medical supplies and equipment transparently, ensuring competition.

Under the project Towards a More Efficient Public Procurement System, the Centre for Applied European Studies has done several case studies of the abuse of negotiated procedure without prior publication in situations related to the COVID-19 pandemic. We will briefly present the findings of these studies below.

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61 Under Article 52 paragraph 6 of the law on public procurement, in an open procedure, the contracting authority may shorten the deadline for submitting tenders to 15 days if the deadlines of 35 days and 25 days from paragraph 3 pts. 1 and 2, respectively, are not suitable for the reasons of justified urgency, for which the contracting authority has valid evidence. By the same token the law on public procurement allows for shortening the deadline for submitting tenders in a restricted procedure to 10 or 15 days, respectively.

Case Study: Procurement of Medical Supplies (2020)[62]

In July 2020, the Republic Health Insurance Fund used a negotiated procedure without prior publication for the procurement of medical supplies to provide basic living conditions during the pandemic. The estimated procurement value was over RSD 1.5 billion. The procurement was justified by the then-epidemiological situation in the country, i.e. increased consumption of medical supplies due to an increase in the number of cases infected with the SARS-CoV-2 virus.

However, not only was this not a matter of extreme urgency (especially not of the kind that requires the provision of basic living conditions under a simplified legal procedure), but some lots (whose estimated value was nearly RSD 200 million before VAT) had nothing to do with the treatment of coronavirus patients.

A negotiated procedure for reasons of extreme urgency (such as providing basic living conditions) can be used only where protecting human lives and health is a matter of days or hours. There is no doubt that this was not the case in this particular procurement. The epidemiological situation during the procurement was serious enough to justify extremely urgent procurement of medical supplies under a simplified legal procedure, and it definitely did not require urgent procurement of medical supplies that were not listed in the protocol for the treatment of coronavirus patients, such as a set of laparoscopic instruments (used to examine the organs inside the abdomen), linear and circular staplers (surgical staplers used in abdominal and rectal surgery), surgical compression garments, non-sterile surgical table covers, endoscopic video capsules (used in colon and stomach imaging), etc.

Besides not meeting the conditions for initiating a negotiated procedure for reasons of urgency, there was no competition either. Only one tender was submitted for 37 out of 38 lots in total. Out of these 37 lots, 32 were offered at prices identical to their estimated value, while three lots were offered at a somewhat lower price. The

62 https://cpes.org.rs/sanitetski-i-medicinski-potrosni-materijal/?lang=en

remaining two lots were offered at a higher price than their estimated value, but they were still accepted!

A particularly interesting detail is that the framework agreement for the majority of the medical supplies for the treatment of coronavirus patients (the estimated value of these supplies was as much as RSD 435,317,065.70 before VAT) was signed with PTM d.o.o. (Šabac). The company is owned by Zorica Šakan, who, according to the media reports, is related to the Provincial Deputy Prime Minister and Provincial Health Secretary, Zoran Gojković.

Only a month after the procedure was completed, likely under public pressure, the Republic Healthcare Insurance Fund suspended the performance of awarded contracts. According to its press release, this was because, in the meantime, the healthcare institutions that had requested urgent procurement of medical supplies managed to get the supplies from other sources, i.e. donations, and because the spread of coronavirus had started to slow down.

This epilogue only confirms that there were no grounds for this type of negotiated procedure and that the contracting authority had tried to take advantage of the situation and procure medical supplies that had nothing to do with the treatment of coronavirus patients by awarding a high-value contract to a company owned by a person close to the government.

Case Study: Medical Supplies for the Serbia Clinical Centre A&E Department (2020)[63]

In October and November 2020, various healthcare facilities used negotiated procedure without prior publication to procure (mostly) scanners and X-ray machines.

What all these procedures had in common was that the contracting authorities justified the urgency by saying that the Ministry of

63 https://media.cpes.org.rs/2021/05/Medicinska-oprema-za-Klinicki-centar-Srbije.pdf (available in Serbian only)

Health, which had granted the funds for the procurement of medical equipment, had imposed short deadlines by which to use the funds.[64]

Besides the deadlines imposed by the Ministry, the contracting authorities stated that the existing equipment was either beyond repair or often broke down due to an increased volume of work caused by the COVID-19 pandemic.

However, even a layperson knows that at the time when the procedures were initiated, the coronavirus pandemic was no longer a new or unexpected circumstance. Consequently, the fact that it had caused an increase in the number of patients for whom the equipment was needed could not have been a circumstance that the contracting authority could not foresee. The deterioration of the equipment could not have been caused by the increase in the volume of work due to pandemic, either. It is much more likely that it was in bad condition before the pandemic.

Using the order of the Ministry of Health to procure the equipment within the set deadline as grounds for an urgent procedure is contrary to the nature and purpose of the negotiated procedure without prior publication. By allowing the procedures to go ahead, a dangerous precedent was set, opening the door to future abuses.

It is scandalous that the Public Procurement Office had given positive opinions on the justification of negotiated procedures in all these cases and that the Republic Commission rejected all complaints that challenged the grounds on which these procedures were conducted.

64 In late October/early November, the Ministry of Health informed healthcare facilities that, under the Plan for the allocation of funds to healthcare facilities founded by the Republic of Serbia, they had been granted funds for the procurement of equipment, investment and investment maintenance in 2020. Healthcare facilities had an obligation to conduct public procurement in compliance with the law on public procurement and submit all related documents to the Ministry of Health within a specified deadline (typically, 30 November).

Case Study: Multislice CT and Ancillary Equipment (2020)[65]

The procurement of a multislice CT is similar to the case of abuse of negotiated procedure without prior publication that we have analysed in the case study on the procurement of medical equipment for the A&E department of the Clinical Centre. In this case, the contracting authority's "excuse" for urgent procurement (besides the order issued by the Ministry of Health's) was that, due to the epidemiological situation, it had been declared a triage station for COVID-19 patients, which could have been grounds for an open or another transparent procurement procedure, but not for a negotiated procedure without prior publication.

Furthermore, the contracting authority had restricted competition by refusing to invite to negotiations an economic operator who had expressed interest to participate in the procedure. This was Medicom d.o.o. (Šabac), an authorised distributor for several international manufacturers of these machines and a regular tenderer in medical equipment procurement procedures. Having learnt about the procedure, Medicom d.o.o. emailed the contracting authority expressing interest to participate in the procedure. The contracting authority confirmed the receipt of the email but did not invite Medicom d.o.o. to negotiations, without any explanation.

By refusing to invite the economic operator who was certainly able to offer the subject matter of the procurement, the contracting authority failed to provide competition, which was its legal obligation.[66] If the contracting authority had invited this economic operator to negotiations, the (alleged) urgency of the procurement would not have been compromised, and the price would likely have been reduced and the quality of the accepted goods increased.

As a consequence, three out of four economic operators accepted the invitation to negotiations and submitted their offers, and the only

65 https://media.cpes.org.rs/2021/05/30.-Skener.pdf (Available in Serbian only)

66 Under the law on public procurement, after publishing a notice on initiating a negotiated procedure without prior publication, the contracting authority ***must invite, in writing, one or, if possible, more economic operators to negotiations***.

acceptable tender was the one by the awarded economic operator. Not surprisingly, the value of the accepted tender was almost identical to the estimated value of the procurement, whilst one tender was far above the estimated value, and another one was submitted without a guarantee that would confirm its seriousness. It is therefore highly likely that the second and the third tenders were submitted just to create an illusion of competition.

The Republic Commission unconditionally accepted the rationale of the contracting authority regarding the justification of the negotiated procedure and the existence of competition, without bothering to consider the claim for the protection of rights of Medicom d.o.o., as an interested party.

“Confidential” public procurement

During the coronavirus pandemic, the principle of transparency of public procurement has not just been threatened by unjustified negotiated procedures without prior publication. In the procurement of medical supplies conducted by the Republic Health Insurance Fund on behalf of healthcare facilities during and after the state of emergency, the principle of transparency was completely ignored.

After the Republic Health Insurance Fund refused to furnish independent media and non-government organisations with the information on the procurement of medical supplies during the state of emergency, the public found out that the Government of Serbia, in its Conclusion SP 05 No. 00-96/2020-1 of 15/3/2020, declared this information “strictly confidential”. To this day, the legal grounds for this decision remain unknown as the Government Conclusion itself is also designated as “strictly confidential”.[67]

67 Available in Serbian only: https://www.cins.rs/podaci-o-nabavci-respiratora-i-broju-testova-tajna/, https://www.slobodnaevropa.org/a/30629031.html, https://birn.rs/rfzo-podaci-o-nabavci-opreme-tokom-epidemije-strogo-poverljivi/, https://www.danas.rs/drustvo/zasto-je-nabavka-medicinske-opreme-i-dalje-strogo-poverljiva/.

As for the requests of CINS, BIRN, Radio Free Europe and other media outlets and NGOs, the Republic Health Insurance Fund replied that "the information on medical supplies procured in Serbia during the state of emergency due to the COVID-19 pandemic, and any related documents, are designated as 'strictly confidential' in line with the Government Conclusion of 15 March 2020."

Under the law on data confidentiality (Official Gazette of RS 104/2009), any information of interest to the Republic of Serbia, the disclosure of which may cause damage, may be designated as "confidential" if the need to protect the interests of the Republic of Serbia outweighs the interest of free access to information of public importance. The law lays down different levels of confidentiality, among them "strictly confidential, designated to prevent serious damage to the interests of the Republic of Serbia".[68]

In this particular case, however, not a single legal requirement for designating the public procurement information as "strictly confidential" was met. Neither the old nor the new law on public procurement envisages situations where all information on a public procurement may be designated as confidential, except if the public procurement concerns defence and security. Surely, publishing the information on the quantities of medications, tests, medical supplies and equipment that Serbia has procured to treat COVID-19 patients could not have caused "serious damage to the interests of the Republic of Serbia". On the contrary, disclosing such information would have helped build citizens' trust in the government and its institutions.

The Guidance from the European Commission emphasises that in emergencies, i.e. situations where human lives and health are at stake, it is possible and preferable to have some flexibility when it comes to the most urgent procurement such as the procurement of medical supplies, tests or ventilators. However, it is important to stay within the limits of the law and consistently observe the basic principles of public procurement.

68 Articles 8 and 14 of the law on data confidentiality.