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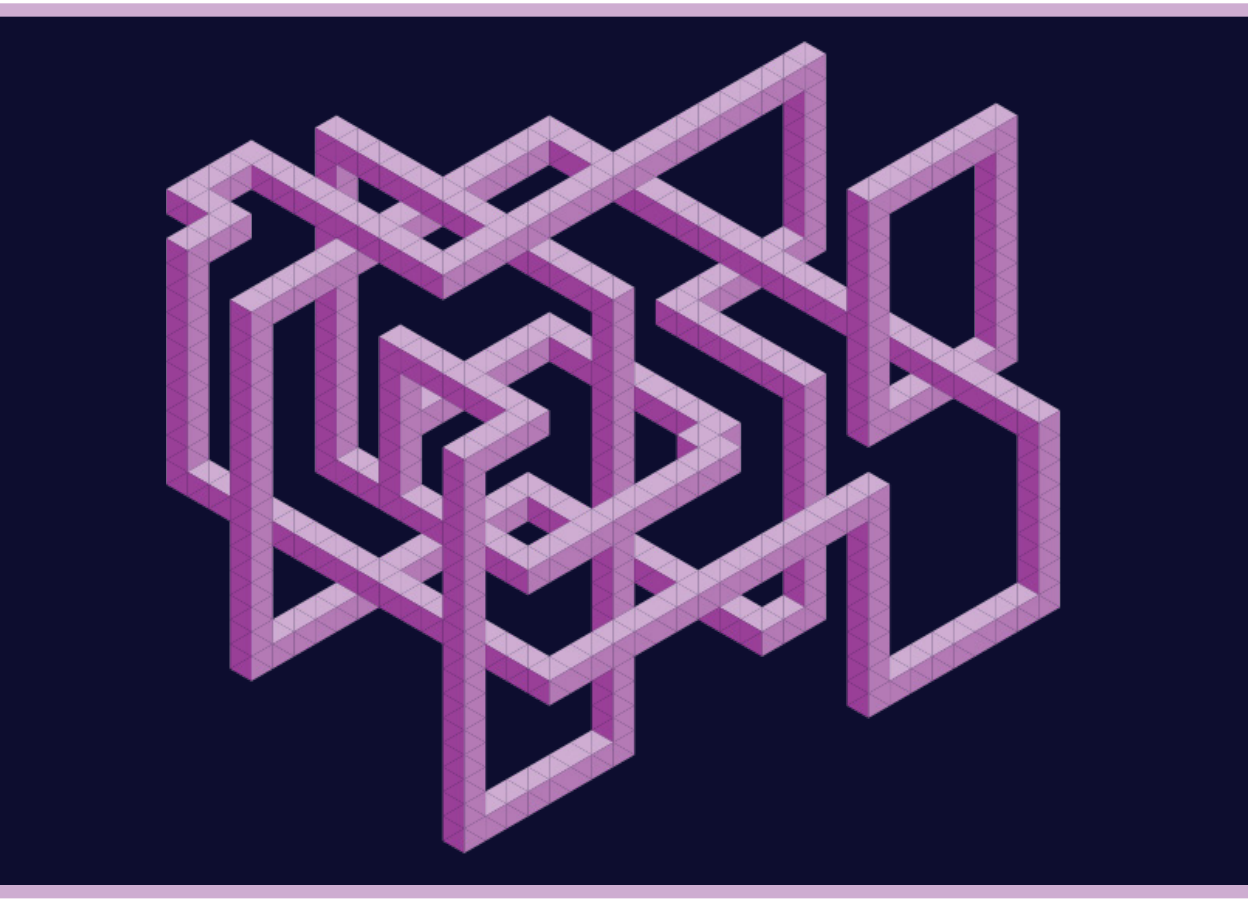
CENTAR ZA PRIMENJENE EVROPSKE STUDIJE

UPJN
UDRUŽENJE PROFESIONALACA U JAVNIM NABAVKAMA REPUBLIKE SRBIJE

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



This project is funded by the European Union

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ALARM REPORT

on the State of Play in Public Procurement in Serbia 2021

November 2021

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#ЕУ ЗА ТЕБЕ

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

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

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Introduction

The three-year project *Toward a Sound Public Procurement System in Serbia* implemented by the Centre for Applied European Studies (CPES) and the Association of Public Procurement Professionals (UPJN), with the support of the Delegation of the European Union to the Republic of Serbia, is coming to an end in December.

As public procurement has been recognised for years as one of the areas prone to corruption, the main objective of the project was to reduce corruption by establishing an efficient public procurement system and introducing accountability in public spending. The areas chosen for the analysis were healthcare, infrastructure and environmental protection. These areas were chosen primarily because they directly affect the daily lives of citizens, but also because significant public funds are allocated to them.

As part of project activities, case studies were done to indicate the neuralgic points of public procurement in selected areas (https://cpes.org.rs/towards-sound-public-procurement-system-in-serbia/?lang=en). The studies have shown that the implemented public procurement procedures were riddled with irregularities and illegalities, primarily concerning non-compliance with the basic principles of public procurement: competition, transparency and cost-effectiveness. In addition, the studies have shown irregular practices concerning the protection of rights and uncoordinated work of key institutions in the public procurement system (Republic Commission for the Protection of Rights in Public Procurement Procedures, Public Procurement Office, Commission for Protection of Competition and Anti-Corruption Agency). Of course, all this applies to cases where

contracts were awarded in public procurement procedures rather than under international agreements or laws derogating from the law on public procurement, although they have also been addressed in the studies.

During the implementation of the project, various initiatives were submitted to the competent authorities, in an attempt to improve the new law on public procurement, the Serbian Public Procurement Development Strategy for 2019-2023 and the supervision of public contract performance (the responsibility of the Ministry of Finance under the new law).

As part of the public consultation concerning the draft of the new law, which was organised by the Ministry of Finance in cooperation with the Public Procurement Office and the Serbian Chamber of Commerce, the UPJN submitted 20 remarks, proposals and recommendations, 12 of which were adopted and incorporated in the draft law. They concerned legal provisions that prescribed high thresholds for the application of the law on the procurement of works, short deadlines for submitting tenders in certain cases, the Public Procurement Commission, the content of tender documents, criteria for selecting economic operators, civil servants responsible for public procurement and protection of rights, to name but a few. Some remarks highlighted the need for a more precise legal and technical wording of the draft law and recommended different legislative solutions from those in the draft law, all to improve the public procurement system in Serbia.

However, the Public Procurement Office rejected all remarks and recommendations made by the UPJN concerning the Serbian Public Procurement Development Strategy for 2019-2023 and the Action Plan for 2019-2020. The remarks were about the objectives and aims of the Strategy regarding improving the public procurement system, i.e. measures to achieve them. Out of the 17 proposals submitted by all stakeholders, only two were adopted.

Given the importance of public contract performance on the one hand, and substantial leeway to amend contracts and vague legal provisions on contract performance in the new law on the other hand, after

the new law entered into force (1/1/2020) and before its application started, CPES requested the information of public importance[1] from:

1. the Ministry of Finance, which under the new law supervises contract performance, asking how the Ministry was going to supervise contract performance, and
2. the Public Procurement Office, asking if the information on contract performance was going to be available to the public and, considering that the Public Procurement Portal was under construction, whether online collection and publication of key information on contract performance would be possible via the new version of the Public Procurement Portal.

Both the Ministry and the Public Procurement Office avoided giving direct answers. The Ministry replied that it would "adopt all the regulations necessary for the application of the new law in due time, i.e. before the law enters into force," whilst the Public Procurement Office said that it "did not have the document that contained the information requested".

CPES then proposed that the Ministry of Finance make it possible for the information on contract performance to be published on the new Public Procurement Portal as it would significantly facilitate contract performance supervision. Since contracting authorities were able to publish their public procurement plans, advertise public procurement procedures, share procurement documents and decisions, and communicate with economic operators and the Public Procurement Office on the new portal, why not make it possible for them to share information on public contract performance? Similarly, to facilitate contract performance supervision, CPES also proposed creating e-forms for contracting authorities to fill in periodically (monthly or quarterly) with basic information on contract performance (contract performance stage, payments made, etc.), and making them available on the Ministry's website or the Public Procurement Portal. The Ministry never replied.

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

That the supervision of contract performance did not start even a year and a half after the application of the new law on public procurement (1/7/2020) the Ministry confirmed in its reply to the request sent by a CPES associate to access information of public importance. The Ministry stated that "risk assessment as per claims received in 2020 has been done" and that "in line with the findings of the risk assessment, Action Programme 2021, whose implementation is in progress, envisages supervision." The drafting of regulations and technical and methodological instructions on supervision was underway,[2] added the Ministry, probably referring to the same regulations and instructions that were supposed to be adopted before the application of the law started.

Considering all the above and the fact that our project ends in December, we have decided that this last issue of the Alarm Report will be a brief retrospective of the most important issues concerning public procurement, focusing on various mechanisms for the protection of the legality in this area, in particular before the courts of law and prosecutor's offices. This is because, in addition to a special administrative procedure before the Republic Commission and an administrative proceeding before the Administrative Court, the legality of a public procurement procedure can also be protected in criminal or misdemeanour proceedings before competent courts and prosecutor's offices. We believe that it is important to investigate this matter further considering that the protection mechanisms mentioned above are rarely used despite numerous irregularities that we come across in public procurement every day. Without it, developing an efficient system of public spending is highly unlikely.

2 https://twitter.com/cpes_org/status/1458470943819448321

Key findings

Considering all the above, the key findings of this Alarm Report will not be much different from those in previous issues. Simply put, not only has the situation in public procurement remained unchanged but it may have even worsened. Perhaps the only difference is that in this issue of Alarm Report we do not use new metaphors or puns to describe the utterly unsatisfactory situation in this area.

A quick reminder: in the previous issues of the Alarm Report we have said that public procurement has only "made progress in regressing", i.e. that it often made one step forward, two steps back.

That these statements are not arbitrary is confirmed by the fact that Serbia opened negotiations with the European Union on Chapter 5 – Public procurement in December 2016, and that five years on it still has not met a single criterion for this chapter to be temporarily closed. In fact, Serbia seems to be further away from meeting these criteria today than it was five years ago. Although according to the European Commission's latest report Serbia made limited progress during the reporting period, the Commission's key recommendations in this area are identical to those the year before. In other words, key issues are not being solved.

Bearing this in mind, we can by no means agree with the Minister for European Integration, Jadranka Joksimović, who says that the European Commission's assessment of Serbia for 2021 means "further progress relative to the progress achieved and observed in the report for the previous year", which, we must add, got the same mark, 3.[3]

3 https://rs.n1info.com/vesti/civilno-drustvo-dalo-trojku-za-evrointegracije-ministarka-ima-drugu-racunicu/

If we look at the key findings of the previous issues of the Alarm Report (since early 2019 to date) we will see negative trends in most segments.

- An extremely small number of tenders per procedure, i.e., reduced competition and failure to honour the principle “best value for money”;
- The value of public procurement contracts exempt from the law on public procurement is increasing, and so is the number of contracts concluded under international agreements or laws suspending the application of the law on public procurement and the number of procedures in which only one tender was submitted;
- Lack of appropriate public procurement control, especially in the stage of contract performance;
- Poor performance of control bodies responsible for the protection of rights in public procurement procedures (Republic Commission, Public Procurement Office, courts and prosecutor's offices).

1. Alignment of National Legislation with the EU Acquis

One of the transitional benchmarks for the temporary closure of Chapter 5 – Public Procurement set by the EU is full alignment with the EU acquis on public procurement, including adopting amendments to the law on public-private partnerships and concessions.

Although some progress has been made in this area (albeit with a long delay) by adopting the new law on public procurement, only a month after it became effective, the law on special procedures for linear infrastructure projects (Official Gazette of RS 9/2020) was adopted, allowing the Government to exempt projects of "special importance for the Republic of Serbia" from public procurement rules.

Under the law on special procedures, future procurement of infrastructure projects of the greatest importance will be realized in open tendering procedures in accordance with the law on public procurement (unless prescribed otherwise under an international agreement) and that in such procurement procedures certain provisions of the law on public procurement will not be applied: those provisions concern the procurement plan, prior publication, proof of meeting the mandatory and additional conditions for participation in the public procurement procedure and deadlines for the Republic Commission to make decisions. As if this was not enough, the Government has the authority to exempt an entire project or its stages and activities from the law on public procurement procedure and implement the strategic partner selection procedure. So, the Government can declare any future infrastructure project a project of special importance and exempt it from the public procurement legislation, whilst criteria for

selecting a strategic partner will be regulated under special regulations, adopted for each project individually.

The rationale for the proposed law on special procedures is particularly interesting. It states that based on the previous experience, it was concluded that during project realisation a lot of time was wasted on solving proprietary relations before issuing licences, often resulting in delayed works. The new law, the rationale continues, will enable faster and simpler project realisation from land acquisition to issuing licences and accelerate public procurement processes necessary for the realisation of projects of special importance for the Republic of Serbia.

So, according to the lawmaker, important systemic and anti-corruption laws, regulations and procedures, common in all regulated legal systems, are slowing down the progress of those countries, which justifies the adoption of a law that allows the government to suspend them in certain cases. Completely makes sense. Some would say that the end justifies the means.[4]

A natural consequence of this thought process is the recent adoption of the law on expropriation, authorising the government to forcibly buy private property for any project under any agreement that Serbia has signed with foreign countries if it deems it necessary "for the realisation of construction projects of importance or special importance for Serbia." The explanation of the law proposal given by the Serbian Prime Minister was almost identical.

Interestingly enough, the adoption of the law on special procedures was preceded by a *lex specialis* on the construction of motorway section Pojate-Preljina (The Morava Corridor),[5] which suspended the application of the law on public procurement. The contract was awarded to a strategic partner in a procedure that was almost identical to the one prescribed in the latter law, without the price as a criterion

4 https://rastkonaumov.wordpress.com/

5 Law on public interests and special procedures in the realisation of the infrastructure corridor of E–761 motorway, section Pojate-Preljina (Official Gazette of RS 49/2019).

for contract award. The *lex specialis* was obviously just a trial balloon for the adoption of the general law on special procedures.

The harmful effects of the law on special procedures have been pointed out by the European Commission, which reports that this law and its wide application undermine the effective implementation of the law on public procurement and that Serbia maintains discriminatory rules in the field of public procurement by allowing for the circumvention of national legislation as well as the EU rules.

As regards the alignment of the national legislation with the EU acquis, a step back is the fact that, more often than not, the infrastructure contracts of great value are awarded under international agreements that completely abrogate all national regulations and transparent procedures and exclude any form of even a minimum of competition. According to the study 2020 Public Spending Transparency Index, conducted by the Toplice Centre for Democracy and Human Rights, out of 20 biggest contracts (by value) that the public sector has awarded in 2020, as many as 17 were concluded under bilateral (international) agreements. In comparison with 2019, there were more contracts (there were 11 in 2019) but their total value was almost equal (EUR 2,044,062,807 in 2019, and EUR 2,021,975,800 in 2020). [6]

Serbia is still to adopt the amendments to the law on public-private partnerships and concessions to align it with the EU Directive on the award of concession contracts. There is no information (not even on the website of the Commission for Public-Private Partnerships) on whether the working group tasked with drafting the law has started working on it. A quick reminder: according to the Action Plan for the implementation of the Public Procurement Development Programme for 2019-2020, Measure 1 – Improving legal framework, the law amending the law on public-private partnership and concessions should have been adopted in Q4 2020,[7] whilst the Action Plan for 2021 has moved the deadline to Q4 2021.[8] However, the law proposal is yet

6 http://nadzor.org.rs/pdf/indeks-transparentnosti-javne-potrosnje-2020.pdf
7 http://www.ujn.gov.rs/strategija/
8 http://www.ujn.gov.rs/strategija/akcioni-plan-za-2021-godinu-2/

to enter the parliamentary procedure, and the website of the Ministry of Economy (under "Draft laws and regulations"), which is responsible for this area, does not offer any information.

It is then no wonder that the recommendations in the reports of the European Commission remain the same every year:

- ensure further, full alignment with the 2014 EU directives on public procurement, in particular by adopting amendments to the law on public-private partnerships and concessions and by ensuring that projects financed from public funds are subject to public procurement procedures;
- ensure that intergovernmental agreements concluded with third countries do not unduly restrict competition and that they comply with the basic principles of public procurement, in line with the national legislation and the EU acquis.[9]

9 https://ec.europa.eu/neighbourhood-enlargement/serbia-report-2021_en

2. Restricted Competition

As observed in the previous segment and referred to in the second recommendation of the European Commission, huge steps back were made concerning honouring the basic principles of public procurement, primarily *ensuring competition and transparency*.

Regarding competition, the best indicator of regression is a great number of contracts concluded under international agreements or laws suspending the application of the law on public procurement, and an increasing number of procedures where only one tender was submitted.

According to the European Commission's Serbia Report 2021, the value of procurements exempted from the law on public procurement increased by approximately EUR 500 million from 2019 to 2020, totalling EUR 1.73 billion or 54% of the cumulative value of all public procurement contracts concluded in 2020. In 2020, the State Audit Institution identified contracts worth approximately EUR 450 million that were exempted from public procurement procedures with no valid rationalisation. Because of these findings, the European Commission has justifiably expressed serious concern.[10]

Furthermore, according to the latest report of the Public Procurement Office, the average number of tenders per public procurement procedure was 2,6 in 2020, which is the same as in 2014 and far from three tenders per procedure in 2017.[11] According to the report for the

10 https://ec.europa.eu/neighbourhood-enlargement/serbia-report-2021_en
11 https://jnportal.ujn.gov.rs/annual-reports-ppo-public

first half of 2019, in 2018 and the first six months of 2019, 55% of procedures received only one tender.[12]

Finally, according to the study conducted by the Toplice Centre for Democracy and Human Rights, 79 out of 100 financially most valuable procedures had only one tenderer, 16 had 2, whilst only 5 had 3 or more tenderers. For the sake of comparison, in 2019, 72 out of 100 procedures had only one tenderer, 19 had 2, whilst 9 had 3 or more.

The above data – as well as the case studies written over the past three years of this project – clearly show that restricted competition has become a rule in public procurement. In Serbia, all bigger contracts are awarded only to the specific, favoured tenderers, without any procedure whatsoever. The ways of restricting competition are varied and quite imaginative: from setting detailed additional requirements and criteria for a contract award and tailoring technical specifications to fit a particular tender, to how the subject matter of the contract is created. Restricted competition is often a result of inappropriate influence by people close to the government, verging on the conflict of interest.

Contracting authorities were not short of ideas when it came to favouring certain tenderers. Some of the latest and most original examples of restricted competition analysed in the case studies are discussed below.

Case study: Medical Devices for the Serbia Clinical Centre Accident & Emergency Department[13]

In mid-2021, under the project "Reconstruction of four clinical centres in Serbia", the Ministry of Health conducted a procedure for the procurement of medical devices for Serbia Clinical Centre. The estimated value of the contract was RSD 12 billion before VAT. The subject matter of the contract consisted of no fewer than 602 items of various functions and purposes: from state-of-the-art medical devices (CT scans, magnetic resonance imaging, ultrasound, etc.) and

12 http://www.ujn.gov.rs/izvestaji/izvestaji-uprave-za-javne-nabavke/

13 https://cpes.org.rs/medicinska-oprema-za-klinicki-centar-srbije-2021/

standard medical devices (microscopes, wheelchairs, IV stands, etc.), to non-medical equipment (stools, bookcases, coffee machines, tools for technical repair services, etc.).

The contracting authority, however, did not divide this complex subject matter of the contract into lots but advertised it as a single contract. By doing so, the contracting authority had significantly restricted competition because the tenderer had to offer all items on the list to even be able to participate in the procedure. As no company can offer all the required goods or even has a license to market all medical devices that the contracting authority was procuring, and as the great majority of these items are marketed by different companies, the logical conclusion is that said procurement should have been divided into lots, enabling more companies to participate and more tenders to be submitted. Ultimately, this would result in a greater number of economically advantageous tenders. However, the contracting authority argued that the decision to go with a single subject matter of the contract was based on the economy of scale and the expectation of a cheaper offer, and that market research had shown that many potential tenderers were able to meet the contractual obligations of the procurement. The contracting authority was wrong: it received only one tender (by a consortium of nine companies), which was just under the estimated value of the procurement (RSD 11,999,312,969.76 before VAT).

The very tight deadline must have been another reason why only one tenderer participated in the procedure: the contracting authority set the minimum deadline that the law allows: 35 days from the publication of the invitation to submit tenders. Under the law on public procurement, in addition to adhering to the minimum deadlines prescribed, contracting authorities must make sure that the deadlines befit the time needed to prepare an acceptable offer, bearing in mind the complexity of the subject matter of the contract. In this case, only a tenderer who had known about the procurement beforehand or who had participated in similar procedures and was therefore somewhat prepared was able to submit a tender. However, a procurement procedure with such a complex subject matter of the contract happens

rarely, if ever. So, by setting such a tight deadline, the contracting authority had restricted competition.

In the rationale for this extraordinarily complex subject matter of the contract, the contracting authority's main argument was that Serbia Clinical Centre had to be fitted out quickly, thoroughly and in one go, with the best possible devices that a tertiary healthcare facility could have. In our opinion, however, after decades of waiting for the reconstruction of the Clinical Centre and repeatedly pushing the deadlines for the completion of works, a few extra months that a procurement opportunity with divided lots would have taken (because reviewing and evaluating the tenders would have taken longer and all the procedures concerning the protection of rights had to be completed) would not have been a problem, especially considering that there would certainly have been a better offer at a lower price. Bearing all this in mind, it will be interesting to see how the contract will be performed: how the equipment will be delivered, i.e. in what time intervals, and if the obligations concerning the guaranteed deadline, as well as other contractual obligations, will be met.

Case study: Hawk Eye (the procurement of vehicles for a parking enforcement service)[14]

In the summer of 2019, the contracting authority, JKP Parking servis in Belgrade carried out an open procedure for the procurement of vehicles via leasing. The contracting authority listed the characteristics of a specific model of a car, which only one company could offer, thus violating the basic procurement principle of ensuring competition and the provision of the law stipulating that a contracting authority cannot list technical characteristics or standards specific to a particular make of goods.

In this case, however, the contracting authority was procuring off-road vehicles, 4x4, manufactured in 2019, maximum length 4600 mm, minimum height 1670 mm, wheelbase 2700-2800 mm, minimum

14 https://cpes.org.rs/hawk-eye-2019/?lang=en

clearance 200 mm. Adding to these key features, the contracting authority listed other technical requirements (engine capacity, engine power, gear stick, how many doors, the colour, etc.) as well as the minimum accessories that the vehicles had to have.

With this combination of precisely specified characteristics, the contracting authority had practically drawn a picture of Land Rover Discovery Sport, and these vehicles were indeed procured.[15] A simple online search for 4x4 SUVs manufactured in 2019 proves that no other vehicle had the required features. Some vehicles falling in this category (BMW, Renault, Nissan, Toyota, Mazda, etc.) met a few of the requirements but none of them met all of them.[16]

The fact that tender documents listed the characteristics of a specific model of a car is even more interesting if we bear in mind that there is only one official dealership for Land Rover in Serbia, British Motors d.o.o. Beograd. On top of that, the legal representative of British Motors, Ostoja Mijailović, is a member of the ruling Progressive Party (SNS) and president of the basketball club Partizan.

Being a manager of a company participating in a public procurement procedure and a member of a contracting authority's political party is neither illegal nor does it preclude such a company from participating in a public procurement procedure. However, when the contracting authority favours that particular tenderer by setting out such specific technical requirements, it significantly increases the suspicion that there was an illegal arrangement between the contracting authority and the tenderer.

Bearing all this in mind, it is no wonder that there was only one tender in this high-value procurement and that, despite all irregularities, none of the potential tenderers objected to the controversial technical requirements by requesting clarification of tender documents or protection of rights. Also, it is no wonder that the value of the selected tender was just under the estimated value (by around RSD 42,000.00).

15 Clearance 211 mm, wheelbase 2741 mm, length 4599 mm, height 1724 mm.

16 Websites such as www.auto-data.net and www.cars-data.com/ have databases of specifications of the majority of vehicles by nearly all manufacturers.

Besides this blatant favouring of a specific tenderer, another issue is whether a parking enforcement service operating on city streets needs expensive, non-economical vehicles intended for hilly and mountainous terrains. The press release issued by the contracting authority suggests that these particular vehicles were procured because they are reliable and ensure a stable camera and other sensitive computer equipment for the control and imaging of illegally parked vehicles where the roads are uneven and in the case of sudden braking. However, the contracting authority failed to explain why other, much cheaper and more economical vehicles with somewhat different characteristics were deemed unsuitable.

The way this public procurement procedure was carried out and the tenderer close to the government favoured is one of the main reasons why so few companies participate in public procurement procedures in Serbia.

The current state of play in public procurement in Serbia is probably best summed up in the statement of Goran Vesić, Deputy Mayor of Belgrade, who said that these vehicles were acquired to demonstrate the authority of the state and to show the arrogantly parked jeeps "how powerful the state is".

Because in this case, the state has demonstrated, yet again, its "power" and "authority". The "power" and "authority" to purchase non-economical off-road vehicles to monitor illegally parked cars on city streets, in a fraudulent procedure, by favouring a company owned by a member of the ruling party. The "power" and "authority" that other market participants are aware of and discouraged by to the point of not even considering submitting their tenders or challenging tender documents.

Case study: Creation, expansion and maintenance of electronic platforms for the healthcare system[17]

Creation, expansion and maintenance of electronic platforms for the healthcare system was the subject of contracts in four public procurement procedures. All four are examples of market division as a form of rigging tenders, and favouring economic operators close to the government.

Despite being open procedures, which implies the greatest possible competition, in all of them, there was only one – and always the same! – group of tenderers, comprised of Telekom Srbija a.d. Beograd, MedIT d.o.o. Beograd and NITES d.o.o. Beograd. In the absence of competition, this group of tenderers was awarded all four contracts, worth around EUR 5,000,000 (before VAT). Moreover, the same group has been the only one to submit tenders and get contracts in all procurement procedures that the Ministry of Health carried out since 2016. All contracts had the same or similar subject matter.[18]

Although the requirements concerning technical characteristics and staff favoured a specific group of tenderers, not a single company tried to challenge them by asking for the clarification of tender documents or protection of rights. In other words, none of the potential tenderers was interested in these procedures despite their rather significant estimated values.

All this indicates market division, i.e. an unspoken understanding between market players that certain companies will not participate in public procurement procedures carried out by specific contracting authorities or in specific geographical areas. Although market division is a form of competition violation, the Commission for the Protection of Competition did not take any action, nor did the other

17 https://cpes.org.rs/izrada-prosirenje-i-odrzavanje-elektronskih-platformi-namenjenih-zdravstvenom-sistemu-2021/

18 The only exception is the public procurement of the national medical platform for prevention and diagnostics in 2016 (JN 07/2016), where there were two more tenderers besides this group of tenderers.

two competent authorities: the Public Procurement Office and State Audit Institution.

Also worth mentioning are close ties between the members of this group of tenderers and the government. Telekom Serbia is a national telecommunications operator, majority-owned by the government and by default close to it. The CEO of NITES (i.e. the Czech branch of the company) is Bojan Kisić, who is the brother of the current Minister for Labour, Employment, Veteran and Social Affairs, Darija Kisić Tepavčević and husband of the former Justice Minister, Nela Kuburović. Although there was no conflict of interest under the public procurement law and the anti-corruption law (it was only after the media wrote about it that the Anticorruption Agency made a statement), the fact that some members of the group are associated with the government cannot be ignored, especially bearing in mind the technical and staff requirements that clearly favoured this group of tenderers.

Rigging procurement procedures and favouring tenderers close to the government result in a lack of competition and a significant outflow of budget funds. Such behaviour harms the taxpayers, causes the decline of public trust in the competitiveness of the procedure and minimises the advantages of a competitive market. When this happens, it is known in advance who will get the contract, rendering the procurement procedure pointless.

Case study: Novi Pazar bypass[19]

This case study looks into the public procurement procedure for the construction of a 2.3 km Novi Pazar bypass, from Varevo to Paralovo. The contracting authority, JP Putevi Srbije [Roads of Serbia], estimated the contract to be worth RSD 166.7 million before VAT. The procedure was conducted after the previous one, with the same subject matter of the contract, conducted five months earlier, was suspended due to lack of interest from potential tenderers.

19 https://cpes.org.rs/obilaznica-oko-novog-pazara-2021

The only company that replied to the invitation to submit a tender was Novi Pazar put d.o.o., with a quote that was over RSD 46 million higher than the estimated value (RSD 212.8 million before VAT). However, since the new law on public procurement allows a contracting authority to award the contract to a tenderer whose price is higher than the estimated contract value, and the tender was acceptable, Novi Pazar put d.o.o. was awarded the contract. The rationale of the decision stated that the tender was acceptable despite the price being higher than the estimated value because, after checking the bill of quantities, the commission concluded that it was, in fact, within the market value.

Although choosing a tender above the estimated value did comply with the law in this particular case, the question is whether the contract value was estimated in accordance with the public procurement law and if the prices offered were really within the valid market values, as was reasoned in the rationale, or whether the contracting authority accepted the tender with a significantly higher price tag than the estimated value because there was no competition?

Last year, Novi Pazar put d.o.o. participated in rather dubious public procurement procedures conducted by another contracting authority, the City of Novi Pazar. On one occasion, this company was awarded a contract in a negotiated procedure (after the open procedure was suspended) after it had reduced the price quoted in the open procedure (which was above the estimated value) by the princely sum of 12 dinars. Despite the tenderer's "generous" concession, according to the decision to amend the contract, the project ultimately cost the contracting authority over 750 thousand dinars more than the original quote. In another open procedure where it was the only tenderer, the same company was awarded a contract for an offer that was a "whopping" 4.52 dinars under the estimated value.

Incidentally, in January 2020, Inkop d.o.o. Ćuprija became the sole owner of Novi Pazar put d.o.o. Inkop d.o.o. is owned by two brothers, Zvonko and Žarko Veselinović, and Milan Radojčić, who is the Vice President of Serb List, a political party close to the government.

All three men have been implicated in several scandals and taken to court for various reasons.

Also interesting is the deadline that the contracting authority stipulated for the completion of works, especially considering that the contractor was to perform the works during the winter months. As the decision on contract award was made in late October and the deadline for the completion of works stipulated in tender documents was 120 days, the contractor would have to clean and prepare the terrain, pave the road, lay concrete on the supporting walls and instal signalisation and other equipment between December and March, when the weather often obstructs (and even prevents) the works. Quite a feat, especially considering that the construction of this bypass has been on and off for the past 15 years and that delaying the procedure or extending the deadline for a few months would not have made much difference.

This case study does not contain any conclusions. In our opinion, simply stating the facts should be enough for you to draw your own conclusions as to whether public procurement procedures in Serbia make sense. Because, even when they are conducted in compliance with the law, they seem to be just a formality: the contract is awarded to the only tenderer that submitted a tender, often at a price significantly higher than the market price. The answer may be “Yes”, “No”, or “Maybe”. Or the standard one “So what?”. It is for you to say.

3. Transparency

When it comes to the principle of transparency, in addition to the lack of it in contract performance, another negative occurrence is a noticeable increase in the number of negotiated procedures without prior publication (because of the alleged special urgency).

Negotiated procedures are the least transparent public procurement procedures, where competition is restricted by default. As stated in the latest report of the European Commission, the proportion of negotiated procedures without prior publication stood at 2.57% of the total value of contracts concluded under the old law on public procurement. This share soared to 23.2% in the second half of 2020 with the entry into force of the new law. This procedure was predominantly used for COVID-related procurement starting from July 2020.[20]

Despite the pandemic, negotiated procedures for the procurement of medical devices were mainly unjustified. The majority of these procedures were carried out when the pandemic was not a sudden circumstance for the contracting authority and the procurement of goods was not so urgent that the contracting authority had to resort to a negotiated procedure. In most cases, there were appropriate alternatives for the goods that were being procured. For example, at the end of last year, healthcare facilities were procuring significant quantities of x-ray devices and CT scans in negotiated procedures, allegedly because of the situation caused by the coronavirus. The real reason was that the Ministry of Health, which had granted the funds

20 https://ec.europa.eu/neighbourhood-enlargement/serbia-report-2021_en

for the procurement of medical equipment, had set short deadlines by which to use them.[21]

At this point, we must refer to the Guidance from the European Commission on using the public procurement framework in an emergency situation related to the COVID-19 crisis, which makes a distinction between urgency and extreme urgency when it comes to choosing a public procurement procedure. In cases of extreme urgency, the Commission recommends an open or a restricted procedure with shortened deadlines for the submission of tenders (this option is also recognised by our law). In cases of extreme urgency, where shortened deadlines cannot be complied with, the Commission recommends a negotiated procedure without prior publication. However, even then, the conditions for the negotiated procedure are to be interpreted restrictively because in this type of procedure contracting authorities derogate from the basic principle of transparency.

In other words, whilst not challenging the justification of conducting negotiated procedures during the pandemic, there is no denying that a significant portion of medical devices purchased during that period could have been acquired under different procurement procedures, ensuring transparency and competition.

However, we must point out that the principle of transparency was not jeopardised just by unreasonable negotiated procedures during the pandemic. The principle of transparency was (and still is) completely suspended in the public procurement of medical devices conducted by the Republic Fund for Health Insurance on behalf and for the account of healthcare facilities during (but also after) the state of emergency.

In fact, in its Conclusion SP 05 No. 00-96/2020-1 of 15/3/2020, designated "strictly confidential", the Government of Serbia declared the information on these procurement procedures "strictly confidential". Because this document is still in force, the legal grounds for this decision remain unknown. It is certain, though, that there are no legal grounds for it under the current legislation (the law on data

21 https://cpes.org.rs/mutislice-ct-scan-2020/?lang=en

confidentiality and the law on public procurement). And how would disclosing information about the cost of vaccines, ventilators or protective masks jeopardise national security?[22]

In this regard, in Serbia Report 2021, in the section on public procurement (and the one on corruption) the European Commission points out that disclosing all procurement information on COVID-19-related procurement on government portals would contribute to enhanced transparency and trust.

Finally, it would be unfair if we did not mention something positive: the new public procurement portal was launched on 1 July 2020. Contracting authorities can use it to share public procurement plans, advertise contracts, publish tender documents and decisions, communicate with economic operators and Public Procurement Office as prescribed by law. Tenderers can use it to access public procurement plans and all the documents concerning procurement procedures and to submit their tenders online. In terms of transparency, the launch of the portal was recognised by the European Commission in its latest Serbia Report.

Despite all the positive features of the new portal, we believe that it can be improved further, primarily in terms of making the information on contract performance public. This is the only way it can fulfil what is probably its main purpose (besides transparency): combat corruption in public procurement.

22 Under the law on data confidentiality (Official Gazette of RS 104/2009), any information of interest to the Republic of Serbia whose disclosure to an unauthorised person would 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 goes on to stipulate that the information may be designated "strictly confidential, to prevent serious damage to the interests of the Republic of Serbia".

4. Green Procurement

By opening Chapter 5 – Public procurement, Serbia has undertaken the obligation to implement the rules on green procurement through laws and regulations, primarily leaning onto the practice of the EU countries. Although this obligation was formally met when the new law on public procurement was adopted, there is a noticeable regression in this area as well.

The new law on Public Procurement stipulates that **during contract performance economic operators must comply with the environmental protection obligations**, i.e. the provisions of the international law governing environmental protection. Also, under the new law on public procurement, a contracting authority must exclude an economic operator from the public procurement procedure if it finds 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 obligations stemming from the provisions of international conventions.

On the other hand, **contracting authorities may incorporate** environmental criteria in the technical specifications of the subject matter of the contract, the selection criteria 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 climate change mitigation) as their contract award criteria.

So, whilst the new law on public procurement lays down the environmental protection obligations for tenderers, there are no such obligations for contracting authorities. Contracting authorities may, but do not have to incorporate environmental criteria in the

technical specifications of the contract subject matter, the selection criteria and the criteria for the most economically advantageous offer.

The reports of the Public Procurement Office for 2019 and 2020 show that the use of criteria for the most economically advantageous offer halved from 10 % in 2019 to 5 % in 2020, whilst the lowest price was used as a selection criterion in 95 % of the procedures. Evidently, green procurement is practically non-existent in Serbia.

In our opinion, the **obligation** for contracting authorities prescribed under the old law in the form of a special public procurement principle, to procure goods, services and works that are environmentally friendly and/or have a minimum impact on the environment and/or are energy efficient and, when justified, to include energy efficiency and the life-cycle cost of the subject matter of the contract in the criteria for the most advantageous offer, was a much better solution. Contracting authorities had the obligation to consider environmental protection and energy efficiency at all times during the planning and implementation stages of public procurement. The fact that contracting authorities mostly ignored this obligation in practice does not diminish its quality. What it may do is indicate that this issue was not raised as often as it should have been in tenderers' requests for the protection of rights.

Provisions governing green procurement in the new law were transposed from the EU Directive on public procurement. However, the alignment of national legislation with that of the EU does not imply an obligation to adopt (or copy) specific provisions of the EU directives verbatim. Harmonisation of legislation primarily means adopting the principles and objectives proclaimed in the directives. As regards specific solutions, the governments should take the real situation in the field as a starting point and adjust those solutions to their needs.

5. Contract Performance Supervision

One of the benchmarks for the temporary closure of the EU accession negotiations for Chapter 5 – Public procurement is for Serbia to put in place adequate administrative and institutional capacity at all levels and take appropriate measures to ensure the proper implementation and enforcement of national legislation in this area 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**".

And yet, in this segment as well, since the opening of Chapter 5 – Public procurement to date, we have seen only regression.

Under the old law on public procurement, which was in force until 1 July 2021, there was some control of contract performance, at least on paper. In addition to the obligation to publish decisions on contract amendments, the transparent use of public funds was achieved, among other things, through the obligation of contracting authorities to submit quarterly reports on the implemented procedures and concluded contracts to the Public Procurement Office. Contracting authorities had to collect and record specific information concerning public procurement procedures and awarded public procurement contracts (i.e. whether the contracts were performed, how long it took, how much money was spent, why they were not performed, etc.) and compile the information into reports for the Public Procurement

Office, which was responsible for the efficient and up-to-date monitoring of public procurement procedures and contract performance.

On the other hand, although it envisages significantly bigger possibilities for amending the contracts than the previous one, the new public procurement law contains only two rather imprecise provisions on the control of contract performance, stipulating that the contracting authority must control the performance of the public procurement contract whilst complying with the requirements set out in the procurement documents and the selected tender, and the ministry responsible for finance is responsible for the supervision of the performance of public procurement contracts. However, as we have seen, the **Ministry of Finance has not started supervising the performance of public procurement contracts even a year and a half after the application of the new law started (and two years after it entered into force**). It did not even pass secondary legislation that would regulate the control in detail.

Perhaps the biggest step back in terms of contract control (if and when it starts) is the fact that supervision, as stated in the response to our request to access information of public importance, will be carried out by the Budget Inspection Department of the Ministry of Finance. This means that public companies, which are the biggest contracting authorities, under the current regulations, will not be controlled because they are not beneficiaries of budget funds. According to the latest report on the work of the State Audit Institution, in 2020, irregularities worth as much as one billion euros[23] were found in the public procurement procedures conducted by three public companies (JP Putevi Srbije [Roads of Serbia], JP Elektroprivreda Srbije [Electric Power Industry of Serbia] and AD Infrastruktura železnice Srbije [Railway Infrastructure of Serbia])! This indicates how serious the problem is, particularly from the aspect of corruption and unlawful arrangements between contracting authorities and tenderers.

23 http://www.parlament.gov.rs/upload/archive/files/cir/pdf/izvestaji/2021/558-21.pdf

Also, if the Budget Inspection Department of the Ministry of Finance performs supervision, who will then control contracts concluded by contracting authorities whose founder is the autonomous province or a local government unit (they are not under the jurisdiction of the Republic Budget Inspection)? Under the budget system law, the budget inspection on the territory of the autonomous province is performed by the budget inspection department of the autonomous province, established by a competent provincial body to inspect, inter alia, direct and indirect beneficiaries of the local government budget. By the same token, a budget inspection department of a local government unit established by a competent executive body of that government unit is responsible for the control of direct and indirect beneficiaries of the budget of that local government unit.

To some extent, the centralisation of budget inspection announced in the draft law on budget inspection answers the question above. But given that this new law proposal will enter into force as late as 1 January 2023, the question is what will happen with the control of public procurement contract performance until then?

Considering all the issues discussed above, our concern is that the competent ministry will not start supervising the performance of public procurement contracts in the foreseeable future, and even if it does, supervision will neither be comprehensive nor efficient. Therefore, and especially considering the non-transparency of this stage of public procurement, there is plenty of room for corruption and illegal arrangements between contracting authorities and bidders during contract performance, rendering the procedure that has been conducted meaningless.

6. Protection of Legality in Public Procurement

Given the current situation in public procurement in Serbia, with rampant corruption, numerous irregularities and violations of the rights of participants in public procurement procedures, the institutions responsible for control, such as the Republic Commission for the Protection of Rights in Public Procurement Procedures, the Public Procurement Office, prosecutor's offices and courts, should play an important role. However, it seems that the established competencies of these supervisory bodies are used very little. Also, even when the irregularities are identified, they are not sanctioned properly. As long as there is no awareness that certain behaviours are prohibited and penalised, we will not be able to talk about establishing an efficient and responsible system for spending public funds, regardless of the form of public spending.

1. Republic Commission for the Protection of Rights in Public Procurement Procedures

The Republic Commission is the second instance appellate body in public procurement procedures. More precisely, it makes final decisions on public procurement procedures, public-private partnerships and concessions when participants in these procedures believe that they have been wronged. This practically means that the disputed public procurement will be conducted as the Republic Commission decides. Even though we do not dispute its importance in public

procurement, there is cause for concern when it comes to how this body operates.

To begin with, the Republic Commission has never held a public oral hearing on any of its cases although this possibility was provided for in the old law on public procurement and still is in the new law. Under the law, both the contracting authority and the applicant may propose an oral hearing if the complexity of the factual or legal situation so requires. In addition, the Republic Commission may decide to hold an oral hearing even if neither the contracting authority nor the applicant has proposed it.

Also, the Republic Commission never hired an expert when deciding on requests for the protection of rights, although this possibility was allowed both in the old law and in the new one. Considering that various goods, services and works can be the subject matter of public contracts, as well as the specificity of areas in which public procurement is conducted, it is clear that the members of the Republic Commission, who are always lawyers, are not competent enough to establish facts in each individual case. The only thing that has been done in this regard is that a list of experts was compiled (2014) and a rulebook on the expert list was adopted (2016) under the law that was in force at the time.[24]

Given that it has never held an oral hearing or hired experts to clarify the facts, it should not be surprising that the Republic Commission does not have a uniform legal practice. More often than not, the Republic Commission decides on a case-by-case basis and makes different decisions even when they concern identical matters.

It should also be pointed out that the quality of decisions of the Republic Commission has been declining over the years. They are often unnecessarily long, with meaningless multiple (verbatim) repetitions of the allegations in the claim and the response to the claim, especially the evidence presented. On the other hand, rationales of decisions and orders for contracting authorities (in those cases where the claim has been upheld) are often incomprehensible and short. All

24 http://kjn.rs/vestaci/

this may be a result of inadequate understanding of the matter on which they are deciding, which is why in certain cases holding oral hearings and hiring experts should be insisted on.

One of the responsibilities of the Republic Commission (also prescribed under the old law) is to adopt binding legal positions regarding the application of public procurement regulations. The purpose of principled positions is to facilitate the application of the law in situations where there are concerns about the application of certain articles of the law in practice. However, the last time the Republic Commission adopted a principled legal position was in April 2014,[25] which means that for 7.5 years, the Republic Commission did not use this mechanism despite there the concerns about the application of certain provisions of the law (e.g. right of action, additional requirements, etc.). Surprisingly, the Republic Commission did not use this instrument when the application of the new law began, i.e. when dilemmas regarding the application of the law are most common.

Finally, the new law on public procurement has abolished civic control of this extremely important public procurement body. Under the old law on public procurement, contracting authorities, tenderers and other stakeholders who believed that their rights were seriously violated in the procedure before the Republic Commission were able to submit petitions to the Committee on Finance, Republic Budget and Control of Public Spending of the National Assembly, and the committee would request that the Republic Commission submit a report on each case. Although the committee has never considered complaints concerning the work of the Republic Commission, the decision to abolish this type of control of the work of the Republic Commission under the new law is certainly a step back when it comes to regulating the protection of rights in public procurement procedures.

25 http://kjn.rs/kategorija/nacelni-pravni-stavovi-zjn-sl-glasnik -124-12-14-15-68-15/

2. Administrative Court

Although the decision of the Republic Commission in the procedure for the protection of rights is final, a dissatisfied participant in a public procurement procedure may initiate administrative action. However, given that an administrative action usually takes years to resolve, and that it does not delay the execution of the decision of the Republic Commission, it is not the best way to deal with the illegalities in the procedures for the protection of rights. Thus, when the new law on public procurement was in the adoption procedure, it was proposed that the issue of examining the legality of the decision of the Republic Commission be regulated more precisely, but it was not accepted. So, the adoption of the new law on public procurement did not bring any changes or improvements regarding the protection of rights before the Administrative Court. Moreover, the general provisions of the law on administrative action do not fully apply to the control of decisions of the Republic Commission or public procurement procedure, which further complicates effective judicial control of public procurement.

As regards the need to make judicial protection in public procurement more efficient and effective, first of all, it is necessary to set a shorter deadline for the Administrative Court to make a decision (ruling) in administrative litigations concerning public procurement procedures. This is particularly important given the specific nature of public procurement procedures, their speedy implementation and characteristic urgency of action, as well as tight deadlines under which the Republic Commission needs to decide on a contested public procurement.

The role of the Administrative Court deciding on claims against the Republic Commission needs to be strengthened in the cases where the annulment of the decision of the Republic Commission would be justified. This could be done by prescribing an obligation for the Administrative Court to make final decisions on the breach of rights claims (deciding in a "dispute of full jurisdiction") rather than return the cases to the Republic Commission for reconsideration. This is because after reconsidering, the Republic Commission usually makes the

same decision, rendering the already lengthy administrative litigation completely pointless.

For the sake of comparison, the Croatian Public Procurement Act stipulates that whenever it annuls the decision of the State Commission (in Serbia, the Republic Commission), the court will be acting in a dispute of full jurisdiction, i.e. it will also decide on the breach of rights claim (in Serbia, request for the protection of rights). There is also a short deadline for the Administrative Court to decide in administrative litigations concerning public procurement, as well as the mandatory disclosure of decisions of the Administrative Court on the State Commission' website. Article 434 of the law stipulates the following:

- No appeal is allowed against the decision of the State Commission, but administrative action may be initiated before the High Administrative Court of the Republic of Croatia.
- The administrative decision must be made within 30 days from the day of lodging a claim.
- If the High Administrative Court of the Republic of Croatia annuls the decision of the State Commission, it will also decide on the claim concerning the public procurement procedure.
- The State Commission must publish the administrative decision on its website without data anonymisation.

For the power to act in a dispute of full jurisdiction to be effective, it is important that the Administrative Court judges are specialised in public procurement and that they collaborate with the Republic Commission.

The need to strengthen the capacity of the Administrative Court in the area of public procurement has been reiterated in the European Commission's reports since 2015. That latest one, for 2021, reads:

"Due to limited specialisation and training, the Administrative Court's capacity to deal with the complexity, diversity, and overall quantity of cases and lengthy legal proceedings remains weak. Cooperation between the PPO and the Republic Commission with the

Administrative Court on the exchange of knowledge and information remains to be strengthened."

The issue of the right of action when it comes to initiating administrative action is no less important. In the current practice of the Administrative Court, contracting authorities do not have a right of action for initiation of administrative litigation, i.e. they cannot challenge the legality of the decision of the Republic Commission – only tenderers can. In our opinion, a right of action should be granted to the representatives of the public interest, either contracting authorities or entities above contracting authorities in the hierarchy (for example, the founder of the public company or a ministry, where the contracting authority is a lower-ranking government body, etc.).

3. Public Procurement Office

The new law on public procurement authorises the Public Procurement Office to monitor the application of public procurement regulations.

Article 179, paragraph 1 of the law stipulates that the Office must monitor the implementation of public procurement regulations and compile an annual monitoring report, as well as submit a request to initiate misdemeanour proceedings for violations of this law and a request for protection of rights, and initiate the implementation of other appropriate procedures before the competent authorities when, based on monitoring, it discovers irregularities in the application of public procurement regulations.

Article 180 of the law regulates monitoring rules. It stipulates that the Office must conduct monitoring to prevent, detect and eliminate irregularities that may occur or have occurred in the application of the law. It further stipulates that the monitoring procedure must be carried out according to the annual monitoring plan adopted by the Office by the end of the current year for the following year, ex officio when conducting the negotiated procedure without prior publication in the case where only a specific economic operator can deliver goods, provide services or perform works, i.e. in case of extreme urgency, as

well as when following up on the information received from a legal or natural person, state administration body, provincial body, local government unit or other authorities.

The Office has adopted the Rulebook on the procedure for monitoring the application of regulations on public procurement (Official Gazette of RS 93/2020), which entered into force on 1/7/2020.

So, the Public Procurement Office has the legal authority and could be far more efficient in detecting and reporting irregularities in public procurement. Most criticisms of its work concerned its inefficiency before the new law on public procurement was adopted.

If we compare the number of procurement procedures that were subjected to monitoring with the total number of procurement procedures in 2020, we will see that only one out of 400 procedures was monitored in 2020.[26] This is according to the Monitoring Report of 31/3/2021 (the first one since the application of the new law started),[27] in which the Office reports on the activities it undertook to prevent irregularities in public procurement procedures and combat corruption.

Even though the Monitoring Report is somewhat unique because it covers the period during which the old law was still in force and the period when the application of the new law began, we believe that the scope of monitoring should have been much larger and that the Office, as one of the most important institutions in public procurement, could (and should) have done much more to combat irregularities and corruption in public procurement, especially considering its modest results before 2020. In our opinion, the Rulebook on the monitoring procedure must stipulate deadlines for the Office, the minimum scope of monitoring and the number of public procurement procedures that will be monitored, which it currently does not.

26 *Public procurement and public-private partnerships – between solid regulations and bad practice*, Transparency Serbia, 2021.

27 http://www.parlament.gov.rs/upload/archive/files/cir/pdf/izvestaji/2021/564-21.pdf

7. Public Procurement Fraud as a Criminal Offence

1. Key elements of the substance of a criminal offence

Public procurement fraud was introduced as a criminal offence in Serbia's legal system with the amendments of the Criminal Code (Official Gazette of RS 121/12 of 24/12/2012), which have been applicable since 1/1/2013. In Chapter 22, under the group of offences against the economy, article 234a was introduced. According to the legislator, it was supposed to protect the principle of legality of public procurement, that is, to criminalise behaviours that seriously violate public procurement procedure; all of that with the scope to prevent illegal influence on the decisions of contracting authorities and damage to the public funds.

In the amended Criminal Code (Official Gazette of RS 94/16 of 24/11/2016), which has been applied since 1/3/2018 and is still in force, the article on procurement fraud was renumbered to 228. However, the substance of the criminal offence has undergone only minor changes, such as included a list of tenderers' members of staff that are in a position to commit this criminal offence.

The justification of introducing a criminal offence specifically related to public procurement was initially disputed in scientific and professional circles. They argued that it was redundant, that legal protection could be ensured under the existing provisions on criminal offences (receiving and giving bribes, political influence, abuse of power), and that adding yet another criminal offence would add to

the hypertrophy of criminal law in Serbia. However, after it has been in application for a few years, and judging by the experience of other countries, there is no doubt that because of the uniqueness and complexity of the subject matter of public contracts, and because of the different forms of crime related to public procurement, this criminal offence must exist. In this sense, legal intervention is justified whenever certain behaviours in society take over and disrupt the essence of the legal order. Many studies agree that public procurement is a state activity most susceptible to corruption[28]. This is because public and private sectors interact most during public procurement procedures and this provides multiple opportunities for actors in both sectors to redirect public funds for the benefit of individuals.[29]

When analysing the legal aspects of this criminal offence and the effects of its processing, it is important to always keep in mind that the goal of criminalising actions against the economy is to protect the functioning of the economic system and prevent the abuse of public trust in the economic system and/or specific institutions.[30]

However, judging by the current legal practices of public prosecutor's offices and courts of law, no significant results have been achieved in prosecuting procurement fraud as a criminal offence. Proceedings that have been initiated and finalised are few and far between. Despite the general impression of the actors in the public procurement system that this is a widespread criminal offence, it is fair to say that the processing of these cases has been sporadic. As a result, the trust in the work of judicial bodies concerning the control of the legality of public procurement has been waning. The adoption of the new law on public procurement did not help improve the efficacy of these proceedings. In 2020, for example, 89 persons were

28 *Preventing Corruption in Public Procurement*, OECD, 2016.

29 Matić Bošković, M. 2017. "Krivično delo zloupotreba u javnim nabavkama – izazovi u primeni", *Privredna krivična dela*, ed. Ivana Stevanović, Vladimir Čolović, Institut za kriminološka i sociološka istraživanja, Institut za uporedno pravo, Belgrade, pp. 215–229.

30 Prof. dr Stojanović, Z. 2007. "Komentar Krivičnog zakonika", *Službeni glasnik*, pp. 535.

reported for allegedly committing a criminal offence of procurement fraud, which is 18 % less than in 2019. In the same year, 45 claims were rejected (a quarter of those that were processed). There were nearly as many indictments as in 2019 (24 and 25, respectively) and 21 convictions (of which as many as 20 were suspended sentences), whilst there were 10 convictions the year before. And, although this is a proprietary crime, the measure of seizure of illegal gains has never been imposed.[31]

There are two basic forms of the criminal offence of procurement fraud and a more serious one. The law gives quite broad definitions of all three.

A basic form of procurement fraud is when a tenderer submits a tender containing false information relevant to the public procurement or when it makes illegal arrangements with other tenderers or when it undertakes another illegal action to influence the decision of the contracting authority. This offence may be committed by any person who participates in a public procurement procedure.

Another basic form of procurement fraud is when a responsible person or official of the contracting authority, by using their position of power or overstepping their authority or failing to perform their duties, violates public procurement law or other regulations and misappropriates public funds.

A more serious offence is when the two basic forms of offence are committed in a public procurement procedure valued over RSD 150 million.

The two basic offences carry a penalty of six months to five years in prison, whilst a more serious offence carries a harsher penalty spanning from one to ten years in prison.

Article 228 paragraph 4 of the Criminal Code allows for the possibility of acquitting the tenderer (the optional basis for acquittal) that voluntarily confesses that its tender was based on false information or illegal agreement with other tenderers, or that they have undertaken

31 *Public procurement and public-private partnerships – between solid regulations and bad practice*, Transparency Serbia, 2021.

other illegal actions to influence the decision-making of the contracting authority before awarding the contract. This provision is not in itself debatable – it applies to many other criminal offences in the Criminal Code – but it is rarely applied in practice.

2. Legal aspects of the substance of a criminal offence

To criminalise the various behaviours of contracting authorities and tenderers, the legislator has given too broad a legal definition of the act of perpetrating a criminal offence, creating a whole range of legal issues and dilemmas concerning the work of public prosecutor's offices and courts of law.

First, the inadequate definition of the act of perpetrating a criminal offence is contrary to one of the basic principles of criminal law: that criminal offences must be defined as precisely as possible (*nulla poena sine certa*) and is particularly unacceptable when the criminal offence relates to legal areas such as public procurement, which are specific, complex and regulated in detail.

In fact, in practice, it is often unclear what should be classified as an act of perpetrating a criminal offence and what facts need to be established during the proceedings, giving plenty of opportunity for inconsistent legal practices and arbitrary actions of government authorities.

Simply put, the consequence of an overly broad and vague legal definition of the act of perpetrating a criminal offence is that many procurement irregularities of varying degrees and significance may be deemed an act of perpetrating a criminal offence. At the same time, however, a valid explanation makes it easy to claim the opposite: that no criminal act has been committed. This creates legal uncertainty for the tenderer but also for responsible persons and officials in the contracting authority.

As regards the first definition of a basic form of procurement fraud, it remains unclear what exactly constitutes false information: is it any inaccuracy in the tender or does it need to have some weight?

Thus, it is up to the prosecutor's offices and courts of law to decide whether an inaccurate piece of information has sufficient weight and legal significance to justify legal intervention. This is not an easy task for judicial office holders who do not deal with public procurement matters on daily basis. Neither the Criminal Code nor the law on public procurement provide an appropriate definition of the term "false information", and the fact that the law on public procurement (Article 82) uses a different term, "untruthful information", makes matters even worse.

In addition, the wording in the Criminal Code that making "illegal arrangements with other tenderers" constitutes a criminal offence is also debatable because the law on public procurement does not stipulate what constitutes a legal arrangement. The Criminal Code does not define specific or characteristic arrangements between the tenderers in connection with the submission of tenders, which is why public prosecutor's offices often misdirect the evidentiary hearing. In this regard, the judges of the Supreme Court of Cassation have pointed out in several professional publications[32] that the problem is even more pronounced if the defendant has been charged with making arrangements in a negotiated procedure (provided for under the public procurement law) because the contracting authority is expected to discuss terms with one or more tenderers in a negotiated procedure, and they certainly reach some sort of arrangement.

In the absence of a precise legal provision, when interpreting what exactly constitutes an illegal arrangement, a useful guideline (but not a source of law) for public prosecutor's offices and courts of law could be the Instruction of the Commission for Protection of Competition for detecting bid-rigging in public procurement (2011). It provides definitions of the terminology and explains the forms of rigged tenders resulting from an arrangement between the tenderers, such as a simulated or fictitious tender, refraining from submitting bids, rotating bids, and market allocation schemes.

32 For example, The Supreme Court of Cassation Newsletter 2/2015.

The act of perpetrating a basic procurement fraud is also defined as "undertaking other illegal actions to influence the decision of the contracting authority", which, in our opinion, is a rather vague definition. Using the notion of illegality to define the substance of a criminal offence is nomothetically incorrect and conceptually confusing because illegality is immanent to the existence of the crime itself; in other words, under the Criminal Code, it is an obligatory element for a crime to exist at all. In addition, it is unclear what can be deemed an illegal action and which of the two laws takes precedence. The legal definition of an act of perpetrating a criminal offence leads to the conclusion that any deviation from the rules governing public procurement (including secondary legislation) may constitute an act of perpetrating a criminal offence, which is certainly not a good parameter for legal intervention. It seems that the problem could be solved if under the substance of a criminal offence (*exempli causa* – for example) the legislator at least listed characteristic actions stipulated in the law on public procurement or referenced the provisions of the public procurement law relating to the protection of the integrity of public procurement, and specified that illegal actions undertaken to influence the decisions of the contracting authority included a person's direct or indirect opening the prospect of having or giving the benefit, accessing confidential information in the stage of preparation of tender documents, taking part in public procurement planning and preparation of tender documents and then participating, or having persons associated to them participate in that same procurement procedure as a tenderer.

This form of a criminal offence can be committed only with premeditation. The benefit itself is not necessary – the crime has been committed when a tender has been submitted or an arrangement that does not need to have a result (to be realised) has been made, with the intent (as a special subjective feature of the act) to influence the decision of the contracting authority. This may be the only element of the substance of a criminal offence that gives some direction to participants in criminal proceedings as to how to tell the difference

between a situation where a tenderer has made an unintentional mistake when preparing a tender and an act of perpetrating a crime.

In the practice of public prosecutor's offices and courts of law, an even bigger issue is another form of procurement fraud which is defined as being committed by a responsible person or official who "by using their position of power, overstepping their authority or failing to perform their duties, violates the law or other regulations on public procurement" without specifying what constitutes these violations of laws and regulations. This practically means that a responsible person and/or official has committed a crime whenever there is an irregularity in the procedure, which is an unjustified broadening of the crime zone.

We cannot help but notice that the wording of the substance of a criminal offence is similar to the provision governing misconduct in public office, Article 227 of the Criminal Code, which is controversial in itself and has been criticised by the scientific and professional communities for many years. However, it still exists in the legal system of the Republic of Serbia as an offence the substance of which is both general and subsidiary, and whenever it is not possible to find elements of another special crime, it is categorised as misconduct in public office. This is why it is both illogical and completely unnecessary to list the same actions ("using their position of power or overstepping their authority or failing to perform their duties") for such a specific and special offence as procurement fraud. What is the purpose of stipulating a special criminal offence if it is already prescribed, in the same way, as misconduct in public office which is a subsidiary criminal offence?

The definition of a more serious procurement fraud does not make sense either: the value of the public procurement in connection with which the crime has been committed must exceed a stipulated threshold (RSD 150 million), whilst the definition of a basic procurement fraud requires misuse of public funds. It would make more sense if an offence was deemed serious based on the amount of misappropriated public funds rather than the value of the procurement itself, which may be completely irrelevant in criminal proceedings. The

seriousness of the consequence should be the factor that determines the gravity of a crime rather than the estimated value of the procurement.

Both forms of procurement fraud are inherent to the substance of a criminal offence. Since a criminal offence is stipulated under the blanket (reference) rule, the Criminal Code lays down the characteristics of the criminal offence only partially, whilst one needs to look for other elements of the substance of a criminal offence in other enactments, such as the law and regulations governing public procurement, whose provisions may be violated by both tenderers and contracting authorities. Thus, in the first definition of procurement fraud, the blanket rule is reflected in the wording "makes illegal arrangements", and in the second one in the wording "violates public procurement law or other regulations". The Criminal Code does not mention the violation of specific provisions of the law on public procurement, nor does the law on public procurement stipulate the offences that may be the subject of criminal proceedings.

It remains unclear why the legislator did not explicitly stipulate at least some of the most common and gross violations of the law on public procurement that unequivocally constitute a criminal offence, such as modifying tender documents to fit a particular tenderer. In practice, these would be situations where the contracting authority, in the description of technical characteristics practically "draws" a product that only a specific tenderer can offer, thus preventing its competitors from submitting acceptable tenders and participating in the public procurement procedure on equal terms.

3. Detecting and proving a criminal offence

Considering that both the contracting authority and the tenderer have an interest in keeping silent about fraudulent activities, the dark figure of crime (the number of committed but undiscovered crimes) in public procurement is quite high. Also, the members of staff responsible for public procurement at contracting authorities and their counterparts working for tenderers, whose employment is at the mercy

of those holding higher positions in the hierarchy, are not motivated to report criminal activities and often find themselves in the role of supporters or helpers because, due to the nature of their jobs, they have the opportunity to influence decisions in public procurement procedures, and they are constantly under the pressure of corruption.

The police and public prosecutor's offices usually receive information on alleged criminal offences from dissatisfied participants in public procurement procedures, which is why so many reports of criminal offences turn out to be false allegations (they are a result of dissatisfaction with the outcome of the procedure) or they are belated, i.e. lodged when it was too late to gather evidence. Mutual reporting of competitors in the public procurement procedure must be subjected to critical, fast and comprehensive consideration by the authorities responsible for criminal proceedings because a conviction for procurement fraud under the public procurement law carries disqualification from participation in future public procurement procedures.

We must point out that Article 21 of the law governing organisation and competence of state bodies in combating organised crime, terrorism and corruption (Official Gazette of RS 94/16 and 87/18), whose application started on 1 March 2018, allows for the **establishment of task forces** composed of the representatives of public prosecutor's offices and various state bodies (including the Public Procurement Office and the State Audit Institution), whose task is to detect and prosecute corruption, including in the area of public procurement. The law also stipulates that these state bodies may appoint officers to liaise with the public prosecutor's offices. These are procedural institutes whose objective is to build the capacity of public prosecutor's offices, both in terms of manpower and the know-how, given the complexity and specificity of this type of economic crime. It remains to be seen whether these mechanisms will be effective in practice, given that they have hardly ever been used since the law entered into force.

The reports of the State Audit Institution, and especially the decisions of the Republic Commission for the Protection of Rights in Public Procurement Procedures in the protection of rights procedures,

may be important in detecting and proving procurement fraud because irregularities in public procurement procedures are usually identified in the decisions of these institutions. For example, **in preliminary investigations and inquests, an indication of procurement fraud may be found in the decisions of the Republic Commission for Protection of Rights to annul public procurement procedures because tender documents were discriminatory, because of the contested proof of technical properties of the goods that are being procured, because public procurement procedures were conducted contrary to the principle of transparency, etc. Although these decisions are available to the public on the Public Procurement Portal and the website of the Republic Commission, there is nothing to suggest, for the time being, that the police and public prosecutor's offices have been following and analysing them.**

Given that the main characteristics of corruption (and therefore procurement fraud) are uttermost covertness, dynamism, adaptability to new conditions, specialisation and professionalism of perpetrators, prevalence, selfish and unethical motives and a multitude of manifestations,[33] it is certainly justified that the Code of Criminal Procedure allows special techniques of evidence gathering,[34] with secret or stealthy listening to the communications of others (colloquially, eavesdropping) being the overriding one. It is an effective way of obtaining evidence by monitoring communication carried out through letters, telephone, email, fax and other means and using it as evidence in criminal proceedings, provided that there is no other way or that it is much harder to gather potential evidence using alternative ways.[35] Also, for evidence gathering to take place, it needs to be approved by a pre-trial judge, making sure that the invasive measures are taken

33 Đukić, S. "Analiza krivičnih dela privrednog kriminaliteta u Srbiji i delikti korupcije u privredi", *Vojno delo*, No. 5/2016, pp. 174–176.

34 Gathering evidence is regulated under Articles 161-187 of the criminal proceedings code, and they include: covert monitoring of targets' conversations, movements and other activities, covert filming/photographing, simulated works, obtaining data from digital devices, controlled delivery and undercover agents.

35 Article 161 paragraph 1 of the Code of Criminal Procedure.

legally and with as few negative effects as possible on human rights and freedoms.

The law governing the organisation and competence of state bodies in the suppression of organised crime, terrorism and corruption has brought important innovations regarding the competence and specialisation of public prosecutor's offices and courts, by stipulating that corruption (including procurement fraud) should be the jurisdiction of the Prosecutor's Office for Organised Crime (if there are elements of organised crime), or special anti-corruption departments of the higher public prosecutor's offices and higher courts in Belgrade, Novi Sad, Kraljevo and Niš. According to the Ministry of Justice, judges and public prosecutors assigned to these departments have demonstrated exceptional moral integrity, have taken special courses and are capable of conducting efficient and fair criminal proceedings.

As regards the public prosecutor's offices responsible for preliminary investigation and inquest, one can observe **predictable, routine work, focusing only on certain types of irregularities in public procurement procedures, concentrating mainly on the contracting authorities' failure to exercise their powers and duties (omissions) and the tenderers' use of false information in tenders**. So far, few criminal proceedings concerning more complex forms of offences such as fixing the outcome of a public procurement procedure requiring more intensive and complicated evidence gathering have been initiated and completed. This is because deputy public prosecutors are being assigned a lot more cases than they can handle (especially in the Higher Public Prosecutor's Office in Belgrade) but also due to the lack of training in the field of public procurement.

4. Comparative legal experience

To get a comprehensive understanding of these issues, it is necessary to analyse as objectively as possible legislative solutions and experiences of countries with the same challenges and similar legal traditions as Serbia.

The Croatian Penal Code recognises two criminal offences related to public procurement: Article 254 regulates procurement fraud, whilst Article 293 regulates illegal favouritism. The former is in the chapter on crimes against the economy, and the latter is in the chapter on crimes against the official duty, which makes sense.

Procurement fraud is a criminal offence committed by a tenderer who submits a tender based on a prohibited arrangement between economic operators to have it accepted by the contracting authority. Although at first glance it resembles a provision in the Serbian Criminal Code, a closer analysis shows that the Croatian wording of the act of perpetrating is simple and clear, with a narrower and more appropriate crime zone, without delving into the meaning of the term "false information" that the tender is based on or the ambiguous wording "other illegal actions in the public procurement procedure". In Serbia, an arrangement between the participants is in itself a crime, perpetrated the moment the participants start making arrangements, i.e. even in a situation where a tender has not been submitted yet, or in a situation where the arrangement has no implications on the public procurement. In Croatia, however, the tender that has resulted from the arrangement has to be submitted. Furthermore, the definition of the substance of the crime is too broad in the Serbian Criminal Code as there was no effort to achieve the purpose of the provision by stipulating what a crime against the economy is.

Illegal favouritism is a criminal offence committed by an official or responsible person who, based on an arrangement, favours a particular economic operator by adjusting the conditions of public procurement, or awards the contract to a tenderer whose tender does not comply with tender documents. Besides being specific, the definition of the act of perpetrating also reflects some of the most serious violations of public procurement regulations, which undoubtedly deserve to be deemed a criminal offence.

Slovenia, however, has a completely different model of legal protection when it comes to public procurement. Procurement fraud is not defined as a special criminal offence, but a rational use of public funds in public procurement procedures is legally protected under

the provisions governing misuse of public funds, which is a criminal offence. More specifically, this refers to a public servant or another authorised person or a beneficiary of public funds who knowingly violates regulations when procuring, acquiring, managing or spending such funds, fails to perform appropriate control causing illegal or wasteful use of public funds although they are aware (or had to be and could have been aware) that such actions can cause serious material damage, which they do. We assume that the adoption of this solution was based on the expectation that legality in public procurement will be protected primarily by other laws, i.e. by an independent, autonomous body responsible for public procurement control, and that legal intervention under the Criminal Code will be necessary in exceptional cases only.

8. Public Procurement Misdemeanours, Practical Issues and Relationship with Procurement Fraud as a Criminal Offence

Under the old law on public procurement (2012), the Republic Commission for the Protection of Rights in Public Procurement Procedures made first instance decisions on misdemeanours in public procurement, whereas with the adoption of the new law on public procurement (2019), the first instance misdemeanour proceedings were assigned to misdemeanour courts. More precisely, Article 246 of the new public procurement law stipulates that Article 87 paragraph 2 item 1 of the law on misdemeanours (Official Gazette of RS 65/13, 13/16, 98/16 CC),[36] will no longer apply, and other provisions of the law have been amended accordingly.

The old solution where the Republic Commission acted in the first instance in misdemeanour proceedings was not legally viable because the Republic Commission both initiated and decided in the proceedings, causing the processing stages in individual cases to catch up with one another. Also, as an administrative body, it could not implement measures under the law on misdemeanours which due to their legal

36 These provisions stipulated that the Republic Commission would be in charge of misdemeanour proceedings in the first instance in line with the law governing public procurement.

nature were reserved exclusively for the court, such as substituting a monetary sanction with a prison sentence, ordering attendance, etc. The legislator has therefore decided to eliminate these problems from the new law and to assign the first instance misdemeanour proceedings to misdemeanour courts.

The new law on public procurement authorises the Public Procurement Office and the Republic Commission to submit requests for initiating misdemeanour proceedings relating to public procurement, provided that the proceedings are initiated when they find out and gather evidence about a misdemeanour during the performance of other duties in their jurisdiction. So, a proceeding can be initiated before a misdemeanour court only if its legality has been examined first, i.e. after the Public Procurement Office has conducted a monitoring procedure[37] and the Republic Commission has conducted a procedure for the protection of rights.[38]

Articles 236 (misdemeanours of contracting authorities) and 237 (misdemeanours of tenderers) of the new law on public procurement **stipulate 18 misdemeanours for contracting authorities and 4 for tenderers**. These are well-structured legal standards that use **blanket (reference) rules**, criminalising behaviours contrary to the specific provisions of the public procurement law. However, in some cases, it is not always easy to tell if certain behaviour is illegal, given the complexity of violated legal rules. Violations related to the award, performance and subsequent amendments to public procurement contracts seem to be most challenging to establish. This is why, when interpreting these provisions, it is necessary to keep in mind the spirit of the law and the objectives of public procurement contracts.[39]

Under the new law, most misdemeanours are, **by nature, omissions**, i.e. a participant in the procurement has failed to act. Experience has shown that they are usually **unpremeditated**, where smaller

37 Article 179 paragraph 1 item 3 of the law on public procurement (2019).

38 Article 234 paragraph 1 of the law on public procurement (2019).

39 Ristanović, O., Varinac, S., Vladisavljević, F. 2021. Priručnik – Prekršaji u oblasti javnih nabavki, Belgrade.

clients (primary schools, cultural institutions, etc.), having limited operational and professional capacities, fail to take due action as a result of mistake rather than intent.

As regards misdemeanours of contracting authorities, the contracting authority itself (legal person) may be fined from RSD 100,000.00 to 1,000,000.00, whilst the responsible person of the contracting authority may be fined from RSD 30,000.00 to 80,000.00. Article 50 of the law also stipulates a special category of persons who may be liable for misdemeanours: **the representatives of the contracting authority who participate in the public procurement procedure contrary to the provisions of the law on conflict of interest**. A conflict of interest is a situation where any member of staff in the contracting authority who is involved in a public procurement procedure or may influence its outcome and has an (in) direct financial, economic or other private interest that may affect their impartiality in the procedure. Article 50 also stipulates that such members of staff have to exclude themselves from the public procurement procedure if at any stage of that procedure it becomes known that there is a conflict of interest. This practically means that a member of staff in a contracting authority (which can be anyone, e.g. a member of its public procurement commission) can be held liable if there is a conflict of interest and they do not exclude themselves from the public procurement procedure.

Under the provisions of the new law on public procurement procedure, a legal person (economic operator), an entrepreneur and a natural person acting as a tenderer, candidate or subcontractor are responsible for misdemeanours of tenderers. A responsible person in the tenderer, candidate and subcontractor is also deemed liable for a misdemeanour.

Article 237 paragraph 1 items 2 and 4 of the new law allow for a **special protective measure – a ban on participation in public procurement procedures** for a maximum of two years. The law also stipulates that the court that has imposed this protective measure must inform the Public Procurement Office within three working days from the day the judgment enters into force, stating the full name and

registration number of the tenderer, candidate or subcontractor and the date on which the ban expires. The Public Procurement Office then publishes this information on its website. This protective measure does not affect all economic operators in the same way because some of them participate in many public procurement procedures as tenderers or candidates whilst others participate rarely or indirectly.

Tenderers' misdemeanours are often reported by competing companies and dissatisfied participants in public procurement procedures, and this can often take the form of unfair competition (e.g. filing false reports to have a competitor banned from participating in a public procurement procedure). It is therefore important that state bodies consider them with particular care and attention to avoid becoming a party to a competition war.

The statute of limitations for initiating and conducting proceedings begins three years after the day the misdemeanour was committed, whilst the absolute statute of limitations starts **six years** after the event. Given that the old law on public procurement laid down the same statutes of limitations, cases transferred from the Republic Commission to the judges in misdemeanour courts are likely to be about misdemeanours whose statute of limitations may become effective soon after the takeover.

Under the old law on public procurement, some actions were just a basis for the Republic Commission to exercise its special power, e.g. impose a fine as an administrative measure, whilst the new law classifies them as misdemeanours. For example, if a contracting authority failed to comply with a decision of the Republic Commission to submit a report on the implementation of the decision of the Republic Commission, the Republic Commission would just fine the contracting authority, whilst under the new law on public procurement, failing to submit the report is deemed a misdemeanour (Article 236 paragraph 1 items 17 and 18).[40]

40 Ristanović, O., Varinac, S., Vladisavljević, F. 2021. Priručnik – Prekršaji u oblasti javnih nabavki, Belgrade.

It should be pointed out that the gravest violation of legal provisions deemed a misdemeanour under the new law (Article 234 paragraph 1 item 2) is committed by a contracting authority that awards a public procurement contract without conducting a public procurement procedure. However, the substance of a criminal offence of public procurement fraud criminalises various actions that can be committed only if the public procurement procedure is conducted. It seems that determining the gravity of the breach of law, i.e. determining whether something is a misdemeanour or a criminal offence, was not done properly because completely ignoring the law should be a criminal offence. When it comes to legal significance, awarding a public procurement contract without conducting a public procurement procedure is certainly the most serious form of violation of the legality of public procurement.[41]

1. The plurality of ineffective legal protection

Being a judge in misdemeanour cases related to public procurement must be challenging because of the number and variety of misdemeanours and the fact that there is a plurality of mechanisms protecting the rule of law in this area. In addition to legal protection, the law on public procurement provides protection in special administrative procedures of protection of rights before the Republic Commission where it exercises its special powers (imposes fines as administrative measures, annuls public procurement contracts, submits reports and documents), in criminal proceedings before the competent public prosecutor's offices and courts (procurement fraud under Article 223 of the Criminal Code), in competition protection procedures before the Commission for Competition Protection, in audit procedures before the State Audit Institution and monitoring procedures of the Public Procurement Office. This obvious effort of the legislator to strengthen the obligation to respect the law in multiple ways ("hypertrophy

41 Ristanović, O., Varinac, S., Vladisavljević, F. 2021. Priručnik – Prekršaji u oblasti javnih nabavki, Belgrade.

of legal protection") may result in several state bodies dealing with the same or different provisions of the law on public procurement in the same procurement procedure. In any case, legal protection is not disputable from the aspect of crime and policy, and it is present in comparative legal systems.

However, despite numerous mechanisms of legal protection, concrete results in the implementation of public procurement in accordance with the law are lacking in Serbia. **This is manifested in the fact that the number of initiated and conducted procedures concerning the protection of rights before the Republic Commission is decreasing, that the Republic Commission and the Public Procurement Office have barely initiated any misdemeanour proceedings since the new law on public procurement entered into force and that very few criminal proceedings concerning procurement fraud have been initiated and completed in the same period. All this leads to the conclusion that the citizens and economic operators' trust in state bodies is on the decline, as well as that state bodies do not do their job, which is why the fight against corruption in public procurement is only declarative.**

2. Conclusions and recommendations

Despite the significant shortcomings of the criminal law and regulations that were highlighted in the previous issue of the Alarm Report, it does not mean that special anti-corruption departments of public prosecutor's offices and courts of law cannot act and exercise their powers. This is especially true if we bear in mind that the solutions and institutes of criminal law are not used because of the inertia of the system and limited human and technical capacities.

However, to improve the efficiency of public prosecutor's offices and courts of law and create conditions for legal provisions protecting the legality of public procurement procedures and trust in the economic system to become a real and serious threat to potential perpetrators of offences in public procurement and achieve prevention in general, and for the substance of the criminal offence of procurement

fraud to be prescribed in line with the principles of criminal law, it is necessary to do the following:

1) **Amend Article 228 of the Criminal Code to have a clearer, more specific act of committing a criminal offence by narrowing down the act of perpetration, defining the terminology used to stipulate the substance of the criminal offence by realistically determining the criminal zone that would include violations of specific public procurement regulations – all with a view to eliminating existing dilemmas and illogicalities.** At the same time, the amendments would ensure that the criminal offence of procurement fraud is in line with the rights guaranteed under the Constitution of the Republic of Serbia, primarily the right to a fair trial under Article 32 of the Constitution and the right to legal certainty under Article 34, and that it is in line with international standards concerning criminal law. The amendments should be made in line with the recommendations of the Alarm Report. For the criminal law intervention to maintain its rigorousness and importance, it must not be prescribed for any omission in the public procurement procedure that is difficult to determine, but for a clearly defined action that represents a grave violation of regulations. **Also, as regards possible amendments to the criminal and misdemeanour provisions, the inadequately stipulated gravity of the violation of regulations should be eliminated, and failure to apply the law on public procurement (failure to implement a public procurement procedure) should be deemed as a criminal offence, not a misdemeanour.**
2) **Ensure better coordination between public prosecutor's offices and state bodies authorised to act in public procurement matters (Public Procurement Office, Republic Commission for Protection of Rights in Public Procurement Procedures, State Audit Institution, Commission for Protection of Competition, Budget Inspection). This needs to be done through liaison officers and task forces provided for in the law on the**

organisation and competence of state bodies in the suppression of organised crime, terrorism and corruption, as well as through other forms of cooperation. This has to be done to improve the efficiency in detecting crimes and to prevent creating grounds for suspicion that a crime has been committed in a case handled by an aforementioned state body without such state body reporting it to the police or the competent public prosecutor's office.

3) **Ensure continuous operation of financial forensic services in higher public prosecutor's offices, i.e. special departments for the suppression of corruption and the Prosecutor's Office for Organised Crime, recruit staff** and ensure that financial forensic experts get the training in public procurement or hire those who already are trained. Given that criminal cases related to public procurement can be rather complex, public prosecutors often need assistance when analysing cash flows and financial transactions, especially in relation to the issues that may arise in criminal proceedings, such as hidden costs of maintenance of goods acquired in a public procurement procedure, financial aspects of the performance of public procurement contracts, payments for goods, services and works delivered in inexpedient public procurements, disputes regarding the quality of delivered goods and many other issues that are currently neither investigated nor processed.

4) **Increase and strengthen staff capacity by increasing the number of deputy public prosecutors and assistant prosecutors and build technical capacity (computers and other necessary equipment).** Giving deputy public prosecutors more time to apply themselves to complex cases would significantly impact suppression of public procurement crimes. This will require funding, but not much compared to the amount of misappropriated public funds every year.[42]

42 Although there is no reliable information or research on the Republic of Serbia, for the sake of illustration, according to a study commissioned by the European

5) **Conduct continuous training of public prosecutor's offices, judges and lawyers requiring specialisation in the complex matter of public procurement, using good practices and comparative legal experiences.** This can be realised under the special programs of the Judicial Academy and Bar Association, as well as under the projects of international organisations and non-government organisations, to ensure that all participants in criminal proceedings have appropriate expertise.

Commission titled "Identifying and Reducing Corruption in Public Procurement in the EU", PwC and Ecorys, European Economic Interest Grouping/2017, the total cost of corruption in public procurement in five areas (transport and railways, water and waste, construction, training, research and development) in eight EU countries amounts to EUR 1.2 and 1.4 billion.