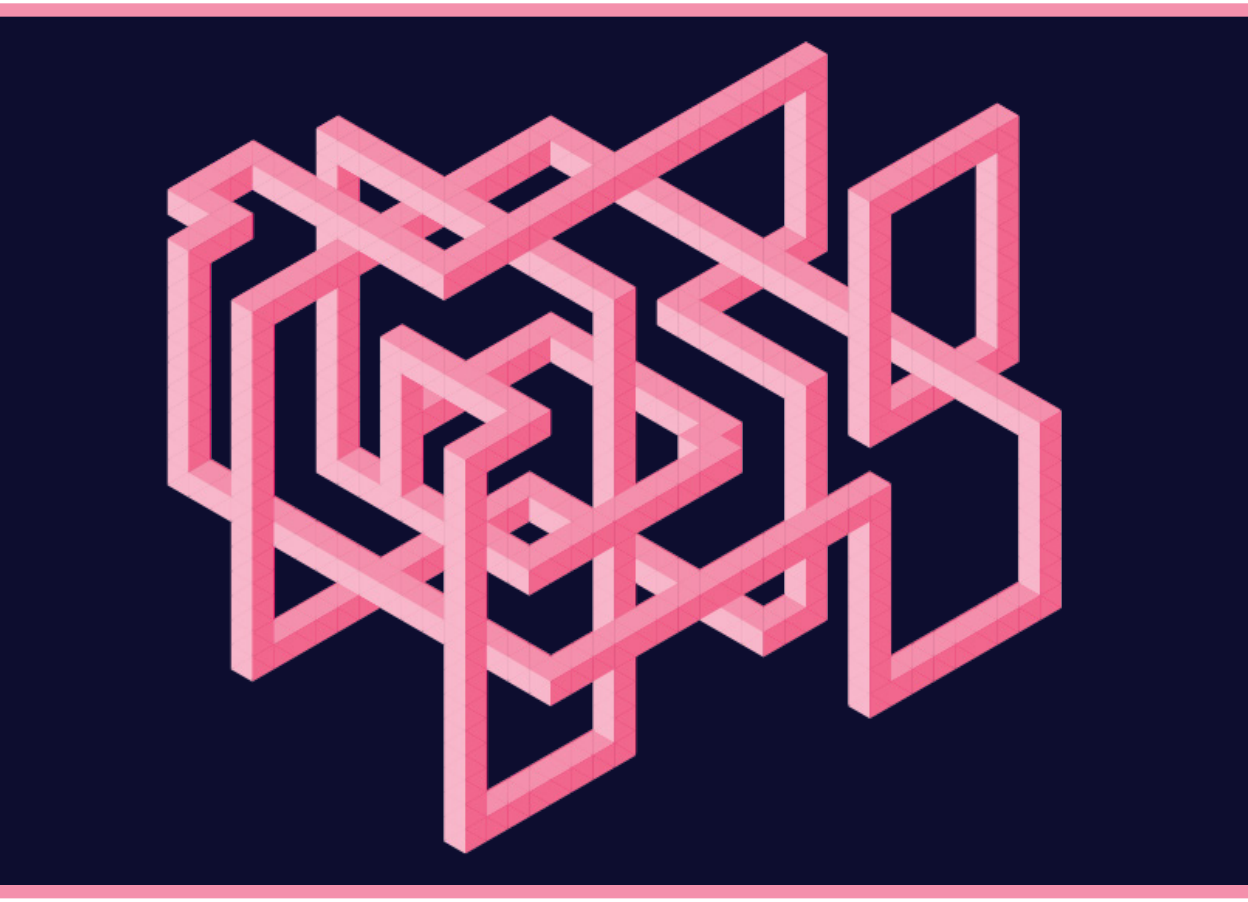
ALARM REPORT on the State of Play in Public Procurement in Serbia 2023



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January 2024

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Content

1. Introduction and Key Findings[1]

Serbia opened negotiations with the European Union on Chapter 5 – Public procurement in December 2016, and more than seven years later it still has not met a single criterion for this chapter to be temporarily closed. Despite the fact that the predictions regarding the closure of this chapter at the time were very optimistic, unfortunately, Serbia seems to be further away from meeting these criteria today than it was seven years ago.

This is shown by most indicators of the quality of the public procurement system in a country. For example, in 2016 and 2017, the average number of tenders per public procurement procedure was 3 and only one bid was submitted in less than 50% of the procedures.[2] Six years later, in 2021 and 2022, the average number of tenders per public procurement procedure dropped to 2,5 and as many as 52.62% and 51.6% of procedures received only one tender. Also, in 2016 and 2017, in 10% or more of procedures, the price-quality ratio criterion was used for contract award, whereas in 2022, criteria other than price were used in only 4% of procedures.[3]

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1 This report was originally created as a Shadow Country Report within the Balkan Tender Watch coalition which is the main reason why its structure differs from the 2023 Alarm report in Serbian language.

2 In 2016, the average number of tenders per procedure was 2.9 and in 2017, 3. In 2016, 43% of procedures received only one bid, whereas in 2017, only one bid was submitted in 48% of procedures.

3 https://www.ujn.gov.rs/?page_id=1156 and https://jnportal.ujn.gov.rs/annual-reports-ppo-public It should be noted that the adopted amendments to the Law on public procurement, whose application started on January 1, 2024, stipulate the

What are the key problems in the public procurement system in Serbia?
In addition to those pointed out by the European Commission in its yearly reports – incomplete harmonization of national legislation with the EU Acquis, a large number of contracts concluded under intergovernmental agreements or laws suspending the application of the Law on public procurement – the main problems continue to be:

- the absence of competition and insufficient transparency,
- lack of appropriate control in the stage of contract execution,
- non-compliance with environmental principles,
- ineffective legal protection (criminal and misdemeanor) and
- insufficient capacities of basic institutions in the public procurement system (Republic Commission for the Protection of Rights in Public Procurement Procedures, Public Procurement Office and Administrative Court).

Also, one of the problems is the poor practice of the contracting authorities in terms of market research, both when preparing the public procurement plan and when determining the estimated procurement value.

obligation of the contracting authorities to use, in addition to the price, some of the quality criteria for computer program development services, architectural services, engineering services, translation services or advisory services. Such a solution will certainly affect the reduction of the percentage of procedures in which price was used as the only criterion for contract award.

1. Incomplete harmonization of national legislation with the EU Acquis

The new Law on public procurement entered into force on January 1, 2020, while its application started on July 1, 2020. With the adoption of this law, two directives on public procurement were successfully incorporated (transposed) into the national legislation: Directive 2014/24/EU (the so-called classic directive) and Directive 2014/25/EU (the so-called sectoral directive). Considering that the public procurement system, in a broader sense, also includes public-private partnerships and concessions, for national legislation governing this area to be fully harmonized it is necessary to adopt, without any further delay, the amendments to the Law on public-private partnerships and concessions to align it with Directive 2014/23/EU on the award of concession contracts. However, Serbia is yet to adopt amendments to the existing Law on public-private partnerships and concessions and in all Action Plans for the implementation of the Public Procurement Development Program in the Republic of Serbia from 2019 until today, the deadline for the adoption of this law has been postponed to the following year. Also, there is no information on whether the Working Group formed with the task of drafting the law has even started its work, nor can information about it be found on the website of the PPP Commission.

2. Exemptions from the Law on public procurement

Furthermore, a big problem is the huge number of contracts that are awarded without any PP procedure, on the basis of various *lex specialis* or international treaties, with questionable compliance with the public procurement principles.

Until recently, the Law on special procedures for the implementation of the projects of construction and reconstruction of linear infrastructure facilities of particular importance for the Republic of Serbia (Official Gazette of RS 9/20; hereinafter referred to as: Law on linear

infrastructure projects) was in force and it allowed the suspension of the Law on public procurement for all linear infrastructure projects (that is, projects of the highest value). Under pressure from the EU and the domestic public, this law was repealed on July 27, 2023, after more than 3 years of its application.

However, shortly after the revoke of this law, in October 2023, the parliament adopted a new lex specialis – the Law on special procedures for the realization of the international specialized exhibition EXPO Belgrade 2027 (Official Gazette of RS 92/23; hereinafter: EXPO Belgrade 2027 Law), which repeals the provisions of the Law on public procurement in the same way as the law that was repealed, only this time for the implementation of projects related to the organization of Expo 2027 exhibition in Belgrade. In this way, it will be possible to spend over EUR 1 billion of citizens' money without conducting public procurement procedures.

The rationale for the adoption of the new law was almost identical to all previous cases: "Based on previous experience in the implementation of projects, it was concluded that in the process of project implementation, it takes a lot of time to resolve property and legal relationships before obtaining all the necessary permits, and because of this, the completion of works is often delayed. This refers to the preparation of subdivision and re- subdivision projects, then the implementation of procedures in the cadaster according to those projects, and finally the expropriation process itself, which is long-lasting, because these facilities are planned, designed and built on several cadastral plots. Bearing in mind the deadlines taken in accordance with the international commitments of the Republic of Serbia as the host of the international specialized exhibition EXPO Belgrade 2027, the adoption of such a legal solution would speed up the implementation of projects and thus the Republic of Serbia would be in a position to fulfill its internationally undertaken commitments on time and successfully organize the mentioned event, the necessity for passing a special law is reflected in the fact that the implementation of the Project will begin simultaneously in several different locations, which

requires a systematic solution to all issues and overcoming all possible problems that may arise in the implementation itself."

Therefore, the explanation is always the same: the progress of the country must not wait, especially not because of some legal procedures and systemic and anti-corruption regulations, even if they represent the foundation of the legal certainty of a country and the rule of law in general, which is unacceptable and very dangerous.

The timing of the repeal of the Law on linear infrastructure projects and of the adoption of the EXPO Belgrade 2027 law is particularly interesting. Namely, the first law was repealed in July, that is, while the European Commission's annual report on Serbia's progress was still being written, while the latter EXPO Belgrade 2027 law was adopted in October, when the report was practically finished. Therefore, in the latest EC report, Serbia was "praised" for revoking the Law on linear infrastructure projects (given that it had been requested of Serbia in several previous reports), and at the same time it avoided criticism for adopting another law that suspends the Law on public procurement. The adoption of this EXPO Belgrade 2027 law was only noted in the last report within the institutional set-up and legal alignment of public procurement field in Serbia.

Finally, when it comes to special laws, we should also mention the Law on the use of renewable energy sources (Official Gazette of RS 40/2021 and 35/2023) adopted in 2021, which somehow always remained "under the radar" despite the fact that it also allows for the suspension of the Law on public procurement. This law stipulates that for the construction of solar power plants and wind power plants a "strategic partner" can be selected in a special procedure outside of the provisions of the systemic Law on public procurement.[4] Thus, in July 2023, in accordance with this law, the Serbian government adopted a Decree on the selection of a strategic partner for the

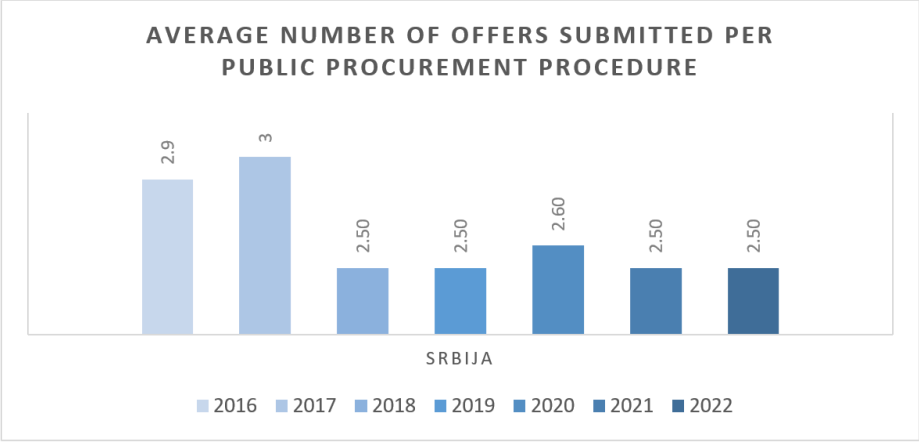
4 Article 87, paragraph 4 of the Law on the use of renewable energy sources stipulates that during the selection and implementation of the public call for selection of a strategic partner and conclusion of an agreement on the execution of the project with the strategic partner, regulations governing public procurement procedures and regulations governing public-private partnership shall not apply.

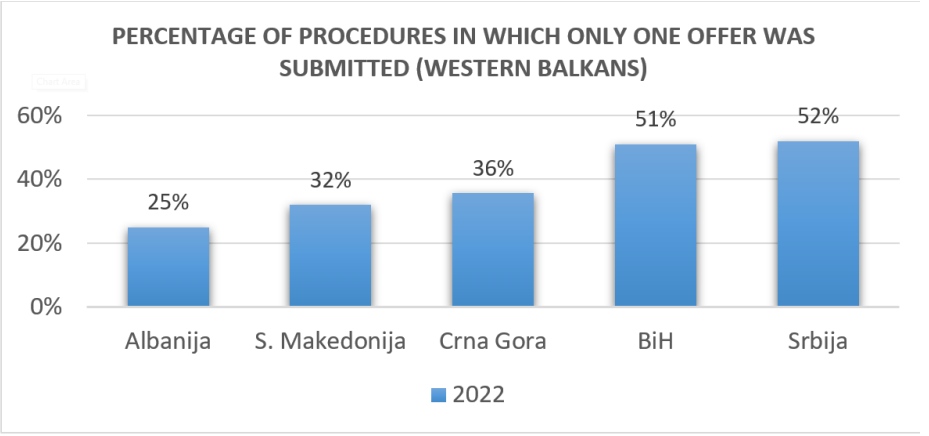
implementation of the construction project without management and maintenance of large-scale self-balanced solar power plants with battery systems for electrical energy storage in the Republic of Serbia (Official Gazette of the RS 58/23). As stated in the latest EC report, this Decree additionally strengthened the practice of avoiding regulations in the public procurement field.

3. Low level of competition and transparency

Closely related to the problem of exceptions to the application of the Law on public procurement is the problem of (non)compliance with the basic principles of public procurement, in cases where public procurement is carried out at all. Here, above all, we are referring to the principles of securing competition and the principles of transparency.

When it comes to competition, it is almost inexistent. According to the latest report of the Public Procurement Office for 2022, the average number of offers per procedure was 2.5, but it is questionable how much this data really reflects the true state of affairs, considering that in as many as 51.6% of procurement procedures only one bid is submitted! This is a truly disturbing data which unfortunately makes Serbia the leader in the Western Balkans.





A large number of procedures in which only one bid was submitted is certainly one of the significant indicators of corruption in public procurement.

The reasons for the insufficient interest of bidders in participating in public procurement procedures are different. One of the causes is certainly the low level of bidders' trust in the public procurement system due to the suspicion that contracting authorities often tend to rig the bids or favor certain bidders. It is equally important to emphasize that the system of protection of rights and legality in public procurement procedures is extremely ineffective. Also, the low level of competition is additionally encouraged by the insufficient market research by the contracting authorities, either during the preparation of the public procurement plan or when determining the estimated value.

In recent years, market sharing has been one of the most common forms of bid rigging in Serbia. In this form of bid-rigging, there is an (express or tacit) agreement between the bidders on the division of the market: certain bidders agree not to participate in procurement procedures with certain clients or in certain geographical areas. For example, participants can assign specific (categories of) purchasers to different companies, so that these companies do not participate in the bidding (or submit only a covering offer) if they are not "right"

purchasers, i.e. they do not participate in the conclusion of contracts offered by certain categories of potential contracting authorities who are assigned to other companies.

In addition to market segmentation, other forms of bid rigging are fictitious bids, rotating bids or refraining from submitting bids, but it is important to note that different bid-rigging techniques are not mutually exclusive and often occur together.

There are also different ways in which contracting authorities can restrict the competition. For example, they can determine specific additional conditions and criteria for the award of the contract, or adjust the technical specifications for pre-determined bidders, or they can manipulate the way in which the subject of procurement is created (in the sense that they can control whether the subject of procurement will be divided into lots or not).

As far as transparency is concerned, it should be said that some progress was achieved with the launch of the new Public Procurement Portal in 2020, which enabled the publication of public procurement plans, notices, documentation and decisions, as well as complete communication with business entities and the Public Procurement Office, in accordance with the law.

Also, certain progress is represented by a relative decrease in the share of negotiation procedures without prior publication (as the least transparent procedure) in the total number of procedures. According to the 2022 report of the Public Procurement Office, the share of these procedures was 0.97%, while in 2020 and 2021, the share was over 2%.

Likewise, recent amendments to the Law on public procurement should make the contract execution phase more transparent, given that **the contracting authorities are now required to publish on the Portal data on all contracts concluded after the public procurement procedure has been carried out, as well as on all subsequent changes to the contract**. It remains to be seen whether such a legal solution will really produce results in practice and whether and in what way the Public Procurement Office will regulate more closely the method of publishing this data and (perhaps more importantly) the types of data, considering that new amendments of the law

prescribe this as PP Office's obligation. If the Office does not prescribe the obligation of the contracting authority to publish data concerning the degree of contract execution, the degree of payments made under concluded contracts, eventually imposed contractual penalties and other important data related to the execution of the contract, there will certainly be no significant progress in terms of the transparency of this phase. As a reminder, within the criteria for the temporary closure of Chapter 5, among other things, it is stated that Serbia should establish adequate administrative and institutional capacities at all levels and take appropriate measures to ensure the proper implementation and application of national legislation in this area before accession, which particularly includes: „strengthening control mechanisms, including detailed monitoring and increased transparency in the execution phase of public procurement contracts and systematic risk assessment with prioritization of controls in sensitive areas and procedures".

In this regard, and when it comes to the execution phase of public procurement contracts, in addition to transparency, adequate supervision over this phase is crucial, because otherwise a huge space opens for corruption and illegal agreements between the contracting authorities and the selected bidders. Despite this, the Law on public procurement regulates the supervision of contract execution very narrowly and imprecisely, and moreover, the competent Ministry of Finance has not supervised the execution of public procurement contracts at all for almost 3 years, from the beginning of the implementation of the law.

Namely, supervision by this ministry became feasible only with the adoption of the special Law on budget inspection ("Official Gazette of RS", No. 118/2021), whose implementation began on January 1, 2023. This law centralized the budget inspection, thus enabling the control of contracts concluded by contractors whose founder is an autonomous province or local self-government unit, which would not have been possible without it. However, to date there is no data on the supervision of this phase of the public procurement procedure.

What makes the existing situation even more dangerous is the fact that the current Law on public procurement provides significant opportunities for amending the contract during its implementation (in some cases, it allows an increase in the contract value up to 50% of the originally contracted value). Therefore, due to non-transparency and non-supervision of contract execution, conditions were created for corruption of unimaginable proportions. In the following period, it remains to be seen in what way and to what extent the budget inspection will carry out the supervision. A positive, but minimal move in this regard could be the provision introduced by amendments to the Law on public procurement, by which the existing (and only) provision that “supervision is carried out by the competent ministry” is supplemented by the obligation of the ministry to regulate more closely the way supervision is carried out, which has not been the case so far.

4. Green procurement

When it comes to respecting ecological principles during the implementation of public procurement procedures, significant progress has been made with the amendments to the Law on public procurement.

Namely, with amendments to the law, the principle of environmental protection was "added" to the existing principle of economy and efficiency, so now the contracting authority is

required to procure goods, services or works of appropriate quality with a minimal impact on the environment.
In addition, the amendments to the law established the obligation of the Public Procurement Office to prescribe the types of goods, services and works for which the contracting authorities are required to apply environmental aspects when determining technical specifications, criteria for qualitative selection of economic operator, criteria for awarding a contract or conditions for the execution of a public procurement contract.

Before these amendments, the Law on Public Procurement stipulated the obligation to comply with environmental protection regulations only for economic operators, but not for contracting authorities. In accordance with the law, the contracting authority had the possibility – but not the obligation – to consider environmental and energy efficiency requirements when determining the technical specifications, selection criteria and contract award criteria. On the other hand, while executing the PP contract business entities were obliged to respect environmental protection requirements, i.e., the provisions of international law related to environmental protection. The consequence of such legal solutions was that, according to the Public Procurement Office 2022 report, the contracting authorities applied ecological aspects in only 0.44% of the total PP procedures.

Considering the new legal solutions regarding "green procurements", we should definitely expect a certain shift in the respect of ecological principles during the implementation of public procurements.

5. Procurement planning and market research

When it comes to the planning phase, as we have already written several times, the risks of corruption can be and are often associated with an unrealistic budget, procurement of unnecessary goods, services or works, insufficient market research, or frequent changes to the procurement plan. Certain provisions of the Law on public procurement contribute to all of this, according to which *there is no deadline for the adoption of a public procurement plan, nor is there an obligation on the contracting authority to conduct market research before the implementation of the procurement procedure.* This is perhaps the reason that in most of the observed public procurement procedures within the project, a large number of changes to public procurement plans was noted, which in a way makes the purpose of planning meaningless.

Market research during the preparation of the procurement plan should be foreseen by law as an obligation, especially considering the importance of this initial phase in procurement planning and definition of items, technical specifications, calculation of life cycle costs, etc. This becomes even more important if we bear in mind that the estimated value (in accordance with the law) *must* be based on the conducted market research of the subject of public procurement, it must be valid at the time of initiation of the procedure and its determination cannot be made in a way that aims to avoid the application of the Law.

As we have already pointed out, market research and a good procurement plan undoubtedly have an additional positive effect on increasing competition.

Directive 2014/24/EU of the European Parliament regarding procurement planning contains a provision related to market research, which allows contracting authorities to conduct market research before starting the public procurement procedure for the purpose of preparing the procurement and informing business entities about their plans and requirements in relation to procurement. This provision is significant because it introduces into the legislation the practice in which the contracting authorities seek or accept the advice of independent experts, competent bodies or market participants, in order

to plan and implement procurement procedures, certainly on the condition that such advice does not lead to distortion of market competition and that it does not violate the principles of non-discrimination and transparency.

And while according to our Law on public procurement consultations with market participants are only a possibility, in Croatian law such consultations are mandatory for all public procurement of works or for large value procurement of goods or services. According to the Croatian law, before starting these procedures the public contracting authority is obliged to submit to the preliminary consultation with the interested business entities the description of the subject of procurement, technical specifications, criteria for the qualitative selection of the business entity, criteria for the selection of the offer and special conditions for the execution of the contract. Also, after the consultations, the public contracting authority is required to consider all objections and proposals of interested business entities, prepare a report on accepted and rejected objections and proposals and publish it on the website. We believe that this is an extremely good solution, which in some form should be implemented in our legislation.

Another issue that doesn't get much attention and which may also represent a significant risk of corruption, is the fact that there is no obligation on the contracting authority to publish a plan of procurement procedures to which the law does not apply. Due to the high thresholds for the application of the Law on public procurement (EUR 8.500 for goods and services and EUR 25.500 for works), the number of procurements for which there is no obligation to apply the law has significantly increased. Prescribing this obligation would enable the monitoring of the use of public funds by the contracting authorities and would undoubtedly contribute to reducing the risk of corruption.

A step forward in this regard may be the fact that amendments to the law introduced the obligation of the contracting authority to publish on the Public Procurement Portal data on the concluded contracts, i.e. purchase orders that are issued in public procurement procedures to which the law does not apply.[5]

6. Ineffective legal protection

Finally, a major problem in the public procurement system in Serbia is ineffective legal protection, despite the large number of protection mechanisms that participants in public procurement procedures have at their disposal.

In addition to "legal protection" before the Republic Commission and in the PPO's monitoring procedure, legal protection is granted in the criminal proceedings before the competent public prosecutor's offices and courts (procurement fraud under Article 223 of the Criminal Code), misdemeanor proceedings before misdemeanor courts, competition protection procedures before the Commission for Competition Protection, and audit procedures before the State Audit Institution. However, despite numerous mechanisms of legal protection in this field, the legal implementation of public procurement and curbing corruption are yet to yield concrete results. *This leads to the conclusion that both the citizens and economic operators' trust in state bodies is extremely low, but also that state bodies do not exercise their powers granted under the Law on public procurement.*

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

5 Art. 152a of the Law on public procurement.

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 are certain concerns 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 previous Law on public procurement and still is in the current 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 previous law and in the current 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, always lawyers as a rule, 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.[6]

Given that the Commission 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.

6 http://kjn.rs/vestaci/

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 (literal) 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 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 (prescribed under the previous law as well) 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, th*e last time the Republic Commission adopted a principled legal position was in April 2014*, which means that for 10 years the Republic Commission has not used this mechanism despite the concerns about the application of certain provisions of the law (e.g. right of action, additional requirements, etc.).[7] It is particularly surprising that the Republic Commission did not use this instrument in the period after the entry into force, i.e. the beginning of the application of the new law, when dilemmas regarding the application of certain provisions are, by the nature of things, most common.

Finally, the current law on public procurement has abolished civic control of this extremely important public procurement body. Under the previous 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

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

the committee would request the Republic Commission to 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.

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 current 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 power to act in a dispute of full jurisdiction to be effective, it is important that the Administrative Court judges are specialized 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.

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.).

Public Procurement Office

The current Law on public procurement authorizes the Public Procurement Office (PPO) to monitor the application of public procurement regulations.

Article 179, paragraph 1 of the law stipulates that the PPO must monitor the implementation of public procurement regulations and

compile an annual monitoring report, as well as submit a request to initiate misdemeanor 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 PPO 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 PPO 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 PPO 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 PPO has 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.

However, according to the Monitoring Report of 24/3/2023[8] in which the PPO reported on the activities it undertook in 2022 to prevent irregularities in public procurement procedures and combat corruption, only 15 contracting authorities (out of over 5,500) were subject to monitoring. Despite the fact that this is a certain improvement compared to 2021, when 10 contracting authorities were included in the monitoring, we believe that the scope of monitoring should

8 http://www.parlament.gov.rs/upload/archive/files/cir/pdf/izvestaji/13_saziv/02-594_23.pdf

have been much larger and that the PPO, as one of the most important institutions in public procurement system, could (and should) have done much more to combat irregularities and corruption in public procurement.

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.

7. Criminal and misdemeanor liability

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, and that legal protection is ensured under the existing provisions on criminal offences (receiving and giving bribes, political influence, abuse of power. However, after it has been in use for a few years now, 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 particular criminal offence must exist. In this sense, legal intervention is justified whenever certain behaviors 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[9]. 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[10].

However, judging by the current legal practices of public prosecutor's offices and courts of law, no significant results have been

9 Preventing Corruption in Public Procurement, OECD, 2016

10 Marina Matić Bošković: Krivično delo zloupotreba u javnim nabavkama – izazovi u primeni

achieved in prosecuting procurement fraud as a criminal offence. Proceedings that have been initiated and finalized 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.

In addition to all this, the legislator has given too broad 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. *The consequence is that 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*. This is confirmed by the data on the number of proceedings initiated and sanctions imposed for this criminal offence. According to the 2022 statistics of the Ministry of Justice for crimes related to corruption, 67 new criminal charges were submitted to the special anti-corruption departments of the Higher Public Prosecutor's Office and the Prosecutor's Office for Organized Crime, 83 claims were rejected, 2 orders to conduct an investigation and 9 indictments were filed. Also, according to these data, only 7 suspended sentences and no prison sentence were imposed[11].

On the other hand, the current Law on public procurement stipulate 18 misdemeanours for contracting authorities and 4 for tenderers.

There are still no official statistics on misdemeanour proceedings concerning public procurement. However, judging by the annual reports of the Public Procurement Office, we can conclude that the number of misdemeanour proceedings brought before the courts has increased. In 2021, the Public Procurement Office filed 143 requests to initiate misdemeanour proceedings, while in 2022 it submitted as many as 429 such requests. In contrast, in 2022, the Republic

11 https://www.mpravde.gov.rs/sr/tekst/33769/statistika-koruptivnih-krivicnih-dela-.php

Commission, which is also authorised to initiate misdemeanour proceeding, filed only 6 requests to initiate misdemeanour proceedings.

> What "catches the eye" is the fact that the gravest violation of the Law on public procurement – failure to comply with the law – is deemed a misdemeanour! More precisely, under Article 234 paragraph 1 item 2) of the Law on public procurement, a contracting authority that awards a public procurement contract without conducting a public procurement procedure will have committed a misdemeanour. It is even more absurd that the substance of the criminal offence of abuse of public procurement incriminates the actions only if the public procurement procedure is carried out!
> Awarding a public procurement contract without conducting a public procurement procedure is, in terms of its legal significance, definitely the gravest violation of law in this area and should therefore be deemed an act of perpetrating a criminal offence rather than a misdemeanour.[12]

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

2. European Commission's 2023 Progress Report on Serbia[13]

The European Commission's 2023 progress report on Serbia was published on November 8, 2023, and it assessed that Serbia is moderately prepared in the field of public procurement. It was also noted that some progress was achieved with the repeal of the Law on special procedures for linear infrastructure projects, which seriously undermined the effective implementation of the Law on public procurement, but, as in the previous few years, it was reiterated that Serbia should in particular:

- ensure that procurement rules under intergovernmental agreements concluded with third countries comply with the public procurement principles, in line with the EU *acquis*, with the basic principles of public procurement, and with national legislation, making sure that these intergovernmental agreements do not unduly restrict competition;
- further align with the 2014 EU Directives on public procurement, in particular by adopting amendments to the Law on public-private partnership and concessions and by ensuring that projects financed from public funds are subject to public procurement procedures;

13 https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/ec_report_serbia_2023.pdf

- further strengthen the capacities of key institutions in the public procurement system – Public Procurement Office, Commission for Public-Private Partnerships and Concessions, Republic Commission for Protection of Rights in Public Procurement Procedures and Administrative Court.

So, if we take a look at the EC reports in the last 3 years, Serbia acted on only one recommendation by repealing the Law on linear infrastructure projects. However, as we have already stated, only 3 months after that a new lex specialis was adopted which once again allows for the suspension of the Law on public procurement – Law on special procedures for the implementation of the international specialized exhibition EXPO Belgrade 2027. This means that essentially no progress has actually been achieved in this regard. Most likely due to the fact that this new Law was adopted only a month before the publication of the EC Report, the European Commission only noted the adoption of this law in the part related to the institutional set-up and legal alignment for public procurement in Serbia.

Also, European Commission pointed out the fact that the Serbian government adopted a Decree on the selection of a strategic partner for the implementation of a project of construction without management and maintenance of self-balanced large-scale solar power plants with battery systems for electrical energy storage in the Republic of Serbia, which introduces derogations from the Law on public procurement and the Law on public-private partnership and concessions. This formulation, however, is not precise enough.

Namely, as already mentioned above, the Law on the use of renewable energy sources has been in force in Serbia since 2021, and it was precisely this Law that enabled the suspension of the Law on public procurement during the construction of solar and wind power plants, through the

prescription of a special procedure for the selection of a "strategic partner". Therefore, the adoption of the aforementioned Decree as a by-law would not even be possible without a law that enabled the suspension of regulations in the public procurement field. In other words, the practice of deviating from regulations in the public procurement field is not established by this Decree, as stated in the EC Report, but by the Law. Therefore, in the following reports, in addition to repealing the Law on EXPO Belgrade 2027, it should definitely be insisted on repealing the provisions of the Law on the use of renewable energy sources, which enable the avoidance of public procurement regulations.

When it comes to the intergovernmental agreements, the Report states that the exemptions from the Law on public procurement on the basis of these agreements fell significantly to 0,5% of the total value of exemptions in 2022, or EUR 33 million, compared with EUR 735 million reported in 2021. However, the Report also notes that given the large volume of big infrastructure projects concluded on the basis of intergovernmental agreements, the reported total value of exemptions is low. The Report also states that intergovernmental agreements are not always in accordance with the principles of equal treatment, non-discrimination and transparency or competition rules.

In the part of the Report related to the public financial management, it was indicated that *Serbia needs to apply the legal framework and methodology regarding capital projects management, and public procurement procedures, to all capital investments, regardless of the type of investment or source of financing.*

Additionally, the report expressed concern regarding the fact that the State Audit Institution found irregularities in cases covering 18,88% of the value of public procurement contracts inspected in 2022.

It was also noted that the share of open procedures increased from 91,3% in 2021 to 98,8% in 2022, that the use of best price-quality ratio criterion remained low at 4% in 2022, while the lowest price criterion remained dominant in 96% of conducted public procurement procedures.[14]

14 According to the 2022 Report of the Public Procurement Office, the share of open procedures in the total number of implemented procedures was 97.83%, and not 98.8% as stated in the EC Report.

3. Recommendations for Improving The Public Procurement System in Serbia

Bearing in mind all the above, in our opinion, for the improvement of the public procurement system in Serbia it is necessary to do the following:

- Complete the harmonization of national legislation with European acquis in the field of public procurement through the harmonization of the Law on public-private partnerships and concessions with Directive 2014/23/EU on the award of concession contracts;
- Repeal the Law on special procedures for the implementation of the international specialized exhibition EXPO Belgrade 2027 and the provisions of the Law on the use of renewable energy sources, which enable the avoidance of public procurement regulations; urgently abort the practice of adopting special laws (lex specialis) which enable the avoidance of the application of the Law on public procurement and other systemic anti-corruption laws, along with the practice of awarding public procurement contracts through the application of interstate agreements;
- prescribe by the law the obligation of contracting authorities to conduct and document market research before adopting the public procurement plan;
- prescribe by the law the obligation of contracting authorities to publish on the Public Procurement Portal data related to the execution of public procurement contracts, primarily data on

the value and degree of contract execution (value of delivered goods, services, works), degree of payment under the contract (how much was paid for the delivered goods, services, works), compliance with execution deadlines and measures taken to sanction non-compliance with contractual obligations on the part of the selected bidder (charged contractual fines, realized means of financial security, etc.), as well as possibly other important payment data (existence of the advance payment i.e.);

- the competent Ministry of Finance should urgently start supervising the execution of public procurement contracts, i.e. pass an appropriate internal act that will precisely determine the manner in which the budget inspection will carry out this supervision and according to which criteria it will select contracts whose execution will be supervised;
- Insist on the consistent application of the Law on public procurement by the contracting authorities, but also on the consistent and timely exercise of functions and the use of legal powers by the key institutions in the public procurement system – the Public Procurement Office, the Republic Commission for the Protection of Rights in Public Procurement Procedures and the Administrative Court, as well as institutions such as the Commission for the Protection of Competition, the Agency for the Prevention of Corruption, the State Audit Institution, the budget inspection and competent courts and prosecutor's offices;
- Increase and strengthen the personnel capacities of key institutions in the public procurement system and ensure their greater mutual coordination, both through institutes prescribed by law and through other forms of cooperation;
- Prescribe the act of committing the criminal offense of abuse in public procurement more clearly and concretely;
- Eliminate the error in the gradation of the severity of the violation of regulations: non-application of the Law on public procurement (non-implementation of the public procurement procedure) should be a criminal act, not just a misdemeanour.