BALKAN TENDER WATCH

SHADOW REPORT

ON PUBLIC PROCUREMENT IN SERBIA 2023

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December 2023

This report is developed as part of the project “Balkan Tander Watch” implemented by the Center for Civil Communications and the Balkan Tender Watch Coalition and financially supported by the Foundation Open Society – Macedonia.

Balkan Tender Watch is a regional coalition of CSOs working on fight against corruption in public procurement in the Western Balkans.

Publisher:
Center for Civil Communications (for the Balkan Tender Watch coalition member Center for Applied European Studies)

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Electronic edition

INTRODUCTION

Starting from 2018, Balkan Tender Watch - a regional coalition of civil society organizations working on fight against corruption in public procurement - assesses the state-of-affairs in public procurement in the Western Balkans.

Based on the unique monitoring methodology comprised of 68 indicators, the average score for all six WB countries related to public procurement performance in terms of application of legislative, institutional, systemic and practical anticorruption measures is calculated at 67%, which means that 33% of all public procurements are still implemented under serious threat of corruption.

In 2022, the total value of public procurement in all WB countries amounted to total of 11.6 billion EUR. The average share of public procurement in the gross domestic product (GDP) of WB countries stands at 8.78%, while its share in total budget expenditure averages at 25.7%. When this amount is correlated to the calculated score of 67%, it could be inferred that, annually, 3.8 billion EUR are under direct threat of corruption.

As regards the general preparedness of WB countries in the area of public procurement, the European Commission assessed Montenegro as the best prepared and Bosnia and Herzegovina as the least prepared country. Montenegro has moderate-to-good and Bosnia and Herzegovina has some level of preparedness. Kosovo is assessed as some-to-moderately prepared, with the remaining WB countries (Albania, North Macedonia and Serbia) falling within the range of moderate preparedness. All WB countries are recommended to improve integrity, fight against corruption and conflict of interests in public procurement, and to ensure consistent implementation of public procurement rules.

Public procurement in the Western Balkans is characterized by absence of/insufficient competition, incomplete transparency, lack of efficient control across the entire public procurement cycle, especially in respect to contract performance, and lack of integrity.

Almost all WB countries suffer some form of non-alignment of their respective legislative and institutional frameworks, which creates problems in implementation of public procurements.

Impunity for violations, abuses and criminal offences committed as part of tender procedures remains the biggest problem in the fight against corruption in public procurement and hinders all and any efforts made towards more efficient public spending.

WB countries are recommended to further improve transparency, accountability and liability in public procurement, take specific measures aimed at detecting and preventing conflict of interests, promote integrity in public procurement, as well as process and monitor cases of malpractice and abuse.

WB countries should take urgent and enhanced efforts to ensure and promote competition, equal treatment and non-discrimination in public procurement, as well as provide further professional and continuous training for persons involved in public procurement.

In addition to the Comparative Evaluation Report, for state-of-affairs in the field of public procurement at the level of individual WB countries is covered under annual shadow reports aimed to offer country-specific and evidence-based insight into and 'local' view of public procurements: how effective is the public procurement system; is the legislative and institutional setup appropriate; and do practical measures taken safeguard against corruption.

Serbia opened its EU accession negotiations under Chapter 5: Public Procurement in

December 2016, but seven years later it has still not met a single criterion for this chapter to be temporarily closed. While predictions for closing this chapter were very optimistic at the time, today Serbia seems to be further away from meeting the criteria than it was seven years ago.

This is showcased by most indicators on the quality of the public procurement system in the country. For example, in 2016 and 2017, the average number of bids per tender procedure was calculated at 3 bids and less than 50% of tender procedures were presented with only one bid.[1] Six years later, in 2021 and 2022, the average number of bids per tender procedure dropped to 2.5 bids, with high 52.62% and 51.6% of tender procedures receiving one bid each. Also, in 2016 and 2017, slightly more than 10% of procurement procedures used the price-quality ratio criterion for contract award, whereas in 2022, contract award criteria different than 'lowest price' were used in only 4% of procurement procedures.[2]

What are the key problems in Serbia's public procurement system?

In addition to those pointed out by the European Commission in its annual reports, such as incomplete harmonization of the national legislation with the EU acquis, large number of contracts awarded under intergovernmental agreements or laws suspending application of the Law on Public Procurement, the main problems continue to be absence of competition and insufficient transparency, lack of adequate control in the stage on contract performance, non-compliance with environmental principles, ineffective legal protection (criminal and misdemeanour), and insufficient capacity at core institutions within the public procurement system (Republic Commission, Public Procurement Office and Administrative Court). Another problem is seen in poor practice by contracting authorities in respect to market research, both when developing public procurement plans and when determining the procurement's estimated value.

[1] In 2016, the average number of bids per tender procedure was 2.9 bids and in 2017 it accounted for 3 bids. In 2016, 43% of procurement procedures were presented with only one bid, whereas in 2017, their share accounted for 48%s.

[2] https://www.ujn.gov.rs/?page_id=1156 and https://jnportal.ujn.gov.rs/annual-reports-ppo-public
It should be noted that amendments to the Law on Public Procurement that entered into force on 1st January 2024 stipulate an obligation for contracting authorities, in addition to price, to also use quality-specific criteria for procurement of computer programme development services, architectural services, engineering services, translation services or advisory services. This solution would certainly reduce the share of procurement procedures that only use price as contract-award criterion.

Incomplete harmonization of the national legislation with the EU acquis

The new Law on Public Procurement was adopted on 1st January 2020 and entered into force on 1st July 2020. In successfully transposed two public procurement directives 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 broader sense, also includes public-private partnerships and concessions, full harmonization of the national legislation governing this area necessitates adoption of, without further delay, amendments to the Law on Public-Private Partnerships and Concessions aimed to align it with Directive 2014/23/EU on the award of concession contracts. However, Serbia has yet to adopt amendments to the existing Law on Public-Private Partnerships and Concessions and review its Action Plans on Implementation of the Public Procurement Development Program of the Republic of Serbia from 2019 to present, as the deadline for adoption of such amendments has been postponed for the following year. Also, there is no information whether the working group tasked with drafting the law has even started its work, nor can such information be found on the website of the Public-Private Partnership Commission.

Exemptions from the Law on Public Procurement

Another big problem is the huge number of contracts awarded without procurement procedure, based on various *lex specialis* or international treaties, with questionable compliance with the public procurement principles.

The Law on Special Procedures for Implementation of Construction and Reconstruction Projects of Linear Infrastructure Facilities of Particular Significance for the Republic of Serbia (Official Gazette of RS no. 9/20; hereinafter referred to as: Law on Linear Infrastructure Projects) was in force until recently and allowed suspension of the Law on Public Procurement for all linear infrastructure projects (i.e. projects of the highest value). Under pressure from the EU and the domestic public, this law was revoked on 27th July 2023, after it had been enforced for a period of more than three years.

However, shortly after the law was revoked, in October 2023, the Parliament adopted new *lex specialis* – the Law on Special Procedures for Implementation of the International Specialized Exhibition EXPO Belgrade 2027 (Official Gazette of RS no. 92/23; hereinafter: EXPO Belgrade 2027 Law), which exempts provisions under the Law on Public Procurement in the same manner as the previously revoked law, this time round for the benefit of projects related to organization of the Expo 2027 Exhibition in Belgrade. This has paved the way for more than 1 billion EUR of taxpayers money to be spent without conducting public procurement procedures.

The rationale offered for adoption of the new law was almost identical to all previous cases: "*Based on previous experience in implementation of projects, it was concluded that, as part of the project implementation process, resolution of property and legal relationships before obtaining all necessary permits consumes a lot of time, which often delays completion of works. This refers to development of subdivision and re-subdivision projects, then implementation of procedures in the Cadastre according to those projects, and finally the expropriation process, which is long-lasting, because the facilities in question are planned, designed and built on several cadastre plots. Having in mind the deadlines under international commitments of the Republic of Serbia as the host of the international specialized exhibition EXPO Belgrade 2027, adoption of such legal solution would speed up implementation of projects and the Republic of Serbia would be in position to fulfil its internationally undertaken commitments on time and successfully organize the above-referred event. The need for adoption of special law is reflected in the fact that implementation of the project will begin simultaneously at several different locations, which requires a systematic solution to all issues and overcoming all possible problems that may arise in the course of its implementation*."

Therefore, the explanation is always the same: progress of the country must not be put on hold, especially not on the account of some legal procedures and systemic and anticorruption regulations, even if they represent the foundation of the country's legal certainty and the rule of law in general, which is unacceptable and very dangerous.

The timing when the Law on Linear Infrastructure Projects was revoked and the EXPO Belgrade 2027 Law was adopted is particularly interesting. Namely, the first law was revoked in July, i.e. when the European Commission's Annual Progress Report for Serbia was being written, while the EXPO Belgrade 2027 Law was adopted in October, i.e. 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 was requested of Serbia in the previous reports), and at the same time it avoided criticism for adopting another law that suspends the Law on Public Procurement. Adoption of the EXPO Belgrade 2027 Law was only noted in the last report, and addressed under the section on institutional setup and legal alignment in the field of public procurement in Serbia.

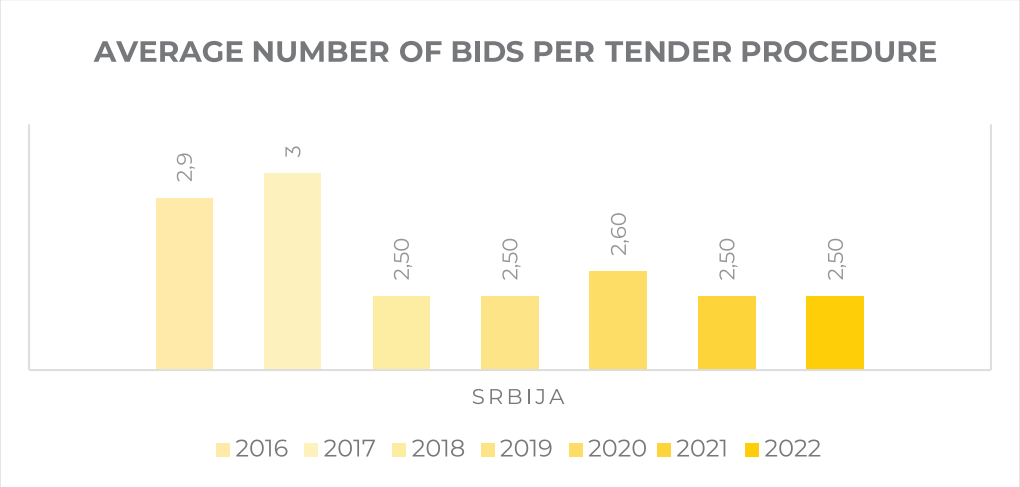
Finally, in respect to special laws, the 2021 Law on Use of Renewable Energy Sources (Official Gazette of RS no. 40/2021 and 35/2023) deserves to be mentioned, as it somehow remained 'under the radar' despite the fact that it also allows suspension of legal provisions under the Law on Public Procurement. This law stipulates selection of so-called strategic partner for construction of solar power plants and wind power plants under a special procedure and outside legal provisions from the systemic Law on Public Procurement.[3] Thus, pursuant to this law, in July 2023 the Serbian Government adopted a decree on selection of strategic partner for implementation of construction project without management and maintenance of large-scale self-balanced solar power plants with battery systems for electricity storage in the Republic of Serbia (Official Gazette of RS no. 58/23). As stated in the latest EC Report, this decree additionally strengthened the practice of avoiding regulations in the field of public procurement.

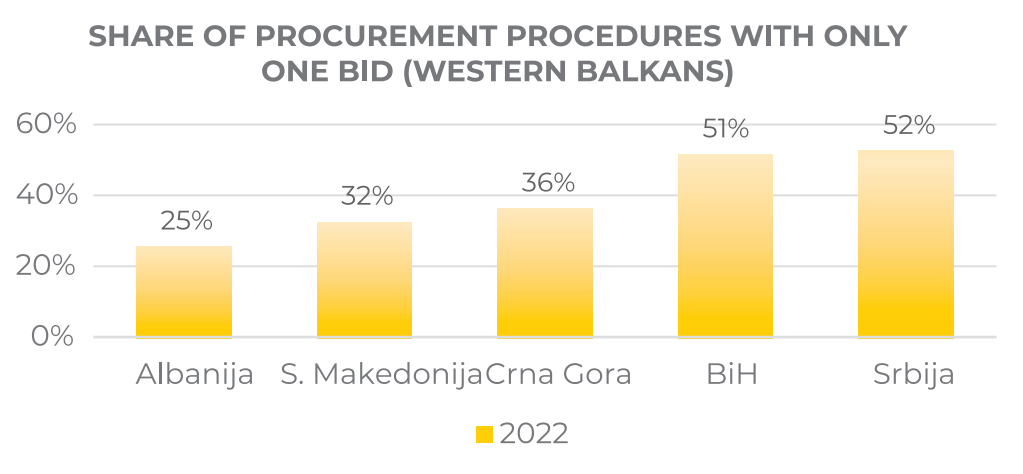
[3] Article 87 par. (4) of the Law on Use of Renewable Energy Sources stipulates regulations governing public procurement procedures and regulations governing public-private partnerships shall not apply to implementation of an open call for selection of strategic partner and for signing an agreement with the strategic partner for project execution.

Low level of competition and transparency

Closely related to the problem of exceptions from application of the Law on Public Procurement is the issue of (non)compliance with the basic principles of public procurement in the cases where public procurement is actually organized. First and foremost, this refers to the principle of ensuring competition and the principle of transparency.

As regards competition in public procurement, it is almost non-existent. According to the Public Procurement Office's 2022 Annual Report, the average number of bids per tender procedure stood at 2.5, but questions are raised about veracity of these data in respect to the actual state-of-affairs, considering that as many as 51.6% of procurement procedures were presented with only one bid. This is truly devastating data, making Serbia an unfortunate leader among the Western Balkans in this regard.





Large number of procedures presented with only one bid is most certainly a significant indicator of corruption in public procurement.

Reasons behind insufficient interest on the part of economic operators to participate in public procurement procedures are different. One reason could be seen in low level of trust in the public procurement system among bidding companies due to suspicions that contracting authorities tend to rig tenders or favour certain companies. Here, It is equally important to emphasize that the system for protection of rights and legality in public procurement procedures is extremely ineffective. Also, low level of competition is additionally encouraged by

insufficient market research on the part of contracting authorities, either during development of public procurement plans or when determining the procurement's estimated value.

Another prominent form of tender ringing in the recent years is market sharing, which implies an (express or tacit) agreement between bidders on market division: certain bidders agree not to participate in procurement procedures with some contracting authorities or in some geographical areas. For example, companies can be assigned to specific (categories of) purchasing entities, excluding them from tender participation (or submitting so-called cover bids) when they are not the 'right' supplier, i.e. they do not participate in contract awards by certain categories of contracting authorities that are assigned to other companies.

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

There are also different ways in which contracting authorities can restrict competition. For example, they can determine specific additional conditions and criteria for contract award, adjust technical specifications to favour pre-determined bidders, or they can manipulate the way in which the procurement subject is created (in the sense of controlling the procurement subject's division 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 publication of public procurement plans, procurement notices, documents and decisions, as well as complete communication with business entities and the Public Procurement Office, in accordance with the law.

Also, some progress is seen in relative decrease under the share of negotiating procedure without previously announced procurement notice (as the least transparent procedure) in the total number of public procurement procedures. According to the Public Procurement Office's Report, in 2022, the share of these procedures was 0.97%, while in 2020 and 2021, their share exceeded 2%.

Likewise, recent amendments to the Law on Public Procurement should make the stage on contract performance more transparent, given that contracting authorities are now required to publish data in the portal on all contracts signed after completion of the procurement procedure, as well as all subsequent changes to the contract. It remains to be seen whether this legal solution would actually yield results in practice, and whether and how would the Public Procurement Office regulate, in greater detail, the method for publishing this data and, more importantly, the types of data to be published, considering that new amendments to the law stipulate this as its obligation. Should PPO fail to stipulate an obligation for contracting authorities to publish data on the level of contract performance, payments made under contracts signed, eventually imposed contractual penalties and other important data related to contract performance, there would certainly be no significant progress in terms of the transparency in this stage of public procurement. As a reminder, criteria for temporary closure of Chapter 5, among others, imply that Serbia should establish adequate administrative and institutional capacity at all levels and take adequate measures to ensure proper implementation and application of the national legislation in this area before accession in the EU, which includes: "strengthened control mechanisms, including detailed monitoring and increased transparency in the stage on public procurement contract performance and systematic risk assessment with prioritization of controls in sensitive areas and procedures".

In addition to transparency, adequate supervision over the stage on contract performance is also crucial as, otherwise, there would be great space for corruption and illegal agreements

between contracting authorities and selected bidders. On the other hand, the Law on Public Procurement regulates supervision over contract performance very narrowly and imprecisely, while the competent Ministry of Finance has not conducted any supervision over performance of public procurement contracts for almost three years, i.e. from the start of law enforcement. More specifically, supervision by this ministry became feasible only after adoption of the special Law on Budget Inspection (Official Gazette of RS no. 118/2021), whose implementation began on 1st January 2023. This law centralizes budget inspection, enabling the control of contracts awarded by contracting authorities whose founder is autonomous province or local self-government unit, which would otherwise not have been possible. To date, however, there is no data on supervision over this stage of public procurement.

What makes the situation 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 of contract value up to 50% of its original amount). Therefore, due to non-transparency and non-supervision of contract performance, conditions have been created for corruption of unimaginable proportions. It remains to be seen how and to what extent the budget inspection would perform supervision in the next period. A positive, but minimal development in this regard could be the provision introduced by amendments to the Law on Public Procurement, which supplements the existing (and only) provision that "supervision shall be performed by the competent ministry" with an obligation for the ministry to more closely regulate the manner in which supervision is performed, which has not been the case thus far.

Green procurement

Amendments to the Law on Public Procurement brought about significant progress in respect to compliance with environmental principles when implementing public procurement.

Namely, the law amendments added the principle of environmental protection to the existing principle of cost-effectiveness and efficiency, obliging contracting authorities to procure goods, services or works of adequate quality with minimal impact on the environment.

Furthermore, they establish an obligation for the Public Procurement Office to stipulate the types of goods, services and works for which contracting authorities are required to apply environmental aspects when determining technical specifications, eligibility criteria for economic operators, contract award criteria or conditions for contract performance.

Before these amendments were adopted, the Law on Public Procurement stipulated an obligation for compliance with environmental protection regulations only for economic operators, but not for contracting authorities. According to the law, contracting authorities have a possibility, but are not obliged, to consider environmental and energy efficiency requirements when determining technical specifications, selection criteria and contract award criteria. On the other hand, when implementing procurement contracts economic operators are obliged to comply with environmental protection requirements, i.e. provisions under international law related to environmental protection. As a consequence of these legal solutions, in its 2022 Annual Report, the Public Procurement Office noted that contracting authorities have used environmental considerations in only 0.44% of all public procurement procedures.

Considering the new legal solutions on green procurements, certain shift can be certainly expected in terms of compliance with environmental principles in implementation of public procurement.

Procurement planning and market research

As reported in the past, corruption risks in the stage on public procurement planning can be and are often associated with unrealistic budgets; procurement of unnecessary goods, services or works; insufficient market research; or frequent changes to the procurement plan. Certain provisions under the Law on Public Procurement contribute to all of this, as they do not stipulate *a deadline for adoption of public procurement plans, nor an obligation for contracting authorities to conduct market research before implementation of their procurement procedures*. This is perhaps the reason why the monitoring of public procurements observed large number of changes to public procurement plans, rendering the purpose of procurement planning meaningless.

Market research during development of procurement plans should be stipulated as legal obligation, especially considering the importance of this initial phase in terms of planning procurements and defining procurement items, developing technical specifications, calculating life-cycle costs, etc. This becomes even more important given that, according to the law, the estimated value *must* be based on previously conducted market research about the procurement subject, it must be valid at the time when the procurement procedure is initiated and it should not be determined in a manner that aims to avoid enforcement of the law.

As indicated before, market research and good procurement planning have an undoubtedly positive effect on increased 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 the start of procurement procedures in order to prepare the public procurement and inform business entities about their plans and requirements. This provision is significant because it introduces a practice in the legislation whereby contracting authorities seek or accept advice of independent experts, competent bodies or market participants to plan and implement procurement procedures, on the condition that such advice does not lead to distortion of market competition and it does not violate the principles of non-discrimination and transparency.

While consultations with market participants under Serbia's Law on Public Procurement are only a possibility, in Croatia such consultations are mandatory for all public procurements of works or high-value procurements of goods or services. According to the Croatian law, before the start of procurement procedures, contracting authorities are obliged to initiate preliminary consultations with interested business entities by presenting them with description of the procurement subject, technical specifications, eligibility criteria for tender participation, bid-selection criteria and special conditions for contract performance. After consultations are completed, contracting authorities are required to consider all objections and proposals put forward by interested business entities, develop report on objections and proposals accepted and/or rejected and publish it on their website. This is believed to be an extremely good solution that, in some form, should be introduced in Serbia's legislative framework.

Another issue that does not get much attention, but may impose a significant risk of corruption, is the absence of any obligation for contracting authorities to publish a plan of procurement procedures that are not subject to application of the law. The number of public procurements that are exempted from the obligation to apply the law is significantly increased on the account of high thresholds defined under the Law on Public Procurement (8,500 EUR for goods and services and 25,500 for works). Introduction of this obligation would enable monitoring of public spending by contracting authorities and would undoubtedly contribute to reduced risk of corruption.

A step forward in this regard may be the fact that amendments to the law introduced an obligation for contracting authorities to publish all contracts signed, i.e. purchase orders for public procurements exempted from law enforcement, on the Public Procurement Portal.[4]

[4] Art. 152a of the Law on Public Procurement.

Ineffective legal protection

Finally, a major problem affecting the public procurement system in Serbia is ineffective legal protection, despite the large number of protection mechanisms made available for participants in public procurement procedures.

In addition to legal protection afforded before the Republic Commission and as part of monitoring procedures led by PPO, legal protection is also granted in the form of criminal proceedings motioned before the competent prosecution office and the courts (procurement fraud under Article 223 of the Criminal Code), misdemeanour proceedings before the misdemeanour courts, competition protection procedures led by the Commission for Protection of Competition, and audit procedures of the State Audit Institution. However, in spite of the many legal protection mechanisms, lawful implementation of public procurement and curbing corruption are yet to yield tangible results. This leads to the conclusion that both the citizens and economic operators' trust in state bodies is extremely low, as well as that state bodies do not exercise their powers granted under the Law on Public Procurement.

Republic Commission for Protection of Rights in Public Procurement Procedures

The Republic Commission is the second instance appellate body for public procurement procedures. More precisely, it makes final decisions on public procurement procedures, public-private partnerships and concessions when participants in these procedures believe they have been wronged. In practice, this means that disputed public procurement would be implemented according to decisions taken by the Republic Commission decides. While the importance of this body in public procurement is not disputed, there are certain concerns in respect to its operation.

First, the Republic Commission has never held a public oral hearing for any case it was presented with, although this possibility was provided for under the previous law and is still in effect under the current law. In particular, both the contracting authority and the applicant, may propose an oral hearing when required by the complexity of the factual or legal situation. Also, the Republic Commission may decide to hold an oral hearing even when that has not been proposed by neither the contracting authority nor the applicant.

Second, the Republic Commission has never hired an expert when deciding on requests for protection of rights, although this possibility was allowed under the previous and the current law. Considering that various goods, services and works can be subject of public contracts, as well as the specificity of areas in which public procurement is conducted, it is clear that members of the Republic Commission, who as a rule are lawyers, are not competent enough to establish the facts in each individual case. The only thing done in this regard concerns compilation of a list of experts (2014) and adoption of rulebook on the list of experts (2016) pursuant to the law in force at the time.[5]

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

It should also be noted that the quality of decisions taken by the Republic Commission has been declining over the years. They are often unnecessarily long, featuring meaningless multiple (literal) repetitions of allegations put forward in the claim and the response thereto, especially evidence presented. On the other hand, rationales of decisions and orders for contracting authorities (in cases where the claim has been approved) are often incomprehensible and

[5] http://kjn.rs/vestaci/

short. All this may be a result of inadequate understanding of the subject matter they are reviewing and therefore holding oral hearings and hiring experts should be required in certain cases.

One responsibility of the Republic Commission (stipulated under the previous law as well) is to adopt binding legal positions on application of public procurement regulations. The purpose of principled positions is to facilitate law application in situations where there are concerns about 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*, which means that for 10 years this public body has not used this mechanism despite concerns about application of certain provisions from the law (e.g. right of action, additional requirements, etc.).[6] It is particularly surprising that the Republic Commission did not use this instrument in the period after its entry into force, i.e. after the new law became enforceable, when dilemmas about application of certain provisions are, by the nature of things, most common.

Finally, the current Law on Public Procurement abolished civic control over this extremely important public procurement body. Under the previous law, contracting authorities, economic operators and other stakeholders which believed their rights had been seriously violated in the procedure before the Republic Commission were able to submit petitions to the National Assembly's Committee on Finance, Republic Budget and Control of Public Spending, with the committee requesting the Republic Commission to submit a report on each case. Although the committee has never considered complaints concerning work of the Republic Commission, the decision to abolish this type of control under the new law is certainly a step backwards in regulating protection of rights in public procurement.

Administrative Court

While the Republic Commission's decision in the procedure for protection of rights is final, any dissatisfied participant in public procurement procedure may initiate administrative action. However, given that an administrative action usually takes years to resolve and that it does not delay execution of the Republic Commission's decision, this legal remedy is not the best way to deal with illegalities in procedures for protection of rights. Thus, when the current law was in the process of adoption, a proposal was made for better regulation of the issue on examining legality of decisions by the Republic Commission, but it was rejected. Finally, the new law did not bring any changes or improvements in regard to protection of rights before the Administrative Court. Moreover, general provisions under the Law on Administrative Action do not fully apply to control of decisions taken by the Republic Commission or those taken in public procurement procedure, which further complicates the effective judicial control of public procurement.

As regards the need to make judicial protection in public procurement more efficient and effective, it is first necessary to set shorter deadline for the Administrative Court to take decision (ruling) in administrative proceedings 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 take decision in contested public procurement.

When deciding upon claims against the Republic Commission, the Administrative Court's role needs to be strengthened in the cases where annulment of the commission's decision would be justified. This could be done by stipulating an obligation for the Administrative Court to make final decisions on claims for breach of rights (acting in 'dispute of full jurisdiction') rather than return the cases to the Republic Commission for reconsideration. This is because after

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

reconsiderations, the Republic Commission usually makes the same decision, rendering the already lengthy administrative proceedings completely pointless.

For acting in dispute of full jurisdiction to be effective, it is important that the Administrative Court judges are specialized in public procurement and collaborate with the Republic Commission.

The need to strengthen the Administrative Court's capacity 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. Under the current practice of the Administrative Court, contracting authorities do not have a right of action for initiation of administrative proceedings, i.e. they cannot challenge the legality of decisions taken by the Republic Commission – only tender participants can. In our opinion, a right of action should also be granted to representatives of the public interest, either contracting authorities or entities above them in the hierarchy (e.g., founder of the public enterprise or line ministry where the contracting authority is lower-ranking government body, etc.).

Public Procurement Office

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

Article 179, paragraph 1 of the law stipulates that PPO must monitor implementation of public procurement regulations and compile annual monitoring reports, initiate misdemeanour proceedings for violations of this law and claims for protection of rights, and initiate other appropriate procedures before competent authorities when, based on its monitoring, irregularities have been identified in implementation of public procurement regulations.

Article 180 of the law regulates the monitoring rules. It stipulates that PPO must conduct monitoring to prevent, detect and eliminate irregularities that may occur or have occurred in application of the law. It further stipulates that the monitoring procedure must be carried out according to the annual monitoring plan adopted by PPO by the end of the current year for the following year or in ex-officio capacity for negotiating procedures without previously announced procurement notice in the cases where only one economic operator can deliver goods, provide services or perform works, i.e. in the cases of extreme urgency, as well as when acting upon information received from legal or natural person, state administration body, provincial body, local government unit or other public authority.

PPO has adopted the Rulebook on the Procedure for Monitoring Application of Public Procurement Regulations (Official Gazette of RS no. 93/2020), which entered into force on 1st July 2020.

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

However, according to PPO's Monitoring Report published on 24th March 2023[7] covering activities taken in 2022 to prevent irregularities in public procurement procedures and to combat corruption, only 15 contracting authorities (among total of 5,500) have been subject to monitoring. Despite the fact that this represents some improvement compared to 2021 when 10 contracting authorities were subject to monitoring, the scope of monitoring should have been much larger and PPO, as one of the most important institutions in the public

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

procurement system, could (and should) have done much more to combat irregularities and corruption in public procurement.

In particular, the Rulebook on the Monitoring Procedure must stipulate deadlines for actions taken by the Office, the minimum scope of monitoring and the number of public procurement procedures that will be monitored, which it currently does not.

Criminal and misdemeanour liability

The justification for 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 existing provisions on criminal offences (receiving and giving bribes, political influence, abuse of power). However, after it has been in use for few years now, and judging by the experience of other countries, there are no doubts about the existence of this particular criminal offence due to the uniqueness and complexity of the subject matter of public contracts and due to different forms of criminal action related to public procurement. In this sense, legal intervention is justified whenever certain behaviours in the 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.[8] This is because public and private sectors interact the most under public procurement procedures and this provides multiple opportunities for actors in both sectors to redirect public funds for the benefit of individuals.[9]

However, judging by the current legal practices of public prosecution offices and courts, no significant results have been achieved in prosecuting procurement fraud as criminal offence. Criminal proceedings in the field of public procurement that have been initiated and finalized are few and far between. Despite the general impression of actors in the public procurement system that procurement fraud is a widespread criminal offence, it is fair to say that processing of these cases has been sporadic. As a result, trust in the work of judicial bodies concerning control of 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 criminal offence, creating a whole range of legal issues and dilemmas about the work of public prosecution offices and courts. The consequence is that, in practice, it is often unclear what should be classified as act of perpetrating criminal offence and what facts need to be established during the proceedings, giving plenty of opportunities for inconsistent legal practices and arbitrary actions on the part of government authorities. This is further confirmed by data on the number of proceedings initiated and sanctions imposed for this criminal offence. According to 2022 statistics of the Ministry of Justice for corruption-related crimes, 67 new criminal charges were submitted to the special anticorruption departments at the Higher Public Prosecution Office and the Prosecution Office against Organized Crime, 83 claims were rejected, 2 orders to conduct an investigation and 9 indictments were filed. Moreover, only 7 suspended sentences and no prison sentence were imposed.[10]

On the other hand, the current Law on Public Procurement stipulate 18 misdemeanours for contracting authorities and 4 for bidders.

There are still no official statistics on misdemeanour proceedings in the field of public procurement. However, judging by the Public Procurement Office's annual reports, it can be concluded that the number of misdemeanour proceedings brought before the courts has increased. In 2021, the Public Procurement Office filed 143 motions to initiate misdemeanour

[8] Preventing Corruption in Public Procurement, OECD, 2016
[9] Marina Matić Bošković, Krivično delo zloupotreba u javnim nabavkama – izazovi u primeni
[10] https://www.mpravde.gov.rs/sr/tekst/33769/statistika-koruptivnih-krivicnih-dela-.php

proceedings, while in 2022 it submitted as many as 429 motions. In contrast, in 2022, the Republic Commission, which is also authorised to initiate misdemeanour proceeding, filed only 6 motions to initiate misdemeanour proceedings.

What stands out 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 public procurement contract without conducting 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 conducted!

In terms of legal significance, awarding public procurement contract without conducting public procurement procedure is definitely the gravest violation of the law in this area and should therefore be deemed as an act of perpetrating criminal offence rather than misdemeanour.[11]

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

EUROPEAN COMMISSION'S 2023 PROGRESS REPORT FOR SERBIA[12]

The European Commission's 2023 Progress Report for Serbia was published on 8th November 2023 and assessed the country as moderately prepared in the field of public procurement. It also notes that some progress was achieved by revoking the Law on Special Procedures for Linear Infrastructure Projects, which seriously undermined effective implementation of the Law on Public Procurement. As was the case under previous reports, the EC reiterates that Serbia should in particular:

- ensure that procurement rules under intergovernmental agreements concluded with third countries comply with public procurement principles, are in line with the EU acquis, the basic principles of public procurement and the national legislation, making sure that these intergovernmental agreements do not unduly restrict competition;
- further align national legislation 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 with public funds are subject to public procurement procedures;
- further strengthen the capacity 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.

An overview of the EC's Reports in the last three years shows that Serbia has acted on only one recommendation by revoking the Law on Linear Infrastructure Projects. However, as indicated above, only 3 months later a new *lex specialis* was adopted, again allowing for suspension of the Law on Public Procurement, i.e. the Law on Special Procedures for Implementation of the International Specialized Exhibition EXPO Belgrade 2027. In essence, this means that no progress has been actually achieved in this regard. Most likely due to the fact that the 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 section on institutional setup and legal alignment in the field of public procurement.

Furthermore, the European Commission pointed out the fact that the Serbian government adopted a decree on selection of strategic partner for implementation of construction project without management and maintenance for self-balanced large-scale solar power plants with battery systems for electricity 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, the Law on Use of Renewable Energy Sources has been in force in Serbia since 2021, and it was precisely this law that enabled suspension of the Law on Public Procurement during construction of solar and wind power plants, by stipulating special procedure for selection of strategic partner. Therefore, adoption of the aforementioned decree as by-law would not even be possible without a law that enabled suspension of regulations in the field of public procurement. In other words, the practice of deviating from regulations on public procurement is not established by this decree, as stated in the EC Report, but by the law. Therefore, as part of its future reports and in addition to revoking the Law on EXPO Belgrade 2027, the EC should definitely insist that disputable provisions under the Law on Use of Renewable Energy Sources that allow avoidance of public procurement regulations be revoked as well.

[12] https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/ec_report_serbia_2023.pdf

As regards intergovernmental agreements, the EC Report states that 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, accounting for 33 million EUR compared to 735 million EUR 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. Furthermore, it is noted that intergovernmental agreements are not always in accordance with the principles of equal treatment, non-discrimination and transparency or competition rules.

In the section on public financial management, the EC Report refers to the fact that Serbia needs to apply the legal framework and methodology on capital projects management and public procurement procedures, to **all capital investments**, regardless of the type of investment or source of funding.

Additionally, the EC expresses concern with the fact that the State Audit Institution had found irregularities in a number of public procurement contracts inspected in 2022 accounting for 18.88% of all public procurements.

Moreover, it is also noted that the share of open procedures has increased from 91.3% in 2021 to 98.8% in 2022, while use of the best price-quality ratio criterion remained low at 4% in 2022 and the lowest price criterion dominated 96% of public procurement procedures conducted.[13]

[13] According to the Public Procurement Office's 2022 Annual Report, the share of open procedures in the total number of implemented procedures accounted for 97.83%, not 98.8% as stated in the EC Report.

RECOMMENDATIONS TO IMPROVE THE PUBLIC PROCUREMENT SYSTEM IN SERBIA

Having in mind all the above, efforts needed to improve the public procurement system in Serbia include:

- Complete harmonization of the national legislation with the EU acquis in the field of public procurement by aligning the Law on Public-Private Partnerships and Concessions with Directive 2014/23/EU on the award of concession contracts;
- Revoke the Law on Special Procedures for Implementation of the International Specialized Exhibition EXPO Belgrade 2027 and provisions under the Law on Use of Renewable Energy Sources that allow exemption from enforcement of public procurement regulations; urgently abandon the practice of adopting special laws (*lex specialis*) that enable derogations from application of the Law on Public Procurement and other systemic anti-corruption laws, as well as the practice of awarding public procurement contracts under intergovernmental agreements;
- Stipulate, by law, an obligation for contracting authorities to conduct and document market research before adopting their public procurement plans;
- Stipulate, by law, an obligation for contracting authorities to publish data related to public procurement contract performance on the Public Procurement Portal, primarily data on the value and level of contract performance (value of delivered goods, services, works), payments made under the contract (how much was paid for delivered goods, services, works), compliance with performance deadlines and measures taken to sanction non-compliance with contractual obligations on the part of the selected bidder (contractual fines charged, financial securities activated, etc.), as well as other important payment data (existence of advance payment);
- Ensure urgent start of supervision activity by the Ministry of Finance over performance of public procurement contracts, i.e. adopt relevant internal acts that will more closely regulate the manner in which the budget inspection would conduct such supervision, including criteria for selection of contracts that will be subject of supervision;
- Insist on consistent application of the Law on Public Procurement by contracting authorities, as well as consistent and timely exercise of functions and use of legal powers by key institutions in the public procurement system – Public Procurement Office, Republic Commission for Protection of Rights in Public Procurement Procedures and Administrative Court, including institutions such as the Commission for Protection of Competition, the Agency for Prevention of Corruption, the State Audit Institution, the budget inspection and competent courts and prosecution offices;
- Increase and strengthen staff capacity at key institutions in the public procurement system and ensure greater mutual coordination, both through law-stipulated institutes and other forms of cooperation;
- Stipulate the act of committing the criminal offense of abuse in public procurement more clearly and specifically;
- Eliminate the error in severity gradation for law violation: non-application of the Law on Public Procurement (non-implementation of public procurement procedure) should be a criminal offence, not just misdemeanour.