# Public Procurement Corruption Map in the Republic of Serbia

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# Foreword

Corruption in public procurement procedures siphons off scarce public resources, often results in shoddy public works and erodes the trust of citizens and businesses in government. Since its establishment in 2001 the Organization for Security and Cooperation in Europe Mission to Serbia has supported our host government, civil society and the judiciary in order to improve the prevention and suppression of corruption in public procurement procedures.

Recognizing the need to thoroughly analyze the risks and vulnerabilities for corruption in the public procurement system in order to better understand what is presumed to be the largest source of systematic corruption in the country, the Mission in 2012 commissioned the drafting of a *Corruption Map of Public Procurement in the Republic of Serbia* - the first section of this publication. The author, Sasa Varinac, identified 21 vulnerabilities in the system that were being used by bidders and contracting entities in order to violate or circumvent the 2008 Law on Public Procurement. The Corruption Map was publically presented on 7 November 2012 in the National Assembly of the Republic of Serbia before the First Deputy Prime Minister, Members of Parliament, government officials and civil society. The drafters of the 2012 Law on Public Procurement used the *Corruption Map* to develop anti-corruption provisions in the 2012 Law which was met with significant praise by the international community and its implementation already achieved notable success according to reports by the Public Procurement Office and the State Audit Institution. In March 2013 Sasa Varinac was selected by the National Assembly, on the proposal of the Parliamentary Committee on Finance, State Budget and Control of Public Spending, to be the President of the Republic Commission for the Protection of Rights in Public Procurement Procedures through the first open selection undertaken by the Parliament.

The Mission continued to support the prevention of corruption in public procurement through such activities as moderating peer-to-peer meetings among the Public Procurement Office, Ministry of Finance Budget Inspectorate, Republic Commission for the Protection of Rights in Public Procurement Procedures and the State Audit Institution in order to improve co-operation in preventing corruption and to exchange information on potential violations of the Law. In parallel, the Mission began implementing training on investigating and prosecuting corruption in public procurement procedures for public prosecutors according to the 2012 Law and the 2012 amendments to the Criminal Code. From this training the idea was formed to identify actual examples of violations and alleged corruption for each of the 21 identified violations in the *Corruption Map*.

In 2013 in partnership with the Association of Public Procurement Professionals, Ivan Ninic, an experienced investigative journalist, wrote the *Practical Examples* - the second section of this publication. Ninic served as an Adviser in the Cabinet of the Minister of Economy from September 2013 to December 2013, and since January 2014 as a Special Adviser to the Director of the Privatization Agency. The practical examples serve as indicators of when violations of the law may have occurred. The purpose of these examples is to educate the judiciary, law enforcement, auditors and financial oversight officials how the system has been manipulated or circumvented and to highlight types of alleged violations that may indicate possible red flags that would require further investigation or analysis. The examples provided serve as illustrations and, unless judgment has been rendered, there is no intention by the author, the Association of Public Procurement Professionals or the OSCE to pass judgment or allege that criminal or civil violations occurred. Although the 2012 Law significantly improved anti-corruption measures, some of the vulnerabilities identified in this publication remain, and those who attempt to violate the Law may continue to use the methods identified. With the improved anti-corruption measures and resources such as this publication, potential violations may be more easily spotted than in the past.

Proving collusion, abuse of authority or other criminal malfeasance in public procurement procedures is notoriously difficult for prosecutors. The Mission sincerely hopes that this publication will serve as a tool for the judiciary, law enforcement, auditors, public procurement professionals, bidders and contracting entities in their quest to further mitigate the risks and vulnerabilities for corruption in public procurement and restore confidence in the public sector that the awarding of government contracts is fully transparent, and to the public that funds are spent efficiently, effectively and economically.

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OSCE Mission to Serbia

Part One

# Public Procurement Corruption Map in the Republic of Serbia

# Introduction

The purpose of regulating the public procurement system, apart from the implementation of the basic principle of cost-effective and efficient use of public funds ("value for money" principle – the best possible ratio between the amount paid and the value received), certainly includes the fight against corruption in this area as well.

Bearing in mind that the Republic of Serbia annually spends around 3,000,000,000 EUR through public procurement procedures (according to official statistics of the Public Procurement Office), it may be said that that there is an enormous risk that acts of corruption could occur in this area and activities the purpose of which is to unlawfully grant preferential treatment to a particular bidder while discriminating others in order to satisfy certain financial, political and other interests. Naturally, these are the interests of a small group of people - certain individuals or interest groups, which pose a threat to the public interest.

Corruption related to public procurement procedures does not only represent a loss of money (of public funds) but it also leads to the procurement of goods, services and works which do not meet the needs of the contracting authority in terms of their characteristics, level of quality and delivery dates and it is not rare that the delivery made is only a part of what was stipulated by the contract or that the delivery is not made at all. Inadequate execution of the public procurement contract adds to the negative effects of corruption related to public procurement. The consequences of inadequately conducted public procurement procedures have a double negative effect on the work of all contracting authorities: on the one hand, their operating costs are increased and on the other, the level of quality of the services which the citizens receive is lower than what could have been provided. The brunt of all of the aforementioned is ultimately borne by the citizens as the institutions in question are mainly financed by their money and the end-users of the said services are the citizens themselves.

Serbia ranks 83rd on the list which includes 178 countries according to the Corruption Perceptions Index of the international non-governmental organization "Transparency International" but it is the only country in the region where a decrease was registered in the absolute value of the index from 3.6 to 3.5, which was its value the previous year. The report by Transparency International also identifies the area of public procurement as one of the key generators of corruption in the country.

Following the adoption of the Law on Public Procurement (hereinafter: the Law) in 2002, Serbia passed the amendments and supplements to the Law in 2004 while a new Law (*Official Gazette of the Republic of Serbia*, no. 116/08) was passed in 2008 and it is still in force. The most important changes introduced by the 2008 Law were the ones regarding the increased transparency, which was achieved by imposing an obligation of publishing a notice on all "high" value procurement procedures on the Public Procurement Portal maintained by the Public Procurement Office.

Furthermore, the participation in such procedures has been simplified by requesting photocopies of the documentation to be submitted rather than their originals. These changes were recognized as a significant step forward in the Report of the European Commission on Progress of Serbia in 2009 and it was noted that Serbia had harmonized its regulations with the Directives of the European Union to a large extent.

However, when realistic indicators are looked at, primarily the ones related to competition, it is evident that the said measures have had no particular effect on the competition. For instance, average number of bids per public procurement was reduced from 8.5 in 2003 to 3.2 in 2011 whereas the share of the contracts concluded in procedures where only one bidder had participated increased from 14% in 2003 to 40% in 2011(official data of the Public Procurement Office). Since it is how intense the competition is that directly influences to what extent the contracting authority is going to get more favourable purchasing terms, it follows that the conditions for achieving the key purpose of public procurement, which is the principle of cost-effective and efficient use of public funds, have worsened rather than improved with the adoption of the new Law.

It is crucial to determine the cause of the steady decline in the level of confidence the bidders have in the public procurement system and of ever increasing numbers of those refusing to participate in public procurement proceedings despite the deteriorated conditions for getting new job contracts in the market due to the economic crisis. In other words, it is paramount to discover what is deterring the bidders from participating in the public procurement procedures in order to focus on changes in that area so that the whole system could gain more credibility and, as a result, increase the number of bidding participants consequently improving the effects of public procurement procedures due to increased competition.

First and foremost, the trust in the public procurement system in the Republic of Serbia has been impaired because competent state authorities have been slow to use their current legal powers. This has resulted in the following consequences:

- Prolonged proceedings for the protection of the rights of the bidders, which has led to abuses of this right by some bidders that blackmailed the contracting authorities and other bidders or obtained a continuance for the execution of the expired contract by filing the request for the protection of rights;
- Lack of efficient control of the execution of the contract; consequently, the contracting authority could allow the bidders selected in the public procurement procedure as the best to completely alter the quoted terms (to increase the price, extend the delivery period, etc.) thus rendering the proceedings meaningless leaving other bidders that have participated feeling deceived;
- Failure to institute legal proceedings for declaring the contract on public procurement null and void after it was signed, which is a very important instrument for fighting illegal arrangements between the bidder and the contracting authority, in which case no participant considers their rights to have been violated but it is the state's interest that has been threatened (entering into or extending a contract without conducting a public procurement procedure, unlawfully adding annexes, most often accompanied by an increase in the price, etc.);
- Inefficiency of the competent authorities when processing violations related to the field of public procurement;
- Insufficient coordination of all authorities competent for the implementation and supervision of the implementation of the regulations related to public procurement.

On the other hand, delayed use of legal powers of the competent authorities has contributed to a significant increase in the number of mechanisms of corruption in the public procurement system, the effects of which might serve the interest of individuals or interest groups at the expense of the public interest. Therefore, the "mechanism of corruption" is used in this text as a blanket term for all irregularities arising from the application of the provisions of the Law or for the phenomena which are not regulated by the provisions of the said Law but which may lead to the effects of corruption. Effects of corruption are manifested as illegally obtained material gain by individuals at the expense of the principle of cost-effective and efficient use of public funds. The existence and use of such mechanisms of corruption certainly affects the trust bidders have in impartial actions of the state and all of its bodies and institutions during the procurement procedure.

This study provides an analysis of the most important mechanisms of corruption related to the public procurement in Serbia and its purpose is to:

- identify mechanisms of corruption as the indicators of potential effects of corruption;
- supply the examples of mechanisms of corruption;
- identify the very effects of corruption;
- propose measures for the prevention of mechanisms and effects of corruption.

Mechanisms of corruption in the public procurement system, which are the subject of this study, are first analyzed in the text itself and then they are presented in the table that follows it, where it is shown at which stage of the public procurement these mechanisms of corruption appear.

Author

1. Public Procurement Phase

# Planning

## 1.1. Mechanism of Corruption: Unnecessary Procurement (in terms of content, quantity or quality)

Upon planning public procurement several actions need to be undertaken by the contracting authority for the purpose of preparing for the implementation of public procurement procedure and subsequent signing and execution of the contract. The said actions are: determining the need for the procurement, allocating the funds by adopting a budget or a financial plan, as well as passing a procurement plan, which contains the schedule according to which the procurement is to be conducted, the type of the procedure, estimated value and other necessary elements.

The contracting authority upon determining the need for the procurement decides what is to be procured during the year by actively communicating with its organizational units (such as technical, financial, legal and commercial departments). Upon doing so, the contracting authority takes into account the procurement analysis and needs analysis for the preceding period, current needs and stored supplies, the survey of the current market situation, as well as annual and mid-term business plans.

It is extremely important that the contracting authority establishes the needs realistically and objectively based on the activities it has jurisdiction over while taking into account the available human and technical resources as well. When it comes to the business activities undertaken by the contracting authority, it should take into account not only what is stipulated by the regulations or decisions of the competent authorities which regulate such activities but also its annual and mid-term business plans.

In view of the aforementioned, the objectivity of the contracting authority when determining the need for the procurement in question should be tested based on the answers to the following questions:

1. Is it necessary to procure the specified items of the procurement in the first place?
2. Are the quantities of the goods that are being procured (the scope of the works or services) necessary?
3. What is the adequate level of quality of what is to be procured?
4. Do the items subject to the procurement in question suit the needs of the contracting authority according to its characteristics?

All of the above falls under the category of establishing whether the actions of the contracting authority during the initial stage of the public procurement procedure have been cost-effective. If the contracting authority does not really need what is being procured or the procured quantity is not adequate, or the quality and the characteristics of the goods are inadequate, unnecessary costs are incurred that are payable from public funds. In many cases the reason for such an outcome is related to corruption, i.e. the attempt by the bidders and certain individuals who are employed by the contracting authority to profit at the expense of public funds.

### 1.1.1. Examples

When it comes to procurement procedures, close scrutiny is required when the following is being procured:

- intellectual services the results of which would not be used by the contracting authority, such as various analyses, research studies, translation services, etc.;
- consumables or spare parts despite the fact that there are considerable stockpiles in the warehouse of the contracting authority which have not been utilized over a longer period of time;
- replacement for the equipment which can still be used and which is in good condition (procuring new cars even though the contracting authority has vehicles at its disposal which have not been used much and which are in perfect working condition);
- specialized professional training for persons who do not need such training considering the type of job they perform;
- procuring special all-terrain vehicles even though nothing that the contracting authority does suggests that such vehicles would be used in specific terrains.

Examples of procurement of goods and services which exceed in terms of their quantity and scope what is required:

- procuring great quantities of building materials although the facility being built is of small square footage and is a small-storey building;
- procuring the number of computers or pieces of office furniture (desks, chairs, etc.) which by far exceeds the number of employees of the contracting authority;
- procuring the design of a website for the contracting authority with a great number of unnecessary features which are not going to be used by those who are expected to visit the site;

With regard to the procurement exceeding the requirements of the contracting authority considerably in terms of the level of quality and technical characteristics of the specified items, the following procurement procedures might serve as an example:

- procuring official vehicles of unnecessary engine capacity and size and with other unnecessary features;
- high-performing computer equipment and programmes (high speed of the processor, great memory capacity, etc.) even though the employees in question are going to use these to perform simple tasks of processing and printing out texts or for email exchange;
- business phones with unnecessary features such as integrated high-resolution cameras;
- expensive office furniture.

### 1.1.2. The Effect of Corruption

Conducting unnecessary procurement procedures, as well as procuring the goods and services which exceed the actual needs of the contracting authority in terms of their scope and technical characteristics leads to unnecessary, i.e. inappropriate use of public funds but it can also indicate that there is an inclination to help certain individuals to gain a profit illegally.

Unnecessary public procurement procedures in Serbia occur primarily due to insufficient internal and external auditing of the appropriate use of the said public procurement procedures. Specifically, judging by the reports on audits which have been conducted by the State Audit Institution, which have been published on the internet presentation of the said state body, it may be concluded that the said Institution has not reviewed the appropriateness of the use of the public procurement procedures. It is very important to establish this type of control in the coming period, especially in view of the fact that the planning stage of the public procurement procedure is not open to general public and the interested parties and that no specific instruments are stipulated which would allow the said parties to request the irregularities to be remedied, such as, for instance, the request for the protection of rights during the public procurement procedure phase or legal proceedings for declaring the contract null and void at the stage of signing and executing the said contract.

In addition to the aforementioned, inappropriate procurement procedures are conducted due to a lack of decisions or internal documents passed by the contracting authorities, which would contain standards based on which it would be determined why something is to be procured, of what kind of quality and what is the required quantity. Such standards might, for instance, exist for the official cars which would define the travelled distance and the type of break-downs required for the initiation of the procurement of new cars.

### 1.1.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

First of all, it is necessary to ensure that greater powers and resources are granted to the State Audit Institution, which should assume the greatest role in monitoring whether the public procurement procedures are implemented appropriately. Furthermore, internal audit of the contracting authority should particularly focus on this aspect of public procurement procedures.

Moreover, contracting authorities should be legally bound to adopt certain standards which would provide the criteria for assessing whether there is a need to procure something, what is the required amount and level of quality. In addition, publishing an annual procurement plan on the Public Procurement Portal, the part designated for publication, would allow all of the interested parties to examine the procurement procedures planned by the contracting authority and to bring to attention if some of them seem inappropriate.

## 1.2. Mechanism of Corruption: Deliberately Setting an Unrealisticly Estimated Value

Estimated value of the public procurement is the amount of public funds the contracting authority has reason to believe is going to be spent for the procurement of certain goods, services or work. As such, the said value includes total value of all payments (apart from the VAT) which the contracting authority would effect in the course of a particular public procurement procedure.

Accurate setting (calculation) of the estimated value affects both the choice of the type of procurement procedure to be implemented by the contracting authority and the implementation of the transparency principle in the course of the proceedings (whether there is an obligation to publish certain types of notices).

Firstly, estimated value affects the choice of the public procurement procedure. For instance, Article 26 of the Law stipulates that low-value public procurement, for which a considerably simplified public procurement procedure for the selection of the best bidder is applied, shall be the procurement of goods, services and works of the same type, whose estimated value, at the annual level, is lower than the value determined by the law which regulates the annual budget of the Republic of Serbia. In addition, the said Article of the Law stipulates that the procurement value which represents the threshold in the budget year below which contracting authorities are not under an obligation to apply the provisions of the said law (or low-value public procurement procedure) is determined in the same way as well.

With regard to determining the estimated value and its significance for the implementation of the principle of public procurement procedure transparency, it should be noted that Articles 69 and 71of the Law stipulate that the estimated value dictates whether the contracting authority is going to be under an obligation to undertake the following actions regarding the public procurement in question:

- the publication of public procurement notices in the *Official Gazette of the Republic of Serbia*;
- the publication of the notice in the language commonly used in international commerce in addition to the one in Serbian;
- the publication of the Prior Information Notice indicating the intention to conduct the public procurement procedure.

Whether the contracting authority is under an obligation to prepare the tender documentation in a foreign language commonly used in international commerce, in addition to the documentation in the Serbian language, shall also depend on how high the estimated value is.

Based on the aforementioned, it may be concluded that realistic and objective value estimate is very important for the selection of the type of the procedure to be applied, the publication of notices on the public procurement, as well as for the preparation of tender documentation. Moreover, estimated value of the public procurement dictates whether the contracting authority is under an obligation to delegate a licensed public procurement officer to the committee for public procurement and to request bank guarantees from the bidders (the contracting authority must demand such guarantees if the value of the procurement in question exceeds a certain amount).

The importance of the estimated value is also reflected by the fact that whether a particular bid is acceptable is contingent on the said value. Specifically, according to the provisions of the Law, the contracting authority may, but does not have to, reject the bids in which the price exceeds the estimated value as inadmissible.

### 1.2.1. Examples

There are several examples of deliberately unrealistic value estimates as a potential mechanism of corruption. For instance, setting the estimated value low in the following cases:

- in order to avoid stipulated obligations of the contracting authority regarding the public notices on the public procurement (publishing a Prior Information Notice and publishing an announcement in the Official Gazette of the Republic of Serbia);
- in order to enable the rejection of bids as inadmissible, and consequently the suspension of the procedure, if the "preferred bidder" does not submit the best bid;
- in order to avoid requesting bank guarantees as performance bonds during the public procurement procedure, as well as during the phase when the contract is being executed.

### 1.2.2. The Effect of Corruption

All of the aforementioned suggests that setting an unrealistically low estimated value, above all, allows the contracting authority to avoid very important obligations stipulated by the Law. It is thus possible to avoid the implementation of the prescribed procedure for publishing notices and the preparation of tender documentation, which threatens the transparency principle, which may also result in deliberate restriction of the competition. On the other hand, an unrealistically low estimated value allows the contracting authority to reject the bids as inadmissible (because the quoted prices exceed the said value) although the quoted prices do represent real market value of what is being procured. In such a way the contracting authority is provided with a mechanism which makes it possible for a particular public procurement procedure to be suspended (due to the rejection of all bids as inadmissible) if it is determined that the "preferred bidder" has not made the best offer.

### 1.2.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

It is necessary to prescribe that it constitutes a separate misdemeanour offence and a reason for declaring the contract null and void if the contracting authority has set an unrealistically estimated value for the procurement in question.

If the competent authorities were to be granted powers to request a justification from the contracting authorities based on the submitted procurement plans regarding the method in which the value of the said public procurement has been estimated, this could also yield results in the prevention of the use of the said mechanism of corruption.

One of the possible measures might be limiting the option of rejecting inadmissible bids by imposing an obligation on the contracting authority to publish what the estimated value is beforehand (before the deadline for the submission of bids expires) if the bid is to be rejected because it exceeds the estimated value amount.

## 1.3. Mechanism of Corruption: Prohibited "Fragmenation" of Public Procurement for the Purpose of Applying Low-value Public Procurement Procedure

The procedure for low-value public procurement is the exception to the rule on the application of an open procedure as the procedure in which a public call for bids is published, which ensures the greatest number of participants in the competition. A specific feature of the low-value public procurement procedure is that it is regulated by a bylaw and not the Law, according to which the contracting authority does not have to publish an invitation for the submission of bids in the *Official Gazette of the Republic of Serbia* or on the Public Procurement Portal, instead it is sufficient to invite three bidders to submit their offers. Therefore, the invitation for the submission of bids is sent out to three addresses of the bidders chosen by the contracting authority and it is deemed sufficient that just one of the bidders has submitted an offer properly (meeting all the requirements) and that the offer is adequate (it has met all of the technical specifications) and the contracting authority may decide to select the said offer and based on this decision sign a contract on public procurement. This is what makes the low-value public procurement procedure quite similar to the negotiated procedures which, in themselves, represent procedures with serious restrictions of the competition.

Specific feature of the low-value public procurement procedure is that the bidders are not under an obligation to submit with their bids any proof that they meet mandatory requirements for the participation as stipulated by the Law. It is sufficient for the bidders to submit their statement declaring that they meet the said requirements and that they are fully aware of moral, financial and criminal liability such a statement entails. This significantly simplifies the procurement procedure but it also leaves room for the bidders to have the opportunity to sign a contract with the contracting authority on executing the procurement without any verification even though they do not meet the participation requirements (due to unpaid taxes, a ban on engaging in certain business activities, etc.).

Low-value public procurement is defined by the Law as the procurement of goods, services or works of the same type, whose value is estimated at an annual level to be under the value stipulated by the Law regulating the annual budget of the Republic of Serbia. Such a definition is an attempt on the part of the legislator to prevent the so-called "fragmentation" of large-scale procurement procedures into a series of smaller ones in order to be able to apply the procedure for low-value public procurement instead of, for instance, an open procedure. This means that the procurement of goods of the same type (for example, office supplies) which does not exceed at an annual level the sum of 3,331,000.00 RSD, which is the maximum value for the procedure for low-value public procurement for 2012, must not be split up by the contracting authority into several low-value procurement procedures.

The problem with this definition is the fact that the Law does not provide a more accurate definition of the goods, services or works of the same type. According to the definition found under Article 2 of the Law, goods, services or works of the same type are those that are classified under the same category, are used for the same purpose or have the same characteristics. However, although it seems that the definition is applicable, the practice has disproved this as it has remained unclear what classification the Law is referring to. Due to this fact, supervising authorities are often unsure whether certain procured items are of the same type which would require from

the contracting authority to add up their total value at an annual level and apply an appropriate type of public procurement procedure accordingly.

Despite the aforementioned problem with the definition of the items of the same type which are subject to procurement, in certain cases it is obvious that the contracting authority has applied several low-value public procurement procedures although the total value of the items in question exceeds the threshold for this type of procedure. Such actions represent a serious violation of the principle of ensuring competition among the bidders and it may indicate that there is a desire to conclude the contract with a particular bidder.

### 1.3.1. Examples

Examples of "the fragmentation" of procurement for the purpose of applying the procedure for low-value public procurement even though the total amount of the procurement in question exceeds the set maximum value for the low-value public procurement are:

- conducting separate procedures for building or adaptation of the same facility (separating procedures for different rooms or even separating the procedures, for instance, for painting the ceiling from painting the walls in the same room);
- separate procurement of certain parts of computer equipment (monitors, keyboards, computer cases);
- separate procurement of pieces of office furniture (chairs, desks, cabinets);
- separate procurement for special organizational units of the contracting authority (local offices) in such a way that each of these units conducts a procedure for low-value public procurement;
- grouping the items which are subject to public procurement into lots in such a way that each lot can be subject to the procedure for low-value public procurement (procurement of uniforms in two lots – pants and shirts of total value which exceeds the stipulated maximum).

### 1.3.2. The Effect of Corruption

If the contracting authority is conducting several procedures for low-value public procurement instead of an open procedure, it is an indication of the intent to completely limit the competition thus enabling certain bidders to be selected and, consequently, to conclude the contract on the public procurement with the said contracting authority.

The aforementioned carries even more weight if we bear in mind that the said procedure does not require any special proof that the mandatory participation requirements for the bidders have been met. Unjustified use of the said procedure might indicate that there is intent to allow the participation of the bidders that do not meet some of those requirements, which is why they would not have been allowed to submit their bids in an open procedure.

### 1.3.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

On the one hand, the classification of the goods, services or works should be determined and defined more accurately so as to eliminate any dilemmas regarding what is considered to belong under the same category at an annual level. The measure which could help achieve this is the introduction of a reference classification system of items subject to public procurement, which would be in line with other existing classifications and all of which would be in accordance with the appropriate terminology used in the European Union – CPV ("Common Procurement Vocabulary").

On the other hand, the way the low-value public procurement procedure is conducted should be differently regulated in such a way that greater competition is secured, which would render the said procedure less prone to abuses. In view of the aforementioned, the possibility of increasing the number of bidders that the contracting authority must contact should be considered (for instance, from 3 to 5) and prescribing that the invitation for the submission of bids must be published on the Portal or the website of the contracting authority. As an alternative to the public announcement of the invitation for the submission of bids, an obligation should be imposed on the contracting authority not only to publish which bidder has entered into contract with the said authority upon the conclusion of procedure for the low-value public procurement but also a list of bidders that have been invited to submit their bids as well.

## 1.4. Mechanism of Corruption: Defining the Items Subject to Procurement in Such a Way as to Ensure Only a Particular Bidder is Able to Execute the Contract

Prohibited restriction of the competition among the bidders is mainly achieved through unjustified use of exceptions and of the negotiated procedures or by conducting any other type of public procurement procedure while violating the principle of transparency and equal treatment of the bidders. However, the restriction of the competition may be achieved through the decision on what is being procured at the planning stage, as has already been mentioned, as well as through defining the items which are subject to procurement in such a way that only a particular bidder is able to offer them and execute such a contract.

Defining the items subject to public procurement entails specifying everything that is to be procured within a single procurement procedure, then grouping the items together into separate wholes – batches (in comparative law the term "lots" is used), as well as defining everything that constitutes a single lot (various parts, i.e. items).

It should be noted that only the bid which includes all of the listed items subject to the said public procurement, whether it be a single item which consists of several elements or items which are grouped together under a single lot, may be deemed as properly submitted and taken into consideration when the bids are ranked. Therefore, a bid shall be considered as improperly submitted if it does not include everything under an item subject to public procurement (for instance, it does not include all of the works within a single building) or which does not include all of the components of a single lot (for instance, all of the drugs listed under the lot "pain-relievers"). However, it is very important to point out that when it comes to lots, the bidder does not have to submit a bid for all of the lots that are listed under a single public procurement procedure, instead, the bidder must offer everything that is listed under a particular lot.

The fact that the failure to include everything that the contracting authority has requested in terms of what is specified as the subject of the procurement constitutes a faulty bid may cause abuses when the items subject to procurement are being defined.

### 1.4.1. Examples

The contracting authority may define the items subject to procurement in such a way that several separate elements are listed under a single item to be procured, grouped together in such a way that only one bidder is able to offer all of them at once. In such a case, where the said item which is being procured could be split up into segments – lots, thus allowing a greater number of bidders to participate if they can offer the specified segments, the contracting authority nevertheless opts to combine all of these segments and allow only those bidders able to offer all of them to participate. An example of such abuse would be the procurement of passenger and freight vehicles together, without splitting them up into lots, particularly if the contracting authority has the information that a particular bidder or bidders offer both in their range of products.

Another abuse that is often cited is when unnecessary items are specified to be procured because the contracting authority may add to the item which is actually necessary something that is not necessary thus defining a single item which only a particular bidder is able to deliver or which puts other bidders in a situation to deliver such an item at great cost. An example of this is when special benefits are requested in addition to the items which are being procured and for which the contracting authority has an actual need, such as the delivery of consumables or tools accompanying some machine when it is a known fact that only a particular bidder has a certain amount available on stock. In such cases, an important factor which is combined with the listed items for procurement procedure for the purpose of corruption are short delivery periods requested by the contracting authority.

The contracting authority may abuse the process of defining the items which are being procured by adding to an item which is subject to open competition in the market something for which a particular bidder holds exclusive rights (for instance, a patent or copyright) instead of acquiring such an item, for which someone holds an exclusive right, in a separate negotiated procedure with a particular bidder (Article 24, para. 1, item 3 of the Law). Thus the competition is limited by the contracting authority as it allows a particular bidder to have an exclusive right for a certain segment of the specified procurement list (often of far lower value than that of other segments) making the said bidder the only one that is able to offer the whole procurement list, which includes segments which are subject to competition. Consequently, in this case, only the said offer would be deemed as having been properly submitted. An example of this could be the procurement of drugs under which the contracting authority requests a drug to be delivered which can be supplied by only one bidder as this bidder is the only one licensed by the competent authority to do so, or it is the only producer of that drug, while all the other drugs are distributed or produced by more than one supplier.

All of the aforementioned in terms of abuses during the process of defining the subject matter of a single integrated procurement (with a single, integral listed item to be procured) applies to constituent parts of a single lot. Namely, in order for the bid to be properly submitted for a single lot, everything listed under it must be included, therefore, the contracting authority may abuse the process of defining what is included in a particular lot also by using the above mentioned methods.

### 1.4.2. The Effect of Corruption

In the case of the aforementioned mechanism of corruption, the contracting authority most often has some information that a particular bidder is the only one that is able to deliver the entire procurement list of items or something that is unusual, but unnecessary, in essence, from the point of view of executing the contract on public procurement in question. By including such elements in the public procurement list in question, certain bidders are given an advantage over the other participants or it creates a situation in which only their bid can be selected.

### 1.4.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

It should be considered whether it is possible to amend the regulations on public procurement so that an obligation is imposed on the contracting authorities to segment the listed items subject to public procurement, whenever it is possible, into several wholes – lots, thus enabling a greater number of bidders to submit a bid within a single public procurement procedure. In such a case, it would be relevant to determine if the procurement list included more segments and the value of the said public procurement could serve as one of the indicators so that in cases where there are more segments and a certain value is exceeded, it would be necessary to conduct the procurement procedure separated into lots.

## 1.5. Mechanism of Corruption: **Making Frequent and Unjustified Exceptions**

Articles 7 and 87 of the Law stipulate procurement procedures which are not subject to the provisions of the said law even though they are conducted by entities which have the status of a contracting authority according to the said law. Therefore, this refers to situations in which the contracting authority does not have to conduct a public procurement procedure according to the prescribed rules since there are circumstances which render the application of such rules redundant or impossible.

Exceptions in themselves imply complete elimination of the legally prescribed procurement procedure, which is why their unjustified use is perhaps the most serious violation of the provisions of the Law. Consequently, the only appropriate approach to exceptions is to interpret them restrictively while the burden of proof whether there are any of the reasons stipulated under one of the 14 items of Article 7 or one of the 8 items under Article 87 of the Law lies with the contracting authority.

A number of analyses of the current law provided by local and foreign experts and the representatives of the European Union conclude that the said law specifies a greater number of exceptions than realistically necessary and that some of the exceptions have been defined in such a way that their restrictive application is not possible.

### 1.5.1. Examples

Examples of unjustified exceptions are the following:

- conducting the public procurement procedure involving two contracting authorities where one, appearing as a bidder, does not have the exclusive or special right to perform the activity which is subject to public procurement procedure in question (contracting authority awards a project to a state-owned faculty without conducting a public procurement procedure although there are a number of privately owned entities which could carry out the same project);
- unjustified treatment of some procurement procedures as confidential despite the fact that the requirements for this have not been met (procurement of office furniture, passenger vehicles, fuel, heating material, etc.);
- executing procurement without the implementation of stipulated public procurement procedures during an extended period after a natural disaster, after all basic living conditions have already been restored;
- failure to conduct a public procurement procedure when purchasing goods for the purpose of rendering a particular utility service even though the said contracting authority has the exclusive right to offer this service (exceptions could be applied only if the market for providing such a service were open to competition);
- procuring research services without implementing the Law in order to allow the contracting authority to gain profit (for the purpose of performing its activity) rather than acting in common interest, which is a prerequisite for making an exception.

### 1.5.2. The Effect of Corruption

A complete elimination of the application of the provisions of the Law (including those which guarantee the protection of the rights of bidders and public interest) certainly in itself raises concerns that there are certain tendencies towards corruption. Procurement which is not accompanied by a prescribed procedure allows the competition to be completely restricted or even eliminated thus posing a very clear risk of unjustified use of exceptions.

### 1.5.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

First of all, it is necessary to reduce the number of exceptions listed under the current Law. Some of the stipulated exceptions cannot be found in comparative law, i.e. in the European legislation. For instance, such exceptions include procurement in the event of natural disasters (instead, negotiated procedure "for reasons of urgency" is applied), procurement from the Republic Commodity Reserves Directorate, procurement of the services of trustees in bankruptcy, etc.

It is necessary to define more accurately certain exceptions in order to secure a more restrictive application of the said exceptions. In this respect, confidential procurement procedures particularly stand out as well as procedures involving two contracting authorities.

In addition to the aforementioned, clearer powers of the competent state authorities should be prescribed as well in order to provide more efficient control of the contracting authorities with regard to the use of exceptions. This would allow the competent

authorities to assess whether certain exceptions are justified based on the analysis of the submitted procurement plans, and based on the results they would be able to prohibit the initiation of the procurement in question or to stop the procurement procedure which is already in progress. In addition, the contracting authorities should be under an obligation to publish separately a list of exceptions that are going to be applied in the course of the year.

## 1.6. Mechanism of Corruption: Frequent and Unjustified Use of the Negotiated Procedure With a Particular Bidder

Negotiated procedure without a public call for bids is a type of public procurement procedure in which the contracting authority directly contacts one or more potential bidders and invites them to submit their bids. Therefore, the nature of the negotiated procedure is such that it leads to a serious restriction of the competition. However, if the reasons for the use of such a procedure are justified, i.e. if the requirements stipulated under Article 24 of the Law have been met, it is an allowed restriction of the competition, in accordance with the objective needs of the contracting authority. Otherwise, the use of the negotiated procedure would result in a serious restriction of the competition since Article 9, para. 1 of the Law, with regard to regulating the principle of securing competition among the bidders, prescribes that the contracting authority may not limit the competition among the bidders, especially that it may not prevent any bidder from participating in the public procurement procedure through an unjustified use of the negotiated procedure.

According to the analyzed reports submitted to the Public Procurement Office by the contracting authorities a significant increase in the number of conducted negotiated procedures has been noted since the current Law entered into application (on 9 January, 2009). According to the Report on Public Procurement Procedures in the Republic of Serbia for the first half of 2011, the number of conducted negotiated public procurement procedures in the said period was 27% relative to the total number of public procurement procedures. On the other hand, the number of such procedures in the member states of the European Union does not exceed 10% of the total number of conducted procedures.

An increase in the number of conducted negotiated procedures certainly points to the fact that the public procurement system is failing to sufficiently secure the fulfilment of one of the basic principles of public procurement, which is the principle of securing the competition among the bidders.

When it comes to the frequency of the application of certain reasons for the implementation of negotiated procedures, the aforementioned report of the Public Procurement Office shows that in almost half of such cases (46%) the grounds for the negotiations were the protection of exclusive rights and "technical, i.e. artistic reasons" due to which the procurement contract could be executed by only one bidder.

The protection of exclusive rights and "technical, i.e. artistic reasons" due to which only one bidder is able to deliver what is being procured are stipulated under Article 24, para. 1, item 3 of the Law as the reasons for the implementation of the negotiated procedure without publishing a public call for bids. This procedure is characterized by a lack of any type of competition since only one bidder is negotiated with,

which puts the contracting authority in the least favourable position. If there are really no objective and convincing circumstances which confirm that the procurement contract may be executed by only one bidder in a certain relevant market, then the use of the said negotiated procedure is an indication of the intent of the contracting party to give an unfair advantage to one of the bidders and to prevent others from participating at the same time.

### 1.6.1. Examples

Examples for the frequent and unjustified use of the negotiated procedure with a particular bidder are the following:

- the contracting authority consciously selects what is subject to procurement so that only a particular bidder is able to execute such a contract;
- the contracting authority does not possess any proof at all that only a particular bidder is able to execute such a contract;
- the proof the contracting authority possesses does not indicate that only a particular bidder is able to execute such a contract.

### 1.6.2. The Effect of Corruption

As has already been mentioned, the main characteristic of the negotiated procedure referred to under Article 24, para. 1, item 3 of the Law is the lack of a public invitation to all potential bidders to submit their bids. In such a procedure the contracting authority contacts only a particular bidder inviting them to submit their bid. Consequently, only a single bidder is informed that the said type of procedure is in progress. This, of course, is not prohibited in itself if the requirements for its implementation have been fully met. However, if the contracting authority conducts the said type of procedure without a valid reason, such actions suggest that their purpose is to ensure that a particular, "chosen", bidder has submitted the only offer in order to be able to select it. In such a case, the competition among the bidders is drastically restricted, which allows the basic principle of public procurement – the principle of cost-effective and efficient use of public funds to be turned into its opposite, causing the contracting authority to pay unrealistically high prices for the procurement of the listed items often of poor quality. Unrealistically high prices would result from the lack of competition in such a case and they could also indicate that a certain part of the amount is intended to benefit individuals who have participated in the preparation and implementation of the negotiated procedure.

### 1.6.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

As one of the mechanisms for the prevention of unjustified use of the negotiated procedure without publishing a public call for bids, the current Law has imposed an obligation that a notice on the selection of the best bid must be published in such a procedure (Article 24, para. 2 of the Law). Such a notice, after the decision on the selection of the best bid has been rendered, is published in the *Official Gazette of the Republic of Serbia* and on the Public Procurement Portal and the bidders that have not been invited to participate in this type of procedure may file a request for protection within eight days, as a legal remedy, contesting that there was a valid reason to use such a procedure. It may be noted that this provision has not yielded the

expected results since, according to the records of the Republic Commission for the Protection of Rights in the Public Procurement Procedures, very few requests have been filed for the cited reason. However, comparative practice (e.g. in Croatia) has shown that when the bidders start using such a mechanism in its full capacity, the decisions of the contracting authorities in most cases are disputed and annulled, therefore, in a very small number of cases these grounds for the use of the negotiated procedure are actually applied.

The Public Procurement Office holds that one possible explanation why the bidders are not using this mechanism more might be the fact that they do not distinguish between "the notice on the selection of the best bid" (at which point the contract has not been signed yet) and the notice on the concluded contract. Namely, the Report on Public Procurement Procedures in the Republic of Serbia for the first half of 2011 states that the bidders consider the contract to be signed with the contracting authority when they see the notice on the selected best bid published and for this reason they fail to react. Therefore, it is important to educate the bidders that the notice on the selected best bid is in essence a notice on the intent of the contracting authority to sign the contract, so they have the possibility to react to it and by filing a request for the protection of rights prevent the signing of the contract. The Public Procurement Office has drawn up special instructions on this issue, which have been sent out to a certain number of bidders in cooperation with the Chamber of Commerce and the said instructions are available on the official internet presentation of the Office.

Therefore, special attention should be focused on the education of the bidders in order to enable them to use the procedure for the protection of rights during the negotiated procedures adequately, especially when there is no public call for bids. The bidders, as the interested parties, represent a very important corrective factor that can contribute through an adequate use of the request for the protection of rights to a more efficient control if the requirements for the implementation of the negotiated procedure have been met.

In addition to the aforementioned, the possibility of amending the existing legal provisions or prescribing some new ones should be considered in order to enable more efficient review of the reasons for the implementation of negotiated procedures without publishing a public call for bids, as well as to enable imposing sanctions for abuses of the right to conduct this type of public procurement procedure. New measures could include:

- submitting the decision on the initiation of the negotiated procedure without a public call for bids to some competent authority (e.g. to the Public Procurement Office) which could suspend such a procedure at any time, i.e. it is necessary to prescribe a provision based on which the competent authorities would get involved in the review of the reasons for the implementation of the negotiated procedures at an early stage, when it is possible to undertake certain measures which would prevent such a procedure to be completed if there are no valid reasons for it;
- prescribing an obligation to publish a notice on the initiation of the negotiated procedure without a public call for bids instead of the notice on the selection of the best bid (which is prescribed by the current Law); in which case the contracting authority would be able to continue with the said procedure and invite certain bidders to submit their offers only after the expiration of the deadline set for filing the requests for the protection of rights, which could contest the grounds for the initiation of such a procedure;

- clarifying the application and the interpretation of certain reasons for the use of the negotiated procedures in order to eliminate the dilemmas that both those who are supposed to apply them and those who are supposed to monitor their application might have. Special attention should be paid to defining more accurately "the technical and artistic reasons" due to which only a particular bidder is able to execute the contract in question (Article 24, para. 1, item 3 of the Law), as well as "the reasons of urgency" (which shall be discussed further below), which are increasingly used as the grounds for the initiation of the negotiated procedure.

## 1.7. Mechanism of Corruption: Frequent and Unjustified Use of the Negotiated Procedure "For Reasons of Urgency"

According to the aforementioned Report on Public Procurement Procedures in the Republic of Serbia for the first half of 2011, the second reason for the implementation of the negotiated procedure according to its incidence was the reason of "urgency" (24%), i.e. the grounds stipulated under Article 24, para. 1, item 4 of the Law which the contracting authorities are allowed to apply under the conditions of "extraordinary circumstances and unforeseeable events". In addition to the aforementioned, upon comparison of the Report on Public Procurement Procedures in the Republic of Serbia for 2010 and the Report on Public Procurement Procedures in the Republic of Serbia for the first half of 2011 (both of which have been drafted by the Public Procurement Office), it may be concluded that the number of the conducted procedures "for reasons of urgency" increased from 17% in 2010 to 24% in the first half of 2011.

The contracting authority may use the said negotiated procedure only if there is extreme urgency caused by extraordinary circumstances (therefore, circumstances that the contracting authority could not have anticipated realistically) which were beyond the contracting authority's control (without the possibility of influencing whether such circumstances would set in). In addition, the necessary prerequisite is that the consequence of the formed set of extraordinary circumstances is such urgency that the contracting authority is not able to follow the deadlines stipulated for open or restricted procedures.

### 1.7.1. Examples

Examples of frequent and unjustified use of the negotiated procedure "for reasons of urgency" are the following:

- extraordinary circumstances have been caused by the delayed initiation of the procedure (poor planning or inadequate monitoring of the execution of the previously concluded contracts);
- extraordinary circumstances have been caused by the actions of the contracting authority itself (if the public procurement procedure has been annulled on several occasions due to the errors made by the contracting authority);
- the contracting authority cites urgency as the reason but conducts the negotiated procedure over a period of several months;

- the contracting authority initiates the negotiated procedure long after the moment that caused the need for urgent procurement ensued (e.g. the contracting authority does not conduct an "urgent" negotiated procedure until two months after the competent authority decides that adverse effects of the event in question should be eliminated).

### 1.7.2. The Effect of Corruption

What should be emphasized with regard to the "urgent" negotiated procedure is that unjustified use of such a procedure not only restricts the competition but also the right to protection of potential bidders that are not allowed to participate in the said procedure (since the contracting authority has not invited them to submit their bid). Namely, in such a procedure filing of the request for the protection of bidders' rights does not delay further actions of the contracting authority, so it is possible for the bid to be selected allowing the contract to be signed and acted on despite the fact that the request for the protection of rights has been filed. Moreover, the contracting authority is not under an obligation in such a procedure to wait until the deadline for filing the request for the protection of rights expires before signing the contract in question, which is what must be done in all other types of procedures. This is not to say that the protection of rights is not allowed in this type of procedure, it means that the contracting authority is not under an obligation to wait after the decision on the selection of the best bid for the deadline for filing the request for the protection of rights to expire before signing the contract, i.e. there is no obligation to halt all activities when such a request is filed. If the Republic Commission for the Protection of Rights in Public Procurement Procedures renders a decision annulling such a procedure, either in full or in part, when the contract has already been signed, such a contract would, according to the Law, be declared null and void as it does not comply with the decision of the said Commission.

As it is possible to determine based on the jurisprudence of the competent courts that the interested parties have initiated legal proceedings for declaring the public procurement contracts null and void only in several cases, it may be concluded that the request for the protection of rights at the moment cannot be seen as an efficient mechanism for eliminating irregularities during the "urgent" negotiated procedures. Consequently, the protection of potential participants in such procedures is limited, as is the ability of the competent state authorities and institutions, which have the power to file the request for the protection of rights, to identify irregularities (Article 106, para. 2 of the Law). Such a restriction of the use of the request for the protection of rights is allowed under the Law if the implementation of the "urgent" negotiated procedure is justified. However, if this is not the case, in a situation that does not offer grounds for the implementation of such a procedure but the contracting authority is nevertheless implementing it, it might raise the question if the contracting authority is deliberately limiting the protection of the rights of the bidders and public interest in order to secure a speedy conclusion and execution of the contract with the "preferred bidder".

### 1.7.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

Firstly, the reasons for conducting "urgent" negotiated procedures relatively frequently compared to all of the other types of procedures should be attributed to the lack of efficient control and sanctions, which should be imposed by the competent state authorities, and, to some extent, to the fact that the bidders are not sufficiently educated in terms of the ways in which they can protect their rights. Due to all of the aforementioned, the mechanisms stipulated by the Law have not been in application in sufficient measure.

The way the legislator has attempted to prevent the unjustified use of the "urgent" negotiated procedure through the provisions of the current law includes imposing an obligation on the contracting authority to submit a report to the Public Procurement Office after the decision on the selection of the best bid has been rendered. The contracting authority is under a special obligation to justify the use of the negotiated procedure for the aforementioned reasons in this report. The said rule has been introduced in order to prevent frequent and unjustified use of this type of the negotiated procedure, particularly bearing in mind that the request for the protection of rights which could be filed by one of the potential bidders or the participants in the procedure does not delay any further activities of the contracting authority. Therefore, it is a type of public procurement procedure which practically does not provide an efficient mechanism for the protection of rights of the bidder as an injured party, which has already been mentioned here. That is why it is extremely important to review and analyze the reasons for the use of this particular procedure. The Public Procurement Office has notified the Budget Inspection and Audit Sector at the Ministry of Finance and the State Audit Institution as the authorities that have jurisdiction over the initiation of appropriate proceedings for determining liability, but there is no information available whether any particular activities have been undertaken towards imposing some sanctions on the contracting authorities.

As has already been mentioned, it is necessary, first of all, that all of the competent authorities, in their full capacity, are undertaking all of the measures they have at their disposal in order to reduce the number of conducted negotiated procedures of public procurement. In view of the above mentioned, the Ministry of Finance and the State Audit Institution should start assuming a special, far more prominent, role, particularly when acting on the notifications received from the Public Procurement Office regarding the reports on the conducted "urgent" negotiated procedures. The said two authorities are without a doubt authorized to initiate appropriate proceedings for establishing liability of the participants of the public procurement procedures and they should use their powers to a far greater extent.

As has already been mentioned, the possibility of amending the existing legal provisions or prescribing some new ones should be considered so as to allow a more efficient review of the reasons for the implementation of the negotiated procedures, especially when it comes to those that do not require a public call for bids. These new measures might include:

- submitting a decision on the initiation of the procedure to one of the competent authorities;
- imposing an obligation to publish a notice on the initiation of the procedure instead of the notice on the selection the best bid;
- clarifying the application of certain reasons for the use of the negotiated procedures.

## 1.8. Mechanism of Corruption: Frequent and Unjustified Implementation of the Negotiated Procedure for the Purpose of Additional Procurement

In addition to the reason of extreme urgency and the situation when only one particular bidder is able to execute the said contract, the negotiated procedure without a public call for bids is often used by the contracting authorities for the purpose of additional procurement.

The contracting authority in such a way may arrange for additional deliveries of goods from the same supplier, when the change of the supplier would impose an obligation on the contracting authority to procure goods of different technical characteristics, which in turn would cause extremely great technical difficulties in their use and maintenance. Deliveries which are arranged in such a way must not exceed 25% of the value of the originally stipulated delivery. It is important to underline that although the delivery is linked to the previous public procurement procedure, i.e. it is practically an amendment to the contract concluded in the first procedure, it is still a new, separate public procurement procedure which is a negotiated type of procedure.

Apart from the additional delivery of goods, the contracting authority may procure additional works or services in the negotiated procedure without a public call for bids, but somewhat stricter requirements are prescribed when such items are being procured. Therefore, additional procurement of services or works may be conducted by the contracting authority under the following conditions:

- if this is arranged with the original service provider, i.e. the contractor;
- if the said services, i.e. works are not a part of the first public procurement, i.e. the original project;
- if the said services, i.e. works have become necessary for the execution of the contract due to unforeseeable events;
- if the said services, i.e. works, are either such that they cannot be separated from the first public procurement technically or financially without causing to the contracting authority extremely great technical difficulties or without incurring extremely great costs, or if they could be subject to a contract that is separated from the first contract but they are necessary for the subsequent stages of providing the services, i.e. executing the works.
- the value of the additional services arranged in such a way, i.e. the works, must not exceed 25% of the value of the services, i.e. works, originally stipulated by the contract.

Since the said procedure excludes competition completely and enables a particular bidder that has already signed the contract to continue with the execution of the procurement, it is necessary to focus attention especially on the review whether there are grounds for the implementation of this type of the negotiated procedure.

### 1.8.1. Examples

Examples of unjustified use of the negotiated procedure for the purpose of additional procurement are the following:

- additional delivery of goods which could be supplied by some other bidder without any technical difficulties in terms of their use and maintenance;
- additional delivery of the works or services which could be separated from the first public procurement, i.e. which are not necessary for subsequent stages of providing services or execution of the works;
- additional procurement that exceeds 25% of the value of the original contract.

### 1.8.2. The Effect of Corruption

The aforementioned negotiated procedure, as well as the negotiated procedure conducted with a particular bidder (the only one that is able to execute the procurement), is characterized by total absence of any kind of competition, since only one bidder is negotiated with. This puts the contracting authority in the least favourable position. If the cited requirements for additional procurement have not been met, then the use of the said negotiated procedure points to the fact that the contacting authority is trying to grant preferential treatment to a particular bidder and to prevent at the same time others from participating.

### 1.8.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

All of the proposed measures in this text for the prevention of unjustified use of the negotiated procedure with a particular bidder could be applied with regard to preventing unjustified use of negotiated procedures for the purpose of additional procurement.

## 1.9. The Mechanism of Corruption: Irregularities Related to the Procurement Plan

Procurement plan is a very important document which is drafted and passed by the contracting authorities. Article 27 of the Law stipulates two requirements for the public procurement procedure to be conducted. Firstly, funds must be allocated to the said public procurement in the budget or the financial plan of the contracting authority, i.e. the public procurement procedure cannot be conducted if the source of financing has not been secured. Secondly, the public procurement in question must be listed in the procurement plan. Therefore, the procurement plan is a document which lists all of the procurement procedures that the contracting authority is going to conduct during the year. In addition, the aforementioned provision of the Law uses the term "annual procurement plan", which means that the contracting authority does not list just the public procurement procedures, i.e. the procurement procedures which are conducted according to the provisions of the Law but also the ones which are not subject to the said Law due to the stipulated exceptions.

The flaw of the current Law regarding the procurement plan is certainly the fact that the content of the said document has not been clearly stipulated. On the one hand, an obligation is imposed on the contracting authority to draw up a procurement plan, but on the other hand, it is not prescribed what such a document should contain. Consequently, even the inspection authorities are unable to establish with

any certainty that the procurement has been completely conducted according to the procurement plan. However, based on certain provisions of the Law it is, nevertheless, possible to conclude what the procurement plan should contain. The Public Procurement Office has drafted a Procurement Plan Model relying on the said provisions. Since the Office is authorized to prepare the models of decisions and other documents passed by the contracting authorities during the public procurement procedures (Article 99 of the Law), the aforementioned model may be deemed to be binding for the contracting authorities.

The basic elements of the procurement plan according to the said model are the items subject to procurement, the type of the procedure to be implemented, estimated value, the execution schedule, the item of the budget or the financial plan, etc. When conducting the procurement during the year in question, the contracting authority has to adhere to the specified procurement plan. This obligation is derived from the aforementioned provision of Article 27 of the Law (the requirement for the initiation of the procurement procedure is that the procurement is listed in the procurement plan). This is also a prerequisite for efficient control of the public procurement procedures. However, it is very important in this respect to point out that the procurement plan is not used just for the purpose of inspection whether the procurement procedures have been executed in accordance with the said document but it also provides preventive review of the need for the public procurement procedure, as well as of the use of a particular type of procedure, and this is done before the public procurement is initiated. Efficient inspection of the cited circumstances (which have already been described as mechanisms of corruption in this text) would prevent the implementation of the public procurement procedures which are unlawful and, consequently, prevent all of the negative effects of such procedures.

Based on what has been said, it may be concluded that there are two types of irregularities that might be encountered in practice regarding the procurement plans. On the one hand, there are irregularities connected with the adoption of the procurement plan and the content of the said document, and on the other hand, there are the ones related to not adhering to what has been specified in the procurement plan when conducting the procurement procedures.

### 1.9.1. Examples

Examples of the irregularities regarding the adoption and content of the procurement plan are the following:

- the contracting authority has not adopted a procurement plan;
- the contracting authority has adopted or supplemented the procurement plan only after the procurement procedure has been completed;
- the procurement plan does not list all of the public procurement procedures that the contracting authority is planning to execute in the course of the year;
- the procurement plan does not list all of the procurement procedures that are exempted from the application of the Law;
- the procurement plan does not contain one of the important elements (the type of the procedure, estimated value, execution schedule, etc.);
- the procurement plan is adopted in an inappropriate procedure that lacks transparency (adopted by the Director without the approval of the managing board or some other supervising body).

Examples of the public procurement procedures during which the procurement plan has not been adhered to are:

- conducting the procurement procedures which have not been listed in the procurement plan;
- the use of a different type of procedure rather than the one specified in the procurement plan (instead of the open procedure, the negotiated procedure or the procedure for low-value public procurement are implemented);
- procuring the goods in different quantities and of different value which exceed the ones specified in the procurement plan;
- failure to adhere to the items and appropriations of funds in the financial plan or budget as cited in the procurement plan, where the source of funds to be used for financing the procurement in question is indicated.

### 1.9.2. The Effect of Corruption

If the contracting authority does not adopt a procurement plan or does not list in it all of the procurement procedures which are going to be conducted in the course of the year, it certainly creates an opportunity to conduct certain procurement procedures without transparency or the procurement procedures whose purpose is to secure personal interests of individuals or certain interest groups (e.g. political parties). The same intent may be recognized when the procurement is conducted independently, i.e. not in accordance with what has been listed in the procurement plan.

In addition to the aforementioned, it should be stressed once again that everything that has been said on the decision on what is being procured, its quantity, level of quality, as well as the type of the procedure, in terms of whether it is justified, may be reviewed by examining the procurement plan or cross-checking what has been executed and the actual plan.

### 1.9.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

The following should be prescribed as the measure for the prevention of the described mechanism and effect of corruption:

- the publication of the procurement plan, the part designated for publication (if not in full, then the most important elements);
- submission of the procurement plans of "major" contracting authorities (those in charge of high-value procurement procedures at an annual level) to the competent authorities for the purpose of their audit;
- the content of the procurement plan which should be clearly defined by the Law or bylaw;
- clear powers granted to the competent authorities in order to allow them to audit the procurement plans and annul them in full or in part, or to warn the contracting authorities about the irregularities under serious penalties if it is found that they have not drafted the plan in accordance with the prescribed procedure and content, i.e. if a suspicion is aroused that what is listed is resulting from certain activities related to corruption.

2. Public Procurement Phase:

# Public Procurement Procedure

## 2.1. Mechanism of Corruption: Failure to Apply the Anti-corruption Rule

Anti-corruption rule referred to under Article 19 of the current law promotes the fight against corruption in the field of public procurement. The legislator has tried to use a single direct measure as the sanction for all of the manifest forms of corruption that may be encountered and proven during the public procurement procedures. The cited provision stipulates that the rejection of a bid is the sanction for acts of corruption undertaken by the bidder involving particular representatives of the contracting authorities at different stages of the public procurement procedures.

The anti-corruption rule lists as the actions related to corruption that the bidder might undertake during the public procurement procedures direct or indirect giving, offering or raising expectations of receiving gifts or some other benefits to the members of the public procurement committee, to persons who have been involved in the planning of the public procurement or some other persons, or threatening directly or indirectly the aforementioned persons. However, in order for the aforementioned actions of the bidder to be the reason for the rejection of the bid pursuant to Article 19 of the Law, it is necessary to establish that they have been undertaken for the purpose of exerting influence in order to learn confidential information or in order to influence the activities of the contracting authority or the rendering of decisions at any of the stages of the public procurement procedures, it is also necessary that the contracting authority is able to provide credible proof confirming that the said actions have indeed taken place.

The anti-corruption rule also prescribes the obligation of the contracting authority to notify the competent authorities in such cases when it is determined that certain acts of corruption are taking place and the said authorities (primarily, the police and the prosecutor's office) shall undertake certain measures for the purpose of punishing such actions.

### 2.1.1. Examples

Failure to apply the anti-corruption rule occurs when:

- the contracting authorities are not trying to obtain evidence of actions related to corruption even though they are aware that such actions have taken place;
- the contracting authority does not reject the bid and tries to conceal actions related to corruption despite the evidence of such actions;
- the contracting authority fails to notify the competent authorities that actions related to corruption have taken place.

### 2.1.2. The Effect of Corruption

Failure to apply the anti-corruption rule has a direct and immediate effect on corruption. Specifically, if the obvious cases (which may be proven) of attempts at corruption or of undertaken actions related to corruption in public procurement procedures are not punished, then public procurement procedures will become fertile ground for growing corruption and advancement of private interests at the expense of the public interest.

The anti-corruption rule should serve as a very important measure for the prevention of the use of all of the corruption mechanisms analyzed in this text, as well as of their effects resulting from their use. Detecting the actions related to corruption, preventing the public procurement procedure to be continued any further, as well as notifying the competent authorities so that they can initiate appropriate proceedings, which is at the core of the application of the anti-corruption rule, represent the foundation of the fight against corruption during public procurement procedures. Consequently, failure to apply the anti-corruption rule whether due to the intent of the contracting authority or due to an inadequate legal definition of the rule, in itself constitutes the most serious mechanism of corruption. This is exactly why the anti-corruption is the first to be analyzed in the part of the text related to the public procurement procedure as the central phase of public procurement (in a broader sense) during which certain mechanisms and effects of corruption appear most often, which is hardly surprising. However, the said mechanism of corruption is common to all of the phases of public procurement so it may be encountered during the planning phase as well as the phase when public procurement contract is to be executed in addition to the phase of public procurement procedure.

### 2.1.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

It is necessary to regulate the anti-corruption rule more precisely. Specifically, due to the way in which it is regulated at the moment by the current law, the said rule has been proven to be impossible to apply in practice. The crucial problem is obtaining "credible" proof of the actions related to corruption. On the one hand, it is not defined what "credible" proof means, and on the other, it is not clear how the representatives of the contracting authority are to obtain "credible" proof. Therefore, it is very important to specify what this proof of actions related to corruption during public procurement might be, as well as the manner in which it could be obtained. In view of the aforementioned, it is worth considering whether to introduce an option of providing protection for the persons who expose acts of corruption, specifically, by introducing special secure phone lines through the use of which they could inform the competent authorities of what they have learned or special email addresses that could be used for receiving anonymous messages.

As a general measure for combating corruption during public procurement procedures, the method of internal communication of the contracting authority should be regulated, the communication between the management and persons who are involved in conducting the public procurement, as well as between the representatives of the contracting authorities and all the other persons that are interested in participating in the public procurement procedure. Therefore, it should be prescribed that the orders related to public procurement procedures should be issued only in writing by the manager, i.e. the persons who are involved in conducting public procurement procedures must act only on such orders. On the other hand, it is necessary to ex-

pressly forbid any type of communication between the contracting authority and the interested parties that is not done through official channels (official letters or emails using the official email address of the contracting authority), under a threat of penalty (either a fine or criminal sanction).

## 2.2. Mechanism of Corruption: Conflict of Interests

Conflict or clash of interests is the term which refers to situations in which a person performing a certain public office or professional activity is put in a position to profit personally or secure that persons close to them, social groups or organizations profit from their decisions or some other actions at the expense of the public interest. This is a conflict between private interests on the one hand and the public interest on the other where there is a great risk that the private interest is going to prevail, i.e. that corruption would take place.

The conflict of interests may be manifested in different ways and it may be displayed before, during and after the decision is rendered during a certain procedure. It occurs when the person who participates in the decision-making process or some other activity of some authority or public institution shows bias in favour of a particular individual's interest during the procedure and at the expense of the public interest. At the heart of the conflict of interests, i.e. the reason why the private interest is served rather than the public interest, is the fact that there is a certain connection between the representative of the public interest and the representative of the private interest. This connection may stem from familial, financial or political ties.

The only provision of the Law which refers to the conflict of interests regarding public procurement procedures in any way is the provision stipulated under Article 9, para. 2 which bans those who have participated in the preparation of the tender documentation or of certain parts of it to participate as bidders or sub-contractors or to co-operate with the bidders during the preparation of the bid. The law neither contains some other provisions which could specify the situations carrying a risk of impartial treatment when deciding in favour of the private interest nor does it prescribe any type of sanctions.

On the other hand, the Law on the Anti-Corruption Agency contains a provision which stipulates that a legal entity, in which a public official owns a share or stocks the value of which exceeds 20% and which is the participant in the public procurement procedure that ends in the conclusion of a contract with a state authority or institution which has over 20% of its capital in public ownership, must notify the Agency thereof within three days from the day the first action of the procedure was undertaken, as well as of the final outcome of the procedure within three days of learning of its completion. However, it may be said that there are two reasons due to which the aforementioned provision is incomplete. Firstly, it just refers to public officials but not to other staff employed by the contracting authority that are involved in the public procurement procedure. Secondly, it covers only one form of affiliation that can lead to a conflict of interests, i.e. affiliation through ownership in terms of business.

### 2.2.1. Examples

The situations and relationships that might cause conflict of interests in public procurement procedures are the following:

- the head of the contracting authority or the employee who is in charge of operations related to public procurement procedures, as well as the persons connected to them, own a share or stocks of the bidding company;
- the head of the contracting authority or an employee who is in charge of operations related to public procurement procedures, as well as the persons connected to them, are involved in the management of the bidding company (as members of managing and supervising boards or shareholders' assembly);
- the head of the contracting authority or an employee who is in charge of operations related to public procurement procedures, do work for the bidder or have some other type of business relations with the bidder.

### 2.2.2. The Effect of Corruption

In public procurement, illegal bias towards a private interest could be manifested at any phase of the public procurement procedure. Therefore, at the planning stage, private interest of individuals or interest groups could be favoured through the specification of items to be procured, the quantity or level of quality, as well as the selection of the type of procedure to be implemented. At the stage when the public procurement procedure is being conducted, the participation requirements for the bidders, technical specifications or criteria for the selection of the best bid might be specified in favour of the private interest. Furthermore, the publication, opening or expert assessment of the bids might be conducted in a way that suits particular bidders which is not in the public interest, which is represented in public procurement through the principle of cost-effective and efficient use of public funds (the selection of the "preferred bidder" which is not actually the best may lead to unnecessary spending of public funds). Illegal bias might occur at the stage of the execution of the public procurement contract as well if the representative of the contracting authority allows a change in the quoted terms which have been stipulated by the contract (allows a time extension for construction or the delivery of poor quality goods, effects payment early even though contractual obligations have not been fulfiled, does not use a bank guarantee given as a performance bond, etc.).

Although the conflict of interests might occur at any of the stages of the public procurement, as has already been mentioned, it has been analyzed under this portion of the text as it is to be expected that it would occur most often during the public procurement procedure, which is when the impartiality of the representative of the contracting authority is perhaps the most evident (when defining the terms, technical specifications or criteria and their application when publishing the notices, opening or providing expert assessment of the bids).

### 2.2.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

First of all, when the regulations on the public procurement procedures are next amended, it should be prescribed which situations or relationships are deemed to cause a conflict of interests during public procurement procedures and specify the persons this applies to. Furthermore, sanctions must be stipulated if there is a conflict of interest, for instance, an obligation to suspend the public procurement procedure or an order banning the conclusion of the contract. In addition, it is crucial to ban the establishment of the said relations for a certain period of time after the completion of the public procurement procedure (e.g. to ban the members of the committee of the contracting authority in charge of the expert assessment of the bids to be employed by the selected bidders for a certain period of time after the conclusion of the public procurement).

Moreover, certain measures should be prescribed which could lead to an easier detection of all forms of conflict of interests and attempts to influence the contracting authority's impartiality in the decision-making process during the procurement procedure. Such measures could generally be applied to all forms of mechanisms of corruption. Therefore, it should be considered if it would be possible to provide protection to the persons who bring to the attention cases of conflicts of interests, as with the anti-corruption rule, by introducing special secure phone lines through the use of which a person would be able to inform the competent authorities of what they have learned or special email addresses that could be used for receiving anonymous messages.

## 2.3. Mechanism of Corruption: Vague and Contradictory Content of the Tender Documentation

Tender documentation includes documents which are drafted by the contracting authority based on which the interested parties draw up their bids or applications for participating in the public procurement procedure. The said documentation is certainly of great importance for the regularity and efficiency of the whole public procurement procedure but also for the execution of the public procurement contract which follows the completion of the procedure. Practically, the entire course of the public procurement procedure, as well as the whole public procurement in a broader sense, depends on how the tender documentation has been prepared.

The law and bylaw prescribe mandatory content of the tender documentation. The purpose of prescribing the content of the said documentation is to provide all of the relevant information to the bidders that is important for the process of preparing the bid and for the execution of the public procurement contract. Pursuant to the provisions of the aforementioned regulations it may be concluded that the tender documentation consists of four basic parts. These include the part which is related to the way the bid is put together and submitted and the way the bid is handled during the public procurement procedure, as well as the parts which refer to the participation requirements, technical specification of the items subject to procurement and criteria for the selection of the best bid.

Insufficiently clear and incomplete defining of any of the aforementioned parts of the tender documentation may indicate an attempt to limit the competition and to conduct the procedure without transparency in order to enable a particular bidder's of-

fer to be selected as the best. In addition, contradictory content of the tender documentation in terms of including conflicting information regarding the same requirement may also indicate such intent on the part of the contracting authority. At the same time, it should not be omitted to mention the situations in which the contracting authority deliberately makes mistakes when drawing up the tender documentation in order to leave room for the public procurement procedure to be suspended if it turns out that the bid of the "preferred bidder" cannot be selected as the best.

Vague and contradictory content of tender documentation enables the contracting authority to assess the bids subjectively during the public procurement procedure. This is particularly important if the contracting authority additionally informs the "preferred bidder" of how such tender documentation is going to be interpreted during the phase of expert assessment of the bids.

### 2.3.1. Examples

Examples of vague and contradictory content of tender documentation are the following:

- vague and contradictory information on how the bidders are supposed to prepare and submit their bids (e.g. one part requires all of the pages of the bid to be stamped by the bidder while the other part requires only the forms completed by the bidder to be certified in such a way);
- conflicting data in the public call for bids and the tender documentation (especially regarding the requirements and elements of the criteria);
- failure to define what is the proof of meeting mandatory participation requirements by the bidder (e.g. it is not specified what authority should issue a licence for the performance of a business activity which is subject to public procurement or any other type of proof);
- insufficiently clear technical characteristics of the items subject to the procurement (different parts list different characteristics);
- the use of methodology for the application of the elements of the criteria for the selection of the best bid which is insufficiently clear and impossible to verify objectively (when it contains parameters which are based on the subjective assessment by the members of the committee of the contracting authority).

### 2.3.2. The Effect of Corruption

Insufficiently clear and incomplete definition of any of the aforementioned parts of the tender documentation may indicate an attempt to limit the competition and to conduct the procedure in a non-transparent way in order to allow a particular bidder to be selected as having the best offer. Moreover, contradictory content of tender documentation in terms of providing conflicting information on the same issue may also indicate such intent of the contracting authority. At the same time, it should not be omitted to mention the situations in which the contracting authority deliberately makes mistakes when preparing the tender documentation in order to leave room for the public procurement procedure to be suspended if it turns out that the bid of the "preferred bidder" cannot be selected as the best despite all the efforts to secure such an outcome of the procedure in question.

### 2.3.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

One of the measures which could prevent tender documentation from being put together with vague and contradictory content is prescribing an obligation of publishing tender documentation on the Public Procurement Portal. If the contracting authorities were aware that the tender documentation they draft could be publicly accessed, it might prevent them from putting it together in a prohibited manner.

Reducing the mandatory content of the tender documentation is also one of the potential measures since such tender documentation would have clearer and less extensive content, without the possibility of repeating the same data several times and offering different specifications when this occurs so that they are mutually exclusive.

Finally, one of the measures could be drafting tender documentation models for various items which are most often subject to procurement (construction works, fuel, insurance services, security services, the delivery of office supplies, etc.) The contracting authorities are under an obligation to adhere to such models when drafting their tender documentation, which might prevent their content from being vague and contradictory.

## 2.4. Mechanism of Corruption: Discriminatory Requirements for the Participation of the Pidders

The participation requirement for the bidders is that the bid must fully comply with what is requested by the contracting authority in the manner stipulated by the Law and tender documentation. The contracting authority must reject a bid that does not meet the requirements as improperly submitted. Therefore, the requirements are eliminatory as the bidder that fails to prove the requirements have been met would be eliminated from any further public procurement procedure, regardless of its remaining content.

The contracting authority must specify accurately in the tender documentation the requirements the bidders have to meet in order to participate in the public procurement procedure in question. Some of the requirements are explicitly stipulated by the Law (Article 44), as well as the proof that the requirements have been met, which the bidders must submit with the bid (Article 45), while certain requirements are stipulated by the contracting authority itself. For instance, the contracting authority specifies under the tender documentation the necessary financial and business capacity that the bidder should possess and what human and technical resources would be considered sufficient. In addition, the contracting authority may set certain additional requirements such as ecological ones (observing the environmental protection standards) and social requirements (hiring the unemployed) as well as other requirements which are reasonably linked to the items subject to the said public procurement.

The purpose of mandatory requirements for the participation of bidders is the elimination of the risk that the contracting authority would conclude a public procurement contract with a bidder that is not capable of executing it. However, the contracting authority cannot set a requirement which would be discriminatory to such an extent that it would favour one of the bidders, i.e. which would unjustifiably prevent other bidders from participating, bidders otherwise capable of making suitable offers.

In view of the aforementioned, whether some requirements are justified is determined based on the objective need of the contracting authority to insist on certain qualifications and capabilities of the bidder regarding the nature of the items subject to procurement themselves, as well as regarding the terms of the execution of the contract. If the contracting authority requires certain conditions to be met which are essentially unnecessary for the execution of a particular public procurement contract while there is information that this requirement is met by the "preferred bidder" and usually only by this bidder, it is certain that discrimination is involved and that it includes elements of the corruption mechanism.

### 2.4.1. Examples

Examples of discriminatory participation requirements are the following:

- contracting authority requires that the bidders should have the annual income from the activity in question which is many times (often ten times) higher than the value of the public procurement in question;
- requesting unnecessary attestations, certificates or testing reports, which the "preferred bidder" already has, while the others would need a lot of time to obtain them, making it impossible for them to submit their bids in time;
- the contracting authority requests references from the bidders proving that they have executed procurement contracts which considerably exceed the value of the public procurement in question in terms of their scope and value (for the construction of several hundred meters of water supply grid, it requests references for several dozen kilometers);
- requesting proof of references that do not refer to the items subject to the public procurement in question (the contracting authority requests references for the delivery of specialized computer equipment for certain complex systems although ordinary PCs for typical office work are currently being procured);
- the contracting authority requires that the bidders should have specific human resources at their disposal without explaining why this is necessary and how the items which are being procured and the execution of the contract are logically linked to the said requirement (specifying a particular number of employees required regardless of the staff structure and their involvement in the execution of the contract in question);
- the contracting authority requires from the bidders particular technical resources which are not logically linked to the items which are being procured, and which are available to the "preferred bidder" (unnecessary vehicles, equipment or technology);
- defining participation requirements so as to prevent the submission of a "joint bid," i.e. a bid by a group of bidders, by requesting from each participant in the bid to fully meet the capacity requirements (which defeats the purpose of the submission of a "joint bid", which is to join forces in order to be able to meet the requirements);
- setting additional requirements that are not logically linked to the specific items subject to the public procurement in question (e.g. insistence on receiving the proof that certain benefits were granted to the contracting authority in the previous years by the bidder in the form of donated equipment, donations or sponsorships).

### 2.4.2. The Effect of Corruption

The use of discriminatory requirements for the participation of bidders limits the competition during the public procurement procedure by enabling particular bidders to participate while preventing others unfairly from participating. In such a way the favoured bidders are directly helped to be selected as having the best bid, which then allows the said bidder to sign the contract in question. It may be said that the use of discriminatory requirements is, perhaps, the most commonly used mechanism of corruption during the public procurement procedures.

### 2.4.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

Publishing tender documentation on the Public Procurement Portal could be the measure which would reduce the number of attempts of the contracting authorities to discriminate against certain bidders through the participation requirements. If the contracting authorities were aware of the fact that general public is going to have access to the tender documentation, it is presumed, as has already been mentioned, that they would refrain from citing unlawful requirements, at least the ones that are obviously unlawful.

The mechanism used for the protection of the rights of the bidders in the public procurement procedures is filing a request for the protection of rights, which is decided on by the contracting authority as the first instance, and the second instance is the Republic Commission for the Protection of Rights in Public Procurement Procedures. In order to prevent the contracting authorities from citing discriminatory requirements in the tender documentation, it is certainly very important to ensure the decision on the request for the protection of the rights is rendered more promptly, as well as to insist on compliance with the decisions regarding the said issue. The cooperation of the authorities in charge of the protection of competition is also important, specifically, of the Republic Commission for the Protection of Rights in Public Procurement Procedures and the Commission for the Protection of Competition, in order to establish more efficiently whether a particular bidder has been discriminated against in the procedure in question, which has resulted in the restriction of the competition leading to all of the negative effects stemming from the said situation.

With regard to the aforementioned, it is important to point out that the Law should define more precisely in which situations the Public Procurement Office and other competent authorities should file the request for the protection of the public interest during the public procurement procedure, i.e. when the said authorities are allowed to react to the restriction of the competition regardless of the fact that the bidders are not reacting to it. Namely, in certain situations, tender documentation and the manner in which the public procurement procedure is being conducted may result from illegal arrangements made between the contracting authorities and the potential bidders, either before or during the public procurement procedure. In such situations in which the bidder that is the injured party withdraws from entering the bid if the contracting authority promises that the said bidder's offer would be selected in some subsequent procurement procedure or the "preferred bidder" offers this particular bidder some sort of benefit (money or concealed participation in the execution of the public procurement contract in question). In such situations, in which it is obvious that the competition among the bidders is limited, the competent authorities should be granted clearer powers enabling them to initiate the proceedings for the protection of the public interest, the outcome of which might be the annulment of the public procurement procedure in question.

## 2.5. The Mechanism of Corruption: Discriminatory Technical Specifications

Technical specifications are a set of objectively and precisely described technical characteristics of the items subject to the particular public procurement procedure and they represent mandatory content of tender documentation. The said description lists the requirements set by the contracting authority in terms of features, level of quality, quantity, packaging and other characteristics of the items that are actually being procured.

The bidders must fully meet the requirements of the technical specification as stipulated by the contracting authority in the tender documentation; otherwise, the bid would be rejected as unsuitable. On the other hand, the contracting authority must describe the items that are being procured as objectively as possible while strictly avoiding any kind of description that might decide in advance which bidder would be selected. With regard to this, it should be mentioned that the Law (Article 39) bans the contracting authority from using and referring to the goods, services or works of certain make, specific source or particular type of construction if such a designation would favour a particular bidder or would eliminate other bidders unfairly. Similarly, the Law stipulates that the contracting authority is not allowed to indicate in the tender documentation a particular trade mark, patent or type, or specific origin or production except in cases where it is impossible to describe the items subject to procurement contract in the way that is sufficiently intelligible to the bidders, in which case citing the trade mark, patent or manufacturer must be followed by the phrase "or equivalent".

### 2.5.1. Examples

Examples of the discrimination against the bidders through the definition of the technical specification of the items to be procured stipulated by the tender documentation are the following:

- simple "copying" the characteristics of the equipment of the favoured bidder;
- requiring various parts of the equipment to be from the same manufacturer;
- citing a particular trade mark, type of the product or production origin.

### 2.5.2. The Effect of Corruption

Discrimination through technical specifications, perhaps, most often happens when the contracting authority tries to "copy" the technical characteristics and dimensions of the items offered by a particular bidder in the technical specification. In such situations the bidders that collect a copy of the tender documentation have to be very careful and closely examine the documentation in order to determine if the specified technical characteristics of the items in question are in fact such that only a particular bidder is able to offer them. Namely, in such a situation the contracting authority does not openly favour certain bidders by naming them or citing the type of a product which only the said bidders may provide, which is not difficult to detect and contest, instead, the contract is calibrated to suit the bidders "preferred" by the contracting authority through subtle adjustments of the characteristics. Contesting such characteristics by filing a request for the protection of rights imposes a not so easy obliga-

tion on the Republic Commission for the Protection of Rights in Public Procurement Procedures to examine all of the circumstances of the case and investigate if it is really true that only certain bidders, known to the contracting authority, are able to satisfy them. In addition, it should be underlined that the contracting authority is not capable of adapting the technical specification to all of the bidders that consider that their offers should be the ones to be selected, instead, everything that is required must be logically linked to the content of the public procurement in question and the accompanying actual needs. Therefore, the contracting authority must not prevent from participation i.e. discriminate against any of the bidders that are able to provide the required characteristics specified in the tender documentation.

The contracting authority would be guilty of considerable discrimination of the bidders, and consequently, of limiting the competition if it were to require through the description of technical characteristics, for instance, that the goods which are being procured are made by particular manufacturers or that they are of a particular type, without the possibility of competing with an equivalent product. Often the contracting authorities offer an excuse for such technical specification in the tender documentation saying that it is a well-known fact that the products of a particular manufacturer are of better quality than others and that the management itself, i.e. the employees of the contracting authority would have selected the said products if they were to buy them for personal use. However, the basic principle during the public procurement procedure is the principle of cost-effective and efficient use of public funds, and securing that competition is as intense as possible is the most important instrument for the implementation of this principle. That is why the contracting authority must not be guided by the personal needs of any individuals who are conducting the public procurement procedure or of those whose bid should be selected but must objectively assess the needs of the institution itself, i.e. organization whose functioning and regular performance of activities requires the public procurement to be conducted. Consequently, using subjective criteria when defining technical specifications, without any specific or objective justification, limits the competition and prevents the implementation of the said principle. In addition, one should not overlook unlawful material gain secured by the individuals as a result of such unlawful conduct.

### 2.5.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

Publishing the tender documentation on the Public Procurement Portal should be one of the measures which, as in the case of discriminatory requirements, might prevent attempts of obvious discrimination and restriction of competition through particular technical specification.

The Republic Commission for the Protection of Rights in Public Procurement Procedures plays a very important role in the prevention of discrimination through the provisions of tender documentation (which has already been discussed). However, the aforementioned Commission works under very tight deadlines when acting on the filed requests for the protection of rights and often without adequate expert knowledge in the field relevant to the items subject to public procurement. That is why the Commission finds it difficult to establish whether the bidders have indeed been discriminated against through the technical specification thus limiting the competition. That is why a possibility of putting together a list of experts who would assist the Commission decide on such issues should be considered. These experts would come from different professional fields, with vast experience and good reputation in pro-

fessional circles. Special rules would regulate how someone could be added to the list and the principles for hiring experts would be defined in order to prevent conflict of interest and secure impartial treatment. In such a way, it would be easier to uncover cases of sophisticated "rigging" of the public procurement procedures in which it is impossible to establish at first glance that a particular bidder is favored.

## 2.6. Mechanism of Corruption: Discriminatory Criteria for the Selection of the Best Bid

A criterion is an element of evaluation, comparison or assessment of bids in the public procurement procedures. Just as the requirements and technical specifications, the criteria are a "constitutive" element of the tender documentation. Many people hold that the criteria are the most important element of tender documentation. If the preparation of tender documentation is the most complex part of the entire public procurement procedure, then setting the criteria listed in the said tender documentation, providing their description and applying them objectively when assessing the bids is certainly one of the most difficult parts of it for the contracting authority. The criteria must be set in advance just as all of the other elements of the tender documentation. The selection of the bidders is first done based on the requirements, then technical specifications, and only then based on the criteria.

The contracting authority is autonomous, i.e. free to choose the criteria, and the set criteria are always the ones which are deemed to be necessary for the assessment of the bids in view of the specific items that are subject to the procurement and the specific needs the contracting authority has. However, the contracting authority must not define the criteria in such a way that certain bidders are favoured, i.e. must not discriminate others capable of offering the execution of the procurement in question in a way that would really satisfy all the needs the contracting authority might objectively have. Namely, similarly to the requirements and technical specifications, the criteria and their elements ("the sub-criteria") could be set in such a way as to allow discrimination against certain bidders. The difference is that when it comes to the criteria, such discrimination is not going to result in automatic exclusion of the bid submitted by the discriminated party, as is the case with the requirements or technical specifications, but the bidder in question will not be able to receive a certain number of weighting points, thus limiting the bidder's possibility to be selected as having the best bid according to the awarded weight in total.

### 2.6.1. Examples

Examples of discrimination against the bidders and restriction of the competition through the use of the criteria for the selection of the best bid are the following:

- awarding a great weight for certain standard of quality certificates that only some bidders possess and that are, essentially, unnecessary in view of the items that are subject to the procurement procedure in question;
- weighting certain professional references which, by their very nature, have no relevance to meeting the specific needs of the contracting authority (references with regard to certain standard goods, where it is really of no significance whether the producer has previously delivered a hundred or several thousands of items);

- application of vague and subjective elements of criteria, such as "quality" or "special benefits" that will be assessed on the basis of subjective opinions of the contracting authority's committee members;
- applying the weighting methodology which cannot be objectively verified;
- applying the weighting methodology that favours particular bidders or just one of them because it unrealistically reflects the differences between the bids (e.g., awarding maximum weight only for particular references or methods of payment, and awarding zero weight to everyone else, by which this element ceases to be a criterion and becomes a requirement).

### 2.6.2. The Effect of Corruption

Everything that has been said with regard to the discrimination against the bidders through set participation requirements, and the effects of it, may be said for the discrimination against the bidders through the set elements of the criteria for the selection of the best bid. Therefore, upon defining a ban on the restriction of competition among the bidders as a principle the legislator has specified under Article 9 of the Law that the bidders must not be prevented from participating in the public procurement procedure through unjustified use of the negotiated procedure or the use of discriminatory requirements and criteria.

### 2.6.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

Since it is possible to say that the effects of corruption resulting from the discrimination of the bidders through the use of criteria for the selection of the best bid are the same as the ones resulting from the discrimination of the bidders through the set requirements for the participation, the same measures could be proposed for the prevention of these effects related to both of these mechanisms of corruption. The only thing that should be emphasized in this respect is that it is somewhat more difficult to identify discrimination attempts related to the said criteria than those related to the participation requirements. This might be concluded based on the fact that the criteria elements may contain very complex descriptions and weighting methodology, which requires a more complex analysis as well in order to determine whether the contracting authority has tried to limit the competition thus causing the effect of corruption to ensue.

## 2.7. Mechanism of Corruption: Irregularities Related to Publishing Contract Notices

Publishing notices related to public procurement procedures for the purpose of informing the interested parties and general public that the public procurement procedure is going to be conducted (Prior Information Notice), that it is in progress and what stage it has reached (an invitation for the submission of bids and a notice on the selection of the best bid in the negotiated procedure), as well as that it has been completed (a notice on the conclusion of the contract or a notice on the suspension of the procedure). Publishing the notices secures that the principle of transparency during the public procurement procedure is applied and by doing so other principles are applied as well. Transparency ensures intense competition and equal treatment of all bidders, which in turn contributes to the implementation of the basic principle, which is the principle of cost-effective and efficient use of the public funds ("value for money" principle).

Announcements on public procurement procedures are published by the *Official Gazette of the Republic of Serbia* and on the Public Procurement Portal (if they exceed the set threshold for low-value public procurement procedures). The Public Procurement Portal is maintained by the Public Procurement Office "for the purpose of improving how well-informed the contracting authorities and bidders are". The content of the notices is legally prescribed, they must be published within certain deadlines, i.e. the law sets deadlines for the submission of notices for publication.

All of the public procurement announcements are published in the Serbian language. If the value of the procurement exceeds 150,000,000 RSD for goods and services, i.e. 300,000,000 RSD for works, they are to be published in a language usually used in international commerce as well.

If the contracting authority fails to publish the notices on public procurement in the manner stipulated by the Law, it is a serious violation of the principle of transparency, and at the moment, the current law prescribes misdemeanour liability as the only sanction. Any actions by the contracting authority that lack transparency, and especially if the notices on the public procurement are not published, represent a significant mechanism of corruption as it may be used for the concealment of relevant information from the bidders interested in participating in the public procurement procedure or from the competent authorities under whose jurisdiction are monitoring and inspection of the said procedure.

### 2.7.1. Examples

Examples of irregularities related to publishing notices on public procurement procedures are the following:

- failure to publish a notice;
- incomplete content of notices (lacking legally prescribed data);
- citing false data, i.e. deliberate mistakes in the notice in order to mislead the bidders and other interested parties (e.g. deliberate mistake in the name of the item to be procured published in the public call for bids so that the public procurement procedure which is being conducted would not be identified);
- publication of the notice in the *Official Gazette of the Republic of Serbia* but not on the Public Procurement Portal, which should not be overlooked as a violation since interested parties increasingly follow the announcements published on the Portal due to easier and faster access (which was why the Portal was set up in the first place);
- delayed publication of notices, after the set deadlines have expired, when neither the interested parties nor the competent authorities are able to react in due time or efficiently (e.g. publishing a notice on the conclusion of the public procurement contract after the said contract has already been executed, when declaring it null and void would not have much effect).

### 2.7.2. The Effect of Corruption

Irregularities related to publishing the notices may be an indication that there have been attempts to conceal information on public procurement procedures that are being conducted, that are going to be conducted or that have been conducted. In such a way the interested parties may lose the opportunity to:

- adequately prepare for the participation in the public procurement procedure, i.e. to prepare available resources or secure new ones that they lack, as well as to obtain the necessary documents (as a result of the failure to publish a Prior Information Notice in the manner stipulated by the Law);
- participate in the public procurement procedure (as a result of the failure to publish a public call for bids in the manner stipulated by the Law);
- undertake measures for the protection of their rights in a timely fashion, such as submitting the request for the protection of rights or initiating legal proceedings for declaring the contract null and void (as a result of the failure to publish a notice on the selection of the best bid in the negotiated procedure, i.e. a notice on the suspension of the procedure or on the conclusion of the contract in the manner stipulated by the Law).

Failure to publish the notices on the public procurement procedure in the manner legally prescribed may have an adverse effect on the state authorities authorized to monitor, inspect and impose sanctions for irregularities in such a procedure. Therefore, if the notice on the conclusion of the contract has been published only after the execution of the said contract or if it has not been published at all, the competent authorities are not going to be able to review the execution of the contract in time and perhaps prevent unjustifiable payments from being effected or prevent some other violation of the public interest.

### 2.7.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

According to the current law the only sanction for irregularities regarding the publication of notices on public procurement procedures is to be charged with a misdemeanour punishable by a fine in the amount stipulated as a sum ranging between set values. The set sums, which apply to all misdemeanour offences referred to by the Law, range from 100,000 to 1,000,000 RSD for the contracting authority, i.e. 20,000 to 50,000 RSD for the liable person working for the contracting authority. This certainly is not sufficient, especially for liable persons, because it cannot secure the effect of general prevention of irregularities, which is why the said fines should be increased. However, prescribing criminal liability should be taken into consideration when it comes to deliberate failure to publish a notice in the manner stipulated by the Law, which is suggested below with regard to the failure to submit a report to the Public Procurement Office as well.

In addition to the aforementioned, it should be considered to regulate the content and the moment of publication of the said notices differently. In such a way, the publication of notices would be of greater importance to the interested parties but also to the competent state authorities. For instance, instead of publishing the notice on the selection of the best bid in the negotiated procedure without a public call for bids, an obligation should be imposed to publish a notice on the initiation of such a procedure in order to ensure that it is possible to prevent the said procedure from being conducted in time, right at the beginning, if there are no valid reasons for using it. Similarly, instead of publishing a notice on the conclusion of the public procurement contract, the contracting authority could be required to publish a notice on the selection of the best bid since it would be possible at that point to prevent the conclusion of the contract itself and its effects.

## 2.8. Mechanism of Corruption: Irregularities During the Opening of the Bids and Their Expert Assessment

After the deadline for the submission of bids expires, the bids are opened. The procedure for opening the bids is conducted by the public procurement committee of the contracting authority, immediately upon the expiration of the set deadline and not later than until the end of the day when the deadline expired. The bids are opened publicly in all procedures and the opening is attended by the authorized representatives of the bidders in addition to the chairperson of the committee of the contracting authority and its members. Authorized representatives of the bidders may undertake certain actions during the process of opening the bids: they can examine other competing bids, express objections which would be recorded in the minutes on the opening, as well as sign and collect a copy of the minutes. The minutes are signed at the end by the representatives of the public procurement committee and the authorized representatives of the bidders who are present.

Expert assessment of the bids is a phase of the public procurement procedure which follows the opening of the bids and it consists of two parts. During the first part the committee of the contracting authority establishes whether the bidders have met the participation requirements, next whether the offered items subject to the procurement have met the technical specifications and finally, whether the quoted price exceeds the estimated value. In essence, this is the eliminatory part of the expert assessment of the bids during which the bids which fail to meet the requirements are rejected (as improperly submitted) as well as those that do not fully comply with the technical characteristics (as inadequate). The bids that exceed the estimated value may be rejected by the contracting authority (as inadmissible) but do not have to be if the contracting authority has sufficient funds to pay the quoted price. After that, the contracting authority conducts the second part of the expert assessment of the bids during which the bids are ranked if they have not been rejected in the previous eliminatory part.

The bids are ranked according to the criteria and defined elements ("sub-criteria") which have been stipulated by the public call for bids and tender documentation, solely by applying the methodology stipulated in the documents passed by the contracting authority. The result of the ranking is the proposal for the selection of the best bid (the first bid on the list), which is cited in the report on expert assessment of the bids and as such it is submitted to the head of the contracting authority for the purpose of rendering the decision on the selection.

Interested bidders must be allowed after the decision on the selection of the best bid has been rendered and submitted (which must be done in person) to examine the documentation on the conducted public procurement procedure (primarily, the other competing bids and the documents related to expert assessment of the bids).

Opening and expert assessment are, therefore, a part of the public procurement procedure during which the content of the bids is established, based on which the bids are assessed in order to identify which one is the best. In addition, the contracting authority must adhere to what was cited in the public call and the tender documentation and act with impartiality and objectivity. Failure to adhere to what was specified by the public call and tender documentation, as well as preventing the interested bidder to make sure the contracting authority has acted with impartiality and objectivity upon deciding may certainly constitute a serious mechanism of corruption.

### 2.8.1. Examples

Examples of irregularities during the process of opening and expert assessment of bids are the following:

- opening the bids a few days after the expiry of the opening deadline;
- preventing the present authorized representatives of bidders to take part in the opening procedure (they are not allowed to have access to what is being read from their competitor's bids; they are not allowed to object; they are not allowed to take a copy of the minutes);
- the minutes on the opening of bids is incomplete (for instance, it does not contain the signatures of the representatives of the bidders and there is no indication as to why their signatures are missing, which the committee in charge of opening the bids must note down);
- preparing the minutes once the opening of bids has already been completed;
- the bid of the selected bidder has not been rejected despite being submitted improperly or despite being inadequate;
- the bid has been rejected although it has neither been improperly submitted nor is it inadequate;
- criteria elements have been applied in a way which does not comply with what was cited in the public call for bids and tender documentation (altering the criteria elements; altering the weight awarded to certain elements; altering the weighting methodology);
- after a decision on the selection of the best bid has been rendered, the interested bidders are not allowed access to documentation on the conducted procedure (primarily to the bids of other competitors and documents on the opening and expert assessment of bids);
- decision on the selection of the best bid is not served on the bidders in person (it is sent by regular mail, by fax or e-mail without the receipt confirmation).

### 2.8.2. The Effect of Corruption

A non-transparent, unobjective and biased procedure of opening and expert assessment of bids may result in an unjustified rejection of some bids, as well as the selection of the bid which should have been rejected or which is not the best according to the criteria elements for selection. In such a way certain bidders are prevented directly and immediately from having their bid selected although their bid meets what was specified in the public call for bids and tender documentation, or a particular bidder is enabled to be selected although the bid in question should have been rejected or is not the best.

### 2.8.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

The most frequently used measure for the prevention of irregularities during the opening and expert assessment is the request for the protection of rights filed by a dissatisfied bidder. This is a measure which makes it possible for the irregularities to be eliminated before the conclusion of the contract thus preventing adverse effects to ensue due to the conclusion and execution of the contract when the bidder is not the best or is not capable of executing it. So far the practice with regard to the said measure shows that the proceedings for the protection of rights have been taking too long thus creating such a situation in which it is possible for the bidders, on the one hand, to abuse their right to file the said request (in order to blackmail the contracting authority or their competitors) while, on the other hand, the contracting authorities would continue conducting the procedure regardless of the irregularities saying that they cannot afford to wait for the outcome of the proceedings for the protection of the rights.

In view of the aforementioned, a more efficient system of the protection of rights must be provided because the proceedings regarding the filed requests often take several months, while the whole point is to have speedy and efficient proceedings. In addition, the enforcement of the decisions of the Republic Commission for the Protection of Rights in the Public Procurement Procedures must be ensured, which shall be discussed at greater length below.

## 2.9. Mechanism of Corruption: Failure to Comply With the Decisions Rendered by the Republic Commission for the Protection of Rights in Public Procurement Procedures

The decision of the Republic Commission for the Protection of Rights in Public Procurement Procedures (hereinafter: the Republic Commission) on the filed request for the protection of rights of the bidders or public interest is final and enforceable, and the decision itself orders the contracting authority to undertake certain actions in order to eliminate the irregularities in the public procurement procedure. The contracting authority must comply with the said order before a certain deadline expires (30 days from the day of the receipt of the said decisions).

The whole proceedings for the protection of rights of bidders and the public interest could be rendered meaningless if the contracting authority failed to comply with the order issued by a decision of the Republic Commission. The said state authority according to the current legal provisions may monitor the enforcement of its decisions, but it is not a prescribed obligation regarding each decision, but only when the petitioner brings to the attention the fact that the contracting authority has not complied with the decision which has been rendered. Based on the receipt of the requested report and documentation in the aforementioned cases, the Republic Commission determines if the contracting authority has complied with the order issued by the rendered decision and, if necessary, notifies the competent state authorities thereof, i.e. the National Assembly and the Government of the Republic of Serbia.

### 2.9.1. Examples

Examples of failures to comply with the decisions rendered by the Republic Commission are the following:

- failure of the contracting authority to submit a report on the enforcement of the decision;
- failure to comply with the order referred to in the decision within 30 days;
- continuing the public procurement procedure although it has been annulled in full by the decision;
- adopting a decision on the selection of the best bid and concluding a contract without repeating the expert assessment of bids that has been ordered by the decision on partial annulment of the public procurement procedure;
- repeating the entire or a part of the public procurement procedure and repeating the violations of the provisions of the Law due to which the entire procedure or its part has been annulled in the first place.

### 2.9.2. The Effect of Corruption

It is widely accepted that no legal norm can be applicable if an appropriate sanction is not stipulated by law in order to prevent its violation or abuse. The protection of the rights of the bidders and the public interest should introduce a speedy and efficient sanction into the public procurement system. The said sanction should be the annulment of the public procurement procedure where irregularities have occurred, accompanied by issuing of mandatory instructions (orders) on how to repeat the entire procedure or its part in accordance with the provisions of the Law.

Failure to enforce the decisions of the Republic Commission as a result renders the proceedings for the protection of rights meaningless consequently rendering the entire public procurement procedure meaningless as well. This directly contributes to the loss of trust in legal protection and legal safety in public procurement procedures, which allows all the other mechanisms of corruption to develop increasing their incidence.

### 2.9.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

In order to ensure legal safety and effectiveness of the proceedings for the protection of rights in public procurement procedures, it is necessary to prescribe that the Republic Commission must monitor the enforcement of every decision it renders and that it should notify the competent state authorities if necessary of the monitoring results. Furthermore, it should be considered whether the Republic Commission could be granted the power to directly impose a sanction if the contracting authority should fail to comply with the orders issued by the decisions of the aforementioned Commission. Primarily, the Republic Commission should be granted the power to file requests for the institution of misdemeanour proceedings or the Commission itself should be the authority responsible for deciding as the first instance in cases of such misdemeanour offences resulting from the failure to comply with the decisions rendered by it.

The possibility of granting the power to the Republic Commission which would allow the Commission to initiate legal proceedings for declaring the public procurement contract null and void if its conclusion did not comply with the decision rendered by the Commission should be also considered. The information on the conclusion of such contracts would be provided through regular and mandatory submission of reports on the enforcement of the decisions. Consequently, the aforementioned measure would be efficient in cases where the contracting authority proceeded with the public procurement procedure despite its annulment by the decision of the Republic Commission signing the contract in question.

Monitoring the enforcement, i.e. imposing sanctions if the decision of the Republic Commission is not complied with, as has been described above, would help reduce the number of irregularities in public procurement procedures and it would increase the efficiency of the implementation of such procedures. Strengthening the mechanisms which ensure that the decisions rendered in the proceedings for the protection of rights are binding, certainly helps secure that actions by those conducting the public procurement procedure are undertaken with due attention and conscientiously, abiding by all of the prescribed provisions and principles.

3. Public Procurement Phase:

# Execution of the Public Procurement Contract

## 3.1. Mechanism of Corruption: Irregularities Regarding the Filing of Reports with the Public Procurement Office

The principle of transparent use of public funds during public procurement procedures is enforced, inter alia, by requesting certain reports to be submitted to the Public Procurement Office by the contracting authorities. Primarily, these are reports for a three-month period on the conducted procedures and signed contracts during that period as well as the report on the implementation of the negotiated procedure "for reasons of urgency" referred to under Article 24, para. 1, item 4 of the Law.

When it comes to three-month reports, the Law prescribes that the contracting authority must collect and record certain data related to public procurement procedures, i.e. the data on the public procurement procedures and the data on the concluded public procurement contracts. Based on such records the contracting authority must draw up and submit the reports to the Office, the purpose of which is efficient and prompt monitoring of the public procurement procedures. The monitoring results of certain public procurement procedures may require the notification of the competent state authorities (Budgetary Inspection, State Audit Institution, etc.) about the identified irregularities.

As has already been mentioned, the way the legislator has attempted to prevent through the provisions of the current Law unjustified use of the negotiated procedure without a public call for bids for reasons of "urgency" is by prescribing an obligation of the contracting authority to submit a report to the Public Procurement Office after the decision on the selection of the best bid has been rendered. Such a rule has been introduced in order to prevent this type of frequent, unjustified use of the negotiated procedure and the contracting authority must justify the use of the negotiated procedure for the said reason in the report. The said report is very important bearing in mind that the request for the protection of rights filed by a potential bidder or one of the bidders that have participated in the procedure does not delay any further activities of the contracting authority.

### 3.1.1. Examples

Examples of irregularities related to the filing of reports with the Public Procurement Office are the following:

- failure to submit a report to the Public Procurement Office as required;
- late submission of the reports, which prevents the Public Procurement Office and competent authorities from reacting in due time (before the execution of the contract has started or ended);
- submission of reports with missing data;
- submission of reports with false data.

### 3.1.2. The Effect of Corruption

If the contracting authority fails to meet its obligations with regard to submitting the reports to the Public Procurement Office, it may be reasonably suspected that it is trying to conceal certain data on the public procurement procedures that are being conducted. In such a way, the data on the number of conducted procedures, the type of the procedures conducted by the contracting authority, the number of the bidders that have participated, estimated value and the value stipulated by the contract may be concealed. In addition, if the three-month reports have not been submitted, it may be assumed that the contracting authority has not conducted the legally prescribed procedures in some cases of procurement at all.

By avoiding the obligation of submitting complete data on the conducted "urgent" negotiated procedures, the contracting authority may attempt to conceal the following:

- the fact that the procedure of the said type has been conducted;
- the reasons for conducting this type of procedure;
- the rate at which and the manner in which the said procedure has been conducted, which may serve as an indication of the validity of the reasons for its implementation (if the procedure has taken too long, if the conclusion of the contract has been delayed until long after the procedure was conducted although extreme urgency was cited);
- which bidders have been invited to submit their bid;
- which bidder has been selected and what is the quoted price.

The aforementioned irregularities related to the submission of the reports to the Public Procurement Office may be an indication of procurement procedures which have been conducted without the implementation of legally prescribed procedures, as well as of non-transparent manner of conducting the procedure accompanied by a serious restriction of the competition. All of the above has characteristics of significant activities related to corruption.

### 3.1.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

Failure to submit the aforementioned three-month reports to the Public Procurement Office is defined under the Law as a misdemeanour offence punishable by a fine stipulated as a sum ranging between set amounts. The Office has initiated misdemeanour proceedings against contracting authorities that failed to submit such reports on more than one occasion while the courts imposed minimum fines on the contracting authorities and liable persons in question. On the other hand, failure to submit the reports on the conducted "urgent" negotiated procedure is not even defined as a misdemeanour offence and there is no prescribed sanction for it in the current Law.

In view of the aforementioned, it may be concluded that it is necessary to prescribe stricter sanctions for a failure to submit a report to the Public Procurement Office and include failure to submit any of the reports prescribed by the Law in the list subject to the said sanctions. Furthermore, the sanctions should be stipulated for the submission of incomplete reports and reports containing false data, which is currently not the case.

Prescribing harsher sanctions for irregularities regarding the submission of the reports on public procurement procedures would have to entail increasing the sentences and it should also be considered to allow the said violations to be treated and to be processed as criminal offences rather than misdemeanours. Such a provision is used by the Law on the Anti-Corruption Agency for instance, with regard to the public officials when they fail to provide complete and accurate data on their assets or on any changes regarding their assets. Therefore, it is absurd that a failure to provide the data on public procurement procedures, where far greater funds are being spent that cannot be compared to the value of some public official's assets, does not constitute a criminal offence.

## 3.2. Mechanism of Corruption: Allowing the Contract to be Executed Differently from what was Stipulated by the Bid and the Contract (Unlawful Annexes to the Contract)

The public procurement contract cannot be concluded without the conducted public procurement procedure. This is also confirmed by the provisions of Article 120 of the Law, which stipulate that the contracts are invalid if they have been concluded without previously conducted public procurement procedure, as well as those that have been concluded with the bidder whose bid has not been selected as the best. Invalidity of the contract is the most serious flaw a contract may have due to which any interested party may file charges with the competent court at any time without any restriction and request that it is ensured that it does not take any legal effect. However, not only that the public procurement contract may not be concluded without conducting the public procurement procedure, but, as a rule, the supplements and amendments to the contract in the form of annexes may not be introduced without such a procedure. One of the exceptions in this respect is the change in the price after the conclusion of the contract if it is the result of legitimate reasons which have been specified in the tender documentation for the public procurement procedure in question. The contracting authority, namely, has the option of allowing a change in the price after the conclusion of the contract, but only due to legitimate reasons which have been specified as such in the tender documentation thus making them known to all of the potential bidders as early as at the stage of preparing the bid. The second exception to the rule that the supplements and amendments to the original contract may not be introduced without conducting a public procurement procedure is the procurement of surplus work with regard to the public procurement contract for the execution of construction works. The said surplus work, which emerges after the conclusion of the contract, may be executed according to the rules of the Special Construction Practices (good business practices in the field of civil engineering). According to the Special Practices, the surplus work is the amount of performed work that exceeds the amount of work stipulated by the contract. Therefore, the work in question is the work stipulated by the contract, it is just the amount that is increased. One of the rules under the special Practices is that the unit price shall apply to the surplus work if it does not exceed 10% of the quantity stipulated by the contract.

Public procurement procedure is, therefore, a prerequisite for the conclusion of public procurement procedure. Supplements and amendments to the contract concluded in such a way cannot be introduced without the application of the provisions of the Law, but in a certain number of cases the contracting authorities have concluded annexes to the public procurement contracts without the application of the Law or have

allowed even without any annexes to the original contract certain contractual terms of execution to be amended, the terms which served as the basis for the selection of the bid in question and the choice of the bidder to be entered into contract with.

If it is allowed at the stage of the contract execution to change what was deemed to be a deciding factor when the contracting authority decided which bidder should the contract be concluded with, it may be stated that the said procedure was meaningless, i.e. that all of the participants in the procedure were misled, except for the contracting authority and the selected bidder. However, apart from the fact that the conducted public procurement procedure served no purpose and that it misled the participants in the said procedure, it must be pointed out that the described conduct of the contracting authority might indicate that an unlawful arrangement was made between the said authority and the selected bidder, i.e. that certain effects of corruption have ensued, which shall be discussed at greater length below.

### 3.2.1. Examples

Examples of allowing the public procurement contract to be executed differently from what has been stipulated by the bid and the contract, either by signing an annex to the contract without conducting the public procurement procedure or without the annex to the contract are the following:

- changing the price stipulated by the contract although the tender documentation does not cite legitimate reasons due to which the contracting authority might allow it;
- changing the price stipulated by the contract in part which is not subject to the legitimate reasons cited in tender documentation, as is the case when the price of transport of some goods increases as a result of a change in the price of fuel, but the contracting authority allows not only a change of transportation costs (as one of the elements in the price structure, whose increase has led to the change in the price), but also allows the bidder's margin to change in the percentage of changed price of fuel;
- a change in the terms and method of payment, by, for instance, effecting full or partial advance payment of the sum stipulated by the contract although the public procurement contract stipulates that the payment is to be effected upon the completion of the job, i.e. when the bidder discharges all of the stipulated contractual obligations;
- a change in the deadline set by the contract for the execution of the job due to the fact that the contracting authority has allowed the selected bidder a time extension on the offered deadline to deliver goods, provide services or carry out works, i.e. the said bidder is allowed to delay the fulfilment of contractual obligations;
- a change in the items that are being procured, where the contracting authority allows the bidder to deliver something of poorer quality and technical characteristics compared to what was originally offered (this also applies to providing services or performing works);
- a change in the items that are being procured when the contracting authority allows the bidder to deliver something that has not been specified by the public procurement contract;
- a change in the quantity of goods to be delivered stipulated by the contract, i.e. the stipulated scope of works or services due to the contracting authority's request or permission that the delivered quantity should be reduced or increased compared to the one stipulated by the contract;

- changes regarding the selected bidder, which occur when the contracting authority allows another entity that has not been mentioned in the bid to execute the procurement instead of the bidder that had to meet the participation requirements for the public procurement procedure and whose bid has been selected in the said procedure as the best according to a certain pre-defined criterion.
- any other changes which constitute a change in the quoted terms, based on which the bid has been selected.

### 3.2.2. The Effect of Corruption

If the contracting authority allows an illegal increase of the stipulated price in the contract or, contrary to the provisions of the contract, effects the payment before the selected bidder has even fulfiled its obligations, one can certainly suspect that public funds are being used for the purposes that are not stipulated by the public procurement contract. In addition, if the selected bidder is allowed to deliver goods that are of poorer quality and technical specifications than stipulated by the contract, the bidder is directly enabled to make a profit which has not been presented in the bid in question and which, consequently, may represent some sort of commission, i.e. a reward that would be paid out to the liable persons or contracting authority's officers. Similarly, if the selected bidder is allowed to deliver something that has not been included in public procurement contract, so it represents either additional quantities or a delivery of completely different goods (the same goes for services or works) without conducting the procedure in accordance with the Law, it practically constitutes a procurement without a public procurement procedure and it enables payment without the observance of competition and market conditions.

In addition to the aforementioned, it is important to note that a change regarding the selected bidder, which occurs when the contracting authority allows another entity, which was not the bidder or mentioned under a particular bid (as a subcontractor or participant in the bid submitted by a group of bidders – in a "joint bid"), to execute the procurement contract, might indicate that for some reason "the real" bidder - the one actually executing the procurement contract (the one delivering the goods, providing the service or performing the works) did not wish to appear in the public procurement procedure. The reasons for this might be, for instance, failure to meet one of the mandatory requirements for the participation of the bidders in the public procurement procedure. For instance, it is possible that the said entity is subject to a measure of banning it from engaging in a certain business activity, that its taxes have not been paid, or that the said entity has failed to meet the obligations stipulated by previous public procurement contracts, which is why the contracting authority would be able to reject the bid according to the provisions of the Law which regulate negative references. If such an entity is allowed to execute the procurement contract either in full or partially instead of the selected bidder, then it is reasonable to suspect that the said entity has offered or given certain material gain to the liable persons or contracting authority's officers in order to secure the contract, which would be impossible to get otherwise as the said entity does not meet the legally prescribed requirements.

### 3.2.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

One of the reasons why detecting and imposing sanctions for the irregularities at this stage of the public procurement procedure is so difficult is the lack of a clear power which would be granted to one of the competent state authorities regarding the collection of information on the execution of the public procurement contract itself and which would then allow the said authority to initiate legal proceedings as an interested party for declaring the contract in question null and void. With regard to this, when amending the current law or passing the new one, it should be stipulated that the contracting authority is under an obligation to submit to the Public Procurement Office not only the data on the conducted public procurement procedures and the resulting concluded contracts, but also the data on how the execution of the contract unfolded (how much was really paid and what was delivered, in what quantity and in what way). Furthermore, it is necessary to collect data on whether some annexes to the public procurement contracts have potentially been signed and if this has been done according to a legally prescribed procedure. It would certainly be difficult to analyze the data on the execution of all concluded public procurement contracts, but it could be prescribed that the data on the execution of contracts would have to be submitted to the Public Procurement Office if they exceed a certain threshold, and at the Office's request, on all the other contracts as well, especially if the information is obtained regarding irregularities at the said stage of the public procurement procedure from certain persons.

The Public Procurement Office should also be granted the legal power to initiate legal proceedings for declaring the contract null and void before the Commercial Court for reasons stipulated by the Law in cases where irregularities have been identified at the stage of the execution of the contract. By doing this, a more efficient system of penalties for the irregularities at the said stage of the procedure would be introduced. Understandably, the aforementioned activities of the Public Procurement Office would require considerably greater human resources, primarily, but also technical resources which would be used for the said activities.

## 3.3. Mechanism of Corruption: Failure to Impose Measures on the Selected Bidder as a Penalty for the Non-Fulfilment of Contractual Obligations

In order to secure that the principle of cost-effective and efficient use of the public funds is adhered to at the stage of the execution of the contract, it is vital that the contracting authority monitors the execution systematically and in an organized manner, and undertakes measures in order to ensure that the contract is executed in the manner and according to the terms stipulated by the bid which was selected as the best. In comparative law there are provisions according to which the implementation of the procedure and monitoring the execution of the contract are treated as two separate functions which are performed by different departments, i.e. different persons within the same contracting authority. In such a way, objectivity of the monitoring process is ensured.

When monitoring the execution of the contract, the contracting authority should determine if the bidder is meeting its contractual obligations on schedule and in the manner stipulated by the contract itself. In addition, the contracting authority must act with the so-called "due care and diligence of a prudent businessmen or owner", which means that it should undertake all of the available measures in order to secure timely and adequate execution of the contract.

Among the measures available to the contracting authority, contractual penalties stipulated by the contract are the most prominent, as well as the instrument of financial collateral for the contractual obligations. Most commonly used instruments of financial collateral for the contractual obligations are bank guarantees or bills:

- as a performance bond;
- for error correction during the warranty period;
- for advance payment refunds.

The contracting authority must require from the selected bidder the aforementioned instruments to be used as financial collateral only if the procurement value exceeds certain amount stipulated by the Law on Budget for the year in progress (in 2012 it was 673,000,000 RSD). However, the contracting authority may require such instruments even if the value is lower than that. If this is requested, the selected bidder must supply the collateral, while the contracting authority shall use it if the said bidder fails to meet its obligations.

The contracting authority has an option available to terminate the contract if it is evident that the selected bidder is unable or unwilling to meet its contractual obligations. With regard to this, it is important to point out that the termination of the contract and activation of the instrument of financial collateral for the fulfilment of contractual obligations constitute negative references for the selected bidder due to which the said bidder's offer might be rejected in some subsequent public procurement procedure involving the same item of procurement. Moreover, the contracting authority may institute legal proceedings for compensation of the damage incurred through outstanding contractual obligations, and it may insist regarding the construction works that the executed construction works are subjected to full expert inspection by the supervising body.

### 3.3.1. Examples

Examples for failure to undertake measures for penalizing the non-fulfilment of contractual obligations of the selected bidder are the following:

- insufficient monitoring of the execution of the contract by the contracting authority;
- failure to invite the selected bidder to execute the contract in the manner stipulated by the contract;
- failure to use penalties and other stipulated sanctions under the contract;
- failure to use bank guarantees or some other instruments used as financial collateral for the fulfilment of contractual obligations by the bidder;
- failure to terminate the contract although the selected bidder is not meeting its contractual obligations;
- failure to initiate legal proceedings before the competent court for the purpose of compensating the damage incurred through outstanding contractual obligations.

### 3.3.2. The Effect of Corruption

As has already been mentioned, at the stage of the execution of the contract, the whole public procurement procedure that has been previously conducted may be rendered meaningless. Namely, if the contracting authority allows the selected bidder not to meet the terms of the contract during the execution of the public procurement in question, based on which the bid has been selected as the best, then it is evident that the other participants in the procedure have been misled and that the principle of equal treatment of all the bidders has been violated drastically, as have been all of the other principles governing the public procurement procedures. However, such actions or, more specifically, failure to act on the part of the contracting authority may indicate serious inclination towards corruption, i.e. an attempt to enable that a payment from public funds is effected into the account of a particular bidder although the bid in question was just fictitiously the best, while the execution of the contract is actually going to be contrary to the quoted offer.

### 3.3.3. Proposed Measures for the Prevention of Mechanisms and Effects of Corruption

The regulations that regulate public procurement procedures should impose special obligations on the contracting authority regarding the monitoring of the execution of the contract and penalizing the failure of the selected bidder to meet its contractual obligations. In view of this, it should be prescribed that the contracting authority has a special responsibility if certain measures are not used to secure the execution of the contract in the manner stipulated by the bid and the contract.

Since the used financial collateral as an instrument securing the fulfilment of the contractual obligations, termination of the contract, final court judgment, as well as the report of the supervising body, all related to the phase of the execution of the public procurement contract, constitute negative references for any subsequent public procurement procedures, the contracting authorities should be under an obligation to use these, and to notify the competent authority (the Public Procurement Office) thereof. Based on the collected information, the competent authority would draw up a list of the bidders with negative references (the so-called "black list"). Such measures would be pre-emptive and to a certain extent they would be able to stop both the bidders and the contracting authorities from securing illegal proceeds for particular individuals by rendering the procedure for the selection of the best bid meaningless at the stage of the execution of the contract.

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| 1. PLANNING | Unnecessary procurement (in terms of content, quantity or quality) | ▪ procurement of intellectual services the results of which would not be used by the contracting authority, such as various analyses, research studies, translation services, etc.;<br>▪ procurement of consumables or spare parts despite the fact that there are considerable stockpiles in the warehouse of the contracting authority which have not been utilized over a longer period of time;<br>▪ procurement for the purpose of replacing the equipment which can still be used and which is in good condition (procuring new cars even though the contracting authority has vehicles at its disposal which have not been used much and which are in perfect working condition);<br>▪ procurement of specialized professional training for persons who do not need such training considering the type of job they perform;<br>▪ procuring the design of a website for the contracting authority with a great number of unnecessary features which are not going to be used by those who are expected to visit the site;<br>▪ procuring official vehicles of unnecessary engine capacity, size and with other unnecessary features. | Unnecessary, i.e. inappropriate use of public funds.<br>An attempt to help certain individuals to profit illegally at the expense of public funds. | Greater powers and resources for the State Audit Institution, whose greatest role should be monitoring whether the public procurement procedures are implemented appropriately.<br>Internal audits of contracting authorities should particularly focus on this aspect of public procurement.<br>Contracting authorities should be legally bound to adopt certain standards which would provide criteria for assessing whether there is a need to procure something.<br>Publishing annual procurement plans on the Public Procurement Portal, the part designated for publication, should become a statutory obligation. |
| | Deliberately setting an unrealistically estimated value | Estimating the value too low:<br>▪ in order to avoid the contracting authority's obligation to publish public procurement notices (to publish a Prior Information Notice and an announcement in the Official Gazette of the Republic of Serbia);<br>▪ in order to enable the rejection of bids as inadmissible and consequently suspend the procedure if the „preferred bidder" does not submit the best bid;<br>▪ in order to avoid requesting bank guarantees from the bidders as performance bonds during the public procurement procedure and during the execution of the contract. | The contracting authority can avoid the implementation of the prescribed procedures for publishing notices and preparation of tender documentation.<br>The contracting authority is provided with a mechanism which makes it possible for a particular public procurement procedure to be suspended (due to the rejection of all bids as inadmissible) if it is determined that the "preferred bidder" has not made the best offer. | Prescribing that it constitutes a separate misdemeanour offence and a reason for declaring the contract null and void if the contracting authority has deliberately set an unrealistically estimated value.<br>Granting the power to competent authorities to request, based on the submitted procurement plans, a justification from contracting authorities regarding the method in which the value of the public procurement was estimated.<br>Prescribing that the contracting authority must publish beforehand (before the expiry of a deadline for the submission of bids) what the estimated value is if a bid is to be rejected because it exceeds the estimated value amount. |
| | Prohibited "fragmentation" of public procurement in order to apply low-value procurement procedures | ▪ conducting separate procedures for the construction or adaptation of the same facility (separating procedures for different rooms or even separating the procedures for paining the ceiling from painting the walls in the same room);<br>▪ separate procurement of certain parts of computer equipment (monitors, keyboards, computer cases);<br>▪ separate procurement of pieces of office furniture (chairs, desks, cabinets);<br>▪ separate procurement for special organizational units (local offices) of the contracting authority in such a way that each of these units conducts a procedure for low-value public procurement;<br>▪ grouping the items which are subject to public procurement into lots and treating each lot as separate procurement subject to low-value procurement procedure (procurement of uniforms in two lots - pants and shirts, whose total value exceeds the stipulated maximum). | Attempting to completely limit the competition thus enabling certain bidders to be selected (the contracting authority invites whoever it chooses).<br>Attempting to enable the participation of bidders that do not meet some of the mandatory requirements due to which they would not be able to submit their bids in an open procedure. | The classification of goods, services or works should be determined and defined more accurately so as to eliminate any dilemmas regarding what is considered to belong under the same category at an annual level.<br>The implementation of the low-value procurement procedure should be differently regulated so as to ensure greater competition. |

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| | Defining the items subject to procurement in such a way as to ensure only a particular bidder is able to execute the contract | ▪ the contracting authority defines the items subject to procurement in such a way that it lists under a single item to be procured several separate elements which are grouped together in such a way that only one bidder is able to offer all of them at once;<br>▪ the contracting authority may add to the item which is actually necessary something that is not necessary thus defining a single item which only a particular bidder is able to deliver or which other bidders are not able to deliver without incurring great costs;<br>▪ the contracting authority adds to the procurement of an item which is subject to open competition in the market something for which only a particular bidder holds the rights (for instance, a patent or copyright), instead of procuring the item that is subject to exclusive rights separately within a negotiated procedure with the said bidder (Art 24 para 1 item 3 of the Law) | Certain bidders are given an advantage over the others or it creates a situation in which only the said bidders can be selected because they are the only ones able to deliver everything that is listed. | An obligation should be imposed on the contracting authorities to segment the listed items subject to public procurement into several wholes - lots, whenever it is possible, thus enabling a greater number of bidders to submit their bids within a single public procurement procedure. |
| | Making frequent and unjustified exceptions | ▪ conducting the public procurement procedure involving two contracting authorities where one, appearing as a bidder, does not have the exclusive or special right to perform the activity which is subject to public procurement procedure in question (contracting authority awards a project to a state-owned faculty without conducting a public procurement procedure although there are a number of privately owned entities which could carry out the same project);<br>▪ unjustified treatment of some procurement procedures as confidential despite the fact that the requirements for this have not been met (procurement of office furniture, passenger vehicles, fuel, heating material, etc.);<br>▪ executing procurement without the implementation of stipulated public procurement procedures during an extended period after a natural disaster, after all basic living conditions have already been restored;<br>▪ failure to conduct a public procurement procedure when purchasing goods for the purpose of rendering a particular utility service even though the said contracting authority has the exclusive right for providing the said service (exceptions could be applied only if the market were open to competition for providing such a service);<br>▪ procuring research services without implementing the Law in order to allow the contracting authority to gain profit (for the purpose of performing its activity), rather than acting in common interest, which is a prerequisite for making an exception. | Conducting procurement without implementing the prescribed procedure allows the competition to be completely restricted or even eliminated.<br>Use of exceptions not only eliminates the implementation of the prescribed procurement procedure but it also eliminates the possibility of the bidders contesting it as the injured parties since the prescribed procedure for the protection of rights is not applied.<br>Under such circumstances there are almost no obstacles preventing the private interest from being served at the expense of the public funds. | Reducing the number of exceptions listed under the current Law.<br>Defining more accurately certain exceptions in order to ensure more restrictive application of the said exceptions.<br>Clearer powers should be granted to the competent state authorities for the purpose of ensuring a more efficient control of the use of exceptions by contracting authorities.<br>It should be legally prescribed that the competent authorities should, based on the analysis of the submitted procurement plans, examine if it is justified to make an exception and accordingly prohibit the initiation of the procurement in question or stop the procedure that is already in progress.<br>Imposing an obligation on the contracting authorities to publish lists of exceptions that are going to be applied in the span of a year. |

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| | Frequent and unjustified implementation of the negotiated procedure with a particular bidder | ▪ the contracting authority consciously selects what is to be procured so that only a particular bidder is able execute such a contract;<br>▪ the contracting authority has no proof at all that only a particular bidder is able to execute the procurement contract in question;<br>▪ the contracting authority possesses the proof which does not indicate that only a particular bidder is able to execute the procurement contract in question. | Drastic limitation of the competition among the bidders. Allows very often the contracting authorities to procure items of low quality at unrealistically high prices. | The possibility of amending the existing legal provisions or prescribing new ones in order to enable a more efficient review of the reasons for the implementation of negotiated procedures.<br>New measures might include:<br>▪ - submitting the decision on initiation of the negotiated procedure without a public call for bids to some of the competent authorities (e.g. Public Procurement Office), which could suspend such a procedure at any moment;<br>▪ prescribing an obligation to publish a notice on the initiation of the negotiated procedure without publishing a public call for bids instead of the notice on the selection of the best bid;<br>▪ clarifying the application and interpretation of certain reasons for the use of the negotiated procedures. |
| | Frequent and unjustified use of the negotiated procedure "for reasons of urgency" | ▪ extraordinary circumstances have been caused by the delayed initiation of the procedure (poor planning or inadequate monitoring of the execution of the previously concluded contracts);<br>▪ extraordinary circumstances have been caused by the actions of the contracting authority itself (if the public procurement procedure has been annulled on several occasions due to the errors made by the contracting authority);<br>▪ the contracting authority cites urgency as the reason but conducts the negotiated procedure over a period of several months;<br>▪ the contracting authority initiates the negotiated procedure long after the moment that caused the need for urgent procurement ensued (e.g. the contracting authority does not conduct an "urgent" negotiated procedure until two months after the competent authority decides that adverse effects of the event should be eliminated). | Unjustified use of such a procedure not only restricts the competition but also restricts the right to protection of potential bidders that are not allowed to participate in the said procedure (since the contracting authority has not invited them to submit their bid). Namely, in such a procedure filing the request for the protection of bidders' rights does not delay further actions of the contracting authority, so it is possible for the bid to be selected allowing the contract to be signed and acted on despite the filed request for the protection of the rights. | It is necessary that all state authorities, in their full capacity, are undertaking all of the measures they have at their disposal in order to reduce the number of negotiated public procurement procedures.<br>The Ministry of Finance and the State Audit Institution should start assuming a much more prominent role, particularly when acting on the notifications received from the Public Procurement Office regarding the reports on the conducted "urgent" negotiated procedures.<br>Other measures listed in the section on negotiated procedures with a particular bidder should be undertaken. |
| | Frequent and unjustified implementation of the negotiated procedure for the purpose of additional procurement | ▪ additional delivery of goods which could be supplied by some other bidder without any technical difficulties in terms of their use and maintenance;<br>▪ additional delivery of works or services which could be separated from the original public procurement, i.e. which are not necessary for subsequent stages of providing services or execution of the works;<br>▪ additional procurement that exceeds 25 % of the value of the original contract. | The absence of any type of competition since only one supplier is being negotiated with.<br>Indicates the contracting authority's wish to give preferential treatment to a particular bidder and, simultaneously, to prevent all others from participating. | All of the proposed measures for preventing unjustified use of negotiated procedures with particular bidders may also be applied with regard to this mechanism of corruption as well. |

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| | Irregularities related to the procurement plans | ▪ the contracting authority has not adopted a procurement plan;<br>▪ the contracting authority has adopted or amended the procurement plan after the procurement procedure has already been implemented;<br>▪ the public procurement plan does not list all of the public procurement procedures which the contracting authority is planning to execute in the course of the year;<br>▪ the procurement plan does not list all of the procurement procedures that are exempted from the application of the Law;<br>▪ the procurement plan does not contain one of the important elements (the type of the procedure, estimated value, execution schedule, etc.);<br>▪ the procurement plan is adopted in an inappropriate procedure that lacks transparency (adopted by the Director without the approval of the managing board or some other supervisory body);<br>▪ conducting procurement procedures which have not been listed in the procurement plan;<br>▪ the use of a different type of procedure rather than the one specified in the procurement plan (instead of the open procedure, the negotiated procedure or the procedure for low-value public procurement are implemented);<br>▪ procuring the goods in different quantities and of different value which exceed the ones specified in the procurement plan;<br>▪ failure to adhere to the items and appropriations in the financial plan or budget as cited in the procurement plan, indicating the source of funds to be used for financing the procurement in question. | Paves the way to non-transparent implementation of certain procurement procedures or implementation of procurement procedures whose purpose is to serve personal interests of individuals or certain interest groups.<br>Monitoring the implementation of public procurement procedures at all stages is rendered more difficult. | The following should be prescribed:<br>▪ publication of the designated part of the procurement plans (if not the entire procurement plan, then its most important elements);<br>▪ submission of procurement plans of "major" contracting authorities (those in charge of high-value procurement procedures at an annual level) to the competent authorities for the purpose of their audit;<br>▪ clearly defined content of procurement plan by the Law or bylaw;<br>▪ basic procedures for the adoption or amendments to procurement plans;<br>▪ clear powers granted to the competent authorities in order to allow them to audit the procurement plans and annul them in full or in part, or to warn the contracting authorities about the irregularities under serious penalties and order them to remedy such irregularities. |

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| 2. PUBLIC PROCUREMENT PROCEDURE | Failure to apply the anti-corruption rule | ▪ the contracting authorities are not trying to obtain evidence of actions related to corruption even though they are aware that such actions have taken place;<br>▪ the contracting authority does not reject the bid and tries to conceal actions related to corruption despite the evidence of such actions;<br>▪ the contracting authority fails to notify the competent authorities that actions related to corruption have taken place. | Failure to apply the anti-corruption rule, whether due to the intent of the contracting authority or due to an inadequate legal definition, constitutes in itself the most serious mechanism of corruption because it serves the purpose of detecting other mechanisms of corruption. | It is very important to specify what the proof of actions related to corruption during public procurement might be as well as the ways in which this proof could be obtained.<br>The method of internal communication of the contracting authority should be regulated, as well as the communication between the management and persons involved in conducting the public procurement and between representatives of the contracting authority and all the persons who are interested in participating in the public procurement procedure. |
| | Conflict of interests | ▪ the head of the contracting authority or the employee who is in charge of operations related to public procurement, as well as the persons connected to them, own a share or stocks of the bidding company;<br>▪ the head of the contracting authority or an employee who is in charge of operations related to public procurement, as well as the persons connected to them, are involved in the management of the bidding company (as members of managing and supervising boards or shareholders' assembly);<br>▪ the head of the contracting authority or an employee who is in charge of operations related to public procurement and persons connected to them, do work for the bidder or have some other type of business relations with the bidder. | Illegal bias towards private interests, which could be manifested at any phase of the public procurement procedure. | It should be stipulated what kind of situations or relationships are deemed to cause a conflict of interests during public procurement procedures and the persons this applies to should be specified.<br>Sanctions should be stipulated if the conflict of interests occurs.<br>Certain measures should be prescribed that would lead to an easier detection of all forms of conflicts of interests and attempts to influence the impartiality of the contracting authority's decision-making process during the procurement procedure. |
| | Vague and contradictory content of the tender documentation | ▪ vague and contradictory information on how the bidders are supposed to prepare and submit their bids (e.g. one part requires all pages of the bid to be stamped by the bidder and the other part requires only forms completed by the bidder to be certified in such a way);<br>▪ conflicting data in the public call for bids and tender documentation (especially regarding the requirements and elements of the criteria);<br>▪ failure to define what is the proof of meeting mandatory participation requirements by the bidder (e.g. it is not specified what authority should issue a licence for the performance of a business activity which is subject to public procurement;<br>▪ insufficiently clear technical characteristics of the items subject to the procurement (different parts list different characteristics);<br>▪ the use of methodology for the application of the elements of the criteria for the selection of the best bid which is insufficiently clear and impossible to verify objectively. | It may indicate an attempt to limit the competition and to conduct the procedure in a non-transparent way in order to allow a particular bidder to be selected as having the best offer.<br>The contracting authority deliberately makes mistakes when preparing the tender documentation, in order to be able to suspend the public procurement procedure if it turns out that the bid of the "preferred bidder" cannot be selected as the best. | An obligation to publish tender documentation on the Public Procurement Portal should be prescribed.<br>Mandatory content of tender documentation should be reduced.<br>Models of tender documentation for various items which are most often subject to procurement (for construction works, fuel, insurance services, security services, delivery of office supplies, etc.) should be provided. |

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| | Discriminatory requirements for the participation of the bidders | ▪ contracting authority requires that the bidders should have the annual income from the activity in question which is many times (often ten times) higher than the value of the public procurement in question;<br>▪ requesting unnecessary attestations, certificates or testing reports, which the "preferred bidder" already has, while the others would need a lot of time to obtain them, making it impossible for them to submit their bids in time;<br>▪ the contracting authority requests references from the bidders proving that they have executed procurement contracts which considerably exceed the value of the public procurement in question in terms of their scope and value (for the construction of several hundred meters of water supply grid, it requests references for several dozen kilometers);<br>▪ requesting proof of references that do not refer to the items subject to the public procurement in question (the contracting authority requests references for the delivery of specialized computer equipment for certain complex systems although ordinary PCs for typical office work are currently being procured);<br>▪ the contracting authority requires that the bidders should have specific human resources at their disposal without explaining why this is necessary and how the items which are being procured and the execution of the contract are logically linked to the said requirement (specifying a particular number of employees required regardless of the staff structure and their involvement in the execution of the contract in question);<br>▪ the contracting authority requires from the bidders particular technical resources which are not logically linked to the items which are being procured, and which are available to the "preferred bidder" (unnecessary vehicles, equipment or technology);<br>▪ defining participation requirements so as to prevent the submission of a "joint bid," i.e. a bid by a group of bidders, by requesting from each participant in the bid to fully meet the capacity requirements (which defeats the purpose of the submission of a "joint bid", which is to join forces in order to be able to meet the requirements);<br>▪ setting additional requirements that are not logically linked to the items subject to the public procurement in question (e.g. insistence on receiving the proof that certain benefits were granted to the contracting authority in the previous years by the bidder in the form of donated equipment, donations or sponsorships). | The contracting authority limits the competition during the public procurement procedure by enabling particular bidders to participate while preventing others unfairly from participating.<br>Most often, the said requirement concerns something that the contracting authority does not need, but which "the preferred bidder" possesses and others do not.<br>Sometimes it is pre-arranged with the contracting authority to obtain first what is listed under the said requirement from the "preferred bidder" (some special equipment is purchased, etc.), after which the contracting authority initiates the procedure and sets this particular requirement which the other bidders are unable to meet. | Tender documentation should be published on the Public Procurement Portal.<br>Ensuring that the decisions on the requests for the protection of rights are rendered more promptly and insistence on the compliance with the decisions regarding the said issue.<br>Better cooperation of authorities in charge of the protection of competition is necessary, specifically of the Republic Commission for the Protection of Rights in Public Procurement Procedures and the Commission for the Protection of Competition in order to establish more efficiently whether a particular bidder has been discriminated against and whether the competition has been restricted in the procedure in question.<br>The situations in which the Public Procurement Office and other competent authorities should file requests for the protection of public interest should be defined more precisely by the Law. |

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| | Discriminatory technical specifications | ▪ simple "copying" the characteristics of the equipment of the favoured bidder;<br>▪ requiring various parts of the equipment to be from the same manufacturer;<br>▪ citing a particular trade mark, type of the product or production origin. | Contracting authority does not openly favor certain bidders by naming them or citing the type of a product that only the said bidders may provide, which is not difficult to detect and contest, instead, the contract is calibrated to suit the bidders "preferred" by the contracting authority through subtle adjustments of the characteristics.<br>The contracting authority would be guilty of considerable discrimination against the bidders, and, consequently, of limiting the competition if it were to require through the description of technical characteristics that the goods which are being procured are made only by particular manufacturers or that they are of a particular type, without allowing the possibility of competing with an equivalent product. | Publishing tender documentation on the Public Procurement Portal.<br>It should be considered whether to compile a special list of experts who would assist the Republic Commission in complex cases in which there are indications of discrimination through the use of technical specifications. |
| | Discriminatory criteria for the selection of the best bid | ▪ awarding a great weight for certain standard of quality certificates that only some bidders possess and that are, essentially, unnecessary in view of the items that are subject to the procurement procedure in question;<br>▪ weighting certain professional references which, by their very nature, have no relevance to meeting the specific needs of the contracting authority (references with regard to certain standard goods, where it is really of no significance whether the producer has previously delivered a hundred or several thousands of items);<br>▪ application of vague and subjective elements of criteria, such as „quality" or „special benefits " that are to be assessed on the basis of subjective opinions of the contracting authority's committee members;<br>▪ applying the weighting methodology which cannot be objectively verified;<br>▪ applying the weighting methodology that favors particular bidders or just one of them, because it unrealistically reflects the differences between the bids (e.g., awarding maximum weight only for particular references or methods of payment, and awarding zero weight to everyone else, by which this element ceases to be a criterion and becomes a requirement). | Everything that has been said for discrimination against the bidders through set participation requirements and for the effects of it may be said for the discrimination through the set elements of the criteria for the selection of the best bid. | Since it is possible to say that the effects of corruption resulting from the discrimination of the bidders through the use of criteria for the selection of the best bid are the same as the ones resulting from the discrimination of the bidders through the set requirements for the participation, the same measures could be proposed for the prevention of these effects related to both of these mechanisms of corruption. |

| public procurement phase | mechanism of corruption | examples | the effect of corruption | proposed measures for the prevention of mechanisms and effects of corruption |
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| | Irregularities related to publishing contract notices | ▪ failure to publish a notice;<br>▪ incomplete content of notices (lacking legally prescribed data);<br>▪ citing false data, i.e. deliberate mistakes in the notice in order to mislead the bidders and other interested parties (e.g. a deliberate mistake in the name of the item to be procured published in the public call for bids so that public procurement procedure which is being conducted would not be identified);<br>▪ publication of the notice in the Official Gazette of the Republic of Serbia but not on the Public Procurement Portal, which should not be overlooked as a violation, since interested parties increasingly follow primarily the announcements published on the Portal due to easier and faster access (which was why the Portal was set up in the first place);<br>▪ delayed publication of notices, after the set deadlines have expired, when neither the interested parties nor the competent authorities are able to react in due time or efficiently (e.g. publishing a notice on the conclusion of the public procurement contract after the said contract has already been executed, when declaring it null and void would not have much effect). | The interested parties may lose the opportunity to:<br>▪ adequately prepare for the participation in the public procurement procedure, i.e. to prepare available resources or secure new ones they lack, as well as to obtain the necessary documents (as a result of the failure to publish a Prior Information Notice for bids in the manner stipulated by the Law);<br>▪ participate in the public procurement procedure (as a result of the failure to publish a public call for bids in the manner stipulated by the Law);<br>▪ undertake measures for the protection of their rights in a timely fashion (as a result of the failure to publish a notice on the selection of the best bid and on the conclusion of the contract).<br>Even competent state authorities can be restricted in the use of their powers to monitor, inspect and penalize irregularities in such a procedure. | Prescribing criminal liability should be taken into consideration when it comes to deliberate failure to publish a notice in the manner stipulated by the Law, which is suggested below with regard to the failure to submit a report to the Public Procurement Office as well.<br>It should be considered to regulate the content and the moment of publication of the said notices differently. |
| | Irregularities during the opening of the bids and their expert assessment | ▪ opening the bids a few days after the expiry of the opening deadline;<br>▪ preventing the present authorized representatives of bidders to take part in the opening procedure (they are denied access to documents; they are not allowed to object; they are not allowed to take a copy of the minutes);<br>▪ the minutes on the opening of bids are incomplete (e.g. does not contain the signatures of the representatives of the bidders and there is no indication as to why their signatures are missing);<br>▪ preparing the minutes once the opening of bids has already been completed;<br>▪ the bid of the selected bidder has not been rejected despite being submitted improperly or despite being inadequate;<br>▪ the bid has been rejected although it has neither been improperly submitted nor is it inadequate;<br>▪ criteria elements have been applied in a way which does not comply with what was cited in the public call for bids and tender documentation (altering the criteria elements; altering the weight awarded to certain elements; altering the weighting methodology );<br>▪ after a decision on the selection of the best bid has been rendered, the interested bidders are not allowed access to documentation (primarily to the bids of other competitors and documents on the opening and expert assessment of bids);<br>▪ decision on the selection of the best bid is not served on the bidders in person (they are sent by regular mail, by fax or e-mail without the receipt confirmation). | A non-transparent, unobjective and biased procedure of opening and expert assessment of bids may result in an unjustified rejection of some bids, as well as the selection of the bid which should have been rejected or which is not the best.<br>Certain bidders are prevented directly and immediately from having their bid selected although their bid meets what was specified in the public call for bids and tender documentation, or a particular bidder is enbled to be selected although the bid in question should have been rejected or is not the best. | A more efficient system of protection of rights must be provided.<br>The enforcement of decisions rendered by the Republic Commission must be ensured. |

| public procurement phase | mechanism of corruption | examples | the effect of corruption | proposed measures for the prevention of mechanisms and effects of corruption |
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| | Failure to comply with the decisions rendered by the Republic Commission for the Protection of Rights in Public Procurement Procedures | ▪ failure of the contracting authority to submit a report on the enforcement of the decision;<br>▪ failure to comply with the order referred to in the decision within 30 days;<br>▪ continuing the public procurement procedure although it has been annulled in full by the decision;<br>▪ adopting a decision on the selection of the best bid and concluding a contract without repeating the expert assessment of bids that has been ordered by the decision on partial annulment of the public procurement procedure;<br>▪ repeating the entire or a part of the public procurement procedure and repeating the violations of the provisions of the Law due to which the entire procedure or its part has been annulled in the first place. | The proceedings for the protection of are rendered meaningless, consequently rendering the entire public procurement procedure meaningless as well.<br>It directly contributes to the loss of trust in legal protection and legal safety in public procurement procedures, which allows all the other mechanisms of corruption to develop leading to their frequent use. | An obligation should be imposed on the Republic Commission to monitor the enforcement of all of its decisions.<br>The Republic Commission should be granted the power to file requests for the institution of misdemeanour proceedings, or the Commission itself should be the authority responsible for deciding as the first instance in cases of such misdemeanour offences resulting from the failure to comply with the decisions rendered by it.<br>The Republic Commission should be granted the power to initiate legal proceedings for declaring the public procurement contract null and void if its conclusion did not comply with the decision rendered by it. |

| public procurement phase | mechanism of corruption | examples | the effect of corruption | proposed measures for the prevention of mechanisms and effects of corruption |
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| 3. EXECUTION OF THE CONTRACT | Irregularities regarding the filing of reports with the Public Procurement Office | ▪ failure to submit a report to the Public Procurement Office as required;<br>▪ late submission of the reports, which prevents the Public Procurement Office and competent authorities from reacting in due time (before the execution of the contract has started or ended);<br>▪ submission of reports with missing data;<br>▪ submission of reports with false data. | It may be reasonably suspected that the contracting authority is trying to conceal certain data on the public procurement procedures that are being conducted.<br>If the three-month reports have not been submitted, it may be assumed that the contracting authority has not conducted the legally prescribed procedures in some cases of procurement at all.<br>By avoiding the obligation of submitting complete data on the conducted "urgent" negotiated procedures, the contracting authority may attempt to conceal the following:<br>▪ the fact that the procedure of the said type has been conducted;<br>▪ the reasons for conducting this type of procedure;<br>▪ the rate at which and the manner in which the said procedure has been conducted indicating whether there have been valid reasons for the procedure in question;<br>▪ which bidders have been invited to submit bids;<br>▪ which bidder has been selected and what is the quoted price. | It is necessary to prescribe stricter sanctions for a failure to submit the report to the Public Procurement Office and include failure to submit any of the reports prescribed by the Law in the list subject to the said sanctions.<br>Prescribing harsher sanctions for irregularities regarding the submission of the reports on public procurement procedures would have to entail increasing the sentences and it should also be considered to allow the said violations to be treated and to be processed as criminal offences rather than misdemeanours (by analogy with the asset disclosure forms submitted by public officials). |

| public procurement phase | mechanism of corruption | examples | the effect of corruption | proposed measures for the prevention of mechanisms and effects of corruption |
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| | Allowing the contract to be executed differently from what was stipulated by the bid and the contract (unlawful annexes to the contract) | ▪ changing the price stipulated by the contract although the tender documentation does not cite legitimate reasons due to which the contracting authority might allow it;<br>▪ changing the price stipulated by the contract in part which is not subject to the legitimate reasons cited in tender documentation, as is the case when the price of transport of some goods increases as a result of a change in the price of fuel, but the contracting authority allows not only a change of transportation costs (as one of the elements in the price structure, whose increase has led to the change in the price), but also allows the bidder's margin to change in the percentage of the changed price of fuel;<br>▪ a change in the terms and method of payment, by, for instance, effecting full or partial advance payment of the sum stipulated by the contract although the public procurement contract stipulates that the payment is to be effected upon the completion of the job, i.e. when the bidder discharges all of the stipulated contractual obligations;<br>▪ a change in the deadline set by the contract for the execution of the job due to the fact that the contracting authority has allowed the selected bidder a time extension on the offered deadline to deliver goods, provide services or carry out works, i.e. the said bidder is allowed to delay the fulfilment of contractual obligations;<br>▪ a change in the items that are being procured, where the contracting authority allows the bidder to deliver something of poorer quality and technical characteristics compared to what was originally offered (this also applies to providing services or performing works);<br>▪ a change in the items that are being procured when the contracting authority allows the bidder to deliver something that has not been specified by the public procurement contract; | If the contracting authority allows an illegal increase of the stipulated price or, contrary to the provisions of the contract, effects the payment before the selected bidder has even fulfiled its obligations, one can certainly suspect that public funds are being used for purposes that are not stipulated by the public procurement contract.<br>In addition, if the selected bidder is allowed to deliver goods of poorer quality and technical specifications than stipulated by the contract, the bidder is directly enabled to make a profit (the difference in the value) that has not been presented in the bid in question.<br>A change regarding the selected bidder, which occurs when the contracting authority allows another entity, which was not the bidder or mentioned under the bid (as a subcontractor or participant in the bid submitted by a group of bidders – in a "joint bid") to execute the procurement contract, might indicate that for some reason the "real" bidder – the one actually executing the procurement contract – did not wish to appear in the public procurement procedure (due to unpaid taxes, a ban on engaging in a particular business activity, not having a licence for performing the activity which is subject to the public procurement in question, etc.). | It should be stipulated that the contracting authority is under an obligation to submit to the Public Procurement Office not only the data on the conducted public procurement procedures and the resulting concluded contracts, but also the data on how the execution of the contract unfolded (how much was really paid and what was delivered, in what quantity and in what way), as well as the data on whether some annexes have been concluded.<br>The Office should also get the legal power to initiate legal proceedings for declaring the contract null and void for reasons stipulated by the Law in cases where irregularities have been identified at the stage of the execution of the contract. |
| | Failure to impose measures on the selected bidder as a penalty for the non-fulfilment of contractual obligations | ▪ insufficient monitoring of the execution of the contract by the contracting authority ;<br>▪ failure to invite the selected bidder to execute the contract in the manner stipulated by the contract;<br>▪ failure to use penalties and other stipulated sanctions under the contract;<br>▪ failure to use bank guarantees or some other instruments used as financial collateral for the fulfillment of contractual obligations by the bidder;<br>▪ failure to terminate the contract although the selected bidder is not meeting its contractual obligations;<br>▪ failure to initiate proceedings before the competent court for the purpose of compensating the damage incurred through outstanding contractual obligations. | Such actions or, more specifically, failure to act on the part of the contracting authority may serve as an indication of serious inclination towards corruption, i.e. of an attempt to enable that a payment from public funds is effected into the account of a particular bidder although the bid in question was just fictitiously the best, while the execution of the contract is actually going to be contrary to the quoted offer. | Special obligations should be imposed on the contracting authority regarding the monitoring of the execution of the contract and penalizing failure of the selected bidder to meet contractual obligations.<br>It should be prescribed that the contracting authority has a special responsibility if certain measures are not used to secure the execution of the contract in the manner stipulated by the bid and the contract. |

Part Two

# Practical Examples

# Introduction

Before this study came about, fundamental mechanisms of corruption that appeared in the public procurement system in the Republic of Serbia had been described in the study entitled *"Corruption Map in Public Procurement Procedures in the Republic of Serbia"*. The said study provides reliable answers to the question what has been causing a permanent decline in the trust of the bidders in the national public procurement system, i.e. what exactly prevents the bidders from competing in the market by offering competitive prices and good quality. Varinac identifies 21 different types of mechanisms of corruption which accompany the execution of the public procurement from the planning phase, the phase when the best bid is selected and the contract is signed to the final phase – when the merchandise, i.e. the goods are delivered, the services are rendered or the works are executed as stipulated by the contract. In addition to identifying the mechanisms of corruption, the aforementioned study sums up the effects of corruption and proposes measures which could eliminate them.

The new study entitled *"Corruption Map in Public Procurement Procedures in the Republic of Serbia – Practical Examples"* mirrors the structure of the previous one consistently and aims at practically clarifying to the professionals in the field, and everyone else who comes into contact with the public procurement system in the Republic of Serbia, the potential mechanisms of corruption that can be encountered in practice. The need for this study has arisen as a result of the desire to enforce the Law on Public Procurement (hereinafter: the LPP), which has entered application on 1 April, 2013, more successfully and efficiently. From a practical point of view, the prerequisite for the new law to achieve the expected effects, i.e. to increase the level of competition, secure greater savings from public funds, prevent the abuses and provide more efficient legal protection of the bidders, is to completely reexamine the past weaknesses of the public procurement system.

For the purposes of this study, the author has analyzed more than 250 decisions of the Republic Commission for the Protection of Rights in Public Procurement Procedures (hereinafter: the Republic Commission for the Protection of Rights), 45 reports of the State Audit Institution (hereinafter: the SAI), 18 reports of the Budgetary Inspection of the Ministry of Finance, 14 reports of the Budgetary Inspection of local self-governments, 5 reports of the internal audit offices, as well as 32 judgments rendered by misdemeanor courts in the Republic of Serbia. In view of the analyzed data, the author has put emphasis on those example cases whose specific nature and frequency illustrate the pattern of violations referred to under the LPP. The presented case studies show the chronological order and the legal nature of the contracting authority's actions undertaken in the manner which does not comply with the provisions of the LPP.

The author has analyzed from the point of view of the number of performed audits, identified violations and filed charges over a period of a single fiscal year the work results of the SAI, the offices of the Budgetary Inspection within local self-governments, as well as the statistical data on the proceedings conducted by the misdemeanor courts with regard to imposed sanctions for the violations referred to under the LPP. Court decisions have been analyzed from the aspect of how severe the imposed sanctions on the contracting authorities and liable persons of the contracting authorities were, as well as the court decisions from the aspect of the expiry of the statute of limitation on the right to initiate or conduct the proceedings. The analysis provided in this study especially underlines the key issues related to the practice of the courts, such as inconsistent court practices when imposing fines on liable persons of the contracting authorities, as well as the issue of imposing a set minimum as the sanction on the contracting authority in the capacity of a legal entity.

*The Association of the Public Procurement Professionals* wishes to offer a contribution through this study to the identification and prevention of weaknesses which lead to corruption in the public procurement system in practice.

Authors

# 1. Planning

## 1.1. Unnecessary Procurement

### 1.1.1. Example

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|---|---|
| *Contracting authority:* | *Public Enterprise*[1] |
| *Item subject to procurement:* | *Spare parts for freight vehicles* |
| *Value of the contract:* | *598,564 RSD* |
| *Source:* | *The Report of the Internal Audit Department of the contracting authority*[2] |
| *Summary:* | *The contracting authority procured 110 pieces of a particular spare part without an objective needs analysis and without running a check whether there were any available pieces in stock even though there were 41 pieces in storage at the moment of the procurement and only 31 pieces of the said spare parts had been replaced during the period of a year and a half.* |

Case Study

Low- Value Public Procurement was initiated in 2008 by the competent organizational unit of the contracting authority "A" and it was approved by the management in accordance with the Law on Public Procurement.[3] The item subject to procurement was 110 identical pieces of spare parts which were being procured for the purpose of repairing freight vehicles. The value was estimated at 2,700,000 RSD without taxes. Considering that this constituted low-value procurement, the contracting authority sent out an invitation for the submission of bids to the addresses of three bidders. The contracting authority selected the bid which was the best in terms of the price, in the amount of 2,607,000 RSD without taxes. The bidder "B" delivered the appropriate quantity of the goods and these were stored in the warehouse of the contracting authority "A".

The execution of the public procurement in question was subsequently subject to extraordinary audit proceedings by the Internal Audit Department of the contracting authority. The price of the said spare part was compared with the prices available in the market and it was determined that the said item could be found in the market at a price which was up to 25 times lower than the price quoted by the bidder the contract was signed with. The contracting authority and the bidder "B" revised the procurement value by concluding an annex to the basic procurement contract. The new value of the procurement of the spare parts that was stipulated by the contract was now 598,564 RSD without taxes instead of 2,607,000 RSD.

1 This study does not provide identification data of the contracting authorities and bidders, i.e. the identification data on the liable persons of the contracting authorities and the bidders, in view of the obligation to observe the restrictions prescribed by the Law on Personal Data Protection (Official Gazette of the Republic of Serbia, no. 97/08. 104/09 – state law, 68/12- the Decision of the Constitutional Court and 107/2012)

2 Number: 33A/2009-44, 19 June, 2009

3 Official Gazette of the Republic of Serbia, no. 116/08

The internal audit of the contracting authority "A" established that during the period of a year and a half the contracting authority had replaced only 31 of the spare parts that were subject to procurement. Moreover, technical services of the contracting authority had made the spare part in question independently in three instances, 8 spare parts had been taken from other freight vehicles, while in 30 cases the freight vehicle had been repaired without replacing a part. The internal audit concluded that at the moment of initiating the public procurement of the said spare parts in the amount of 110 pieces, the contracting authority had at its disposal 45 pieces of identical parts stored in its warehouse.

In addition, the findings of the Internal Audit suggest that the spare part in question would be difficult to damage on a freight vehicle. There is a piece of information provided by the Internal Audit that should be especially underlined and that is the fact that the contracting authority "A" had written off as scrap metal 1902 freight vehicles (2006-2009) which could have been used for obtaining the aforementioned spare parts in a sufficient number to satisfy the needs of the contracting authority for several years.

## 1.2. Deliberately setting an unrealistically estimated value

### 1.2.1. Example

| | |
|---|---|
| *Contracting authority:* | *Public Utility Enterprise* |
| *Item subject to procurement:* | *goods and services* |
| *Value of the contract:* | *263,947,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[4] |
| *Summary:* | *The contracting authority conducted low-value public procurement procedures during a fiscal year which resulted in the conclusion of 89 contracts, despite the fact that the same type of goods and services were worth 263,947,000 RSD in total, thus avoiding the publication of the notices.* |

Case Study

The contracting authority "A" conducted 120 low-value procurement procedures in 2011, out of which the SAI identified 89 low-value procurement procedures for which the contracting authority was under an obligation to issue a public call for bids in an open procedure. According to the findings of the SAI, the contracting authority had concluded 89 contracts worth 263,947,000 RSD. The SAI classified the said contracts during the auditing proceedings into 18 procurement procedures of the goods and services of the same type. Through the use of this method the SAI was able to identify the construction works worth 100,437,000 RSD. The said works were subject to 31 contracts concluded with the contracting authority in the low-value public procurement procedure in the course of a fiscal year. All of these contracts concluded by the contracting authority had the maximum limit which was just below the threshold for low-value procurement procedures in 2012. This allowed the contracting authority "A" to mainly conclude contracts with a limited list of the recurring bidders during the said fiscal year.

4 Number: 400-1968/2013-01, 24 December, 2013

According to the SAI, in this particular case the goods, works and services were of the same type or related to each other, so the requirements referred to under Article 26 of the LPP, which stipulates that low-value public procurement is the procurement of the goods, services or works of the same type whose value at an annual level is estimated to be lower than the threshold specified under the law regulating the annual budget of the Republic of Serbia, had not been met. The Law on the Budget of the Republic of Serbia from 2012 (Article 33) set a threshold for low-value procurement procedures between 331,000 RSD and 3,311,000 RSD without VAT.[5]

The SAI found that the contracting authority had acted contrary to the provisions of Article 37 of the LPP when setting the value of the public procurement procedures in question as it managed to avoid the publication of notices. The said provision stipulates that the contracting authority is not allowed to choose the method of setting the value of a public procurement so as to avoid the publication of notices due to its estimated value. By conducting the public procurement procedures in such a way, the contracting authority was in violation of Article 20 of the Law on Public Procurement.

## 1.3. Prohibited "fragmentation" of public procurement for the purpose of applying low-value procurement procedures

### 1.3.1. Example

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|---|---|
| *Contracting authority:* | *Public Enterprise* |
| *Item subject to procurement:* | *IT infrastructure and a server* |
| *Value of the contract:* | *3,992,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[6] |
| *Summary:* | *The contracting authority concluded two contracts on the procurement of goods with the same supplier in a low-value public procurement procedure instead of conducting a single open procurement procedure.* |

Case Study

The contracting authority "A" procured IT infrastructure in January, 2011 from the bidder "B" worth 2,475,000 RSD. The contracting authority concluded on the same day, with the same bidder "B", a contract for the procurement of a server worth 1,517,000 RSD. In both cases of procurement, the contracting authority had first conducted a procedure for low-value public procurement in accordance with the LPP. The contracting authority had conducted two low-value public procurement procedures arranging the procurement by contracts worth 3,992,000 RSD in total.[7] According to the findings of the SAI, the contracting authority had an obligation to conduct the purchase of the IT infrastructure and server in question in a single open call procedure.

5 Official Gazette of the Republic of Serbia, no. 101/11
6 Number: 400-2629/2012-01, 12 December, 2012
7 JN 22/46 and JN 22/47.

The contracting authority was in violation of Article 20 of the LPP when it conducted a low-value public procurement procedure worth 3,992,000 RSD. The cited Article prescribes that the selection of the best bid is done, as a rule, according to the open public procurement procedure while the best bid may be selected according to other public procurement procedures if the requirements stipulated by the said law have been met. The described actions of the contracting authority did not comply with Article 37 of the LPP, allowing the publication of notices to be avoided, as the requirements referred to under Article 26 of the LPP had not been met.

### 1.3.2. Example

| | |
|---|---|
| *Contracting authority:* | *Public Enterprise* |
| *Item subject to procurement:* | *computers and computer equipment* |
| *Value of the contract:* | *5,001,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[8] |
| *Summary:* | *The contracting authority conducted two procedures for the procurement of computers and computer equipment with three suppliers within six months instead of conducting a single open procurement procedure.* |

#### Case Study

The contracting authority "A" procured computers and computer equipment in March, 2011 and entered into contract with the bidder "B" worth 2,301,000 RSD. Then the contracting authority "A" conducted the procurement of a server and entered into contract with the bidder "C" worth 1,402,000 RSD. Simultaneously, the contracting authority conducted the public procurement procedure for procuring scanners and printers and entered into contract with the bidder "D" worth 1,298,000 RSD. The SAI claims that the contracting authority had to conduct all three public procurement procedures[9] as one single open procedure for the procurement of computers and computer equipment because these were goods of the same type, the procurement of which had to be executed within a single procedure segmented into lots.

The contracting authority's actions did not comply with Article 37 of the LPP, which allowed the publication of notices to be avoided, and in view of the fact that the requirements referred to under Article 26 of the LPP had not been met, the contracting authority was in violation of the provisions of Article 20 of the LPP by conducting a low-value public procurement procedure worth 5,001,000 RSD.

8 Number: 400-2629/2012-01, 12 December, 2012
9 JN 27/2, 22/31 and 27/22

1.3.3. Example

| | |
|---|---|
| *Contracting authority:* | *Local Self-Government (Municipality)* |
| *Item subject to procurement:* | *construction works for road repairs* |
| *Value of the contract:* | *9,972,500 RSD* |
| *Source:* | *The Decision of the Republic Commission for the Protection of Rights*[10] |
| *Summary:* | *The contracting authority allocated funds according to the annual public procurement plan in the amount of 9,972,500 RSD for works of the same type for street, road and bridge repairs, but subsequently decided to conduct several procedures for low-value public procurement.* |

Case Study

The contracting authority "A" started a procedure in March, 2012 for low-value public procurement of construction works for road repairs in the village "D", the estimated value of which was 1,735,344 RSD without taxes. The bidder "B" filed a request for the protection of rights with the Republic Commission at the stage before the deadline for the submission of bids expired in accordance with the LPP.

The bidder "B" pointed out in the said request that the contracting authority "A" had initiated several public procurement procedures during the same period for the works of the same type in addition to the public procurement in question. The contracting authority should have conducted a single high-value procurement procedure considering what the total value of the low-value public procurement procedures would be if they were to be added up and that the works in question were of the same type and planned to be executed in a single fiscal year. Moreover, the said bidder had expressed this objection during the procedure before the contracting authority and it had been rejected by the said authority as unfounded, so the bidder continued the procedure before the Republic Commission.

Upon examining the financial plan of the contracting authority for 2012, the Republic Commission for the Protection of Rights determined that the contracting authority had planned 9,972,500 RSD for the purpose of repair work on streets, roads and bridges. Although the contracting authority did specify that the said procurement would be executed as the low-value procurement in accordance with Article 26 of the LPP, it was established in the proceedings before the Republic Commission that such actions did not comply with the provisions of the LPP and the Regulation on the Low-Value Public Procurement Procedure.[11]

Namely, Article 37 of the LPP prohibits the contracting authority from choosing the method of setting the value of the public procurement which allows the publication of notices to be avoided due to a low value estimate. On the other hand, Article 2 of the Regulation on the Low-Value Public Procurement Procedure stipulates that the low-value public procurement procedure is to be conducted when the estimated value of the goods, services or works of the same type is lower at the annual level than the threshold set by the law regulating the annual budget of the Republic of Serbia.

10 Number: 4-00-543/2012, 11 May, 2012
11 Official Gazette of the Republic of Serbia, no. 50/09

The fact that the contracting authority had initiated several procedures for the low-value procurement of construction works on repairing the village roads also indicates that the contracting authority had intended to abuse the LPP, which also affected the decision of the Republic Commission. The decision of the Republic Commission upheld the bidder's request and ordered the contracting authority to annul the public procurement procedure in its entirety.

## 1.4. Defining the items subject to procurement in such a way as to ensure only a particular bidder is able to execute the contract

### 1.4.1. Example

| | |
|---|---|
| *Contracting authority:* | *State Fund* |
| *Item subject to procurement:* | *office furniture* |
| *Value of the contract:* | *5,000,000 RSD* |
| *Source:* | *The Decision of the Republic Commission for the Protection of Rights*[12] |
| *Summary:* | *The contracting authority set the criteria concerning the esthetics, the production line, dimensions with no margin for variation tolerance in the tender documentation for the procurement of office furniture which raises suspicion that the bidder able to meet the tender requirements was known in advance.* |

Case Study

The contracting authority "A" published a public call for bids for the procurement of office furniture in February, 2011 estimating the approximate value of the procurement to be 5,000,000 RSD without taxes. The bidder "B" submitted a request for the protection of rights which the contracting authority "A" rejected as unfounded, which is why the bidder filed a request with the Republic Commission. The bidder "B" claimed in the request that the technical specifications included in the public call for bids by the contracting authority "A" had been such that adequate furniture could only be offered by an exclusive representative of a foreign manufacturer, i.e. the bidder "N".

The bidder "B" referred to the required technical specifications pointing out that the measurements were set with a precision to "a millimeter, centimeter and a gram without any tolerance of possible, even minimal, variations". Contracting authority "A" defined in tender documentation that the delivery date would carry a weight of 40 points whereas the best price would be given a weight of 30 points. According to the bidder "B" these elements favour the bidder "N", claiming that "the said bidder either has the goods on stock or has made an arrangement for the delivery with the foreign manufacturer". In addition, it is also said in the request that for certain pieces of furniture, specifically the chairs, it is required to supply the certificates on the compliance with the European (EN) standards which could not be issued in the Republic of Serbia at that time.

12 Number: 4-00-327/2011, 10 May, 2011

The Republic Commission established in the proceedings conducted with regard to the said request that the contracting authority "A" had defined for every item subject to procurement "very detailed, extremely precise technical requirements which range from the criteria the listed pieces of furniture must meet in terms of esthetics, precise measurements, materials they should be made of, and for certain pieces their exact weight (e.g. a chair was required to weigh exactly 15kg". Furthermore, it was established that the contracting authority had specified for each piece of furniture "the name of the manufacturer, as well as the production line of the cited manufacturer the piece is a part of", and that "in terms of the measurements no variation tolerance was allowed, i.e. acceptable variation margin".

Since setting technical requirements in the described way constitutes a violation of Article 39, paragraphs 3 and 4 of the LPP, the Republic Commission for the Protection of Rights rendered a decision annulling the entire public procurement procedure. Despite the aforementioned decision, the contracting authority "A" awarded in a month's time the procurement contract in question precisely to the bidder "N" in a negotiated procedure without prior invitation to bid.[13]

## 1.5. Frequent and unjustified use of the negotiated procedure with a particular bidder

### 1.5.1. Example

| | |
|---|---|
| *Contracting authority:* | *Public Enterprise* |
| *Item subject to procurement:* | *Procurement of the service of drafting a preliminary design* |
| *Value of the contract:* | *303,000,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[14] |
| *Summary:* | *The contracting authority and the bidder executed the work subject to the said procurement before concluding the contract in an unlawful negotiated procedure without prior publication of the public call for bids.* |

Case Study

The contracting authority "X" initiated a negotiated procedure without publishing a public invitation for public procurement of the service of drafting the preliminary design of the modernization of the railway line section "S-N", the value of which was estimated at 250,000,000 RSD.[15] The contracting authority stated in a decision on the initiation of the public procurement, citing the provision of Article 24, paragraphs 1 and 3 of the LPP, that only the bidder "D" could meet the requirements since the said contracting authority had drafted "the general design and feasibility study of the general design for the reconstruction and modernization of the railway line "S-N-S" in 2003. At that time the procurement was initiated based on the decision of the Managing Board of the contracting authority "X" and the contract was concluded with the bidder "D", which was a dependent company of the contracting authority "X".

13 Official Gazette of the Republic of Serbia, no. 116/08
14 Number: 400-1171/2011-01, 28 December, 2011
15 JN-6

According to the findings of the SAI, general design and feasibility study had been approved by the audit commission of the competent ministry. At the stage of conducting the negotiated procedure without prior publication of the public call, the bidder "D" submitted a bid originally quoting 306,196,000 RSD while the final quoted price was 303,000,000 RSD. The contracting authority then revised its procurement plan for 2010 and set a newly estimated value of the procurement at 303,000,000 RSD. The contracting authority and the bidder concluded a contract in November, 2010 which was revised by the SAI.

According to the findings of the SAI, this particular case involved procurement of the service of drafting a preliminary design of the modernization of the railway line "S-N" so according to the LPP the service in question could not be linked to the previous procurement of the general design and feasibility study of the general design for the reconstruction and modernization of the railway line "S-N-S". The SAI found that the contract in question was concluded on 11 November, 2010 but the first interim statement was issued to the contracting authority on 12 November, 2010 already in the amount of 283, 060,000 RSD. Issuing the interim statement only a day after the contract was signed according to the statement of the liable persons of the contracting authority was the result of the fact that the majority of the works had already been done before the contract was even concluded.

The contracting authority violated the provisions of Articles 9 and 20 of the LPP by doing so.

### 1.5.2. Example

| | |
|---|---|
| *Contracting authority:* | *Public Utility Enterprise* |
| *Item subject to procurement:* | *Procurement of fuel* |
| *Value of the contract:* | *23,000,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[16] |
| *Summary:* | *The contracting authority arranged the procurement of fuel in a negotiated procedure without prior publication of notices and without any grounds for it, which eliminated the competition granting an exclusive right to a particular bidder.* |

### Case Study

The contracting authority "G" rendered a decision on the initiation of the public procurement[17] of fuel for the vehicles and other machinery the value of which was estimated at 33,000,000 RSD and the same decision stipulated an open procedure to be conducted. Despite the aforementioned, the contracting authority applied Article 24, para.1, item 3 of the LPP and concluded a contract on the procurement of fuel worth 23,938,000 RSD without taxes with the bidder "S" in a negotiated procedure without the publication of a public call for bids. The legislator stipulated under the said provision that the negotiated procedure without the publication of the public call for bids should be conducted due to technical, i.e. artistic reasons or due to reasons re-

16 Number: 400-1968/2013-01, 24 December, 2013
17 NVV-03 PP-04/2012

lated to the exclusive rights of a particular bidder, i.e. due to the fact that only a particular bidder was able to execute the procurement in question.

The SAI underlined in its findings that the bidder "S" did not have an exclusive right to deliver the fuel for vehicles and other machinery and that there were no grounds for the negotiated procedure to be implemented. In addition, the SAI stressed that the contracting authority "G" was under an obligation to conduct an open public procurement procedure in accordance with the LPP considering what the value of the said procurement was. With regard to contracting authority's actions, the SAI stressed that the provisions of Articles 9 and 20 of the LPP had been violated and that the contracting authority had prevented other bidders from participating in the procedure for procurement in question.

Furthermore, the cited example of procuring the fuel in the manner which violates the principle of securing competition among bidders with no legitimate reason is extremely common in practice. In other words, this practice is one of the most commonly identified by the SAI when auditing the entities in the public sector, i.e. the contracting authorities.

## 1.6. Frequent and unjustified implementation of a negotiated procedure for the purpose of additional procurement

### 1.6.1. Example

| | |
|---|---|
| *Contracting authority:* | *Public Enterprise* |
| *Item subject to procurement:* | *Procurement of the service of removal of weed and grass* |
| *Value of the contract:* | *720,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[18] |
| *Summary:* | *The contracting authority arranged the procurement of "additional services" of weed and grass removal in a negotiated procedure without the publication of a public call for bids despite the fact that the specified services were subject to a warranty period stipulated under the previous contract which had been concluded by the contracting authority with the same bidder.* |

Case Study

The contracting authority "K" rendered a decision in September, 2011 on the initiation of the negotiated procedure without the publication of the public call for bids for the purpose of procuring the service of removing (mowing and clearing) dry weeds and grass from the premises of business facilities located in the area exposed to fire and explosion hazards.[19] The type of procedure was selected by the contracting authority according to the provision of Article 24, para.1, item 7 of the LPP and it was estimated to be worth 720,000 RSD without taxes. The cited provision stipulates that the contracting authority may conduct the negotiated procedure without prior

18 Number: 400-3794/2012-01, 21 March, 2013
19 JN 07-02/P-77/2011-DD

publication of a public call for bids for the procurement of additional services which has not been included in the original procurement, provided that the value of the additional services does not exceed 25% of the total value of the original contract as well as that the additional services cannot be technically or financially separated from the first public procurement.

According to the findings of the SAI the said procurement contract was awarded to the bidder "D" whose bid was assessed to be the best and the contract worth 705,000 RSD was concluded with the said bidder. The bidder undertook a contractual obligation to provide a service of weed and grass removal from the facilities of the contracting authority in accordance with the specifications included in the tender documentation and the accepted bid. Moreover, the SAI determined that nine months prior to this the contracting authority "K" had signed a contract with the same bidder "D" worth 2,896,000 RSD. The subject matter of the aforementioned contract was the provision of the same type of service while the bidder undertook an obligation to perform at its own expense "as many treatments as necessary for the total extermination of weeds during the warranty period", and at the first call of the contracting authority.

The SAI found in this particular case that there were no grounds for the initiation and implementation of the procurement in question as it had been included in the previous procurement contract with the same bidder that agreed to a warranty period under the said contract.[20]

## 1.7. Frequent and unjustified implementation of the negotiated procedure "for reasons of urgency"

### 1.7.1. Example

| | |
|---|---|
| *Contracting authority:* | *Public Utility Enterprise* |
| *Item subject to procurement:* | *Procurement of the service of lift maintenance* |
| *Value of the contract:* | *800,000,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[21] |
| *Summary:* | *The contracting authority conducted a negotiated procedure without the publication of a public call for bids for the purpose of procuring the services of lift maintenance when there were no grounds for it and without waiting for the final decision of the Republic Commission in the proceedings conducted at the bidder's appeal.* |

Case Study

The contracting authority "A" rendered a decision in June, 2011 on the initiation of the first stage of the restricted procedure for public procurement of services and works related to the scheduled regular maintenance, urgent interventions, running repairs and investment maintenance for, approximately, 6,120 lifts in the territory

20 JN 07-02/6-D/2011-DD
21 Number: 400-2629/2012-01, 24 December, 2012

of the city "M".[22] Estimated value of the procurement in question was 800,000,000 RSD but it was annulled by the decision of the Republic Commission due to irregularities in the tender documentation brought to the attention by the bidder "F".[23]

The decision cited that the contracting authority had set the requirement for the recognition of the qualification and the method of proving the requirements had been met contrary to the provisions of Article 45 of the LPP. The contracting authority requested from the bidder to meet the business capacity requirement, for which there were no grounds, specifically, that it had "rendered services and executed works either the same as or similar to the items subject to public procurement of regular maintenance of at least 300 lifts permanently installed in the buildings" during 2010.

According to the findings of the SAI, the contracting authority "A" was aware of the fact that the Republic Commission was conducting the proceedings at the request of the bidder "F" but it did not suspend the actions related to the procurement procedure in question before the final decision was made by the Republic Commission. Namely, the contracting authority "A" rendered a decision in September of the same year on the initiation of the negotiated procedure without the publication of a public call for bids citing as grounds for this decision Article 24, para. 1, item 4 of the LPP. In the meantime, the contracting authority "A" rendered the decision reducing the estimated value of the public procurement specified in the decision of June, 2011.

The contracting authority justified the decision to initiate the negotiated procedure without the publication of a public call for bids by pointing out that the Republic Commission for the Protection of Rights had not been able to render a decision for four months, which, according to the contracting authority's claims, had caused difficulties in its business activities. The total value of the said procurement, which had been executed and arranged by the contracting authority in lots, was 247,349,000 RSD whereas the total value of the works and services of the same type stipulated by the contract were 382,653,000 RSD.

According to the conclusion of the SAI, the contracting authority "A" is in charge of an activity performed in common interest in the name and on behalf of the residential buildings which have entrusted the investment and running maintenance to the said authority, therefore, the procurement of services for the purpose of repairing the lifts had to be listed in the procurement plan for 2011. Considering that the use of the said type of procedure, i.e. the manner in which the procurement had been conducted by the contracting authority, was unjustified the provision of Article 20 of the LPP was violated.

22 JN 37/35-P and JN 37/38-P
23 Number: 4-00-914/2011, 22 November, 2011

## 1.8. Irregularities related to the procurement plan

### 1.8.1. Example

| | |
|---|---|
| *Contracting authority:* | *Public Utility Enterprise* |
| *Item subject to procurement:* | *Procurement of financial services (loan arrangements)* |
| *Value of the contract:* | *261,989,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[24] |
| *Summary:* | *The contracting authority concluded four loan agreements with commercial banks without previously listing the procurement of financial services in the annual procurement plan.* |

Case Study

The contracting authority "T" concluded several long-term loan agreements during the fiscal year of 2010 with commercial banks through the implementation of a negotiated procedure without publishing a pubic call for bids. Namely, the contracting authority had concluded a loan agreement with the bank "A" for the amount of 77,116,000 RSD and with the bank "E" a loan agreement for the amount of 149,847,000 RSD. In the process of auditing the contracting authority the SAI established that the contracting authority had communicated in writing with the Public Procurement Office but only after the agreements in question had been signed with the banks.

Namely, in the official letter sent to the Office the contracting authority cites the reasons for the initiation of the negotiated procedure without the publication of a public call for bids. The contracting authority claims that the funds in question were allocated for honouring the commitments towards the suppliers resulting from court settlements which were due for payment, so it was necessary to take out a credit line as soon as possible and if the public procurement were conducted after the publication of a public call for bids, the funds would have been obtained upon the expiry of the value date for the settling of the debt.

The Public Procurement Office informed the contracting authority that it was unclear from their official letter why the open procedure had not been conducted earlier, i.e. it remained unclear when the exceptional circumstances had ensued.[25] According to the findings of the SAI, the contracting authority replied to the Office's response but without supplying the requested information in accordance with Article 95 of the LPP. Furthermore, the SAI determined that the contracting authority had concluded two other loan agreements with two banks for the amount of 35,026,000 RSD without conducting a public procurement procedure.

According to the conclusion of the SAI, the contracting authority was not allowed to conduct the procurement of financial services since this was not specified under the annual procurement plan, therefore, the requirement referred to under Article 27 of the LPP had not been met.

24 Number: 400-1959/2011-01, 16 December, 2011
25 Number: 404-02-493/2010, 4 June, 2010

1.8.2. Example

| | |
|---|---|
| *Contracting authority:* | *Public Enterprise* |
| *Item subject to procurement:* | *Procurement of steel pipes* |
| *Value of the contract:* | *137,772,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[26] |
| *Summary:* | *The contracting authority procured steel pipes, which were not returned within the set deadline, through "a loan agreement" from suppliers and accordingly a payment was made into the account of the said suppliers for the said procurement without conducting the public procurement procedure.* |

Case Study

The contracting authority "K" concluded three "loan agreements" during the fiscal year of 2011 with various business entities (suppliers). All three agreements stipulated that the supplier would lend the pipes to the contracting authority so that the works on laying the gas pipeline in the municipality "X" would not be delayed. With regard to this the supplier would send a bill for the amount equal to the purchasing price and transportation costs if the contracting authority did not return the borrowed pipes within the stipulated deadline. Since the contracting authority failed to return the borrowed pipes within the arranged deadline, the supplier "A" sent a bill for 36,137,000 RSD, the supplier "B" sent a bill for 83,905,000 RSD and the supplier "C" sent a bill for 17,730,000 RSD, without taxes.

The SAI obtained an explanation from liable persons of the contracting authority which stated that public procurement procedure had been conducted with regard to which there were problems with the delivery, and that the contracting authority had to supply the steel pipes. According to the contracting authority's claims if the procurement in question had not been executed through a loan agreement, the damage incurred during the execution of the project would have been greater "both in terms of the execution schedule and in terms of the penalties which would have been payable due to the delays caused by a lack of steel pipes."

According to the conclusion of the SAI, the contracting authority executed the procurement of steel pipes worth 137,772,000 RSD in total without conducting the public procurement procedure, which is a violation of Article 20 of the LPP. The cited provision stipulates that five different procedures may be used by the contracting authority when executing a particular public procurement of goods and services, and a loan agreement is not one of them. Therefore, the contracting authority had to duly list the procurement in question in the procurement plan for the said fiscal year prior to the conclusion of the aforementioned "loan agreements" in accordance with the LPP, and specify the type of the public procurement procedure and set the execution schedule.

26 Number: 400-1959/2011-01, 16 December, 2011

# 2. Public Procurement Procedure

## 2.1. Vague and contradictory content of tender documentation

### 2.1.1. Example

| | |
|---|---|
| *Contracting authority:* | *Educational Institution* |
| *Item subject to procurement:* | *Procurement of cleaning agents and disinfectants* |
| *Value of the contract:* | *3,100,000 RSD* |
| *Source:* | *The Decision of the Republic Commission for the Protection of Rights*[27] |
| *Summary:* | *The contracting authority weighted the offered goods, i.e. assessed the criterion of "quality", based on the experience of using such products during the previous years, without applying criteria which can be measured objectively.* |

Case Study

The contracting authority "M" published a call for bids for public procurement in lots – cleaning agents and disinfectants, the estimated value of which was 3,100,000 RSD without taxes. The bidder "B" filed a request for the protection of rights with the Republic Commission after the best bid was selected. The bidder held that the contracting authority had not adhered to the provisions of the LPP when deciding on the best bid. Namely, the said request states that the decision on the selection of the best bid did not contain a detailed explanation on the method of awarding points according to the criterion of "quality". The reason for this, according to the bidder, was the fact that the contracting authority stated that the assessment of quality for all three lots had been based on "the years of experience of using certain products in the institution".

The Republic Commission for the Protection of Rights analyzed the tender documentation of the said procurement, specifically, the part with bid assessment criteria which had been set by the contracting authority. In this context, the contracting authority opted for the criterion of the most cost-effective bid by defining the weight of the following elements: price – 60 points; product's level of quality - 20 points; payment due date – 15 points; the period of validity of the bid – 5 points. Under the criterion of "quality of the bid" the contracting authority specified the evaluation to be done in the following manner: very good quality – 20 points; good quality – 15 points; satisfactory quality – 10 points; partially satisfactory quality – 5 points; unsatisfactory quality – 0 points.

In this particular case it is of particular interest that the contracting authority specified in the tender documentation that "the weight would be awarded based on the years of experience of using certain products, as well as based on the required qualities that the product should possess". Since the criteria for the assessment of "quality" could not be measured and since such actions by the contracting authority did not comply with Article 54 of the LPP, the Republic Commission for the Protection of Rights decided to annul the entire procurement procedure in question.

27 Number: 400-1959/2011-01, 16 December, 2011

## 2.2. Discriminatory requirements for the participation of the bidders

### 2.2.1. Example

| | |
|---|---|
| *Contracting authority:* | *Public Enterprise* |
| *Item subject to procurement:* | *the service of providing insurance of property, persons, vehicles and against liability* |
| *Value of the contract:* | *149,000,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[28]<br>*The Decision of the Republic Commission for the Protection of Rights*[29] |
| *Summary:* | *The contracting authority set a requirement according to which the bidder had to supply the proof from the register that it had organizational units in places where the organizational units of the contracting authority are based although according to the existing regulations there is only an obligation to register "a branch office".* |

Case Study

The contracting authority "A" initiated an open public procurement procedure in 2011 for the procurement of insurance of property, persons, vehicles and against liability related to business activities. The public procurement was estimated at 149,000,000 RSD and the public call had been published on the Public Procurement Portal and in the *Official Gazette of the Republic of Serbia*. The tender documentation was purchased by five insurance companies, one of which, the potential bidder "B", filed a request for the protection of rights at the stage preceding the opening of the bids. The bidder claimed in the request that the contracting authority had violated the provisions of Articles 8, 9 and 11 of the LPP by specifying discriminatory requirements regarding the business and financial capacity and technical and human resources, net returns of the bidder and guarantee funds. The contracting authority issued a document rejecting the bidder's request as unfounded, so the same request was subsequently filed with the Republic Commission.

The bidder cited several irregularities in the request which aroused suspicion that the procurement in question did not comply with the provisions of the LPP. Among other things, the bidder objected to the fact that the contracting authority stipulated in the tender documentation that the bidder was required to supply proof of technical resources in the form of a certificate issued by the Serbian Business Registers Agency (SBRA) proving that the company included organizational units in the places where the organizational units of the contracting authority are based (five towns)

The Republic Commission for the Protection of Rights analyzed this particular case and determined that from the point of view of the existing regulations a company could, but did not have to, award the status of a branch office to its organizational unit which was then to be registered in accordance with the law. Local offices and subdivisions of a company, in this case of an insurance company, may operate as internal business units but if they do not have the status of a branch office there is

28 Number: 400-3794/2012-01, 21 March, 2013
29 Number: 400-1959/2011-01, 16 December, 2011

no obligation to register them at the SBRA. Consequently, it was established that the requirement from the tender documentation of the contracting authority did not comply with the provisions of the Law on Registration of Business Entities[30] and the provisions of the Law on Companies[31].

Since the aforementioned requirement specified in the tender documentation of the contracting authority did not comply with the LPP, the Republic Commission for the Protection of Rights rendered a decision to annul the entire public procurement in question.

### 2.2.2. Example

| | |
|---|---|
| *Contracting authority:* | *Limited Liability Company founded by the Republic of Serbia (100%)* |
| *Item subject to procurement:* | *the service of insuring property and employees* |
| *Value of the contract:* | *562,797 RSD* |
| *Source:* | *The Decision of the Republic Commission for the Protection of Rights*[32] |
| *Summary:* | *The contracting authority set an unreasonably high criterion for proving the financial capacity of the insurance company, which caused restriction of the competition and discrimination of the bidders.* |

Case Study

The contracting authority "V" initiated in March, 2013 the procedure for low-value public procurement of property and employee insurance for the fiscal year of 2013, the estimated value of which was 562,797 RSD. The bidder "Z" filed a request for the protection of rights with the Republic Commission at the stage prior to the expiry of the deadline for the submission of bids for the procurement in question. The request cited a number of objections to the execution of the procurement in question, and the first objection was that the contracting authority had set a requirement regarding the financial capacity. Namely, the contracting authority required from a potential bidder to have an income from non-life insurance services rendered of 20,000,000,000 RSD in total for the previous three years. The bidder "Z" held that the requirement of the contracting authority "V" was irrational considering that it was disproportionate to the value of the procurement in question, where the total insured amount was 280,879,752 RSD, the amount 70 times lower than the required income.

The Republic Commission examined the tender documentation and found that the contracting authority had indeed defined as necessary financial capacity the fact that the bidder had had in the previous three years "generated a total income from the rendered services of non-life insurance in the amount of 20,000,000,000 RSD". Article 9 of the LPP prescribes that the contracting authority may not limit the competition among the bidders and especially may not prevent any bidder from participating in the public procurement procedure, through the unjustified use of the negotiated procedure or though discriminatory requirements or criteria. In addition,

30 Official Gazette of the Republic of Serbia, no. 51/04 and 61/05
31 Official Gazette of the Republic of Serbia, no.125/04
32 Number: 4-00-605/2013, 24 June, 2013

Article 44 of the LPP prescribes that the contracting authority defines what is to be considered necessary financial and business capacity for the participation of the bidders in a certain public procurement procedure.

The contracting authority had to make sure that the set requirement was logically linked to the items subject to the public procurement in question and since that was not the case here, the Republic Commission annulled the entire public procurement procedure.

### 2.2.3. Example

| | |
|---|---|
| *Contracting authority:* | *Public Enterprise* |
| *Item subject to procurement:* | *maintaining the hygiene of the communal parts of residential buildings* |
| *Value of the contract:* | *750,651,000 RSD* |
| *Source:* | *The Decision of the Republic Commission for the Protection of Rights*[33] |
| *Summary:* | *The contracting authority set a mandatory participation requirement for the public procurement of the service of maintaining hygiene of the communal parts of residential buildings according to which the bidder had to have, in addition to mandatory 394 hygienists, six "glaziers".* |

Case Study

The contracting authority "E" published a public call for bids in January, 2013 in an open procedure for public procurement of the services of regular hygiene maintenance of communal parts of the residential buildings for the period of three years, whose estimated value was 750,651,000 RSD. Before the expiry of the deadline for the submission of bids for the participation in the procedure in question, the bidder "Z" filed a request for the protection of rights with the Republic Commission. Among other things, one of the objections concerning the irregularities of the tender procedure included, according to the bidder, the requirement set by the tender documentation of the contracting authority regarding the human resources. According to the cited requirement, the potential bidder had to have at least six employed "glaziers". The bidder "Z" pointed out the fact that the set requirement "had no logical connection with the items which were subject to this specific public procurement".

The Republic Commission for the Protection of Rights determined in the proceedings regarding the request of the bidder "Z" that the contracting authority had stipulated that the potential bidder had to prove that it employed at least 400 employees responsible for cleaning activities. At least 394 of these had to be hygienists and at least six of the employees had to be "glaziers".

Moreover, the procurement in question included only maintenance of hygiene in communal parts of residential buildings, specifically: cleaning, washing communal parts of the residential buildings which included horizontal surfaces, removing cobwebs, washing the glass on the entrance door and wind shields, as well as wash-

33 Number: 400-1959/2011-01, 16 December, 2011

ing the walls and doors (outside and inside) of the lift cabin, washing the handrails and fences on the stairs. The Republic Commission for the Protection of Rights determined that the requirements stipulated by the contracting authority regarding the minimum number of "glaziers" had no logical connection with the services which were subject to public procurement.

The contracting authority "E" had violated the provision of Article 44, para. 6 of the LPP by setting the aforementioned requirement for the potential bidders. The cited provision stipulates that the contracting authority may not set discriminatory requirements for the bidders or the requirements which are not logically linked to the items which are being procured. The contracting authority had violated the provision of Article 9, para. 1 of the LPP as well, as the principle of securing the competition among the bidders had been violated.

## 2.3. Discriminatory Technical Specifications

### 2.3.1. Example

| | |
|---|---|
| *Contracting authority:* | *City Administration* |
| *Item subject to procurement:* | *installing lighting at the football stadium* |
| *Value of the contract:* | *49,000,000 RSD* |
| *Source:* | *The Decision of the Republic Commission for the Protection of Rights*[34] |
| *Summary:* | *The contracting authority cited in detail in the public call for bids technical specifications which the bidder had to meet using exact names of manufacturers, i.e. the type of the equipment which was being procured.* |

Case Study

The contracting authority "A" published a public call for bids in March, 2012 for the procurement of lighting installation works at the football stadium estimated to be worth 49,000,000 RSD. The bidder "F" filed a request for the protection of rights before the deadline for the submission of bids expired but the contracting authority rejected it. The bidder continued the proceedings for the protection of rights before the Republic Commission citing in the request that the contracting authority had defined the criteria specified in the tender documentation in such a way that a particular bidder would be at an advantage. The bidder "F" addressed in the request the issue of the technical resources citing that the contracting authority required in the tender documentation the submission of the proof, specifically, the decision on the licence scope and a certain certificate (SRPS ISO/IEC 17050, ISO 9001, EN 14001, OHSAS 18001). In addition, the bidder "F" cites that the contracting authority had defined in tender documentation the measurements of the floodlight pole bearing to fit the measurements of the international manufacturer "D".

The Republic Commission for the Protection of Rights considered the request of the bidder "F" and analyzed the tender documentation of the contracting authority "A". With regard to the allegations from the request in question, the Republic

34 Number: 400-572/2012, 31 May, 2012

Commission for the Protection of Rights established other technical requirements defined as a certain type of a device (for the use related to the main switch cabinet) which the suppliers of the goods had to deliver and install. It was established that the contracting authority had opted for the desired functional features and that "the technical specifications for all the cabinets subject to the contested public procurement had been described and presented in detail". Due to the precise definition of the technical requirements, the contracting authority had cited the type and the name of the manufacturer, thus violating Article 39, para.3 of the LPP according to the Republic Commission.

The cited provision explicitly prescribes that the contracting authority may not indicate in the tender documentation a trade mark, patent or type, nor special origin or type of production. In this specific case, the LPP allows the contracting authority to specify in the tender documentation the elements, such as the trade mark, patent or a manufacturer, provided that the said specification is followed by the phrase: "or equivalent". Since this was not done in the case in point, the Republic Commission for the Protection of Rights annulled the entire procurement in question.

## 2.4. Irregularities during the opening and expert assessment of bids

### 2.4.1. Example

| | |
|---|---|
| *Contracting authority:* | *Public Enterprise* |
| *Item subject to procurement:* | *Procurement of construction and specialist works* |
| *Value of the contract:* | *Unknown* |
| *Source:* | *The Decision of the Republic Commission for the Protection of Rights*[35] |
| *Summary:* | *The contracting authority selected the bid submitted four hours after the expiration of the deadline for the submission of bids, stipulated in the tender documentation, as the best bid although it should have been rejected as overdue.* |

Case Study

The contracting authority "B" conducted a procedure for low-value public procurement of works related to the building of a temporary dog shelter – construction, specialist and installation works in January, 2013.[36] The bidder "R" filed the request for the protection of rights at the stage following the selection of the best bid which alleges that, inter alia, the selected bid of the bidder "N" had been overdue, improperly submitted and inadmissible. The bidder "R" stated in the request that the contracting authority set as the final deadline in the call for the submission of bids 23 January, 2013 at 10 AM. Despite this fact, the selected bid of the bidder "N" was submitted on 23 January, 2013 at 14:05 PM and this was recorded in the minutes on the opening of the bids.

The contracting authority had served on the bidders a notice on the postponement of the opening of bids, which was now postponed until 24 January, 2013 at 13:15 PM.

35 Number: 400-1959/2011-01, 16 December, 2011
36 JN 8/2013

According to the allegations of the bidder "R" in such a way the bid of the bidder "N" was allowed to be submitted in time and to be selected as the best. It is also asserted in the request for the protection of rights that the present representatives of the bidders had objected that the bid should be considered overdue, but the contracting authority referred to the served "notice" on the postponement of the opening of bids. Moreover, on 22 January, 2013, i.e. one day before the deadline for the submission of bids expired, the contracting authority had amended the tender documentation by eliminating certain items from the "Application Form 1".

The Republic Commission for the Protection of Rights found that the allegations from the request of the bidder "R" were founded and that the contracting authority had violated the provision of Article 61, para. 3 of the LPP as well as the provision of Article 78 of the LPP since it set a new deadline for the opening of the bids in a subsequent notice after the deadline for the submission of bids had expired and since the bid selected as the best had not been submitted in time. The contracting authority violated the provision of Article 32, para. 7 of the LPP as the amended tender documentation did not set a new deadline for the opening of the bids after the expiry of the deadline for the submission of bids.

Furthermore, the contracting authority violated the provision of Article 2, para. 4 and Article 5 of the Regulation on the Procedure of Opening the Bids and the Minutes Form for the Opening of Bids[37] as the opening of the bids had not been conducted on the day specified in the call for bids or before the end of the last day of the deadline for the submission of the bids at the latest.

The Republic Commission for the Protection of the Rights rendered a decision annulling the entire procurement procedure due to the committed violations of the LPP.

## 2.5. Allowing the contracts to be executed differently from what was stipulated by the bid and the contract (unlawful annexes to contracts)

### 2.5.1. Example

| | |
|---|---|
| *Contracting authority:* | *Healthcare Institution* |
| *Item subject to procurement:* | *procurement of consumer goods* |
| *Value of the contract:* | *36,000,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[38] |
| *Summary:* | *The contracting authority and the bidder concluded an annex to the original contract increasing the price of the goods by 32.05% without proper grounds for it although in the relevant period the registered retail price growth was 6.5%.* |

### Case Study

The contracting authority "E" concluded a contract on the procurement of consumer goods with the bidder "C" in May, 2012, which was worth 30,650,000 RSD. The said procurement included cleaning agents (18,035,000 RSD), office supplies (7,168,000

37 Official Gazette of the Republic of Serbia, no. 50/09
38 Number: 400-102/2013-01, 2013

RSD), printed forms and other printed materials (5,447,000 RSD). The contract was concluded after the open public procurement procedure but without dividing the procurement of goods into separate lots, which was a violation of the provisions of the LPP.

When the SAI audited the contracting authority, it found that only four months after the conclusion of the original contract the contracting authority "E" had concluded an annex with the bidder "C" increasing the price for the remaining, i.e. undelivered, goods listed under the original contract. The price of the undelivered goods listed under the original contract was increased by 32.05%, so instead of 6,522,000 RSD the contracting authority was charged 8,612,000 RSD for the procured goods.

The provision of Article 82, para. 4 of the LPP prescribes that the contracting authority after the conclusion of the contract may allow a change in the price only if there are legitimate reasons for it, which must be specified in the tender documentation, or prescribed by special regulations. The SAI quoted in its findings the official data of the Statistical Office of the Republic of Serbia according to which the annual rate of retail price growth in 2012 was 12.2%. In addition, the SAI pointed out that during the period from May to October, 2012 (the period between the signing of the original contract and the signing of the annex to the original contract) the annual rate of retail price growth was just 6.5%.

Unjustifiable increase in the price of the goods subject to the original contract constitutes a violation of the provision of Article 82, para.4 of the LPP by the contracting authority.

### 2.5.2. Example

| | |
|---|---|
| *Contracting authority:* | *Public Utility Enterprise* |
| *Item subject to procurement:* | *Procurement of finishing carpentry* |
| *Value of the contract:* | *3,175,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[39] |
| *Summary:* | *The contracting authority selected the most cost-effective bid priced at 1,511,000 RSD and subsequently effected an advance payment in the amount of 3,076,000 RSD for the arranged works into the bidder's account.* |

Case Study

The contracting authority "N" executed a low-value public procurement in November, 2011 – the procurement of finishing carpentry, the estimated value of which was 3,175,000 RSD.[40] According to the criterion of the most cost-effective bid (the weight awarded for the price – 8 points, for method of payment – 10 points and the execution date – 10 points) the contracting authority selected the best bid quoting a price of 1,511,000 RSD without taxes and the contract was entered into with the bidder "D".

39 Number: 400-2391/2013-01, 25 December, 2013
40 M 48/11

During the auditing proceedings the SAI established that the value of the works which the bidder "D" had executed and invoiced to the contracting authority "N" was 3,086,000 RSD without taxes, i.e. that the price of the executed works was higher than the one stipulated by the contract and quoted in the bid by 1,576,000 RSD. Practically, the contracting authority arranged the procurement of the works worth the cited amount without conducting the public procurement procedure and by doing so, it violated the provisions of Articles 20 and 82 of the LPP.

The SAI analyzed the contract in question and determined that the deadline for the completion of the works had not been specified in accordance with the bid of the bidder "D" and in the manner stipulated by the tender documentation for the public procurement in question. If it is taken into account that the execution date was one of the elements according to which the bids were assessed by the contracting authority, it follows that the contracting authority was in violation of the provisions of Articles 11 and 82 of the LPP. According to the findings of the SAI, the contracting authority "N" had effected advance payment into the account of the bidder "D" in the amount of 3,076,000 RSD, which was not in accordance with the concluded contract and the submitted bid.

### 2.5.3. Example

| | |
|---|---|
| *Contracting authority:* | *Public Enterprise* |
| *Item subject to procurement:* | *Procurement of construction works* |
| *Value of the contract:* | *630,000,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[41] |
| *Summary:* | *By concluding an annex to the original contract with the consortium of bidders, the contracting authority changed the payment currency stipulated by the contract for the works specified in the tender documentation, specifically RSD (quoted and accepted price) was changed into EUR (the price on the day of the opening of the bids), which resulted in an increase of the originally quoted price for the works by 49,304,000 RSD (payable in accordance with the exchange rate for EUR applicable on the day of the payment)* |

#### Case Study

The contracting authority "Z" concluded the public procurement of the construction works on the building of a power supply and business complex in October, 2011 which was estimated to be worth 630,000,000 RSD. Moreover, the procurement in question was initiated in the negotiated procedure without publishing a public call for bids in accordance with the provision of Article 24 of the LPP and Article 5 of the Law on the Building Industry Incentive during the Economic Crisis[42], based on the conclusion of the Government of the Republic of Serbia.[43] Upon the completion of the procedure, the contracting authority concluded a contract on the construction works

41 Number: 400-83/2013-01, 28 October, 2013
42 Official Gazette of the Republic of Serbia, no. 45/10
43 Number: 351-6666/2010, 16 September, 2010

on the business and power supply complex with the bidder "W" (a consortium consisting of three business entities) worth 693,491,000 RSD without taxes.

The SAI found during the auditing proceedings that the contracting authority and the bidder had concluded Annex 1 to the original contract which calculated the value of the works subject to the said contract in the amount of 693,491,000 RSD according to the mean rate of exchange for EUR applicable on the day the bid was submitted, which amounts to 6,882,254 EUR. Therefore, in this particular case the SAI found that the bidder had quoted a price in RSD which was required by the tender documentation. Despite this fact, the contracting authority and the bidder later changed the payment currency from RSD to EUR, to be calculated according to the exchange rate applicable on the day of the opening of the bids, but with the payment according to the exchange rate on the day of the payment. The contracting authority violated the provisions of Article 82, para. 4 of the LPP, which stipulates that the price may be changed only due to legitimate reasons which must be stipulated under the tender documentation.

According to the findings of the SAI, the contracting authority's actions had resulted in a change in the price so instead of 693,491,000 RSD stipulated by the original contract, the total value of the contract for the said works reached the amount of 737,539,000 RSD by signing Annex 1 and Annex 2 with currency clauses, the difference being 49,304,000 RSD. This difference would be considerable greater if it were taken into account that the bidder sent an invoice to the contracting authority for the executed works for the amount of 786,843,000 RSD.

## 2.6. Failure to comply with the decisions of the Republic Commission for the Protection of Rights in Public Procurement Procedures

### 2.6.1. Example

| | |
|---|---|
| *Contracting authority:* | *Limited Liability Company founded by a public enterprise* |
| *Item subject to procurement:* | *the procurement of oils and lubricants* |
| *Value of the contract:* | *103,635,530 RSD* |
| *Source:* | *The Decision of the Republic Commission for the Protection of Rights*[44] |
| *Summary:* | *The contracting authority failed to comply with the decision of the Republic Commission for the Protection of Rights and failed to eliminate an improperly submitted bid, instead, the contested bid was selected for the second time in the repeated procedure as the best.* |

Case Study

The contracting authority "P" conducted a restricted procedure in December, 2012 for the procurement of goods – "oils and lubricants" divided into lots and it rendered a decision on the selection of the best bid for the first three lots. During the stage following the decision on the best bid, the bidder "E" filed a request for the protection

44 Number: 4-00-53/2013, 28 January, 2013

of rights with the Republic Commission. The bidder alleged in the request that the contracting authority had violated the provision of Article 118 of the LPP as it did not comply with the order issued in the Decision of the Republic Commission, which had been rendered two months earlier regarding the repeated decision of the contracting authority.

Namely, the Republic Commission for the Protection of Rights determined in the previous proceedings that the bid by the bidder "Z" had been improperly submitted and that it could not have been assessed as the best, so the phase II of the restricted procedure of the procurement of goods "oils and lubricants" (for lots 1,2,3 and 5)[45] was partially annulled.

According to the decision of the Republic Commission the contracting authority "P" was under an obligation to repeat the procedure in the part related to rendering the decision on the selection of the best bid. In the repeated procedure of expert assessment of the bids the contracting authority selected for the second time the bid of the bidder "Z" as the best instead of labeling it as improperly submitted in view of the explanation of the previous decision of the Republic Commission for the Protection of Rights. Due to the failure of the contracting authority "P" to act in accordance with the said decision, the Republic Commission for the Protection of Rights rendered a new decision annulling in the same way phase II of the restricted procurement procedure again.

The provision of Article 118 of the LPP prescribes that the contracting authority must comply with the orders of the Republic Commission for the Protection of Rights issued by its decisions no later than within 30 days from the day of the receipt of the said decision.

## 2.7. Failure to impose measures on the selected bidder as a penalty for the non-fulfilment of contractual obligations

### 2.7.1. Example

| | |
|---|---|
| *Contracting authority:* | *Public Agency* |
| *Item subject to procurement:* | *Procurement* |
| *Value of the contract:* | *247,760,000 RSD* |
| *Source:* | *The Report of the State Audit Institution*[46] |
| *Summary:* | *The contracting authority failed to use the option stipulated by the contract, i.e. failed to calculate and charge the bidders 3,858,000 RSD as a penalty stipulated by the contract for the delayed delivery of services and goods.* |

Case Study

The contracting authority "F" conducted in 2011 four public procurement procedures and concluded contracts with the best bidders worth 247,760,000 RSD in total. In an open procedure the following were procured: office furniture (19,847,000 RSD

45 Number: 4-00-1514/2012, 4 October, 2012
46 Number: 400-102/2013-01, October, 2013

without taxes), construction and installation works (215,975,000 RSD) and execution of construction and installation works (9,656,000 RSD) while in the procedure for low-value procurement spare parts for the data storage system were procured and delivered (2,282,000 RSD).[47]

The contracting authority stipulated in the contracts it concluded with the bidders different penalty rates for each day of delaying the execution of a contractual obligation (10%, 5%, 5% and 3.6%).The concluded contracts did not stipulate that paying the stipulated penalty would release the contractor from the obligation to execute the works or from any other obligations and responsibilities stipulated by the contract. The supervising authority confirmed that the deadlines specified in the contract had been exceeded in the process of providing the service of the execution of the works and this was noted in the measurement book. The delay in the delivery of the goods was documented by accounting documents.

The SAI found during the auditing proceedings that the contracting authority had failed to calculate the penalties stipulated by the contracts due to the failure to meet the deadline for the completion of the works, i.e. the delivery of the goods subject to procurement, in all of the said cases. According to the findings of the SAI, in all four cases there were grounds for charging the stipulated penalties since the obligations had been discharged with a delay of 172 days in total (21,61, 36 and 54 days). Accordingly, the contracting authority failed to charge the bidder the total sum of 3,858,000 RSD as the stipulated penalty by the contract although there were legal grounds for doing so, in accordance with the LPP and the Law on Contracts and Torts.

47 JN 65/D/11, 02/R/11, 33/R/11, 86/D/11

# 3. Jurisprudence Related to Violations of the Law

## 3.1. The Type of the Procedure and Legitimation

If the right of the bidder to initiate the proceedings before the Republic Commission for the Protection of Rights and the right to the administrative proceedings are looked at independently as types of legal protection, then, on the other hand, it may be noted that in the Republic of Serbia there are two aspects of judicial liability for actions which violate the provisions of the LPP.[48] The first aspect is the liability for a misdemeanour offence both of the contracting authority and the bidder as well as of the liable persons working for the contracting authority or the bidder. The criminal aspect is the liability of the liable persons working for the contracting authority, the bidder, as well as for all of the other participants in the legal procedure for public procurement when there are elements of a criminal offence.

When it comes to imposing sanctions in the public procurement procedures in domestic practice, the perpetrators of violations are predominantly prosecuted for misdemeanours rather than criminal offences. The main difference between the liability for a misdemeanor offence and a criminal offence is that the LPP explicitly prescribes the provisions which represent grounds for initiating the proceedings for determination of liability solely for misdemeanors (punishable by a fine). On the other hand, the grounds for establishing criminal liability with regard to omissions in the application of the LPP must be considered solely in the context of the Criminal Code of the Republic of Serbia.[49] This means that criminal liability cannot be established through a direct application of the LPP since it does not explicitly prescribe that it is a criminal offence.

Active legitimation for the initiation of the misdemeanor proceedings according to the provisions of the LPP[50] (Article 179) is granted to the competent authority or the injured party. The term competent authority is defined by the law as the government authority, authorized inspector, public prosecutor and other authorities and organizations which have public authority and which have jurisdiction over direct enforcement or supervision of the enforcement of regulations which regulate the misdemeanour offences in question.

The jurisdiction over the supervision of the enforcement of the previous LPP was entrusted to the Ministry responsible for financial operations (Article 119). In practice this meant that the Ministry of Finance through its Budgetary Inspection Department would initiate the proceedings to determine misdemeanor liability for committed violations referred to under the LPP before the competent misdemeanor courts with territorial jurisdiction over the case in question. In addition to the aforementioned authority, it may be noted that in practice the proceedings for determining misdemeanor liability may be initiated by the Department for Budgetary

48 Official Gazette of the Republic of Serbia, no. 116/08
49 Official Gazette of the Republic of Serbia, no. 85/05, 88/05 - corrected, 107/05 – corrected, 72/09, 111/09, 121/12 and 104/13.
50 Official Gazette of the Republic of Serbia, no. 65/13

Inspection of the Provincial Secretariat of Finance of the Autonomous Province of Vojvodina, as well as the offices for budgetary inspection and audits which function as a part of local self-governments according to the Law on Budgetary System[51] (Articles 84-90).

With regard to active legitimation for initiating and conducting the misdemeanor proceedings, significant progress has been made by the adoption of the new LPP[52] which entered into force on 1 April, 2013. The new law has authorized the Public Procurement Office to initiate the misdemeanor proceedings whenever it somehow learns of a violation of the LPP which may serve as the grounds for raising the issue of liability for a misdemeanor offence (Article 136). In addition, the new law granted the power to the Republic Commission for the Protection of Rights to conduct the proceedings for misdemeanor offences as the first instance, i.e. the power to sentence the contracting authorities and the liable person of the contracting authority to pay fines (Article 139).

Over the past years the SAI has played a significant role in the Republic of Serbia in the identification of misdemeanor offences related to the LPP and the initiation of proceedings for the purpose of imposing sanctions for their commission in accordance with the powers referred to under the law on the State Audit Institution (Articles 9 and 10).[53]

## 3.2. Identifying Violations

### 3.2.1. The City of Novi Sad

According to analyzed data from the records of the City of Novi Sad (the Budgetary Inspection Office), the Budgetary Inspection Office conducted in the period from 2008 to 2013, within the scope of its jurisdiction established by the Law on the Budgetary System, audits of material and financial transactions of entities working in the public sector, i.e. of the beneficiaries of the public funds, specifically:

- In 2008, ***21 audits*** were conducted and ***2 requests*** were filed for the initiation of misdemeanor proceedings regarding the violations referred to under the LPP[54] which involved ***2 legal entities*** and ***2 natural persons***;
- In 2009, ***24 audits*** were conducted and ***4 requests*** were filed for the initiation of misdemeanor proceedings regarding the violations referred to under the LPP[55] which involved ***3 legal entities*** and ***5 natural persons***, as well as ***filed criminal charges in 2 cases*** against ***2 liable persons***;
- In 2010, ***46 audits*** were conducted and ***11 requests*** were filed for the initiation of misdemeanor proceedings regarding the violations referred to under the LPP involving ***6 legal entities*** and ***11 natural persons***;
- In 2011, ***41 audits*** were conducted and ***9 requests*** were filed for the initiation of misdemeanor proceedings regarding the violations referred to under LPP involving ***9 legal entities*** and ***12 natural persons***;

51 Official Gazette of the Republic of Serbia, no.54/09, 73/10, 101/10, 101/11, 93/12, 62/13, 63/13 - corrected and 108/13
52 Official Gazette of the Republic of Serbia, no. 124/12
53 Official Gazette of the Republic of Serbia, no. 101/05, 54/07 and 36/10
54 Official Gazette of the Republic of Serbia, no. 39/02, 43/03, 55/04 i 101/05
55 Official Gazette of the Republic of Serbia, no. 116/08

- In 2012, ***38 audits*** were conducted and ***3 requests*** were filed for the initiation of misdemeanor proceedings regarding the violations referred to under LPP involving ***2 legal entities*** and ***3 natural persons***;
- In 2013 (the period: months 1 to 6), 20 audits were conducted and ***4 requests*** were filed for the initiation of misdemeanor proceedings regarding the violations referred to under LPP involving ***2 legal entities*** and ***4 natural persons, as well as 4 cases with filed criminal charges*** against ***4 liable persons***.

### 3.2.2. The City of Kragujevac

According to the data from the records of the City of Kragujevac (City Administration for Local Self-Government and General Administration Services, Public Procurement Office), during the period between 2008 and 2012 the City Budgetary Inspection Office did not file any requests for the initiation of misdemeanor proceedings for violations referred to under the LPP.[56]

### 3.2.3. The City of Belgrade

According to the analyzed data from the records of the City of Belgrade (Budgetary Inspection Office)[57] during the period between 2009 and 2013 the Budgetary Inspection Office of the City of Belgrade conducted, within the scope of its jurisdiction established by the Law on the Budgetary System, audits of material and financial transactions of entities working in the public sector, i.e. of the beneficiaries of the public funds, specifically:

- In the period between January, 2009 and June, 2013 ***68 audits*** were conducted regarding which ***16 requests*** for the initiation of misdemeanor proceedings against a legal entity and ***117 requests*** for the initiation of misdemeanor proceedings against a liable person of the legal entity, and the filed requests included ***1597 violations*** in total referred to under the LPP.

### 3.2.4. The City of Zrenjanin

According to the analyzed data from the records of the City of Zrenjanin (Department for General Administrative and Joint Services), the Budgetary Inspection Office was established by the Mayor's decree[58] in September, 2011, and it officially started working on 10 February, 2012 and this Office conducted, within the scope of its jurisdiction established by the Law on the Budgetary System, audits of material and financial transactions of entities working in the public sector, i.e. of the beneficiaries of the public funds for the period between 2012 and 2013, specifically:

- In 2012, ***5 audits*** were conducted during which no irregularities were found regarding the application of the LPP;
- In 2013 (period: months 1 to 6), ***6 audits*** were conducted and ***2 requests*** were filed for the initiation of misdemeanor proceedings regarding violations referred to under the LPP.

56 Information no. SI-26/13, 17 September, 2013
57 Number: 031-26/2013, 16 September, 2013
58 Number: 016-171/11-II, 20 September, 2012

3.2.4.1. Example

| | |
|---|---|
| *Contracting authority:* | *Educational Institution* |
| *Item subject to procurement:* | *Procurement of goods and services* |
| *Value of the contract:* | *several different procurement procedures during a fiscal year* |
| *Source:* | *The Budgetary Inspection Office of the City of Zrenjanin*[59] |
| *Summary:* | *Misdemeanor proceedings were initiated against the contracting authority due to the violation of the provisions of the LPP which had been identified during an audit conducted by the Budgetary Inspection Office.* |

Case Study

The Budgetary Inspection Office of the City of Zrenjanin conducted in 2013 an audit of the material and financial transactions of the budgetary beneficiary, i.e. the contracting authority "A", including the inspection of how the LPP was being implemented. With regard to the conducted audit, the Budgetary Inspection Office filed with the competent misdemeanor court a request for the initiation of the misdemeanor proceedings since it had been found during the audit that the contracting authority "A":

- Failed to appoint a person to the Public Procurement Committee who holds a law degree, thus violating Article 3, para. 1 of the Regulation on the Criteria for Establishing Public Procurement Committees[60];
- Failed to note a correction of the calculation error in the quoted sum upon opening the bids in the manner stipulated by Article 58, para. 3 of the LPP;
- Took into consideration the bids in which the bidders omitted to quote the prices for particular items in the manner stipulated by the instruction to bidders for drafting the bids which constitutes a violation of Article 5, para. 2 of the Regulation on the Criteria for Establishing Public Procurement Committees;
- Concluded a contract with the selected bidder whose content did not adhere to the model contract included in the tender documentation, which is a violation of Article 120 of the LPP;
- Allowed the bidder not to adhere to the concluded contract by allowing the contracting authority to be billed for the procurement of materials used for the execution of the works despite the fact that the said materials had been an integral part of the bid of the selected bidder, which constitutes a violation of the provisions of Articles 49 and 120 of the LPP;
- Undertook the obligation of paying for the procurement of goods and services (fuel, teaching materials, electrical fittings and services of physical and technical surveillance) worth 3,676,678 RSD in total without implementing the LPP although this was stipulated by the annual plan, which is a violation of Article 20 of the LPP and Article 56 of the Law on Budgetary System[61].

59 Number: 4-00-53/2013, 28 January, 2013
60 Official Gazette of the Republic of Serbia, no. 50/09
61 Official Gazette of the Republic of Serbia, no. 54/09, 73/10, 101/ 10, 101/11, 93/12, 62/13, 63/13- corrected and 108/13

### 3.2.5. State Audit Institution

According to the analyzed data from the records of the SAI[62], presented in accordance with its internal work organization, the SAI audited during the period between 2010 and 2013, within the scope of its jurisdiction established by the Law on the State Audit Institution, the business transactions of entities working in the public sector including the implementation of the LPP as well as the provision of Article 57 of the Law on the Budgetary System by the audited entities as follows:

#### Department for Audit of the Budget and Budgetary Funds of the Republic of Serbia

During the period from January 2009 to June 2013 ***43 entities*** were audited after which ***35 requests*** were filed for the initiation of the misdemeanor proceedings against ***47 liable persons*** due to the violation of the provisions of the Law on the Budgetary System, i.e. the LPP, while during the same period the competent misdemeanour court rendered only ***9 judgments***, out of which were ***7 convictions*** and ***2 acquittals***. Apart from the requests for the initiation of misdemeanor proceedings, the aforementioned Department of the SAI did not file any criminal complaints regarding the identified irregularities referred to under the LPP.

#### Department for Audits of Local Authorities' Budgets

During the period from January 2009 to June 2013 ***14 entities*** (municipalities and cities) were audited after which ***34 requests*** were filed for the initiation of misdemeanour proceedings against ***34 liable persons*** due to the violation of the provisions of the Law on the Budgetary System, i.e. the LPP, while during the same period the competent misdemeanour court rendered only ***7 convictions***. Apart from the requests for the initiation of the misdemeanor proceedings, the aforementioned Department of the SAI did not file any criminal charges regarding the identified irregularities referred to under the LPP.

#### Department for Audits of the Mandatory Social Security Organizations

During the period from January 2011 to June 2013 ***80 entities*** (mainly pharmacies) were audited after which, in the period between 2011and 2012, ***61 requests*** were filed for the initiation of the misdemeanor proceedings against ***118 persons*** due to the violation of the provisions of the Law on the Budgetary System, i.e. the LPP. In 2012 the competent department of the SAI filed criminal charges in one instance against a liable person of the audited entity.

#### Department for Audits of Public Enterprises, Business Entities and Other Legal Entities

During the period from January 2011 to June 2013 ***16 entities*** (public enterprises) were audited after which ***15 requests*** were filed for the initiation of the misdemeanor proceedings against ***16 legal entities*** and ***33 natural persons*** due to the violation of the provisions of the Law on the Budgetary System, i.e. the LPP. During the

62 Information no. 037-3576/2013-09, 10 October 2013

period that lasted until June, 2013, the competent misdemeanour court rendered ***5 convictions*** and ***1 acquittal*** while ***in 3 cases the proceedings were suspended***.

Department for Audits of the National Bank of Serbia in part relating to the state budget operations and of other entities subject to audits

During the period from January 2008 to June 2013 ***11 entities*** (NBS, funds, public agencies) were audited after which ***3 requests*** were filed for the initiation of the misdemeanor proceedings against ***3 liable legal entities and 3 liable natural persons working for the legal entities*** due to the violations referred to under the LPP. One of the aforementioned requests was suspended as absolute statute of limitation had expired for conducting the proceedings. Apart from the requests for the initiation of the misdemeanor proceedings, the aforementioned Department of the SAI did not file any criminal charges regarding the identified irregularities referred to under the LPP.

## 3.3. Misdemeanour Court Proceedings

### 3.3.1. Records of the Proceedings

Jurisdiction for conducting the proceedings regarding misdemeanor offences against legal entities and proceedings against the liable persons working for the contracting authority or the bidder in terms of its function, subject matter and territory is stipulated by the Law on Misdemeanours. There have been two ways of recording the cases related to the violation of the LPP that may be identified in the practice of the courts so far. The first group of cases includes those proceedings conducted due to a direct violation of the LPP. The second group of cases includes the cases related to the proceedings initiated due to a violation of the Law on the Budgetary System, i.e. due to the indirect violation of the LPP.

Namely, provision of Article 57 of the Law on the Budgetary System prescribes "the contract on the procurement of goods, financial assets, services or the execution of works which are entered into by the direct or indirect beneficiaries of the budgetary funds and the funds of the mandatory social security organizations must be concluded in accordance with the regulations which regulate public procurement procedures." In addition, the aforementioned law prescribes the obligation regarding the management of the undertaken financial commitments (Article 56) and the responsibilities for the undertaken financial commitments payable from the budget (Article 54).

In their requests for the initiation of misdemeanour proceedings the authorized budgetary inspection and the SAI very often cited that the contracting authorities and the liable persons working for the contracting authorities had violated the provisions of the Law on the Budgetary System while the violation cited included a failure to observe the provisions of the LPP as well and as such it provided the grounds for the justification of the request in question. This issue is of particular importance since the way the cases are recorded in the data bases of the misdemeanour courts in the Republic of Serbia depends on which law and provisions are cited by the authorized applicant in the description of the violation as grounds for the request for the initiation of the proceedings against the liable persons.

The newly introduced change compared to the previous LPP which was in force from 1 April, 2013 is the fact that the Republic Commission for the Protection of Rights will now conduct the proceedings for misdemeanour offences as the first instance body against the contracting authorities and impose sanctions. This will secure in part centralized penal records of misdemeanours related to the violations of the LPP, however it will not affect the court records of the misdemeanor offences referred to under the Law on the Budgetary System which shall be kept separately.

### 3.3.2. Misdemeanour Court in Novi Sad

According to the analyzed data from the records of the Misdemeanour Court in Novi Sad[63] for the period between 2010 and 2013, uniform proceedings were conducted before this court for the violations referred to under the LPP, the Law on the Budgetary System and the Law on the Funds Owned by the Republic of Serbia. The Misdemeanor Court in Novi Sad received from the SAI:

- In 2010, ***5 requests*** for the initiation of misdemeanour proceedings, specifically, related to the violations referred to under the LPP (Article 121, para.1, items 2, 6 and 16 and para. 2);
- In 2011, ***5 requests*** for the initiation of misdemeanour proceedings, specifically, related to the violations referred to under the LPP (Article 121, para.1, items 2, 6 and 16 and para. 2);
- In 2012, ***25 requests*** for the initiation of misdemeanour proceedings, specifically, related to the violations referred to under the LPP (Article 121, para.1, items 2, 6 and 16 and para. 2), with reference to the violations referred to under the Law on the Funds Owned by the Republic of Serbia (Article 45, para. 2, item 3) and the Law on the Budgetary System (Article 103, para. 1, item 4);
- In 2013 (period: months 1 to 6), ***4 requests*** for the initiation of misdemeanour proceedings, specifically, related to the violations referred to under the LPP (Article 121, para.1, items 2, 6 and 16 and para. 2), the Law on the Funds Owned by the Republic of Serbia (Article 45, para. 2, item 3) and the Law on the Budgetary System (Article 103, para. 1).

### 3.3.3. Misdemeanour Court in Kragujevac

According to the analyzed data from the records of the Misdemeanour Court in Kragujevac for the period between 2008 and 2013, proceedings were conducted in ***one case*** before this court for the violations referred to under the LPP at the request received and registered in May, 2013. In the period in question the said court did not conduct any other proceedings or render decisions regarding the violations referred to under the LPP.

63 Information without a reference number, 28 October, 2013

### 3.3.4. Misdemeanour Court in Niš

According to the analyzed data from the records of the Misdemeanour Court in Niš[64] for the period between 2010 and 2013, proceedings were conducted before this court in cases related to the violations referred to under the LPP. The Misdemeanor Court in Niš received from the SAI:

- In 2010, ***2 requests*** for the initiation of misdemeanour proceedings, specifically, related to the violations referred to under the LPP (Article 146, para.1, items 2 and 12);
- In 2011, ***5 requests*** for the initiation of misdemeanour proceedings, specifically, related to the violations referred to under the LPP (Articles 6, 24 and 121, para.1, items 6,7 and 18);
- In 2012, ***4 requests*** for the initiation of misdemeanour proceedings, specifically, related to the violations referred to under the LPP (Article 20 and Article 121, para.1, items 6,7 and 8);
- In 2013 (period: months 1 to 6), ***6 requests*** for the initiation of misdemanour proceedings, specifically, related to the violations referred to under the LPP (Article 4, para. 1, item 1, Article 20, Article 27, paragraphs 1 and 2 and Article 121, para.1, items 6, 7 and 18).

## 3.4. Inconsistent Court Practices

Court decisions of the misdemeanour courts of the Republic of Serbia in cases related to the violations of the provisions of the LPP have been inconsistent. This was caused by the insufficiently developed jurisprudence in matters related to misdemeanor offences in public procurement procedures, relatively low number of cases being processed by the courts, as well as the extremely low-ranging fines which may be imposed on liable persons working for the contracting authority in accordance with the LPP.

The provisions of the previous LPP, which was in force until 1 April, 2013, the range of the prescribed fines was from 100,000 to 1,000,000 RSD, specifically for the contracting authorities which had violated the provisions of the LPP in one of the specified segments (Article 121, para. 1). The range of fines which could be imposed in accordance with the LPP on the liable persons working for the contracting authority was from 20,000 to 50,000 RSD (Article 121, para. 2). When it comes to the liability of the bidders, the previous LPP prescribed fines which ranged from 100,000 to 1,000,000 RSD for the bidders as legal entities (Article 122). Furthermore, the previous LPP prescribed fines ranging from 20,000 to 50,000 RSD for the liable persons working for the bidder, or the natural person who appears as the bidder.

Based on the 10 sample court decisions that have been analyzed ***(Table 1)***, which were rendered in the period between 2010 an 2013 by the competent misdemeanour courts of the Republic of Serbia, in which sanctions were imposed on the ***liable persons*** working for the contracting authority, the following conclusions may be formulated:

64 Information no. 40-123/13, 18 September, 2013

- Court proceedings were initiated before the courts based on the requests of the SAI and/or the authorized budgetary inspections and all of the requests for the initiation of misdemeanour proceedings were related to arranging contracts and payments for the goods and services by the liable person working for the contracting authority, without conducting prior public procurement procedures in accordance with and in the manner stipulated by the provisions of the LPP;
- The total value of the procurement contracts for the goods and services subject to the misdemeanour proceedings was ***685,060,720 RSD***;
- The total sum of fines imposed by the presiding courts on liable persons working for the contracting authorities due to committed, i.e. proven, violations was only ***143,000 RSD*** compared to ***500,000 RSD*** which was the maximum amount that could have been imposed as a fine according to the LPP;
- Maximum fines of 50,000 RSD were not imposed on the liable persons in a single case, instead, the imposed fines ranged from 5,000 RSD to 30,000 RSD maximum whereas the proceedings in one case ended with "a reprimand" of the liable person working for the contracting authority (a Minister in the Government of the Republic of Serbia);
- Liable persons working for the contracting authorities in the analyzed cases mostly admitted the violations the SAI and the Budgetary Inspection had accused them of, which was especially taken into account by the presiding judge when setting the amount to be imposed as a fine;
- In certain cases the records were not updated with regard to the fact whether the court decision had become final and enforceable, i.e. whether the fine had been collected from the perpetrator of the said violation.

Based on the 10 sample court decisions that have been analyzed ***(Table 2)***, which were rendered in the period between 2010 an 2013 by the competent misdemeanour courts of the Republic of Serbia, in which sanctions were imposed on the ***legal entities, i.e. the contracting authorities***, the following conclusions may be formulated:

- Court proceedings were initiated before the courts based on the requests of the SAI and/or the authorized budgetary inspections, and all of the requests for the initiation of misdemeanour proceedings were related to various aspects of violations of the provisions of the LPP, and most often they were related to signing contracts for the goods and services without a public procurement plan, signing contracts for the amount greater than the one specified in the plan, unjustified implementation of the procedure, unjustified conclusion of annexes to the original contract, as well as to any other actions that did not comply with the LPP;
- The total value of the procurement contracts for the goods and services subject to the misdemeanour proceedings was 2,715,869,947 RSD;
- The total sum of fines imposed by the presiding courts on legal entities, i.e. the contracting authorities due to committed, i.e. proven, violations was 1,450,000 RSD compared to 10,000,000 RSD which was the maximum amount that could have been imposed as a fine according to the LPP;
- Maximum fines of 1,000,000 RSD were not imposed on the liable persons in a single case, instead, in eight court decisions the imposed fine was 100,000 RSD, in one case 150,000 RSD, while the imposed maximum was 500,000 RSD;
- Insufficiently restrictive court practice regarding the penalties imposed on the contracting authorities for the violations related to public procurement procedures is justified by presiding judges, in informal communication, by the fact that in such cases the fine is payable from the state budget, i.e. the budget of the contracting authority, which would have an adverse effect on the liquidity of the entities in question;

- Liable persons in the analyzed cases mostly admitted the violations the SAI and the Budgetary Inspection had accused them of, but they provided explanations regarding specific circumstances that had led to the said violations, which the presiding judge took into consideration when setting the amount to be paid as a fine;
- In almost all of the court decisions the accused in the misdemeanour proceedings were: 1) contracting authorities as legal entities and 2) representatives of the contracting authority as the liable persons in legal entities;
- In certain cases the records were not updated with regard to the fact whether the court decision had become final and enforceable, i.e. whether the fine had been collected from the legal entity which had committed the said violation.

### 3.5. Statute of Limitation for the Protection of Rights

One of the basic reasons why it has been difficult to punish the perpetrators of violations related to public procurement procedures in the Republic of Serbia over the past years has been a relatively short period of the statute of limitation for initiating, i.e. conducting the proceedings before the misdemeanour court. The previous Law on Misdemeanours prescribed that the misdemeanour proceedings could not be initiated or conducted if a year elapsed from the day the violation had been committed (Article 76)[65]. This rule resulted in the expiry of the statute of limitation in several dozens of cases related to public procurement procedures in court practice every year. Ex post audits of the implementation of the LPP which are conducted by the SAI and the Budgetary Inspection especially contributed to such an outcome.

Public procurement audits were mostly performed with a delay of about a year, after the audited entity had submitted a financial report for the previous fiscal year. With regard to most audited entities at the moment of the audit or when the audit was completed, the statute of limitation for initiating or conducting the misdemeanour proceedings had already expired. The only exception occurred when the SAI or the Budgetary Inspection had based their charges on the violation of the Law on the Budgetary System (Article 57) since in such a case the statute of limitation for initiating and conducting the proceedings was three years.

The acute problem with the statute of limitation in the area of public procurement procedures has been remedied after the new Law on Public Procurement was passed, which now stipulates that the statute of limitation for the right to prosecute someone for the violations referred to under the said law is three years from the day the said violation has been committed (Article 171).

Based on the 10 sample court decisions that have been analyzed ***(Table 3)***, which were rendered in the period between 2011 an 2013 by the competent misdemeanour courts of the Republic of Serbia, in which proceedings against the ***legal entities, i.e. the contracting authorities*** were suspended due to ***the expiry of absolute statute of limitation***, the following conclusions may be formulated:

65 Official Gazette of the Republic of Serbia, no. 101/05

- Court proceedings were initiated before the courts based on the requests of the SAI and/or the authorized budgetary inspections, and all of the requests for the initiation of misdemeanour proceedings were related to various aspects of violations of the provisions of the LPP, and most often they were related to signing contracts for the procurement of goods and services for the amount greater than the one specified in the plan, unjustified implementation of the procedure, unjustified conclusion of annexes to the original contract, as well as to any other actions that did not comply with the LPP;
- The total value of the procurement contracts for the goods and services subject to the misdemeanour proceedings was ***1,657,613,736 RSD***;
- The proceedings were initiated before the court with a delay of at least a year from the day the violation of the LPP was committed while in some cases this was done even two years later, which was due to the moment when this violation had been brought to attention, i.e. due to the identification of the violation;
- The case which cited the greatest value of the public procurement contracts of ***960,689,000 RSD*** was related to six public procurement procedures which the contracting authority had not conducted according to the LPP, but the court determined that relative statute of limitation for conducting the proceedings had expired;
- In certain cases there were grounds for conducting the proceedings based on the request for the initiation of the proceedings but during the proceedings before the court two years elapsed from the day of the commission of the said violation, which caused the presiding judge to confirm the expiry of the absolute statute of limitation suspending the proceedings.

Table no. 1 - Examples from court practice in cases regarding the signing of contracts for goods and services by the liable person working for the contracting authority without conducting prior public procurement procedure in accordance with and in the manner prescribed by the provisions of the LPP

| Example | Year | Misdemeanour Court | Imposed Fine (RSD) | Liable Person working for the Contracting Authority | Procurement Value (RSD) |
|---|---|---|---|---|---|
| 1 | 2011. | Novi Sad | 5.000 | School Principal | 2.100.000 |
| 2 | 2013. | Bečej | 10.000 | The Head of a Healthcare Institution | 147.776.000 |
| 3 | 2012. | Niš | 30.000 | The Head of a Public Enterprise | 100.000.000 |
| 4 | 2013. | Valjevo | 10.000 | The Head of a Sports Facility | 5.319.000 |
| 5 | 2011. | Belgrade | 30.000 | Secretary of the Ministry | 14.372.000 |
| 6 | 2012. | Niš | 20.000 | The Head of a Public Enterprise | 270.000.000 |
| 7 | 2012. | Kruševac | 10.000 | The Head of an Educational Institution | 1.883.000 |
| 8 | 2012. | Belgrade | Reprimand | Minister of the Government of the RS | 18.457.000 |
| 9 | 2013. | Niš | 8.000 | Officer of the Local Self-Government | 542.168 |
| 10 | 2010. | Belgrade | 20.000 | The Head of a Republic Authority | 124.611.552 |
| Total Sum of the Imposed Fines (RSD): | | | 143.000 | Total Value of Procurement Procedures (RSD): | 685.060.720 |

Table no. 2 – Examples from court practice in cases where a sanction was imposed on the contracting authority as a legal entity due to a violation referred to under the LPP with regard to conducting and arranging the procurement of goods and services

| Example | Year | Misdemeanour Court | Imposed Fine (RSD) | Liable Person working for the Contracting Authority | Procurement Value (RSD) |
|---|---|---|---|---|---|
| 1 | 2012. | Niš | 100.000 | The Public Enterprise | 36.000.000 |
| 2 | 2012. | Belgrade | 100.000 | The Public Enterprise | 250.000.000 |
| 3 | 2011. | Niš | 150.000 | The Public Enterprise | 100.000.000 |
| 4 | 2011. | Belgrade | 500.000 | The Public Enterprise | 4.507.947 |
| 5 | 2012. | Jagodina | 100.000 | The Public Enterprise | 41.468.000 |
| 6 | 2012. | Jagodina | 100.000 | The Public Enterprise | 50.000.000 |
| 7 | 2012. | Niš | 100.000 | The Public Enterprise | 26.100.000 |
| 8 | 2011. | Niš | 100.000 | The Public Enterprise | 18.000.000 |
| 9 | 2012. | Niš | 100.000 | The Public Enterprise | 270.000.000 |
| 10 | 2012. | Belgrade | 100.000 | The Public Enterprise | 1.919.794.000 |
| Total Sum of the Imposed Fines (RSD): | | | 1.450.000 | Total Value of Procurement Procedures (RSD): | 2.715.869.947 |

Table no. 3 – Examples from court practice in cases where a decision was rendered on the suspension of the misdemeanor proceedings regarding the violations referred to under the LPP due to the expiry of absolute statute of limitation for conducting the proceedings and imposing a sanction

| Example | Misdemeanour Court | Party to the Proceedings | Procurement Value (RSD) | The Date of the Commission of the Violation | The Date of the Initiation of the Proceedings | The Date of the Suspension of the Proceedings |
|---|---|---|---|---|---|---|
| 1 | Belgrade | Public Utility Enterprise and the Director | 323.529.725 | 1.1.2009. 31.7.2009. | 23.4.2010. | 22.3.1011. |
| 2 | Niš | Public Utility Enterprise and the Director | 80.000.000 | 8.2.2010. | 18.9.2011. | 3.10.2012. |
| 3 | Belgrade | Public Utility Enterprise and the Director | 960.689.000 | 10.2.2011. 31.12.2011. | 21.11.2012. | 15.3.2013. |
| 4 | Niš | Public Utility Enterprise and the Director | 228.000.000 | 2010. | 18.9.2011. | 3.10.2012. |
| 5 | Subotica | Public Utility Enterprise and the Director | 5.079.000 | 10.3.2011. 9.11.2011. | 20.10.2012. | 4.4.2013. |
| 6 | Novi Sad | Elementary School and the Principal | 391.965 | 2010. | 18.13.2011. | 5.4.2013. |
| 7 | Niš | Public Utility Enterprise and the Director | 14.389.000 | 3.9.2010. | 31.1.2012. | 19.10.2012. |
| 8 | Novi Sad | Elementary School and the Principal | 24.755.806 | 2007. | 28.12.2009. | 20.6.2012. |
| 9 | Niš | Sports Centre and the Director | 779.240 | 2011. | 21.1.2013. | 9.4.2013. |
| 10 | Svrljig | The State Fund and the Liable Person | 20.000.000 | 26.8.2010. | 10.2.2012. | 3.4.2013. |
| Total Value of Procurement Procedures (RSD): | | | 1.657.613.736 | | | |