# MAIN PROBLEMS OF PUBLIC PROCUREMENT IN SERBIA

## In the Context of New Legal Solutions and European Integration

prEUgovor policy paper

Transparency Serbia
Centre for Applied European Studies

Belgrade, May 2022

B | T | D The Balkan Trust for Democracy
A PROJECT OF THE GERMAN MARSHALL FUND

Norway

# MAIN PROBLEMS OF PUBLIC PROCUREMENT IN SERBIA

## In the Context of New Legal Solutions and European Integration

Transparency Serbia
Centre for Applied European Studies

Belgrade, May 2022

**MAIN PROBLEMS OF PUBLIC PROCUREMENT IN SERBIA IN THE CONTEXT OF NEW LEGAL SOLUTIONS AND EUROPEAN INTEGRATION**

**Publisher**
For the prEUgovor coalition:

Transparency Serbia
Palmotićeva 31/III Belgrade
www.transparentnost.org.rs

Belgrade Centre for Security Policy
Đure Jakšića 6/5, Belgrade
www.bezbednost.org

**Authors**
Transparency Serbia, Centre for Applied European Studies

**Design and layout**
Jelena Pejić Nikić

ISBN-978-86-84711-52-8



The publication is published as part of the project *PrEUgovor for Rule of Law and EU integration of Serbia* supported by Balkan Trust for Democracy, a project of the German Marshall Fund of the United States and the Royal Norwegian Embassy in Belgrade. Opinions expressed in this publication do not necessarily represent those of the abovementioned donors, or its partners.

# Contents

## Introduction

One of the most important areas of European integration is the one related to public procurements and public-private partnerships. Although Serbia-EU negotiations in Chapter 5 are opened among the first, at a time when the relevant regulations have already been significantly harmonized with the Union's, the current state of negotiations is far from desired. Year after year, the European Commission repeats the same key recommendations, noting not only omissions and delays, as can often be found in other negotiating chapters, but also on actions that constitute an open violation of the principles of competition and equal treatment in concluding the most valuable deals. In addition, “public procurements” are treated as one of the eight “most risky” areas for corruption in the Action Plan for Chapter 23.

The new Law on Public Procurement has been in force since July 1 2020, so enough time has passed to analyze its effects in the most critical areas. It is also an opportunity to see to what extent legal norms and existing action plans have contributed to both positive changes and negative trends in these fields.

This document, prepared by members of the prEUgovor coalition, transparency Serbia and the Center for Applied European Studies, discusses public procurements:

- through the prism of priority issues highlighted by the European Commission in its reports;
- in connection with securing competition in public procurement procedures;
- by looking how transparent public procurements are;
- through analysis of the monitoring, oversight and audit system; and
- through an examination of the mechanisms for punishing abuses and their (non-) application in practice.

In the end, the most important recommendations to address the problems we pointed out are for the new Government of Serbia and the new convocation of the Parliament and the EU.

# Law on Public Procurement through the prism of EU integration

In order to get a broader picture of what the new Law on Public Procurement (hereinafter: LPP) has brought in the context of the EU integration process and whether and how much progress has been made, we must look at the situation in this area before the adoption of the Law and its entry into force. As a reminder, the new Law on Public Procurement was published in the Official Gazette of the Republic of Serbia.

The review of the reports of the European Commission (hereinafter: the EC) on the Republic of Serbia for the previous three years, which cover the period both before the adoption of the LPP and the period after its effective implementation, will cover only the most relevant allegations. It will help us answer questions about whether the RS "responded" to the problems highlighted in these reports by adopting the new LPP and whether, if so, to what extent it has implemented the recommendations the EC sent through its reports.

## European Commission Report on Serbia for 2019

In the Report for 2019, the EC explicitly pointed out that public procurement, infrastructure projects, sectors of health, education, construction and spatial planning, and indispensable public companies are "spaces" that remain particularly vulnerable to corruption. The EC noted no tangible improvements concerning transparency in these fields. As early as 2019, public procurement legislation was largely in line with the EU acquis. It is especially emphasized that there was still a lack of capacity in the "key" institutions in this area, primarily the Public Procurement Office and the Public Procurement Administration (hereinafter: the PPC).



The EC assessed that Serbia remained (as in the previous year's Report) moderately prepared regarding the matter regulated by Chapter 5, pointing out that no progress was made during that reporting period. It insists on a significant improvement of competition and the efficiency and transparency of the public procurement system.

The EC recommendations from the previous Report were not implemented and therefore remained to be implemented in the coming period:

1. Ensure further alignment with the 2014 EU Directives on public procurement, including on utilities and on concessions;
2. Adopt the new public procurement law and amendments to the Law on Public-Private Partnership and Concessions (LPPPC);
3. Ensure that intergovernmental agreements concluded with third countries and their implementation do not unduly restrict competition, and comply with the basic principles of public procurement, such as transparency, equal treatment and non-discrimination;
4. Continue to strengthen the capacity of the primary institution in the field of public procurement, such as the Public Procurement Office, the Republic Commission for the Protection of Rights in Public Procedures and the administrative courts.

The intergovernmental agreements concluded with third countries, and their increased application was especially emphasized. The EC assessed that extended implementation of such agreements was not in accordance with the principles of equal treatment, non-discrimination, transparency, and competition and neither in line with the relevant EU acquis. The average number of bids per tender fell from 3 in 2017 to 2,5 in 2018, the lowest in the last five years. The proportion of negotiated procedures without prior notice remained at 3% in 2018. The share of open procedures remained at 91% of the total value of contracts. The use of the most economically advantageous tender criterion remained low at 11% of the total number of awarded contracts, while the use of the lowest price criterion was increasing. It might ultimately lead to higher product lifecycle costs for Serbian citizens. The State Audit Institution found irregularities in 7.4% of inspected procuring entities in 2017, falling from 10% in 2016. The PPO increased its staff to 38, out of which 12 positions remained vacant. With that number of filled posts, having in mind the wide range of competencies and responsibilities of the PPO, it did not have the administrative capacity to perform its tasks. The Commission for Public-Private Partnerships and Concessions also remained understaffed for the efficient performance of their responsibilities. There were absolutely no developments in integrity and handling conflicts of interest in the field of public procurement. The capacity of the Administrative Court to deal with complex and numerous cases is still deficient, which inevitably results in proceedings before this court taking a very long time.

## European Commission Report on Serbia for 2020



Despite the praise for adopting the new Public Procurement Law, in its Annual Report for 2020 the European Commission unequivocally expressed its concern over the adoption of legislation related to infrastructure projects of "special importance to the Republic of Serbia",[1] which exempted these projects from public procurement rules and thus enabled them to circumvent EU rules and standards. These agreements concluded with third countries were not systematically in line with the principles of equal treatment, non-discrimination, transparency and competition. In this way, decisions from the national legislation on public procurement can be suspended entirely or in certain phases of projects, and the RS Government is authorized to choose a strategic partner in circumstances that it considers important or urgent. So, the significance and value of the adopted LPP are undermined, and potentially its effective application. Leaving room for circumvention of national legislation, and thus, indirectly, EU rules and standards, RS maintains discriminatory rules in the field of public procurement. The situation in sectors particularly vulnerable to corruption remains unchanged. There are no visible improvements in transparency and risk assessment for corruption in public procurement.

Serbia remains moderately prepared in this area. The progress made is limited and comes down to adopting a new LPP. The recommendations mentioned above from the 2019 Report remain unfulfilled, and this Report also calls for their consistent implementation. With the adoption of the new LPP, the legal and institutional framework of the public procurement system in the RS is

[1] Law on Special Procedures for the Realization of Projects for the Construction and Reconstruction of Line Infrastructure Facilities of Special Importance for the Republic of Serbia ("Official Gazette of the RS", No. 9/2020)

mainly in line with the EU acquis. It is commendable that the new LPP introduces electronic procurement as a mandatory practice. The Report also commends the provisions on applying the principles of equal treatment, non-discrimination, transparency and competition. The adoption of amendments to the Law on Public-Private Partnerships and Concessions is emphasized as necessary in order to further harmonize with the EU Directive on concessions.

The average number of bids per tender remained low and stable at 2.5 and was still significantly lower than 3 bids in 2017. For the first time since 2015, the share of contracts awarded to foreign bidders fell to 2% of the total number of contracts. Regarding the monitoring of contract award and implementation in 2019, the proportion of negotiated procedures without prior publication increased from 3% in 2018 to 4%. The best price-quality ratio criterion has remained low at 10%, while the lowest price criterion remained dominant in 90 % of cases. The State Audit Institution found irregularities in 9.6% of inspected procuring entities in 2019. The Government's Anti-Corruption Council noted that the current framework of internal and external control over the expediency of public procurements in large public utility companies is both inadequate and prone to abuses. Bearing in mind that the contracts of these entities represented 27% of the total number of all concluded contracts and 44% of the total value of all concluded contracts in 2019, the competent institutions should investigate the allegations of the Council but also continuously monitor these procedures at both state and local level.

The capacity of the PPC has been slightly improved. Twenty-eight of the 38 systematized positions have been filled, and the institution still lacks adequate administrative capacity. As for the other "main" institution in the public procurement field - the Republic Commission for the Protection of Rights, its capacity has decreased by 4 people compared to 2019. Due to limited and inadequate specialization and training, the Administrative Court does not have the capacity to deal with the complexity and diversity of cases, and the legal proceedings before this body are still very long, and the number of cases is constantly increasing. It is necessary to significantly improve cooperation and communication between the PPC and the Republic Commission on the one hand and the Agency for Prevention of Corruption on the other hand in order to ensure the implementation of an efficient and effective penal policy against violators of public procurement laws.



## European Commission Report on Serbia for 2021

Unfortunately, the last publicly available and published Report does not deviate in anything and unequivocally confirms what has already been stated in the previous two. It was published on October 19 last year, almost a year and a half after the application of the LPP began. Even though the changes in legislation have led to legal solutions being almost entirely in line with the acquis communautaire, the statements from the Report and the actual state of affairs, which we are witnessing in practice, tell us that there is little but "further harmonization" achieved.

The EC notes that there is a noticeable increase in the number of contracts exempt from the application of the LPP through concluded interstate agreements and that in this way, the application and essence of the LPP are seriously endangered.

The EC recommendations and concerns highlighted in the Report are almost identical to those in previous reports and boil down to further harmonization of the relevant legislative framework, prevention of potential harmful impact and restriction of competition through interstate agreements and strengthening of the capacity of relevant institutions in public procurement. Competition is still at an unenviable level, and the system's institutions do not have enough capacity to "fight" the main problems in this area.

## So what did the new LPP actually bring us?

At first glance, it could be said that the LPP, apart from the fact that it significantly harmonized the legislative framework with EU requirements, has changed little in practice. Even if we stayed and viewed things exclusively through the prism of progress in joining the EU, that is. looking exclusively at the findings and recommendations we receive from the EC, we would come, if not to the same, then at least to a very similar conclusion. Little has changed in practice. The LPP and the new Portal have undoubtedly led to some improvements in transparency, the implementation of public procurement procedures has been accelerated and, to some extent, relieved of the administrative burden that has accompanied these procedures in the past. On the other hand, those problems that the LPP should have solved are still present in practice. First of all, the problem of lack of competition stands out, which we will deal with in the next part of this analysis. In addition, public procurement has almost become synonymous with corruption in public discourse and thus far surpassed "its initial place" in Chapter 5 and took up significant "ground" in the context of Chapter 23 as well. They took this place not only because of the identification with corruption but also because of the "lukewarm", not to mention non-existent penal policy towards violators of legal norms in the field of public procurement. Violations of the Law in the field of public procurement and impunity of those responsible in this area have become almost a trend.



Keeping in mind all the above, and knowing that public procurement is recognized as an important area in the process of EU accession (fundamentals), what remains completely unclear is the passivity and lack of reaction of the EU. So, as it has already been pointed out, the recommendations sent by the EC to the RS have not changed in the last three years, they have not changed because none of them has been substantially and completely fulfilled. Precisely because of that, it is impossible not to wonder why the EU does not insist on their consistent implementation, on RS clearly and unequivocally explaining why it did not heard abide by them and implement them, but often went completely against them, making harmful moves that are in direct collision with the formulated recommendations. It is more than clear that the harmonization of relevant regulations has not led to the desired result, and that is a real, effective change in the situation in practice, on the ground. Without the efficient and effective implementation of the prescribed solutions in practice, legal solutions, even if fully harmonized with the Acquis communautaire, remain nothing but a "dead letter". In addition, of course, without following the recommendations, it is difficult to expect that further progress in the EU accession process can be achieved, both within cluster 1 (*The Fundamentals of the Accession Process*), in the areas of public procurement and the Rule of Law and fundamental rights, but and the totality of the accession process.

## Competition in public procurement

The issue of competition, i.e., the issue of lack of competition is certainly one of the most common ones when it comes to public procurement. Higher intensity of competition is extremely desirable because it inevitably leads to a higher level of transparency of the entire process, better control of the process by participants who participate in it, but perhaps most importantly, it guarantees choice and quality, i.e., the possibility to choose between the tenders of several tenderers to find the one that best suits the requirements in terms of price, quality and other relevant criteria.

Precisely due to the above, as one of the reasons for the adoption of the LPP, which was explicitly stated in the Explanation on that occasion, was precisely to increase of competition in public procurement procedures.

The following is a table with the average number of bids under the public procurement procedure in the previous five years in RS.

***Table 1 Average number of bids under the public procurement procedure in the previous 5 years***

| 2017 | 2018 | 2019 | 2020 | 2021 |
|---|---|---|---|---|
| **3** | 2,5 | 2,5 | 2,6 | 2,5 |

A look at the table tells us that although an almost insignificant increase of 0.1 was recorded in 2020, the situation "returned to normal" in 2021. For the sake of illustration, it should be pointed out that this level, back in 2011, amounted to 3.2 offers, and that we are currently very far even from the level we were at in 2017. Given that the RS has spent more than 3 (on average as much as 4.5) billion euros annually through public procurement in the last five years, it is unlikely that such a low level of competition can be justified solely by the usual explanation of a "small, unattractive market"). "When we add to these data the fact that in over 55% of public procurement procedures only one bid is submitted, it is clear that the situation is more than alarming.[2] According to these data, RS is not only "significantly" behind the member states, but also behind the neighboring countries in the region.[3]

These data inevitably lead us to a conclusion that has been emphasized several times, both during the public debate that preceded the adoption of the LPP, and subsequently by the domestic pundits and civil society organizations active in this field - alignment with the acquis *per se* does not mean anything. Without efficient and effective implementation, primarily control of the implementation of both procedures and implementation of contracts in this area, and especially consistent, efficient and effective penal policy against those who violate legal provisions, we can neither expect the system to be effective, nor, therefore, that the tenderers will have confidence in it.



[2] The results of the research of the Toplica Center for Democracy and Human Rights showed that in 2020, the average number of tenderers in the 100 largest public procurements was 1.34. In as many as 75 procurements, there was only one tenderer, 18 of procurements with two, five with three and two with four tenderers.

[3] In Serbia, every month will be a Public Procurement Month (naled.rs) and half of procurements with only one tenderer, one fifth without tenders (naled.rs)

The reasons for the above data are numerous, and below we will look at the most important ones.

Although the new Law significantly relieved the public procurement procedure of formalism and significantly facilitated its participation, it can definitely be concluded that this was not (the only) thing that discouraged tenderer from participating in past procedures. The new LPP "introduced" innovations that further influenced the intensity of competition in this area. By prescribing new, higher thresholds for the application of legal norms and conducting public procurement procedures, one million dinars for the procurement of goods and services, and three million for the procurement of works, a significant number of procedures were below that threshold. Although this solution was criticized during the public debate and it was pointed out several times that it would lead to a further decline in competition, it was nonetheless maintained. It was in these "financially less demanding" procedures that many tenderers sought their opportunity to compete. After the entry into force of the LPP, the rules and procedures governing public procurement procedures do not apply to procedures up to the mentioned thresholds, i.e., these transactions may be concluded by direct agreement, which in itself excludes competition. To illustrate, the average value of public procurement contracts in 2021 in RS was three million and fifty-nine thousand dinars, which speaks in favor of the fact that the new thresholds are too high.

Regarding larger, capital procedures and increased competition they entail, we can say that the state itself "took care" of that by adopting the already mentioned Law on Special Procedures for the implementation of projects for construction and reconstruction of line infrastructure facilities of special importance for the Republic of Serbia. Having in mind the time when this regulation was passed, i.e., before the entry into force of the LPP, it is hard to have the impression that the state itself largely made the LPP meaningless even before it began to be implemented. The mentioned regulation leaves a wide space for "miscondunct", i.e., provides an opportunity to suspend the application of the provisions on public procurement in the event that a certain infrastructure project is declared a project of "special importance" for the RS. In practice, this not only restricts competition, leaving the choice to the "strategic partner" as to who he will hire for the necessary jobs without conducting public procurement, but also, as a rule, leads to a "Kingdom of Darkness", i.e., the absence of any publicly available information on these projects. The adoption of the mentioned regulation was merely the last step within the broad practice of bending and circumventing the rules on public procurement. It has been more than present before through the conclusion of interstate agreements[4] and the adoption of special laws[5] that would exclude the application of the LPP. Due to all the above, it should not be surprising that the value of public procurements exempted from the application of the Law is getting higher and higher every year, and so in 2021 it amounted to as much as 380 billion dinars. If we take into account that the total value of all concluded public procurement contracts in the mentioned year amounted to around 560 billion, it is clear how much of an amount is distributed without the application of the LPP.[6] For example, this amount amounted to "only" 203.2 billion dinars in 2020, but unfortunately, realistically considering the situation in practice, it is realistic to expect that it will be higher from year to year.



[4] Interstate agreements of the Republic of Serbia on loans with the People's Republic of China
[5] Cases "Moravian Corridor", "Belgrade Waterfront", etc.
[6] KJN Annual Report (ujn.gov.rs)

To all this we must certainly add the "traditional" ways of restricting competition resorted to by contracting authorities, which both the new LPP formally and the competent authorities have not resolved in practice, such as:

1. Prescribing tender documentation, i.e., technical specifications in order to restrict competition - a current practice, especially in the public procurement of official vehicles. Although the technical specification seems neutral at first glance, through a secondary, usually peripheral item, the technical specification is compared so as to correspond to only one, precisely specified item of procurement (e.g., "trunk cannot be larger or smaller than 4.2 l" which corresponds to only specific vehicle model of a particular manufacturer).
2. Division of larger procurement into several lots - a current practice in public procurement of medical equipment. Suitable for cartel agreements between different tenderers and thus price arrangements. It often happens that i.e., within one procurement we have two tenderers, one of which sends a tender only for lots 1,3 and 5, while the other sends a tender only for lots 2,4 and 6.
3. Prescribing redundant, irrelevant criteria as important ones when submitting a tender or seeking inadequate means of security / guarantees - e.g., when procuring maintenance of air conditioners, the tenderer is required to have a business space of at least 200 m2 in ownership or a requesting to give / take a guarantee for the seriousness of the tender in the amount exceeding 50% of the total purchase price.
4. Prescribing other conditions that may restrict competition in order to favor a particular tenderer - e.g., unusually short delivery time of a certain product for which the procurement by other tenderers requires a certain amount of time, while a specific tenderer has the specific product in stock.



In addition to all the listed manners, what can often be heard from tenderers is that they do not participate in public procurement procedures because they simply do not trust the public procurement system, i.e., the actions of institutions in charge of supervising the implementation of regulations governing this area, in charge of protection of rights, but also those that should prosecute and punish those who break the Law. The fact that 98% of public procurement contracts are concluded exclusively with domestic tenderers can serve as an illustration of the inefficiency of the established system. This unequivocally indicates that even foreign tenderers do not have excessive trust in the public procurement system in RS.

If the solution to this problem is not taken more seriously in the near future, a further decline in the intensity of competition in combination with the usual practice of procuring only the "cheapest", i.e., exclusively by applying the criterion of the lowest offered prices will in practice inevitably lead if not to the shortest, then at least to the most economically unprofitable lifecycle of the object of procurement, which in the long run will cost the final customers the most, i.e., the citizens of Serbia.

# Transparency of public procurement in Serbia

## The principle of Transparency in Serbian public procurement

Transparency has been one of the principles proclaimed by the Public Procurement Law since the adoption of the first Law of its kind.[7] At that time, through the *Principle of Transparency in the Use of Public Funds*, it was prescribed that public funds could be used only for the purposes specified in the contract concluded in the public procurement procedure, as well as the rule that public calls to public procurement should be published in the Official Gazette of Serbia, and if the value of the public procurement exceeds the amount of 3,000,000 dinars for goods and services, or 15,000,000 dinars for works, in one daily newspaper that is distributed throughout Serbia. Also, within the same principle, it was prescribed that a person who participated in the public procurement procedure has the right to access to data on the conducted public procurement procedure.

The next Law, from 2008[8], contained similar but more specific provisions, because it was prescribed that advertisements on public procurement, in addition to the "Official Gazette", should be published on the Public Procurement Portal, which was established by that Law. The rights of participants in public procurement were also specified, in terms of insight into the documentation during the opening of bids and after the issuance of the decision.

The 2012 law[9] formulated the principle of transparency in a normatively better way: "the contracting authority is obliged to ensure publicity and transparency of the public procurement procedure, respecting, but not limited to, the obligations under this law." The principle was operationalized through numerous other provisions of the Law, which required the publication of advertisements and documents on public procurement on the Portal, as well as through the duty to publish numerous other documents on the websites of contracting authorities.



The current Law on Public Procurement was passed with reference to the new directives of the European Union in that area, so that in its explanation more attention is paid to harmonization with those directives than to explaining the intended effect of certain rules and their comparison with previously valid ones. The proposer thus explained that the new directives aim to "increase the transparency and flexibility of public procurement procedures", so the expectation is expressed that the application of the Law will increase transparency.

The proposers also stated that the adoption of this Law achieves the goal of "ensuring transparency of public procurement procedures, regardless of the value of the contract and the absence of discrimination between domestic and European tenderers." Similarly, it was argued that passing the new Law would help fight corruption, as it would "increase transparency", as well as make sure that businesses, the public, the media and other actors are aware of the possibilities available for contract award and be able to learn more about these possibilities." Similarly, it is argued that e-procurement will provide greater transparency, "by providing information on indivi-

[7] Law on Public Procurement ("Official Gazette of RS", No. 39/2002, 43/2003 - other law, 55/2004, 101/2005 - as amended and 116/2008 - as amended)
[8] Law on Public Procurement ("Official Gazette of RS", No. 116/2008)
[9] Law on Public Procurement ("Official Gazette of RS", No. 124/2012, 14/2015 and 68/2015)

dual contract award opportunities, but also by providing a clearer picture of public procurement on a broader basis".[10]

"Transparency" is also mentioned in the explanatory memorandum in connection with the work of the centralized public procurement body (Article 79), in connection with the engagement of experts, bodies and economic entities in the preparation of tender documents (not to violate the principle of transparency) in relation to the content of the public procurement notice (Appendix 4).

## Exceptions to the application of the Law

As to the realization of the principle of transparency in public procurement, we look at this phenomenon on several levels, the basic one of which is making information available to the public that something is being procured. Disclosure of this information is the rule, but there are a number of exceptions. The Law on Public Procurement itself envisages some situations when its provisions, even those that ensure transparency, will not be applied.

The first such case is the situation when procuring entities conduct procurement "in accordance with the procedures established" by an international agreement or other act on the basis of which an international obligation has arisen, which the Republic of Serbia concluded with one or more third countries or its narrower political-territorial units and which refers to goods, services or works intended for joint implementation or use by "signatories", or "by international organizations". With this exception, transparency does not have to be ruled out, but there is no mechanism in the LPP that would ensure publicity of data, unless otherwise provided by an interstate agreement. Namely, based on the Constitution itself, interstate agreements have greater force than the Law.[11]



In practice, transparency is partly ensured in other ways. The interstate agreement itself must pass the ratification procedure in the National Assembly. In addition to the interstate agreements, certain loan arrangements related to the implementation of certain projects are subject to ratification. During the adoption of such laws, MPs, citizens and potential competitors for the contract often receive information about a "fait accompli" as to who will be the contractor of certain works.

The second exception relates to situations where, instead of domestic Law, procurement is governed by rules laid down by an international organization or financial institution, if that organization or institution fully finances the procurement. If the funding comes mainly from that source, the rules agreed upon apply, while in the case of minority funding, domestic Law would have to apply. Procurement conducted under these rules provides for the publication of public calls for participants. However, the scope of transparency is often lower than when the LPP is applied, due to higher thresholds for publishing procurements and rules on the purchase of tender documents

[10] Ibid.

[11] https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Inicijativa_BICA_-_Vlada_Srbije_-_transparentnost_me%C4%91udr%C5%BEavnih_uvora.pdf

(instead of publishing them)[12]. Finally, these procurements are not necessarily advertised on the Public Procurement Portal, the place where interested tenderers would first look for them.

Article 11 stipulates that in the case of procurement on the basis of interstate agreements, "the principles of this law shall be applied", including the principle of transparency. Whether and to what extent the application of this principle will really be ensured depends on the contracting authorities themselves, which have the possibility to envisage measures that would increase the publicity of the procedure in their internal acts. It is also stipulated that the Republic of Serbia must "inform the European Commission about all international agreements or other acts" on the basis of which the exemption from public procurement rules is envisaged. However, that list is not published.

Business transparency, which would be ensured through advertising of procurement, is not always ensured, even in cases of procurement that are exempted under Article 12 of the Law, except when it is provided through the application of other regulations (e.g., when it comes to the purchase and lease of real estate). This article also provides for exceptions concerning the "purchase of time slots for TV and radio broadcasting", arbitration services, certain legal services, notary services, financial services related to securities, procurement of loans, employment contracts, certain civil protection services, passenger transportation by rail, procurement from contracting authorities who have exclusive rights (the only ones performing an activity) and certain research and development services. Here, too, there is an obligation to apply the principle of transparency, "to the extent it is appropriate", and the application of the principle depends exclusively on the internal acts of the contracting authorities.



Pursuant to Article 20, the Law prescribes additional exemptions for procurement in the field of defense and security. The first basis from that group refers to the international agreement and the deployment of (military) forces. The second concerns procurement in which the application of the Law would "oblige the Republic of Serbia to disclose data whose disclosure is contrary to the fundamental interests of its security, based on a decision of the Government." Procurement for intelligence activities is explicitly excluded, as well as procurement related to joint development of new products (by Serbia and EU member states), procurement for Serbian forces in other countries, and procurement of military equipment and security sensitive equipment from other countries and associated services and works. In addition to all these exceptions, three additional ones are envisaged. The Government may provide that by applying the rules on public procurement, Serbia would be "obliged to provide information that it considers to be detrimental to the fundamental interests of its security", that the protection of the fundamental security interests of the Republic of Serbia cannot be guaranteed by other measures, such as providing for requirements in order to protect the confidentiality of data made by the contracting authority in the public procurement procedure ", if the procurement and execution of the procurement contract were declared secret or "must be accompanied by special security measures", based on regulations, and important security interests cannot be protected by other measures.

[12] https://nova.rs/emisije/sporan-tender-za-rendgen/

In the application of exceptions related to the security sector, there were many cases of obvious violations of the rules, which were not investigated and punished. It seems that the duty to submit special reports on confidential procurement in the field of security to the competent committee of the National Assembly (according to the Law from 2012), which is not in the current Law, was not helpful in solving this type of problem.

In the case of procurements that are exempt on any of the above grounds, contracting authorities are obliged to report to the Public Procurement Office, stating the aggregate value of planned and contracted procurements on each of the listed grounds. During the validity of the previous Law on Public Procurement (2013-2019), it was possible to search the Portal for data from the Report, according to the contracting authority, the grounds for exemptions and the quarter, and data on planned and agreed value and number of procedures were also listed. The search on the new Portal only allows the listing of reports of individual contracting authorities, after which you can see the total annual (no more and quarterly) value of contracted work (by type of exception). Also, the planned value of these procurements is no longer visible, nor the number of such contracts concluded with the application of exceptions.

## Impact of increased thresholds

The new Law on public procurement has raised the thresholds above which contracting authorities are obliged to conduct public procurement. According to the Law from 2012, there was an obligation to advertise, and thus publish procurements whose estimated value was at least 500 thousand dinars without VAT. The obligation of the ordering party to advertise on the Portal and on the website was then introduced for the so-called "small value purchases" (between 500 thousand and five million dinars), where the contracting authority must directly request at least three bids. According to previous legal concepts (in force 2008-2013), small value procurements could be advertised, but there was no such obligation.



The 2019 law (in force since July 1, 2020) significantly increased the thresholds, and thus reduced the number of procurements that are published. Now, the basic threshold for advertising procurements is one million dinars, for works three million, and for procuring numerous services as much as 15 or 20 million dinars! No explanation was provided for these changes in the impact analysis of the regulations. During the public debate, it was mentioned that there were requests for the thresholds to be even higher, and that they are still lower than the thresholds applied in the European Union. Data on the number and expected value of public procurements were also not presented, which procurements will for this reason see their transparency, and thus their level of competition reduced.

In an attempt to determine what the proposer of the Law failed to do, we collected relevant data by searching for the relevant information on the old Public Procurement Portal. The estimated value of public procurement of a certain type that was advertised in the last full year when the previous Law (2019) was applied, was used as a search criterion.

***Table 2: Procurement from 2019, worth more than 500 thousand dinars, which would be below the threshold under the new Law***

| Type of procurement | estimated value below the new threshold (1 or 3 million dinars) | estimated value above the new threshold (1 or 3 million dinars) | % of omitted purchases |
|---|---|---|---|
| **works** | 1,317 | 3,091 | 30 |
| **goods** | 6,345 | 21,483 | 23 |
| **services** | 2,135 | 7,008 | 23 |

As can be seen, close to one third of the procurements of works, which previously had to be published, would fall "below the threshold" with the application of the new Law. When it comes to goods and services, the share of procurements that are exempt from the obligation to publish is close to a quarter, in total. However, in this consideration, it should be taken into account that for the procurement of fifteen types of "social and other special services" from Annex 7 of the new Law, an increased threshold (15 and 20 million dinars, respectively) is applied, which is not included in Table 1. For example, in the "hotel and restaurant services" covered by this annex in 2019, there were as many as 95 procurement procedures worth between 500 thousand and 15 million dinars and only seven that were more valuable than that amount and which should be advertised also under the provisions of the new Law. In the case of investigation and security services, there were 111 procurements that would remain "below the threshold" under the new Law and 52 that would have to be advertised.



Similar to the previously mentioned exemption bases, for procurements below the threshold, it is prescribed that "the principles are applied in a manner appropriate to the circumstances of the specific procurement", and the elaboration of that principle is left to the contracting authorities themselves, within their internal acts.

## The unmentioned grounds for exemption - special laws

In addition to procurements that the Law itself sees as exempt from application, there are some for which it is not the case. In Serbia, several laws (so-called "lex specialis") have been passed, which exempt procurement for certain projects from the general regime. The result is their reduced transparency. Based on a special law passed for the implementation of the "Belgrade Waterfront" project[13], special rules are envisaged regarding the financing of public works. According to Article 16 of that Law, the City of Belgrade "may prescribe" that "works on developing construction land, including construction of public areas, as well as construction of public facilities owned by the investor on the basis of a contract, are recognized as settling the overall obligation on behalf of the contributions for developing construction land". The final settlement between the investor and the City of Belgrade will be made after the completion of the construction of all facilities within the scope of the planning document. The contract with the investor of that project

[13] Law on Determining Public Interest and Special Procedures for Expropriation and Issuance of Construction Permits for the Realization of the "Belgrade Waterfront Project" ("Official Gazette of RS", No. 34/2015, 103/2015 and 153/2020)

was concluded without competition, with a reference to the interstate agreement between Serbia and the United Arab Emirates. The investor of all works, including those related to public facilities, became a jointly owned company in which the foreign partner owns 68% of the shares, which means that the company is not obliged to advertise public procurement at all. This Law has further reduced the transparency regarding the payment for performed public works, and data are not available in practice even on the basis of requests for access to information.

The special Law for the "Moravian Corridor" stipulates, in Article 17, that when selecting a strategic partner and concluding a contract on the design and construction of the Moravian Corridor, as well as when choosing expert supervision over the execution of works, regulations governing public procurement procedures do not apply", but rather the rules from the decree issued by the Government. The decree[14] provided for the publication of a public call, in one daily newspaper, on the website of the relevant ministry and the website of e-Government, but not on the Public Procurement Portal. Data on the implementation of this contract are also not published in the reports on exempted public procurements.

A special law for line infrastructure[15] has provided for a number of situations in which the regular public procurement procedure will not be fully applied, but modified (e.g., in shorter deadlines). The application of the Law on Public Procurement may, however, be completely suspended for the choice of a strategic partner, based on a decision of the Government (Articles 37 and 39). In that case, the selection of partners is made on the basis of the provisions of a special law and Government decrees (for each project individually). Pursuant to Article 39, any such procedure should ensure the application of the principles of transparency and competition, and Article 40 stipulates that a public call must be published (in one daily newspaper, on the website of the competent authority and on the e-Government website, but not on the Public Procurement Portal).



Another special law, regarding the construction of apartments for members of the security services[16], provided for a deviation from the regular rules of public procurement (shortening of deadlines), but procurement must in any case be advertised.

## Non-transparency of a dubious legal basis

In addition to procurements for which it is known on what basis they were non-transparent, there are also those for which that basis is not known. This is, among other things, the case with numerous procurements that were conducted as part of the response of the state to the COVID-19 pandemic. Some of these procurements were conducted without the application of the (old) Law, based on the highest level of urgency in times of natural disasters.[17] In other situations, non-transparent procedures were implemented with reference to legal grounds that were obviously

[14] Decree on Criteria and Manner of Selecting a Strategic Partner and Expert Supervision over the Execution of Works on the Implementation of the Project for Construction of the Infrastructure Corridor of the E-761 Motorway, Section Pojate-Preljina ("Moravian Corridor") "Official Gazette of RS", no. 55 of 2 August 2019. 6 of 29 January 2021.
[15] Law on Special Procedures for the Realization of Projects for the Construction and Reconstruction of Line Infrastructure Facilities of Special Importance for the Republic of Serbia ("Official Gazette of the RS", No. 9/2020)
[16] https://www.transparentnost.org.rs/images/publikacije/Poseban%20zakon%20TS.pdf
[17] https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Kovid_propisi_i_rizici_od_korupcije.pdf

untrue (e.g. with reference to the protection of state security in cases of equipping COVID hospitals). When the applicants tried to obtain the procurement documents, they were told that the conclusion of the Government of Serbia from March 15, 2020 prescribed the confidentiality thereof, which will last "until the end of the pandemic",[18] which has not been done yet. It should be reminded that neither the previous nor the current Law on Public Procurement provides for the possibility to declare procurements entirely secret, except for those carried out in the security sector and not in the field of healthcare[19]. Finally, the Prime Minister added additional confusion to all this by claiming that the data on one type of these procurements (vaccines) were declared secret based on the seller's request, and that the situation is similar in EU countries. However, there is no legal basis for such a thing.[20]

## New portal - advantages and disadvantages

The new Public Procurement Portal has increased transparency, as it has made publicly available some of the information that was not previously available, is easier to search, faster, and generally more functional. The greatest progress is visible when it comes to the Portal's searchability. Previously, for advanced search it was necessary to enter at least three parameters, and now the search can be performed only once. A very important improvement, not so much for transparency, but for strengthening competition, is the possibility for interested tenderers to follow the procedures they choose or advertise from certain groups.

A major improvement is the ability to download data in machine-readable form (although it is currently limited to 5,000 items[21]). This was not possible at all on the old Portal, but the download was only possible for smaller groups of search results (15). True, at the time of the application of the previous LPP, the Public Procurement Office published data sets in machine-readable form on the state Open Data Portal, which is no longer the case. However, as the 2018 Transparency Serbia survey showed, a lot of mistakes were made when publishing data, which reduced the value of this type of transparency.



Access has been greatly facilitated when seeking information on procedures over a period of time, which in the past has meant access to a higher number of pages. A special section on the Portal is now dedicated to centralized public procurement.

On the Portal itself it is possible to see some information that was not previously available - the status of the procurement (whether completed or in progress), information on the plan in which the procurement was planned, the estimated value of public procurement (previously invisible in search), submission deadline bid (previously visible only in the tender documentation), and decisions on the request for protection of rights. The data on the concluded contract are better systematized and more visible. Search provides more features than before ("contains-does not contain", "starts with", "ends with", "equals").

[18] https://birn.rs/rfzo-podaci-o-nabavci-opreme-tokom-epidemije-strogo-poverljivi/

[19] https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/publikacija_matra.pdf

[20] https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Javne_nabavke_na_plenarnoj_sednici_NKEU_2021.pdf

[21] https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Inicijativa_Kancelariji_za_javne_nabavke_-_preuzimanje_podataka.pdf

On the other hand, the establishment of the new Portal and the entry into force of the new Law resulted in the elimination of the possibility to easily access some very important information related to the negotiation procedure. In the past, the opinions of the Public Procurement Office were always visible, as well as the tender documentation, while now these documents are not published. This is a major shortcoming, bearing in mind that the negotiation process already carries with it increased risks of corruption.

## Internal acts of purchasers

Of great importance for the application of all principles that are not elaborated in detail through legal provisions is the "internal act of the contracting authority" ("special act") of Article 49 of the Law. The procuring entity is obliged to regulate by this act the manner of planning, implementation of public procurement procedure and monitoring the execution of public procurement contracts (manner of communication, rules, obligations and responsibilities of persons and organizational units), manner of planning and implementation of procurement to which the Law does not apply, as well as of the procurement of social services and other special services. The contracting authorities should publish this act on their websites.

In terms of the scope of the internal act and the possibilities for its successful implementation, the Law from 2019 represents a significant step backwards compared to the previous one (from 2012), which for the first time established the obligation to adopt this document.[22] Among other things, it was envisaged that the Public Procurement Administration would prescribe the content of the internal act in more detail, publish a model act and check the compliance of the contracting authorities acts with the prescribed rules.



During the implementation of the new Law, some examples of good practice were noted, where, for example, local governments envisaged that they would publish information on procurement on their websites, although the Law did not oblige them to do so (e.g., procurement below new thresholds, information on the fact that procurement is carried out, with a link to the Portal).[23]

## Law on Free Access to Information of Public Importance

The Law on Free Access to Information of Public Importance[24] has been a great support for the transparency of public procurement data since 2004, both through its provisions and through the practice of ruling on complaints, which practice was established by the Commissioner for Information of Public Importance.[25] This Law is important because on the basis of its provisions, information and copies of documents whose proactive publication (on the Portal, on the client's website) is not prescribed as obligatory, and which by their nature do not represent a secret, can be requested and often obtained. The Law also helps to obtain documents that contracting authorities would like to withhold, citing various grounds of secrecy, as these reasons must be reconsidered in the application process, first by themselves and, in the event of an complaint, by

[22] https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Komentari_i_predlozi_za_dopunu_predloga_ZoJN.pdf

[23] For ex. https://www.vrnjackabanja.gov.rs/dokumenta/javne-nabavke, http://velikogradiste.rs/javne-nabavke-4/

[24] *("Official Gazette of RS", No. 120/2004, 54/2007, 104/2009, 36/2010 and 105/2021)*

[25] https://www.poverenik.rs/sr/publikacije/приручници.html

the Commissioner. The Law on Free Access to Information also helps to obtain information that is not directly covered by the provisions of the LPP, but relates to the implementation of the concluded contract or to procurements conducted under some other procedure (exceptions). Finally, this Law stipulates the obligation to proactively publish a lot of information on public procurement, within the factsheet.

Amendments to this Law from the end of 2021, specified in the Law itself (and not only in the Instruction issued by the Commissioner), that the factsheet contains: "15) data on public procurement, including the public procurement plan and the list of concluded contracts on procurement of goods, services, works and real estate, with the amounts of concluded contracts, date of conclusion and duration". Also, the obligation to produce and publish the factsheet has been significantly expanded, so that it now covers almost all contracting authorities, while previously such local public companies, among others, did not have such an obligation.

The number of cases in which public procurement information is withheld remains high. During 2021 and during 2022 (until 5.5), the Commissioner ruled on 119 complaints related to the denial of requests for data on public procurement. Even more worrying is the fact that the list of decisions of the Commissioner (from all years)[26], which have not been enforced, includes as many as 13 related to public procurement.

## Monitoring, oversight and auditing

### A brief history



More than the weakness of legal provisions, the sore point of any anti-corruption law is the lack of control mechanisms. In the area of public procurement laws, the main problem during the first decade of implementation was the lack of clear division of competencies between the Public Procurement Office, the Ministry of Finance, the Commission for Protection of Rights and other bodies, as well as numerous legal gaps. While the PPO performed expert tasks (preparation of by-laws, training) and supervise the compliance of certain provisions of the Law (especially when giving opinions on the application of negotiation procedures), the Ministry of Finance was competent for general oversight of the implementation, whereas in practice did not perform it.

Since oversight by state authorities was clearly insufficient, the main channel for resolving irregularities were the activities of disgruntled bidders, only a small fraction of whom were willing to use the legal mechanism to protect their rights, and the pressure of the public. The status of the Republic Commission for the Protection of Rights was also not properly regulated from the outset, as it was initially established "within the Public Procurement Administration". During one period it did not function at all, and then faced a large number of cases and delays.

As much as controlling the validity of the public procurement procedures itself was problematic, the planning in accordance with the purpose and executing of contracts was even bigger problem. The things have changed significantly since the start of the work of the State Audit Institution,

[26] https://www.poverenik.rs/images/stories/dokumentacija-nova/izvestajiPoverenika/2021/LatNI2021.doc

which already in its first Report cited numerous irregularities in public procurement that had not been detected before, and continued to do so in every subsequent Report. Increased attention to public procurement was one of the first positive consequences of the opening of the negotiation with the EU, and Chapter 5 concerning public procurement was opened among the first, on December 13 2016.

A significant strengthening of the public procurement monitoring mechanisms came with the 2012 adoption of the 2012 LPP, which was among the first laws proposed by the new ruling party (SNS), as part of its political program, with which it received significant voters' support. This Law assigned, among other things, significant supervisory powers for the Public Procurement Office, the mechanism of civic supervision and protection of whistleblowers, improved independence of the Republic Commission for Protection of the Right. The Law introduced special mechanisms for preventing and suppressing the risk of corruption and reporting to the Parliamentary Finance Committee. However, some provisions were not fully functional from the very beginning, and their weaknesses emerged in practice, especially in relation to punishing suspected abuses.

## Monitoring and supervision according to the provisions of the new Law

The Law on Public Procurement from 2019, instead of improving the previous solutions, changed the system of monitoring and supervision over public procurement in a way that caused concern. The basic premise of the new legal solution is the division of competencies between the Public Procurement Office and the Ministry of Finance, so that the PPO conducts "monitoring" of procedures, and the Ministry supervises the execution of contracts.



According to Article 180 of the LPP, the Public Procurement Office shall perform "monitoring over the application of public procurement legislation for the purpose of preventing, detecting and removing irregularities that may arise or have arisen in the application" of that Law. The monitoring procedure shall be carried out pursuant to an annual monitoring plan that is adopted by the PPO, on the basis of notification from a legal or natural person, state authorities, the autonomous province authority and the local self-government unit, or ex officio , when it comes to the negotiation procedure without prior publication referred to in Article 61, paragraph 1, points 1) and 2). The monitoring performed during the conducting of a public procurement procedure does not suspend it. Contracting authorities, bidders and public authorities are obliged to provide the requested data and information of relevance for the monitoring to the Office, within the 15 days.

On the other hand, the monitoring shall not be carried out if the PPO establishes that they are not competent, where the period of three years has elapsed since the completion of the public procurement procedure or the conclusion of the contract without conducting the procedure, or when the applicant and information relevant for monitoring cannot be identified from the notification.

PPO prepares an annual report on the conducted monitoring, which shall be submitted to the Government and the National Assembly no later than March 31 every year. PPO further regulates the manner in which monitoring is performed. The Public Procurement Office has drafted a bylaw,

the Rulebook on the procedure of monitoring the application of public procurement regulations. The Rulebook envisages several types of monitoring - regular, extraordinary, control and supplementary. However, it did not provide deadlines for the Public Procurement Office actions, the minimum coverage of each monitoring (which is checked through regular monitoring), the duration for regular controls and the minimum number of procurements that will be controlled.

Transparency Serbia has proposed significant changes to this article of the Law, so that the PPO is responsible for "monitoring and supervision" (instead of the term monitoring, which is not common in domestic legislation). Furthermore, we suggested that in case of established incompetence, the Office will inform another competent authority in order to initiate the procedure, respecting the rights of whistleblowers. Moreover, with a notification that was not signed, we suggested that this should not be a reason for non-action by PPO, but only situations when it is not possible to see the violation of the Law that is indicated. No less important is the proposal that the monitoring report, in addition to being submitted to the Government and the Assembly, be published on the PPO website. The proposal was that instead of the Ministry of Finance, the PPO supervises the implementation of the contract, as an administrative body that is more professional and experienced in that regard.

The program for the development of public procurement in the Republic of Serbia for the period from 2019 to 2023 was adopted only at the session of the Government held on November 13, 2019. The program was adopted with explicit reference to the provisions of the relevant regulation for the preparation of planning documents - Article 38, paragraph 1 of the Law on Planning System of the Republic of Serbia.[27]



When it comes to reducing irregularities, the need for the PPO to conduct systematic monitoring is emphasized. "Based on the data collected in the systemic monitoring, the PPO will be able to determine in which areas and with which contracting authorities it is necessary to perform this type of monitoring in order to prevent (but also detect) incorrect actions in conducting public procurement procedures, but also in some In some cases, acting on complaints, react in a timely manner and influence the actions of the participants in the public procurement procedure in accordance with the LPP", it is said in the Program.

It is important that the Program states that the results of monitoring activities need to be made available to the public "through the relevant media, through information on the most common causes of misapplication of regulations, including possible structural or recurring problems in the application of rules, prevention, detection and adequate reporting of cases of fraud, corruption, conflicts of interest and other irregularities related to public procurement." This, however, is not the practice. Even the monitoring report itself is not published before the Government and the Assembly decide on it.

It is also pointed out that the PPO should help other bodies with its findings (budget inspection of the Ministry of Finance, inspection bodies, the State Audit Institution, the Police and the Public Prosecutor's Office) to be more efficient. Although the Program envisages "systematic monitoring

[27] "Official Gazette of RS", No. 30/18

of the practice of competent bodies, such as the Republic Commission and the State Audit Institution, but also continuous awareness of these institutions, in order to identify the most common irregularities identified by these bodies, then to act preventively (through presentation to the public and additional education) and prevent the recurrence of these irregularities ", the new Law did not bring enough preconditions for that. Namely, it does not envisage the duty of the PPO to perform general supervision over the implementation of the Law, which would ensure monitoring of the work of other bodies, but only "monitoring" (of public procurement procedures) on one hand, and supervision over contract execution, performed by the Ministry of Finance.

In the first monitoring report, the Public Procurement Office stated that since the entry into force of the new Law on July 1 2020, most questions have been about the use and functioning of the new Public Procurement Portal and new legal provisions. The establishment of electronic communication through the Portal was emphasized as the most important novelty. The Monitoring Group had four employees, and a total of five are planned. In combating and preventing irregularities in public procurement procedures and fighting corruption in 2020, the PPO cooperated with the Prosecutor's Office in 15 cases, with the Ministry of the Interior in 13 and with the Agency for the Suppression of Corruption in 14 cases. All 42 requests referred to proceedings conducted under the old Law. The PPO also acted in 35 cases of supervision over irregularities reported by businesses and "in a certain number of cases" not specified by the contracting authorities. In 2020, the PPO submitted eight requests for initiating misdemeanor proceedings, half of which were the result of acting on the submitted complaints. Misdemeanor complaints were filed because of contracts concluded with no previously conducted public procurement procedure, implementation of a non-open or restrictive public procurement procedure without fulfilling the conditions, failure to communicate lawfully and to publish the public procurement plan. Comparative data on the number of monitored public procurements with the total number of conducted public procurement procedures in 2020 show that this type of supervision covers only one out of 400 procurements.



The monitoring report was published only on the website of the National Assembly, which has not yet discussed it. Although it is a very extensive report, it was published as a non-searchable scanned document.

The year 2021 was marked by record numbers of concluded contracts, their total value, as well as the share of public procurements in the gross domestic product (GDP), when compared to the previous year. The increase in the number of contracts was caused by the fact that contracts for each individual lot or purchase order are now all registered on the new Portal, unlike before. The increase in overall contract value probably reflects not just a higher amount of procured goods, services and works, but also the fact that new reporting is more comprehensive.

In 2021, approximately 49,000 procedures were announced under both the old and the new Law, while in 2020 there were around 56 thousand procedures announced. In the last year of application of the old Law (2019) there were about 62,000. This reduction in the number of announced procedures was mainly influenced by raising the threshold below which the Law does not apply. In the first quarter of 2022, there was a noticeable increase (of approx. 20%) in the number of announced procedures on the Public Procurement Portal compared to the same period of the previous year.

The Public Procurement Office has not yet published a monitoring report for 2021. The data published in the Draft Action Plan for the Program for the Development of the Public Procurement System show that 258 procedures were monitored in 2021, which is fewer than in 2020 (274). Having in mind that only about 0.5% of procedures is subject to monitoring, the monitoring scope may be considered extremely small. The organization Transparency Serbia submitted a proposal that the Draft Action Plan increase the number of monitoring to 500 in 2022, which was accepted. Another thing that should be improved is informing the applicants about the outcome of their submitted monitoring initiatives.

Things are even worse when it comes to the supervision of the implementation of public procurement, which should be performed by the Ministry of Finance. The manner of performing that supervision, as well as its scope, are not regulated by the Law on Public Procurement, nor was it envisaged to adopt a bylaw that would deal with these issues.

There is no data available on contract execution oversight in neither 2020 nor 2021, which should be performed by the Ministry of Finance. The new Law on Budget Inspection, adopted in December 2021 (until now regulated through the Budget System Law only), provides that budget inspection within this Ministry will perform such oversight, but the Law will be applied as of January 1 2023.

In its annual Report for 2021, the SAI pointed out irregularities observed in the audit of financial statements in the total amount of 180.59 million dinars, of which 50.82 million dinars (all with one audited entity) related to non-implementation of public procurement procedures. When it comes to the audit of regularity, a total of 120.13 billion dinars of procurements were observed (in 108 entities). In 1,395 cases, irregularities were noticed, which concern as much as 53.46 billion dinars (44.50%). Irregularities refer to non-implementation of the procedure, despite the fact that there are no reasons for exemption - 17.67 billion dinars, to the implementation of procurement even though no internal act was adopted or procurement is not planned (68.58 million dinars), irregularities during implementation dinars), during the conclusion of the contract (4.14 billion dinars), during the execution of the contract (3.44 billion dinars).



These SAI findings are another clear indication that the established monitoring and control system is clearly not sufficient to prevent breaches of the rules at a time when it is still possible to prevent possible damages. In addition, it should be noted that during 2020, the SAI noticed a violation of the rules on public procurement to a significantly lesser extent (14.24%).

## (Non-)punishment of violations of the Law

There are several types of sanctions that can be imposed for violating public procurement rules. The Criminal Code distinguishes since 2012 a separate criminal offence – misfeasance in public procurement – that is developed from the general concept of abuse of official duty. A person who submits an offer based on false information, colludes with other bidders, or undertakes other unlawful actions with the aim to influence the decision of a contracting authority, shall be punished with imprisonment from six months to five years. Similarly, the penalty will be imposed against a person in the contracting authority who, through abuse of position or powers, by exceeding

his/her powers or failure to discharge his/her duty violates the Law or other regulations on public procurement and thus causes damage to public funds. When the estimated value of public procurement is higher than RSD150 million (nearly €1,27 million) – no matter how big the actual damage is – the punishment will be higher (from 1 to 10 years) It is also envisaged that a perpetrator who voluntarily discovers that a bid is based on false information or an illicit agreement with other bidders, or that he has taken other illegal actions with the aim to influence the contracting authority's decision before he decides on the contract, may be acquitted.

This crime is rarely prosecuted. According to available data, in 2020, there were 111 criminal charges, 26 people were indicted, and only 17 verdicts were passed, of which as many as 13 on the basis of a plea agreement (in 2019, there were 102 criminal charges, 25 people were indicted, 16 verdicts were passed – 6 on the basis of a plea agreement). Official data for 2021 are still not available.

As far as misdemeanors are concerned, there are two articles in the Law on Public Procurement that prescribe a number of misdemeanors, divided into misdemeanors of contracting authorities and misdemeanors of bidders. In the period from 2013 to 2020, they were not sanctioned at all, due to inconsistencies between the provisions of the previous Law on public procurement and the Law on misdemeanors. With the adoption of the new Law on public procurement, the obstacles that existed before were removed, so that at least some of the misdemeanors related to public procurement are punished again. Although there are still no official statistics on misdemeanor courts, it can be indirectly concluded that the number of misdemeanor proceedings before the courts has increased. Thus, for example, the annual Report of the Public Procurement Office shows that in 2021, the Office submitted 143 requests for initiating misdemeanor proceedings, while in 2020, the Office submitted only 8 such requests.



Since there are no official statistics for 2021 for misdemeanors, Transparency Serbia sent requests for free access to information of public importance to the Misdemeanor Courts in Belgrade, Novi Sad, Kragujevac and Niš, as well as to special departments of the High Courts and the Prosecutor's Office for Organized crime. The aim of the request was to determine the number of proceedings that have been conducted and are still being conducted in the above-mentioned courts for the criminal offense of "Misfeasance in public procurement", as well as for misdemeanors related to public procurement. When it comes to statistics for criminal offenses, we received an answer from the High Court in Belgrade that in 2021, 2 verdicts were passed related to the said criminal offense, and from the High Court in Niš and the Prosecutor's Office for Organized Crime that in 2021 there were no cases related to the crime related to public procurement. We received a response to the requests that had misdemeanors for the case from all Misdemeanor Courts, and 49 misdemeanor proceedings are currently pending before them.

Violation of integrity rules may also constitute grounds for disciplinary measures against civil servants, but there are no records as to whether such measures have been applied. Therefore, even if sanctions exist and may be proportionate and dissuasive, the frequency of their application is insufficient to deter from wrongdoings.

While, on the one hand, the number of criminal offenses and misdemeanors in the field of public procurement that are punished is small, the number of cases in which misconduct is suspected is huge. One of the most prominent cases of this kind is the one in which misconduct suspected in public railway companies and the relevant ministry[28]. Another case that has recently stirred up the public, more because of the subject of the procurement than because of the procedure itself, refers to the wiretapping equipment of EPS.[29] Numerous examples of this kind were also analyzed in the research published by the members of the coalition prEUgovor, Transparency Serbia and the Center for Applied European Studies during the previous year.

In addition to (non) punishment of individuals responsible for violating the rules on public procurement and public-private partnerships, the lack of reaction of state bodies is also worrying in cases when actions need to be taken to annul illegally concluded contracts. A good example of this is the decision of the Belgrade Higher Public Prosecutor's Office[30] not to initiate proceedings to determine the nullity of the agreement on joint construction of the "Belgrade Center" railway station building, parking and accompanying commercial facilities, although for concluding that agreement, which by its nature is a public-private partnership, no public procurement procedure was conducted, as required by Law.

Not only is the degree of punishment for irregularities unsatisfactory, but the planned measures can also be assessed as such. Thus, the Operational Plan for the Prevention of Corruption in Areas of Special Risk, which should be implemented during 2021 and 2022, does not envisage measures that could lead to the achievement of that goal, except indirectly (training for police and prosecutors). The situation is similar when it comes to the Action Plan for Chapter 23. As can be read from the last Report on its implementation, although for the first quarter of 2022 it was planned to conduct and present "Assessment of the impact of measures taken to reduce corruption in public procurement", the Report is still being prepared, while taking corrective measures based on the findings of the Impact Assessment is planned only for the first quarter of 2023.



[28] https://www.krik.rs/bivsi-drzavni-sekretar-poledica-negirao-da-je-namestao-javne-nabavke-potpisao-bih-isto-i-sad/

[29] https://birn.rs/prislusni-centri-unutar-eps-a-nabavili-opremu-kakvu-koriste-tajne-sluzbe/

[30] https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Odgovor_VJT_-_ni%C5%A1tavost_Prokop.pdf

## Recommendations[31]

**For Government and the National Assembly**

- Discontinuing the practice of contracting public procurement and public-private partnerships without competition and the public, and based on interstate agreements, introducing control mechanisms and providing additional information to citizens regarding the implementation of concluded contracts of this type and repealing other laws (except LPP and LPPPC) which currently regulate the implementation of certain public procurements and public-private partnerships;
- Creating preconditions for greater proactivity of public prosecutor's offices in detecting irregularities in public procurement and public-private partnerships and in eliminating the harmful consequences of improperly planned, conducted and executed public procurements (capacity building, reviewing of RPPO performance reports).

**For the New Convocation of the National Assembly**

- A request of the competent committee of the National Assembly to the Government to submit data on procurements conducted in connection with the COVID-19 pandemic, a recommendation to the State Audit Institution (SAI) to include these procurements in the audit plan, and review of reports of the Government and SAI;
- Organizing a public hearing to discuss the Public Procurement Office's Report on public procurement monitoring and information on the work of all other bodies responsible for monitoring, control, supervision, audit and review of public procurement procedures, and prosecution of violators;
- Support to the State Audit Institution for conducting a number of feasibility audits related to public procurement, reviewing SAI reports and initiating a procedure to determine the responsibility of the heads of audited entities that did not eliminate irregularities observed during other audits.

**For the new Government of Serbia, ministries and the Public Procurement Office**

- Correction of existing public policy documents in the field of European integration, public procurement and public-private partnerships so that it covers all important issues for eliminating irregularities and increasing competition in public procurement;
- Revocation of the conclusion of 15.2.2020. on the secrecy of procurement related to the pandemic COVID-19;
- Increase the number and quality of information on the Public Procurement Portal, the functionality of the Portal and strengthen the connection with other databases, including:



[31] See also: Proposed Priorities for the New Government and the New Convocation of the National Assembly 2022-2026, prEUgovor, February 2022.

  - Publication of data on the execution of contracts and connection with the register of electronic invoices and data of the Treasury on executed payments;
  - Publication of individual information on procurements carried out without the application of the Law, and not only a summary overview;
  - Expanding the review of public procurement data by the number of bids per procedure;
  - Publication of information on performed monitoring, supervision, audit, misdemeanor and criminal proceedings in connection with each procurement for which some of it has been conducted;

- Amendments to the Law on Public Procurement so to restore the obligation to publish tender documents and opinions of the PPC for negotiated procedures without publishing a public invitation;
- Development of a methodology based on which the Budget Inspection, i.e. another appropriate unit of the Ministry of Finance, will monitor the execution of public procurement contracts in order to maximize the scope and quality of that supervision and publish the results of supervision;
- Promoting the role of internal audit concerning the proper conduct of public procurement;
- Improving the Rulebook governing the monitoring of the Public Procurement Office so that the coverage is as extensive as possible and the obligations of the PPC are more precisely defined, and to ensure timely publicity of information on the conducted monitoring;
- Development of a model of an internal act to give the contracting authorities the opportunity to cover all crucial aspects of public procurement that the Law sufficiently regulates, and conduct monitoring of the application of the rules on the adoption of the internal act;
- Promoting examples of good practice in public procurement (e.g. publishing information when there is no legal obligation);
- Changing the legal framework for public-private partnerships, not only to comply with EU rules but also to address identified problems (including strengthening transparency, the efficiency of oversight, penalties for breaches of rules, improving the legal status of the Commission for Public-Private Partnerships, publishing information on supervision over the execution of existing contracts);
- Considering the need to clarify Article 228 of the Criminal Code, based on data on previous practice, to eliminate dilemmas and illogicalities and more efficient punishment of a large number of perpetrators.

**For the European Commission and the European Parliament**

- When assessing Serbia's progress in amending regulations in the field of public procurement and public-private partnerships and giving opinions on draft laws, the European Commission should pay equal attention to alignment with the EU acquis and other identified problems;
- To continue to point out the inadmissibility of the practice of regulating public procurement and public-private partnerships through interstate agreements and "special laws";
- To expand the range of issues on which it will assess the progress in the implementation of public procurement and public-private partnerships in its reports for Serbia by including an analysis of the importance of collected statistical indicators (e.g. for performance in detecting and punishing detected irregularities, competition, efficiency).

# About prEUgovor

Coalition prEUgovor is a network of civil society organisations formed in order to monitor the implementation of policies relating to the accession negotiations between Serbia and the EU, with an emphasis on Chapters 23 and 24 of the Acquis. In doing so, the coalition aims to use the EU integration process to help accomplish substantial progress in the further democratisation of the Serbian society.

Members of the coalition are:

ASTRA – Anti-Trafficking Action
www.astra.rs

Autonomous Women's Centre (AWC)
www.womenngo.org.rs

Belgrade Centre for Security Policy (BCSP)
www.bezbednost.org

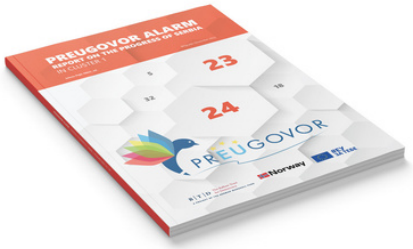
Centre for Investigative Journalism in Serbia (CINS)
www.cins.rs

Centre for Applied European Studies (CPES)
www.cpes.org.rs

Group 484
www.grupa484.org

Transparency Serbia (TS)
www.transparentnost.org.rs

PrEUgovor's key product is the semiannual report on the progress of Serbia in Cluster 1.




Follow prEUgovor activities on the official website, Facebook page and Twitter account.

**ISBN-978-86-84711-52-8**

B | T | D The Balkan Trust for Democracy
A PROJECT OF THE GERMAN MARSHALL FUND

Norway