THE ANALYSIS OF THE STATE OF PLAY WITH IRREGULARITIES IN PUBLIC PROCUREMENT WITH RECOMMENDATIONS TO IMPROVE MEASURES FOR THEIR EFFICIENT DETECTION AND PUNISHMENT

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The main purpose of the project is to provide support to developing a stable, transparent and competitive public procurement system in the Republic of Serbia, in accordance with the European Union standards, including enhanced implementation of the strategic and political framework for creating an efficient and accountable procurement system.

The following outcomes are expected from the project:

- strengthened and additionally developed strategic, legislative and institutional framework for public procurement, aligned to the EU *acquis*,
- improved implementation of regulations in the area of public procurement practice,
- established and developed e-procurement platform and
- strengthened capacities and professional competences of the Public Procurement Office of the Republic of Serbia and other relevant target groups.

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INTRODUCTION

Regulating public procurement procedures has got several objectives. Besides meeting the conditions for unimpeded movement of goods and services, contribution to economic development, establishing financial prudence, it can be noted that, nevertheless, economic and efficient use of public funds (the "value for money" principle – maximisation of the value obtained against the price that has been paid), as well as suppression of irregularities, are two main objectives of public procurement.

Thus, fighting irregularities is one of the primary targets of the overall public procurement system. Given that approximately 3,000,000,000 EUR is annually spent on public procurement in Serbia (the official data of the Public Procurement Office), one can note that in this area there is a risk of actions that aim at illegal favouring of certain bidders and discrimination of others, in order to meet certain financial, political and other interests. Naturally, it is the vested interests of a narrow circle of persons – individuals and interest groups, threatening the public interest.

Irregularities in public procurement do not only generate losses (in public funds), but also cause the failure of purchased goods, services and works to meet the needs of contracting authorities, i.e. end users, with their features, quality and delivery dates. It also happens quite often that only a part of contracted value is delivered or that delivery fails completely. The consequences of inadequately conducted public procurement are reflected as double negative onto the work of all contracting authorities: their operational costs increase, whereas the quality of services rendered to the citizens is lower than the potential. All this ultimately affects the citizens, because it is mainly the institutions funded by their money, and citizens are users of those services[1].

Suppression of irregularities in public procurement, thus, needs to be implemented through various measures permeating all stages of public procurement process: planning, conducting public procurement process and contract execution. The public procurement system should ensure efficient prevention of irregularities and enable efficient sanctioning in case of their occurrence. That is why the question of irregularity suppression cannot solely be viewed as a matter of taking any special measures, but as a goal to be achieved through various aspects of public procurement system reform, e.g. enhancing transparency[2], but surely through better pubic information and higher awareness of all stakeholders in public procurement system.

1. THE STATE OF PLAY – IRREGULARITIES IN DIFFERENT STAGES OF PUBLIC PROCUREMENT

Public procurement in the broadest sense consists of planning, the very procedure of public procurement (procurement contract award) and procurement contract execution. So, these are the three stages of a public procurement cycle and in each stage certain irregularities are possible and they shall be presented in the text below.

[1] Saša Varinac, Ivan Ninić, The Association of Public Procurement Professionals of Serbia – *The Corruption Map in Serbia's Public Procurement,* The OSCE Mission to Serbia, 2014, p.2

[2] The Strategy of Public Procurement Development in the Republic of Serbia for the period 2014–2018 ("The Official Gazette of the RS", number 122/14).

1.1 PLANNING

Public procurement planning is the initial stage in a procurement cycle and implies several actions taken by the contracting authority to prepare the public procurement conducting procedure and subsequent public procurement contract award and execution. The actions are: identifying the needs for public procurement and market survey, allocation of funds by budget appropriation or financial plan, as well as making a procurement plan with procurement time-table, type of procedure, estimated contract value and other necessary elements.

1.1.1 Inadequate procurement needs identification

Through procurement needs identification, the contracting authority decides what to purchase within a year by actively communicating within its organizational units (e.g. technical, financial, legal and sales department). With that, the contracting authority is governed by procurement and needs analysis in the previous period, current needs and inventories, analysis of the current state of play in the market, as well as annual and mid-term operation plans.

It is very important for the contracting authority to realistically and objectively identify the needs from the aspect of tasks within its competences, but also from the aspect of available of staffing and technical capacities. Regarding the tasks performed by the contracting authority, one should take into account not only the regulations and decisions of competent authorities defining those tasks, but also the annual and mid-term operation plans.

In the procurement planning stage, a special attention needs to be paid to timeliness and planning method. Contracting authorities struggle with the problem of delayed procurement plan-making and inadequate planning in terms of planning more or less than needed. That problem results in engaging excessive resources and leaving them unused, or subsequent identification of needs not envisaged at the planning stage, which calls for conducting negotiated procedures “by urgency” or leaves the contracting authority without the necessary goods or services.

The main prerequisites of good planning are: monitoring stock inventories, managing the supply chain and knowing the users’ needs. Also, it is necessary to thoroughly survey the market in order to obtain information on potential bidders, intensity of competition, the risk of possible agreements among bidders, which is all relevant in order to plan the type of procedure to conduct as well as the way of defining technical specifications and other elements of the tender documentation.

Practice has shown that little or no attention is paid to the question of performance, i.e. purposefulness of procurement. In needs specifications made by the user through the contracting authority and submitted to the public procurement service for planning, most often a written rationale as a basis for justifying the procurement is missing[3]. Also, contracting authority often does not have a model for writing justifications with clear-cut elements indicating how the specific procurement can contribute to a more economical and efficient achievement of the contracting authority’s goals, i.e. its business (work) plans.

In terms of the above discussed, the objectivity of contracting authorities in identifying the needs for procurement should be assessed through replies to the following questions:

[3] For more details see another document prepared by the Project: „How to Assess and Justify the Needs for Public Procurement – Guidelines for Contracting Authorities”, available at: http://eupodrska.ujn.gov.rs/izvestaj-kako-proceniti-i-opravdati-potrebe-za-javnim-nabavkama-smernice-za-narucioce/.

1) Is it necessary to purchase the specific procurement subject?
2) Are the requested quantities of goods (volume of works or services) necessary?
3) What is the adequate quality of the procurement subject?
4) Is the procurement subject, by its characteristics, suitable to the needs of the contracting authorities?

All the above belongs to the domain of consideration, primarily for the sake of economical actions of contracting authorities in the initial stage of public procurement. Procurement of something not really needed for contracting authority, or procurement of inadequate quality and characteristics causes unnecessary expenses of public funds. In certain cases, the motive thereto can be of corruptive nature.

Regarding **unnecessary procurement**, special attention should be paid to the procurement of:

- intellectual services the results of which are not to be used by the contracting authority, e.g. various analyses, research, translation, etc;
- consumables or spare parts, if there are significant stocks in the contracting authority's storage, not used within a longer period;
- replacement of the equipment still usable and in good conditions (purchase of new vehicles, although the contracting authority possesses vehicles that have not been used much and that are completely in order);
- professional specialised training for persons who don't need such training, given their job positions;
- procurement of special off-road vehicles although no task performed by the contracting authority indicates that the vehicles could be used in specific terrains.

Examples of procurement of quantity and volume larger than needed are:

- large quantity of construction material, although the facility to be built has a small area and number of storeys;
- computers or parts of office furniture (desks, chairs, etc.) in quantities much larger than the number of contracting authority's staff;
- web site design for contracting authority, with a high number of unnecessary applications that expected visitors of the web site are not likely to use.

Regarding the procurement **significantly above contracting authorities' needs by quality and technical characteristics,** examples can be the following:

- official vehicles of unnecessary volume, dimensions and other features;
- computing equipment and programmes of high performances (high processor rate, significant memory available, etc.), although procured for the needs of staff who are going to use them for simple operations of text processing or email exchange;
- official telephones with unnecessary features, e.g. high resolution camera;
- expensive office furniture.

Examples of procurement **with quality significantly lower than needed** (mainly because it is cheaper) are:

- surgical yarn and gloves cracking at surgical interventions and thus directly threatening the patients' lives;
- spare parts of short life cycle jeopardising all facilities due to low quality, potentially causing breakdowns and damage to exceed the price of the spare parts by multiple times (e.g. procurement of mining facilities' ball bearings);
- software preventing the contracting authority from doing e-business it is obliged to do under special regulations;
- low quality winter tyres disabling the movement of patrol and other off-road vehicles in adverse winter conditions;
- printer toners disabling clear and legible document production;
- road asphalting with insufficient quantity of tarmac or low quality tarmac causing frequent road damage on the same traffic lines;
- safety equipment not protecting the staff from extreme conditions they are exposed to while performing tasks for the contracting authority.

Conducting unnecessary procurement, as well as procurement exceeding the realistic needs of contracting authority by volume and technical characteristics causes unnecessary, i.e. uneconomical expenditure of public funds, also potentially indicating the intention of enabling certain persons to obtain illegal gain.

1.1.2 Irregularities in defining the elements of Procurement Plans

Besides conducting unnecessary procurement procedures, i.e. procurement of unrealistic quantity and quality, there are certainly other irregularities occurring at this stage of public procurement too. The irregularities appear in defining the elements of procurement plan made by contracting authority and published on the Public Procurement Portal, with consequences that are not just formal non-compliance in the document contents. The irregularities are:

- application of a certain type of procedure although the prescribed requirements have not been met;
- unjustified use of exceptions;
- unrealistic estimate of contract value.

1.2 CONDUCTING PUBLIC PROCUREMENT PROCEDURES

Public procurement procedure, according to the current Public Procurement Law[4] (hereinafter: PPL), starts with taking a decision to initiate a public procurement procedure and ends with a decision of contract award becoming final (with no more possibilities to challenge it by filing a complaint – a request for ptotection of rights). At that stage of public procurement procedure, irregularities occur primarily in relation to tendering documents as basis for tender submission, limiting competition and favouring certain bidders through its contents. Also, at that stage, irregularities occur in unallowed communication among participants of public procurement procedure, both between bidders and contracting authority and among bidders themselves. In the former case, it is various forms of bias demonstrated through

[4] "The Official Gazette of RS", no. 124 from 29 December 2012, no. 14 from 4 February 2015 and no. 68 from 4 August 2015.

conflict of interest and violation of the integrity of procedure, and in the latter it is the conslusion of the so-called cartel agreements among bidders themselves. Certainly, at this stage of public procurement there occur irregularities related to professional evaluation of tenders, with assessment of tenders' compliance with the requirements, technical specifications and other requests of contracting authority.

The most important part of this stage of public procurement is certainly the preparation of tender dossier used for tender submission. At the same time, this is the most important part of this procurement stage is the preparation of tendering documents submitted as tender. It is the most important act-document composed by contracting authority and its composition, i.e. contents shall influence the entire course of public procurement procedure and subsequent procurement contract execution. It can be noted that the basic, constituent elements of tendering documents are the qualification criteria, technical specifications and contract award criteria. Those are important elements because they indicate what the contracting authority evaluates when selecting the successful bidder for procurement contract award. The requirements are relative to the bidders' capacities to execute the specific contract, i.e. the contracting authority's needs to be met through procurement procedure, while the criteria and their elements indicate the issues important to the contracting authority during the contract execution (first and foremost, the costs, but also other related parametres, e.g. the pace of contract execution). Besides those elements, tendering documents contain other information needed for bidders to submit suitable tenders, as tenders without deficiencies in their contents, indicating that the bidders are capable of executing the specific procurement contract.

Much as all the above basic elements of tendering documents are relevant for a correct and quality tender evaluation, each of those elements is liable to use for the purpose of limiting competition and favouring certain bidders.

1.2.1 Discrimination through qualification criteria

Regarding qualification criteria, contracting authorities express their needs through defining additional requirements in tender documents. Additional requirements primarily refer to the bidders' capacities to successfully execute the specific procurement contract and are related to their financial, corporate, staffing and technical capacities and equipment to respond to the contracting authorities' needs. Request for the head count, which is not really necessary, as well the unnecessary data on annual revenues, values and size of professional references, as well as equipment which is not commensurate with the procurement subject in quality and quantity, certainly indicate the tendency to favour a specific bidder, while preventing others from participating.

Examples of discriminatory qualification criteria:

- the contracting authority's requirement for bidders to have relevant prior contracts executed, by value and size significantly above the value of the specific contract (to build watermains several hundred metres long, the required references are dozens of kilometres);
- reqesting evidence of references not related to the specific procurement contract (contracting authority requesting references to delivery of specialised computing equipment for complex systems while actually purchasing simple PCs for daily office work);
- contracting authority's requirement for bidders to have annual revenues from their activities by multiple times (often ten times) higher than the value of the specific procurement contract;

- requesting unneccessary attests, certificates or examination reports, already possessed by the “favourite” bidder, while it takes a long time for other bidders to obtain them, so they don’t meet the deadline for tender submissions;
- contracting authority’s request for certain human resources without any rationale or logical relevance to the contract subject or execution (the request for a specific head count, regardless of the HR structure and their engagement for the specific contract execution);
- defining qualification criteria by way of preventing the submission of “joint tender”, i.e. tender of a group of bidders, by asking each bidder from the group to fully meet the requirements in terms of capacities (this makes the sense of submitting “joint tender” meaningless, because it is precisely in concerted efforts and capacities to meet the requirements);
- contracting authority’s request for certain technical capacities not logically related to the procurement subject and possessed by the “favourite” bidder (unneccessary vehicles, equipment or technology);
- requesting additional requirements that are not in logical connection with the specific procurement subject (e.g. insisting on the bidder demonstrating the offered advantages to the contracting authority in previous years, such as gifted equipment, donations or sponsorship).

1.2.2 Discrimination through technical specifications

Technical specifications are a set of objectively and accurately described characteristics of the specific procurement subject and represent the mandatory contents of the tender documentation. From the description it is obvious what the contracting authority’s requirements are regarding the properties, quality, quantity, packaging and other characteristics of the procurement subject itself. The bidders are obliged to fully meet the technical specifications defined by the contracting authority in the tender documentation, and, otherwise, the tender shall be rejected. On the other hand, the contracting authority is obliged to describe the procurement subject as objectively as possible, strictly avoiding descriptions that might pre-determine the successful bidder.

Discrimination through technical specifications are, perhaps, the most frequent ones in the contracting authorities’ efforts to “copy” the technical characteristics and dimensions of a certain bidder’s tender. In such situations, bidders who take the tender files need to be very cautious and pay a special attention to the technical specifications of the subject, establishing whether those are the technical characteristics that can actually be offered by a certain bidder alone. Namely, the contracting authority then does not openly favour certain bidders, by stating their names or type of product that only they can offer, which is not difficult to detect or challenge, but try to rig the contract for its “favourites” through a subtle definition of characteristics. With that, it should be emphasised that contracting authorities cannot adjust technical specifications to all bidders who believe that their bid should be selected, but their obligation is to bring all requirements in a logical connection with the contents of a specific procurement and objective needs following it. So, contracting authorities may not prevent any bidders from participation with the contents of their tendering documentation, or discriminate against those who can meet the requirements as such.

Contracting authorities would commit serious discrimination against bidders, and consequently limitation of competition too, if requesting technical characteristics of specific manufacturers or specific type of products when describing them, not allowing the equivalent products to be competitors. It often happens that contracting authorities justify such technical specifications in their tender documents by pointing to the generally known fact that products of a specific manufacturer are of higher quality than others, so the managers or staff of the contracting authority would select precisely such products if purchasing for their

own needs. However, the fundamental principle of public procurement procedures is that of efficiency and economy, so broad competition is the most important means to that end. Therefore contracting authority may not be governed by personal needs of individuals conducting the procurement procedure or those whose tender “should be” selected, but must objectively define the needs of the institution or organisation the functioning and operations of which the procurement procedure is conducted for. *Ipso facto*, the application of subjective measurements when defining technical specifications, without any specific and objective justification, restricts the competition and prevents the fulfillment of the mentioned principle. With that, the illegal material gain for individuals as consequence of such illegal actions should by no means be neglected.

Examples of discrimination against bidders through technical specifications of the contract subject as stated by the contracting authority in the tender files are:

- references to a specific trade mark, type of product or origin of manufacturing;
- simple “copy” of the favoured manufacturer’s equipment characteristics;
- conditionality of various equipment parts from the same manufacturer.

1.2.3 Discrimination through elements of criteria

Discrimination against bidders can be done through elements of the most economically advantageous tender criterion. If the contracting authority chooses elements of criteria not related to execution of the specific public procurement contract, or not really needed, and has certain information of those elements as possible to meet by one favoured bidder, it is certainly discrimination and limitation of competition. For example, defining technical and technological advantages as criterion elements, although those facts don’t actually bring any benefit to the contracting authority in terms of economic and efficient execution of public through one bidder, can cause additional costs to the contracting authority due to, say, the necessary and expensive training of staff, higher costs for consumables or necessary changes in technical equipment of bidders, demanding additional and unplanned procurement.

Examples of discrimination against bidders and limitation of competition through the criterion of the most economically advantageous tender are:

- applying non-defined and subjective criterion elements, e.g. “quality” or “special advantages”, to be evaluated on the basis of subjective attitudes of the contracting authority’s selection committee members;
- applying the methodology of weighting that is not objectively verifiable;
- evaluating with high number of weights for certain quslity certificate owned by certain bidders only, basically not needed for the procurement contract subject;
- applying the methodology of weighting suitable to certain bidders, or one of them, because it does not realistically reflect the differences between what has been offered (e.g. maximum score to certain technical advantages only and zero score to others, with that element thus losing the nature of a criterion and becoming a requirement).

1.2.4 Reaching cartel agreements among bidders in order to influence the outcome of public procurement procedure

There are three main types of agreement: agreement on price, agreement on delivery and agreement on the bidder offering the best tender. There are certain indicators of the existence of such agreements:

- formal, when tenders of different bidders contain the same errors and form;
- huge differences in prices between the lowest and other tenders;
- several interested parties asked questions, but only one bidder submitted a tender, although the situation in the relevant market is different and indicates more potential bidders capable of meeting qualification criteria;
- deliberate renunciation of a bidder who submitted a most advantageous tender, so that the contract be awarded to the second best tender, much less advantageous to the contracting authority.

1.2.5 Conflict of interest

Conflict of interest is a situation in which an individual performing a certain public function or professional activity is given the opportunity to personally benefit or to provide benefit to close persons, social groups and organisations, by making a decision or other act, to the detriment of the public interest. It is a conflict between the private interest, on the one hand, and of the public interest, on the other, when there is an excessive risk that private interest will prevail over the public, i.e., that corruption will happen.

The conflict of interest has multiple manifestations, and can be expressed before, during, and after the decision-making in a process. It occurs when a person taking part in making a decision or performing other activities of an authority or a public institution acts in a biased way in favour of the interests of individuals and at the expense of the public interest. Consequently, a conflict of interest can be expressed in all stages of public procurement, but it is most difficult to detect it in the planning stage when the needs of the contracting authority are adjusted to specific individuals or interest groups. In essence, the conflict of interest, or the reason why private interest is satisfied to the detriment of the public interest, is a certain relationship of co-existence between what represents the public interest (representatives of the contracting authority) and the representatives of the private interest (potential bidders). This can be a family, financial, or political affiliation.

The most common forms of conflict of interest that have been established by the authorities in the Republic of Serbia so far (the Republic Commission for the Protection of Rights in Public Procurement Procedures, above all) were:

- members of the commission of the contracting authority have not signed a statement confirming that they are not in conflict of interest or did not sign the statement before undertaking the first actions in the public procurement procedure (for example, before the preparation of the tender documentation);
- deputy members of the commission of the contracting authority who took part in undertaking certain actions in the public procurement procedure instead of members and did not sign the said statement;
- persons appointed as members of the commission of the contracting authority were at the same time engaged in the work of the bidders;
- persons appointed as members of the commission were in a particular business relationship with the bidder (for example, they were employed by the body engaged by the selected bidder to produce a report on testing the quality of goods, which was then submitted in its tender).

1.2.6. Irregularities in the opening and expert evaluation of tenders

Opening and expert evaluation of the tenders are part of the public procurement procedure in which the content of the tenders is determined, and based on this, they are evaluated in order to obtain the most

favourable tender. The contracting authority is, in addition, obliged to abide by what was stated in the tender documentation, and to act impartially and objectively. The deviation from what is stipulated in the tender documentation and the inability of the interested bidder to assure the objectivity and impartiality of the contracting authority in the decision-making can certainly be a serious irregularity. Non-transparent, non-objective and biased implementation of the opening and expert evaluation of tenders may result in a groundless rejection of some tenders, the selection of a tender that should have been rejected or the tender that is not the most favourable one based on the application of the criteria for the selection. In this way, certain bidders are directly prevented from their tender being selected, although they fulfil all that is required by the tender documentation, i.e., one bidder is allowed to be selected, although its tender should have been rejected, or is not the most favourable one.

Examples of irregularities at this stage of the public procurement process are:

- taking out or inserting documents (evidence) from and in the tenders in the course of their examination, with the aim of making the unacceptable tender acceptable and vice versa;
- allowing the bidder to modify or subsequently enter the individual data in its tender that is relevant to the evaluation of tenders (price, delivery time, etc.);
- intentionally neglecting the tenders in the offers in order to avoid the rejection of a favoured bid;
- non-argumented suspension of the public procurement procedure after it has been established (after the tender opening) that the favoured bidder cannot be awarded a contract, either because it has some shortcomings in the tender or because its offer is not the most favourable one;
- rejection of the tenders due to an unusually low price, without explanation indicating that public procurement cannot be implemented at the offered price;
- non-rejection of the tender despite the apparently unusually low price (which deviates significantly from the estimated value and prices in the tenders of other bidders), despite the fact that the bidder has not given a convincing explanation or did not give an explanation for such a price even though the contracting authority asked for such an explanation;
- non-rejection of the tender despite the apparently unusually low price (which deviates significantly from the estimated value and prices in the tenders of other bidders), so that the contracting authority does not require the explanation of such price and chooses it (contract) to enable the bidder that submitted it to increase the price in the phase of execution of the contract;
- the submitted samples of the procurement subject-matter are not analysed in a transparent way, by not inviting the bidders to attend the analysis and by not submitting minutes thereof;
- after the decision on the award of the public procurement contract, the contracting authority postpones the conclusion of the contract, expecting that the deadline for validity of the tender of the selected bidder expires, and the selected bidder will therefore withdraw from the conclusion of the contract.

1.3 EXECUTION OF THE PUBLIC PROCUREMENT CONTRACT

In order to ensure compliance with the principles of efficiency and economy at the stage of execution of public procurement contracts, it is very important that the contracting authority systematically and in an organised way monitors the execution, and takes measures to ensure the execution of the contract in the manner and under the terms offered in the tender that is selected as the most favourable one. In

comparative law, there are solutions on the basis of which the implementation of procurement procedures and the monitoring of the execution of the contract are two separate functions, carried out by different departments or different entities within the same contracting authority. In this way, it is possible to achieve greater objectivity in this monitoring.

The public procurement procedure is a prerequisite for the conclusion of a public procurement contract. Amendments to the contract thus concluded, as a rule, cannot be performed without the application of the provisions of the Law on Public Procurement, but in a number of cases, the contracting authorities conclude annexes to the public procurement contract without the application of that law or, permit the change of the offered conditions, without the annex to the original agreement, for the purpose of performance of the contract on the basis of which the tender was selected of the bidder with which the contract was concluded. If, at the stage of execution of the public procurement contract, a change is allowed of what was decisive when the contracting authority in the public procurement procedure made a decision with whom to conclude that contract, then it can be concluded that this procedure did not make sense, that is, all the participants in that procedure, other than the contracting authority and the selected bidder, were misled and that there was ungrounded spending of public funds.

When monitoring the execution of the contract, the contracting authority should determine whether the bidder fulfils its contractual obligation within the time limit and in the manner specified by the contract itself. The contracting authority is obliged, in addition, to act with due care and diligence, which means that it should take all measures at its disposal to ensure timely and adequate implementation of the contract. Of the measures that the contracting authority has at its disposal, the contractual penalties provided for by the contract itself, the financial security of contractual obligations (bank guarantees, insurance policies, etc.) are definitely determined, as well as the possibility of terminating the contract if it is obvious that the selected bidder will not or cannot fulfil its contractual obligations. In this regard, it is very important to emphasise that the termination of the contract and the activated financial collateral for fulfilment of contractual obligations, according to the provisions of the PPL, are negative references to the selected bidder, due to which its tender can be rejected in some subsequent public procurement procedures with the same subject matter. In addition, the contracting authority may also file a claim for compensation of damages due to failure to fulfil contractual obligations, as well as, in carrying out construction works, to insist that the supervisory authority fully performs professional supervision of the executed works.

Regarding the purpose of public procurements, systematic and regular monitoring of the execution of the contract can point to two occurrences that may make the purpose itself meaningless. On the one hand, situations must be sanctioned where the contracting authority permits such a change in the subject matter when executing the public procurement contract itself, which gives a preliminary positive assessment of the expediency, which occurred on the basis of an analysis of the planning phase and the implementation of the public procurement procedure, seriously bringing it into question or apparently denying it. Examples for this are the following:

- change in the subject matter of procurement, by allowing the contracting authority to deliver to the bidder something that is of lesser quality and technical characteristics in relation to what is offered (the same applies to the provision of services or the execution of works);
- change in the subject matter of procurement, by ordering the contracting authority to be delivered something that is not even provided for in the public procurement contract;

- change in the contracted quantity of goods to be delivered, or the change in the contracted volume of works or services, by the contracting authority requesting or permitting execution beyond what is specified in the contract;
- changes of the selected bidder, so that the contracting authority allows, instead of that bidder that had to fulfill the conditions for participation in the public procurement procedure and whose tender in that procedure was selected as the most favourable one on the basis of a predetermined criterion, procurement is implemented by another bidder that is not presented in that tender or introducing in the implementation of the contract a subcontractor that was not represented in the tender;
- other changes that represent an alternation of the offered conditions, on the basis of which the tender was selected.

On the other hand, the negative occurrence of public procurement at this stage is also an inadequate and unsystematic monitoring of the stocks in the warehouse or the condition of the equipment, assets or buildings that the contracting authority has, which were the subject matter of previously conducted public procurement procedures. In these cases, there may be consequences that no longer reflect a specific public procurement in which such items have been procured, but reflect on the planning and implementation of future public procurements.

2. CURRENT STATE OF PLAY – AUTHORISATIONS FOR TACKLING IRREGULARITIES IN THE APPLICABLE LAW ON PUBLIC PROCUREMENTS

The PPL defines the responsibilities of the Public Procurement Office (hereinafter referred to as: the Office) and the Republic Commission for the Protection of Rights in Public Procurement Procedures (hereinafter referred to as: the Republic Commission), but also the State Audit Institution (hereinafter referred to as: the SAI), Anti-Corruption Agency (hereinafter referred to as: the Agency), the Commission for the Protection of Competition, and defines the obligations of participants in public procurement procedures to carry out certain actions towards those institutions. In addition, the Ministry of Finance of the Republic of Serbia as well as the Budget Inspectorate within that ministry have a primarily supervisory role in the public procurement system.

The basic institutions in the public procurement system whose tasks, manner of work and form of organisation are regulated by the PPL are the Public Procurement Office and the Republic Commission.

2.1. PUBLIC PROCUREMENT OFFICE

Pursuant to the provisions of Articles 135 and 136 of PPL, the Office is formed as a separate organisation that supervises the application of the PPL, adopts by-laws and performs expert tasks in the field of public procurement, monitors the implementation of public procurement procedures, controls the implementation of certain procedures, gives opinions on the application and interpretation of the PPL, examines the fulfilment of the conditions for the implementation of the negotiation procedure referred to in Article 36 of the PPL, manages the Public Procurement Portal, performs activities related to accession negotiations with the European Union, submits requests for the initiation of the misdemeanour procedure and the procedure for determining the invalidity of the contract, establishes a vocational training programme and determines the manner and conducting the professional examination for the public procurement officer, prepares public procurement reports, proposes measures for improvement of the public procurement system, provides expert assistance to contracting authorities and bidders, contributes to the creation of conditions for the economical, efficient and transparent use of public funds

in the public procurement procedure. The Office is responsible to the Government of the Republic of Serbia for its work.

2.2. REPUBLIC COMMISSION FOR PROTECTION OF RIGHTS IN PUBLIC PROCUREMENT PROCEDURES

Pursuant to the provision of Article 138, paragraph 1 of the PPL, the Republic Commission is established as an autonomous and independent body of the Republic of Serbia, which provides protection of rights in public procurement procedures. The Republic Commission also has a number of special authorisations listed in the provisions of Articles 160-166 of the PPL, but it is a body established primarily for the purpose of ensuring the protection of rights in public procurement procedures, and for its work it is responsible to the National Assembly of the Republic of Serbia. In addition to deciding on requests for protection of rights and appeals against decisions of first instance authorities - the contracting authorities, the most important authorisations of the Republic Commission include: control of the implementation of decisions by the contracting authorities, conduct of the misdemeanour procedure in the first instance, fines, annulment of the public procurement contract, initiation of the procedure for determining the nullity public procurement contract.

The Republic Commission has exclusive competence to conduct the first instance misdemeanour proceedings in cases of violations prescribed by the Law on Public Procurements. Misdemeanour proceedings before the Republic Commission shall be initiated at the request of the Directorate, DRI (SAI), and other authorized body or ex officio, immediately after the knowledge of the offense.

However, in the Law on Misdemeanours and the Law on Public Procurement there are significant collisions regarding some provisions that do not allow the implementation of the first instance misdemeanour proceedings before the Republic Commission. In particular, the measures for securing the presence of a defendant in a misdemeanour procedure can only be enforced by the misdemeanour court, but not by the Republic Commission. Then, the existence of a misdemeanour and the pronouncement of a sentence is decided by adoption of a conviction or acquittal, which can be passed only by courts, but not by other state bodies, such as the Republic Commission. Also, the penalties imposed in the first instance misdemeanour procedure can be enforced only by the misdemeanour court that pronounced them or the court in the area where the misdemeanour order was issued, which means that the penalty imposed by the Republic Commission in the misdemeanour procedure could not be collected in enforcement proceedings. In the end, the authority conducting the first instance misdemeanour procedure for misdemeanours from the PPL is given authority to initiate it ex officio, which is inapplicable.

All of the above, in addition to other existing conflicting provisions of these two laws completely prevent the implementation of the first instance misdemeanour proceedings before the Republic Commission, so this authorisation of the Republic Commission is only available on paper.

2.3. STATE AUDIT INSTITUTION

According to the provisions of the Law on State Audit Institution, the State Audit Institution is the highest authority for public funds auditing in the Republic of Serbia, which is responsible to the National Assembly for the execution of its tasks within its competence. The SAI audits the financial statements, auditing of the regularity of operations and auditing of the purposefulness of operations.

According to the PPL, the SAI has certain authorisations in public procurement procedures, such as: submission to the institution of the contracting authority’s report on the change of the public procurement contract, submission of the contracting authority’s report on the award of the contract to

the bidder whose tender contains the price above the estimated value, filing of a request for protection of the rights requiring the annulment of the public procurement procedure in which the irregularity has been established and the initiation of a misdemeanour proceeding in connection with public procurement offenses before the Republic Commission.

The implementation of the audit of financial operations in terms of public procurement operations is certainly an integral part of the SAI's authorisations, where business is determined in accordance with the provisions of the Budget System Law, Budget Law, PPL and other financial regulations. Also, the audit of business expediency will always refer to the control of a particular phase of public procurement procedures, which primarily refers to the planning of public procurement.

2.4. ANTI-CORRUPTION AGENCY

The Anti-Corruption Agency, in accordance with the provisions of the Law on the Anti-Corruption Agency, is an autonomous and independent state body, accountable to the National Assembly of the Republic of Serbia for performance of duties from its purview.

The Agency supervises implementation of the National Strategy for Combating Corruption and the Action Plan for Implementation of the National Strategy for Combating Corruption, a special part of which concerns public procurement. Regarding the public procurement procedures and the role of the Agency in them, the PPL provides notification of the Agency on data on the existence of corruption in public procurement by the person in charge of public procurement or any other person engaged in the contracting authority, as well as any interested person with relevant data about the existence of corruption. Also, there is an obligation for the contracting authority to inform the Agency that there has been a violation of the prohibition of work engagement with the supplier, that is, that the representative of the supplier from the supplier or a related person has received, directly or indirectly, a monetary compensation or any other benefit or acquired a share of the supplier or persons connected with the supplier, within the period specified in Article 25 of the PPL. These persons may also contact the public if the Agency or the competent prosecutor's office has not undertaken any activity within one month from the date of filing its application. Therefore, it is clear that the same information is received by different bodies in relation to public procurement procedures, so it can be asked who will really react to them and whether any authority will react at all, although there is a possibility for all interested parties to address the public under certain conditions, as the competent authorities do not act upon submitted applications.

2.5. COMMISSION FOR THE PROTECTION OF COMPETITION

The Commission for Protection of Competition is an autonomous and independent organisation established under the Law on Protection of Competition, accountable to the National Assembly of the Republic of Serbia for performance of duties from its purview. The Commission's competence implies detection of competition infringement, sanctioning of such infringements and elimination of consequences of competition infringements (acts or actions of market participants that aim or result in significant restriction, distortion or prevention of competition) on the market of the Republic of Serbia or its part.

Article 24 of the PPL stipulates that if the contracting authority basically doubts the authenticity of the statement of an independent tender, by which the bidder, under full substantive and criminal responsibility, confirms that the tender has been submitted independently, without concert with other bidders or interested parties, it is obliged to immediately inform the Commission for Protection of Competition. Any interested person, that is, a person employed or otherwise engaged in work with an

interested person (bidder, potential bidder), has any obligation to notify the Commission if it has any information about the competition infringement in the public procurement procedure.

Article 35 of the Law on Protection of Competition stipulates that the Commission initiates the procedure of examining the breach of competition ex officio, when on the basis of the submitted initiatives, information and other available data, it assumes based on grounded facts the existence of an infringement of competition.

If the Commission for Protection of Competition determines that the bidder or the interested person has infringed the competition in the public procurement procedure, it may impose a measure prohibiting participation in the public procurement procedure, which may last up to two years (Article 167 of the PPL).

2.6. COMMISSION FOR PUBLIC-PRIVATE PARTNERSHIP AND CONCESSIONS

In accordance with the Law on Public-Private Partnership and Concessions, the Public-Private Partnership Commission provides expert assistance in the implementation of public-private partnership projects and concessions as an inter-ministerial public body operating independently in its work. Certainly the most important job done by the Commission is to give opinions in the process of approving the PPP project proposal without the elements of the concession and in the process of passing a concession act. Of other tasks, the preparation of methodological materials in the field of PPP by the Commission is especially emphasised. In addition, the Commission, at the request of the public body or the concession contractor (which may also be the contracting authority in the sense of the PPL) makes recommendations on projects, but also facilitates the execution of these projects by interpreting the best foreign experiences for the Republic of Serbia with regard to PPP with or without elements of the concession.

2.7. MINISTRY OF FINANCE

The Ministry of Finance, pursuant to the Law on Ministries, carries out public administration affairs related to, *inter alia*, public procurements. Although the Ministry of Finance does not have a formal competence for the adoption of any by-laws nor any other direct role in public procurement, it nevertheless, together with the Office, participates in the adoption of sub-legal acts adopted by the Government of the Republic of Serbia (a list of the contracting authorities referred to in Article 2, paragraph 1, item 1 of the PPL, the Decision on the establishment of a list of contracting authorities for whose needs the Administration for Joint Services of the Republic Bodies conducts centralised public procurements), and, on the other hand, through its Public Revenue Control Department, the Budget Inspection Department (hereinafter referred to as: the Budget Inspectorate) and its competencies has certain supervisory powers.

The Budget Inspectorate acts on the basis of the Law on the Budget System, the Law on Inspection Supervision and the Decree on Work, Authorisations and Features of the Budget Inspectorate, and shall perform tasks related to the inspection control of the application of laws and accompanying regulations in the field of financial and material operations and purpose and lawful use of funds with all beneficiaries of funds, and therefore it is also responsible for controlling the spending of funds in the framework of public procurement procedures.

In accordance with Article 87 of the Budget System Law, after the conducted inspection control, the Budget Inspectorate prepares the control report and proposes measures for removing the identified illegalities and irregularities in the work of the controlled entity and submits it to the beneficiaries of

budget funds, enterprises, legal entities and other entities where Inspection control has been performed. It shall also submit to the Minister of Finance a report on the conducted inspection control with findings and measures.

In the event that the controlled entity fails to comply with the proposed measures from the control report, the budget inspectorate has the authority to order measures for their elimination by a decision, and in case of established illegalities, it has the power to file complaints against the responsible persons for initiating the misdemeanour procedure, the application for a commercial offense as well criminal charges.

There is a concrete cooperation between the budget inspectorate and the competent prosecutor's office - that is, the budget inspectorate, on the basis of the request of the prosecution, performs inspection control and provides the necessary notifications in the event that the public prosecutor cannot evaluate from the criminal complaint itself whether the likely allegations of the application or if the information in the application does not provide sufficient grounds for deciding whether to carry out an investigation or if it otherwise finds out that the crime has been committed. In addition, during the inspection supervision, the budget inspectorate may refer the matter to the competent prosecutor for further action, if it finds that there are features of the criminal offence from the controlled area, which may also be public procurements.

Interesting is the authorisation of the budgetary inspectorate to carry out, in accordance with the need, extraordinary inspection controls, in accordance with the provisions of the Budget System Law and the Decree on Work, Authorisations and Features of the Budget Inspectorate.

We particularly emphasise the possibility of submitting reports (by physical and legal persons, state bodies and institutions, even anonymous ones) to the budget inspectorate on the findings and suspicions of irregularities and illegalities in the handling and use of budgetary and other public funds, which as a result may have or there is damage to the national budget (budget of the Republic of Serbia, autonomous province and/or local self-government unit), or the budget of the European Union.

From the published reports on the work of the budget inspectorate, it can be seen that they violate public procurement regulations, and that in some ways there is a similarity with the content of the SAI report, with the budget inspection referring cases in which the irregularity was established by the competent authorities for further action (for example, it is noted that the contracting authorities carry out public procurement procedures, although the conditions for this, prescribed by the provision of Article 52 of the PPL, frequent application of negotiating procedures with and without publishing public calls, although the conditions for their implementation have not been fulfilled, contracts have been concluded without conducted procedures public procurements, the contracting authorities did not act in accordance with the orders from the decision of the Republic Commission, goods were delivered that were not in accordance with the technical specifications presented in the tender, and the case files are forwarded to the competent prosecutor's office because of the suspicion of the existence of a criminal offence under Article 234a of the Criminal Code, etc.).

2.8. PROSECUTORS' OFFICES

The Criminal Code of the Republic of Serbia (hereinafter referred to as: CC) contains several provisions that may be related to the provisions of the PPL. These are, above all, general provisions on the validity of criminal legislation, criminal offences, perpetrators, penalties, security measures etc. The law also regulates the authorisations that the competent authorities – the police, prosecutors' offices and courts – have at different stages of the criminal proceedings. Also, the Criminal Code contains norms on liability for individual criminal offences. Some of these criminal offences may be related to public procurements,

and in some laws of this kind, including the Criminal Code of the Republic of Serbia, there is a special criminal act related to public procurement.

Article 234a of the Criminal Code defines a criminal offence entitled “Misfeasance in Public Procurement”.

The first paragraph of the aforementioned article of the Criminal Code foresees the punishment of responsible persons with the bidder for several different forms of violation of the PPL. The first form to be mentioned is “submitting an offer based on false data”. The PPL itself does not contain the term “false”, but uses the synonymous “untrue information” in Article 82, paragraph 1 of the PPL, which stipulates that the contracting authority may reject the tender if it has evidence that the bidder in the previous three years prior to the announcement of the invitation to tender the procurement procedure provided untrue data in the tender. In this respect, this crime has similarities with other crimes, depending on which of the data is false. Certainly there is a question of proving that some information is false.

The second form refers to situations where bidders concert among each other. This criminal offence is similar to the “Abuse of monopolistic position” under Article 232 of the CC, but it also applies to situations in which this crime might not exist. Namely, in the case of the criminal offence referred to in Article 232 of the CC it is necessary that the actions of the defendants “cause a market disturbance” or some other similar harmful consequence. In the case of a criminal offence related to bidders in public procurement, there is no need to have a detrimental effect on this form of enforcement, but it is enough to undertake activities for a specific purpose. In Article 26, the PPL prohibits agreements between the bidders. This article states that each bidder confirms by the statement of an independent tender under full substantive and criminal responsibility that the tender has been submitted independently, without concert with other bidders or interested parties. There is no discrepancy in this respect.

The third form of violation of the provisions of the PPL of the first paragraph relates to situations where the responsible person in the bidder “undertakes other unlawful actions”. Here too, as in the previous two cases, the action is aimed at a certain goal – “for the purpose of influencing the decision-making of the public procurement contracting authority”. This provision may include many unlawful acts, and in particular those related to Article 23, paragraph 2 of the PPL – giving, offering, enabling potential benefit, or attempting to learn confidential information. These norms can be linked to another, from the previously existing criminal offence – bribery.

The second paragraph on this criminal offence brings a completely different kind of responsibility. Thus, punishable here is the “responsible or official person” who abuses office (or abuses position of a responsible person). The difference between the “classical” part of abuse of office is, first of all, that the unlawfulness of the act is explicitly prescribed here – a specific type of unlawfulness – “violation of laws or other public procurement rules”. In the case of abuse of office, punishable is also “exploitation” that moves within the framework of legal rules. Another difference is that only one consequence is required here – “causing damage to public funds”. In contrast, in the case of “classical” abuse, the consequence could be in obtaining benefits for oneself or for others, causing damage to another or damaging to others' rights. In that sense, a serious criticism could be made in reference to the abstractness of the terms used in describing the substance of this form of the said criminal act. Namely, the question arises which violations of the provisions of the PPL are referred to when it is said in the description: “violates the law or other regulations on public procurement” – whether it is a violation of any provisions of the PPL, or there are some particularly important provisions that must be violated. Also, the problem is in the part of the description which states: “causes damage to public funds”. Namely, there is no definition of “public funds” in the PPL itself, and the question of the amount of damage that must be incurred (as well as proving the origin thereof) is raised, especially bearing in mind paragraph 3, which prescribes a higher

penalty, not depending on the amount of the damage incurred, but depending on the value of the public procurement. Thus, paragraph 3 of Article 234a of the CC provides for a higher penalty in the event that one of the crimes described above is committed in connection with the procurement whose value exceeds the amount of RSD 150 million. This norm is illogical because it deviates from the usual rule that a more severe penalty is prescribed when there is greater damage or material gain. Therefore, the consequences can be illogical – that for the damages of RSD 1 million for the procurement worth RSD 1 million, the offender will be fined less than the one who makes a damage of RSD 10,000 for the procurement worth RSD 150 million. In addition to this illogicality, the problem can also be the fact that it is not clear which value of the procurement is referred to (estimated value or value of the concluded contract), since these values can be significantly different, and some forms of this crime can take place at the time while the contract has not yet been concluded.

3. RECOMMENDATIONS FOR IMPROVING MEASURES FOR EFFECTIVE DETECTION AND SANCTIONING OF IRREGULARITIES IN PUBLIC PROCUREMENTS

3.1. NECESSARY AMENDMENTS TO THE PROVISIONS OF THE PPL

At the Intergovernmental Conference on Serbia's Accession to the European Union, held on 16 December 2016 in Brussels, Chapter 5 was opened in the negotiations for the accession of the Republic of Serbia to the European Union. This chapter deals with public procurement, as well as public-private partnership and concessions. The opening of this chapter is based on the assessment that the regulation in the field of public procurement in Serbia is largely (but still insufficiently) aligned with the EU acquis, and that Serbia has made significant progress in public procurement and reforms in that area. However, the conference also adopted criteria for closing Chapter 5, i.e., the goals that Serbia needs to meet in order to achieve policy and instruments such as those in EU countries in the field of public procurement. From the point of view of this analysis, the following criteria are especially important:

- preparation of practical tools for implementation and monitoring of regulations (including by-laws, manuals and standard document models);
- strengthening control mechanisms, including direct monitoring and improved transparency in the stage of execution of public procurement contracts and systematic risk assessment with prioritization of controls in the most vulnerable areas and procedures;
- efficient functioning of the legal remedy system;
- measures related to the prevention and combating of corruption and conflict of interest in the field of public procurement, both at the central and the local level.

On the other hand, the National Anti-Corruption Strategy in the Republic of Serbia for the period 2013-2018, as the Assessment of the state of public procurement, states:

> *“So far, there has been no efficient sanctioning of malpractice in public procurements and adequate cooperation between the Directorate for Public Procurement, public prosecutor’s offices, the ministry competent for financing affairs, SAI and other competent institutions. The new Law on Public Procurements (“Official Gazette of RS”, No. 124/12), came into force on 6 January 2013, and its implementation began on 1 April 2013. It has achieved a significant progress in the regulatory plan, in the field of transparency of procedures, reduction of discretionary powers of directors of the bodies conducting procurement, strengthening control over public procurement procedures, sanctions, professionalism, building capacities and integrities of the persons*

responsible for public procurements. Anti-corruption effects of the new Law and the need for possible amendments cannot be fully perceived. However, it is clear that it is necessary to harmonize other regulations with the new Law and adopt by-laws which shall govern the issues of determining appropriateness (justifiability) of public procurement, carrying out the monitoring and control of public procurement procedures, preventive mechanisms aimed at preventing conclusion of agreements on the basis of unjustified or irregular execution of the public procurement procedure, internal acts that would precisely govern the public procurement procedure, etc. Introduction of discipline in public procurements and combating irregularities should be supported by decisions of the National Commission for the Protection of Rights; however, they have not been enforced consistently."

The National Anti-Corruption Strategy lists the following Objectives that should be achieved, also in the field of public procurement:

1) Enhance participation of the public in monitoring budget expenditures;

2) Consistent application of the Law on Public Procurements and keeping records on the actions of competent authorities related to the irregularities found in their reports;

3) Improve cooperation and coordination between relevant institutions at all levels of the government on anti-corruption activities.

Based on the above criteria for the closure of Chapter 5, but also on the basis of the quoted part of the National Anti-Corruption Strategy in the Republic of Serbia for the period 2013-2018, it can be concluded that special attention will be paid in the forthcoming period to the assessment of efficiency and applicability the provisions of the PPL, in particular those containing the authorisations of the competent authorities and measures related to the prevention and combating corruption and conflict of interest, and in this regard, a special emphasis should be placed on proposing activities that will improve this fight, especially in the part that relates to the performance of a public procurement contract. In this regard, an effective sanctioning of irregularities in public procurements, as well as adequate cooperation between the Public Procurement Office, the Republic Commission for the Protection of Rights in Public Procurement Procedures, Public Prosecutor's Offices, the Ministry of Finance, the State Audit Institution and other competent institutions must be ensured in particular. As in the aforementioned Public Procurement Development Strategy in the Republic of Serbia for the period 2014-2018, on the basis of previously performed analyses, it is foreseen that amendments to the PPL will be made in order to fully align with the *acquis communautaire*, so that the forthcoming amendment, i.e., the adoption of a new PPL, is a good opportunity to look at the real needs for certain authorisations and measures available to the competent authorities in the fight against corruption and conflict of interest, all with regard to their capacities, as well as the way of organisation and their position within the state administration.

3.1.1. Change or clarification of powers of the competent authorities

The general impression when taking into account all the aforementioned authorisations that the competent authorities have on the basis of the PPL is that the following shortcomings in the public procurement system must be corrected through the amendments to the regulations:

- authorities have excessive authorisations, given their human and technical capacities, but also a number of constraints that follow the prescribed way they are educated and organized (prohibition of employment that does not apply to the entire public sector, the inability to engage highly-skilled staff with significant experience due to low salary limits, etc.);

- several authorities have the same authorisations that can be applied to the same event – the same public procurement procedure, so it is often asked which of those authorities will really use their authorisations, under the assumed expectation of each of the authorities that the other authority will do it because of the more adequate capacity or a more complete evidence that it has or may obtain;
- the competent authorities receive a large number of data provided by the contracting authorities on the basis of the obligations prescribed by the provisions of the PPL, and due to the scope and complexity of the content, it cannot be processed within the prescribed deadlines or within the deadlines that provide for effective sanction (if certain deadlines for the procedure are not prescribed in the PPL);
- mismatch of authorisations from the PPL with the provisions of other regulations, both in the material (rules contained in the norms), as well as in the procedural sense (manner of implementation of the procedure).

In performing certain tasks regarding the monitoring function, it is necessary to distinguish the systemic monitoring, which as a rule is carried out by the public procurement administrations as central bodies in public procurement systems, from supervision exercised by the body responsible for the protection of rights in individual public procurement procedures and supervision performed in accordance with their authorisations by the state audit institutions and inspection bodies (budget inspectorate).

In the opinion of experts, and taking into account the existing control system in the Republic of Serbia and in order to coordinate the various authorisations of the competent authorities in the best way, they have achieved appropriate results in the performance of supervision, it is recommended that the Office performs systemic monitoring (such as systemic oversight of the public procurement system, on the basis of which it proposes the necessary changes in the system, conducts training and prepares instructions, etc.), while regarding the conduct of monitoring in individual public procurement procedures it is necessary to clearly define the authorisations of the Office and the situations in which the Office would perform such monitoring. Namely, the importance of the Office is also indisputable in the monitoring of individual public procurement procedures (first of all, in order to prevent irregularities, but also in order to correct them in a timely manner), but it is necessary to make it clear (clearer) in which situations, with which purpose and in what way such monitoring is carried out.

Also, efforts must be made to establish a continuous and, if possible, formalised cooperation between institutions (by signing an agreement, protocol, etc.), in particular between the Public Procurement Directorate, the Republic Commission, the State Audit Institution and the Prosecutor's Office. This cooperation should enable prosecutors to better recognise the elements of substance of certain crimes, in connection with the unlawful and improper conduct of participants in public procurement procedures, as well as to provide adequate evidence on this. Namely, it is often a problem that there is no clear material evidence that public procurement with the intention has been carried out in such a way as to favour one bidder and to discriminate others.

3.1.2. Public procurement planning

The occurrence of unnecessary public procurements contributes, first of all, to insufficient internal and external audit of the importance of public procurement. It is very important that this control is established in the upcoming period with the adequate capacity of the competent institutions. First of all, more authorisations and capacities for state audit institutions are needed, which should play a major role in controlling the purposefulness of public procurements. Also, internal audit within the contracting authority should pay special attention to this aspect of public procurements. It should also oblige the

contracting authorities to adopt certain standards that will contain criteria for assessing the need for something to be procured, to be procured in certain quantities or a certain quality. The contracting authority could have such standards, for example, for official cars, and they would define after how many kilometres travelled, or after what kind of defects they would start the procurement of new cars.

The applicable provisions of the PPL in relation to the procedure preceding the execution of the public procurement procedure in a fairly detailed manner regulate the content of the public procurement plan, and contain a significant level of transparency through the obligation to publish public procurement plans by the contracting authorities. In addition, in accordance with the provisions of the by-laws, the contracting authorities are obliged to regulate this procedure with their internal public procurement acts.

However, in my view, in order to strengthen integrity in public procurements and to achieve the "value for money" principle, it is necessary to incorporate in the PPL provisions related to the market research contained in the Directive, which provides that before the commencement of the procurement procedure, the contracting authorities may conduct market consultations for the purpose of preparing the procurement and informing companies about their procurement plans and requirements, and for that purpose, the contracting authorities may, for example, seek or accept advice from independent experts or authorities or market participants, while such advice can be used in the planning and implementation procurement procedure, provided that it does not lead to distortion of competition and violation of the principle of non-discrimination and the principle of transparency.

3.1.3. Provisions of the PPL that contain measures for the fight against corruption and the prevention of conflict of interest

In the part of the PPL that regulates anti-corruption measures and prevention of conflicts of interest, it is necessary to delineate the authorisations of the competent authorities, so that different institutions have their own specific and clear authorisations, so as to avoid the intertwining of same situations and situations that have so far been common in practice - that none of the authorities take any of the measures at its disposal, expecting the other authority to do so. In that sense, it is important to point out that mechanisms already established by other regulations, especially those in the area of criminal law and the fight against corruption, must be used, so that such mechanisms are not repeated and copied in the PPL itself, because this introduces confusion in the order of actions to be taken, as well as in the competencies of state bodies.

In addition, certain measures should be promoted which would lead to easier detection of all forms of conflict of interest and attempts to influence the impartiality of the contracting authority in the decision-making in the course of implementation of procurements. In general, these measures could be applied to all forms of irregularities. In that sense, like with the anti-corruption rule, the possibility of providing protection to persons who reveal the occurrence of conflict of interest should be considered, by introducing special, protected telephone lines through which they can inform the competent authorities of their knowledge, or specific email addresses to which they can send anonymous email messages. These measures could be listed in the (new) PPL itself, but care should be taken not to conflict with the provisions of other relevant regulations, such as the Law on the Protection of Whistle-blowers. Likewise, it is important to redefine some of the existing measures in order to enable their implementation, because the way they are currently unclearly defined, make it difficult or impossible for adequate procurement by contracting authorities and participants in public procurement procedures, which, therefore, reflects on efficiency in the detection of irregularities and their sanctioning by the competent state authorities.

The next part of the text will more specifically point out, first and foremost, to the shortcomings of the measures envisaged in the current provisions of the PPL, and it is understood that the consultant proposes deletion or redefinition of all measures that were found to be unnecessary or unclear.

3.1.3.1. General measures for the prevention of corruption - Article 21 of the PPL

This article of the PPL contains several provisions that need to be amended and specified, while the question arises as to whether this article is needed or can be deleted in its entirety. Namely, the provision of paragraph 1 is a provision of declaratory and general nature, which does not contain any closer obligations or sanctions for failure to comply with it. Also, the assumption is that the PPL itself contains many provisions that aim to properly regulate the obligation of the participants in the public procurement process, thus preventing the occurrence of corruption.

Then the provision of paragraph 2 of this Article contains obligations regarding the mode of communication, and should therefore be contained in Article 20 of the PPL.

Also, it is unnecessary to prescribe an obligation for contracting authorities whose total estimated value of public procurements annually exceeds one billion dinars to adopt a special anti-corruption plan, given the obligation laid down in Article 59 of the Law on Anti-Corruption Agency, which regulates that state authorities, bodies of territorial autonomy and local self-government bodies, public services and public enterprises are under the obligation to adopt an integrity plan in accordance with the guidelines for the preparation and implementation of the integrity plan of the Anti-Corruption Agency. It is advisable that competent state authorities, and in particular the Public Procurement Office, provide professional assistance to the Agency in the implementation of these activities, in the part of creating a plan of integrity that would relate to public procurement processes, instead of prescribing an obligation for the contracting authority to make another act in addition to the act prescribed by a special regulation.

3.1.3.2. Protection of the integrity of the procedure - Article 23 of the PPL

Paragraph 1 of this Article is incompatible with the EU Directive. This provision of the PPL provides for an automatic exclusion from the bidder's procurement procedure that participated in the planning of public procurement or the creation of certain parts of the tender documentation, which can result in a significant reduction in competition in public procurement procedures. Thus, for example, it can reasonably be expected that bidders will refrain from participating in the procurement process of design services, so that they can participate in the procedure for awarding a contract for public procurement of works.

In this regard, the Directive provides for an obligation for the contracting authority to take appropriate measures to ensure that the participation of such a bidder does not jeopardise competition. Such measures include the submission to other bidders of relevant information exchanged or created as part of the bidders' participation in the preparation of the procurement procedure and the establishment of appropriate deadlines for the receipt of tenders. On the other hand, such a bidder could be excluded from the procedure only if there is no other way to ensure compliance with the obligation to respect the principle of equal treatment, with the right of the bidder to, before the exclusion from the public procurement procedure, be able to prove that its participation in the preparation of the procurement procedure cannot jeopardise the competition.

Paragraph 2 of this Article also contains a serious shortcoming, bearing in mind that it does not contain a consequence on the bidder that gave, offered or enabled some potential benefit or attempted to find confidential information from the contracting authority or otherwise influence the contracting authority's conduct during the public procurement, or according to the public procurement procedure, in the case of such drastic violation of the law and impact on the integrity of the public procurement procedure.

Therefore, the legislator did not give an answer if in such a case the tender of such a bidder is excluded from the procedure, or whether it is forbidden to participate in the procedure if such actions appear in the stage of preparation of tenders, whether the procedure in such a case is discontinued, etc.

3.1.3.3. Duty to report corruption - Article 24 of the PPL

The first shortcoming in connection with this article is that it imposes an imperative provision in paragraph 1, which is not followed by the appropriate sanction in the event of failure to apply it. More importantly, it is unclear why such an obligation is generally prescribed by the PPL, bearing in mind that these are duties regulated by other regulations, such as the Criminal Code and the Law on the Protection of Whistle-blowers. Also, this provision instructs a person to notify more than one state authority about the existence of corruption, which creates confusion about their actions.

Furthermore, it is unclear why the prohibition of dismissal and transfer to another work position relates to “conscientious acting” and “good faith” in reporting corruption, since such a provision leaves room for abuse of it, and it is precisely that a dismissal has been received with the employer’s reasoning that the employee did not report corruption in good faith.

Another illogical aspect of this article of the Law refers to the possibility of informing the public of the existence of corruption. Namely, this is the way to deny the right to the person who learned about corruption on public procurements to address the public without limitation, but his/her right is hereby limited to the precisely defined situations regulated by the Law.

3.1.3.4. Independent offers and breach of competition - Articles 26 and 27 of the PPL

In practice, it has been proven that it is unnecessary for the bidder to deliver one more paper, in the form of a statement on an independent tender. Such a statement does not in itself mean anything, and it creates the risk of rejecting tenders for the stated reason, and it is sufficient to provide only for the obligation for bidders to submit independent tenders.

Nevertheless, here it is especially important to point out the problem in relation to the provision of Article 27, paragraph 4 of the PPL. This provision allows the contracting authority to continue the public procurement procedure and execute a public procurement contract, acting conscientiously and wishing to, after notification by the competent authority, satisfy the need for which it initiated the public procurement procedure, with the risk that, in the event of proving the breach of competition, the consequences which affect more itself, but the bidders that committed infringement of competition. Can the contracting authorities in such a situation be expected to be motivated to report an infringement of competition? How many contracting authorities have so far reported a breach of competition in public procurement procedures, even though the contracting authority is the one that carries out a specific public procurement procedure that will first notice a breach of competition?

In this regard, the solutions from comparative practice, which, for example, envisage that, in the event of a reasonable doubt as to whether there has been an infringement of competition in a specific public procurement procedure, the contracting authority will inform the competent authority for protection of competition, which will by its decision to initiate/not initiate proceedings in connection with this infringement, notify the contracting authority within 10 days of the receipt of the notice, which will suspend the procurement procedure in case the competent competition authority initiates such a procedure.

3.1.3.5. Civil supervisor – Article 28 of the PPL

Under the provisions of Article 28 of the PPL, if the contracting authority carries out a public procurement procedure with an estimated value of more than one billion dinars, the procedure is monitored by a civil supervisor. The PPO appoints a civil supervisor for each pre-described public procurement procedure.

The Civil Supervisor represents the institute introduced into the public procurement system in the Republic of Serbia in 2012, with the purpose and aim of introducing additional control of the most valuable public procurement procedures by independent experts. However, from the analysis of the PPA reports and practices in the process, it seems that this institute did not give the expected results. Namely, according to the data from the annual reports of the PPA, out of 130 procedures involving the supervisor since 1 April 2013, the supervisors filed a report in only 42 proceedings, and only several reports are considered before the relevant committee of the National Assembly (without any specific conclusions by that committee), and it is to be expected that keeping this institute will be reviewed when the new law is enacted, and that the said function of the PPO in that regard, in the event of the removal of this institute from the PPL, is also deleted.

Also, by analysing public procurement regulations in the region and EU Member States, it can be established that this institute is not recognised and widespread, as an institute that effectively “helps” in overseeing the implementation of public procurement procedures. For example, this institute existed in Poland, but since it was not effective, it was abolished after a few years (it was in use from 2004 to 2007).

3.1.3.6. Conflict of interest – Article 29 and 30 of the PPL

The PPL in Article 29 prescribes situations in which there is a conflict of interest within the meaning of this Law, and Article 30 stipulates that the contracting authority cannot conclude a public procurement contract with the bidder in the event of conflict of interest, if the existence of a conflict of interest influenced or could have influenced the decision-making in the public procurement procedure. However, bearing in mind that data on the conflict of interest between the authorised persons of the contracting authority and the bidder are not available to the public, it is left upon the “conscience” of the contracting authority that it will act in accordance with the said provision of the PPL or that, in some other way, the necessary information on the existence of a conflict of interest.

In this regard, it would be opportune to make the data on the potential conflict of interest of the authorised persons, managers and members of the public procurement commission accessible to the public and regularly updated.

3.1.4. Execution of the contract

The public procurement procedure is a prerequisite for the conclusion of a public procurement contract. Amendments to the contract thus concluded cannot, in principle, be implemented without the provisions of the Law on Public Procurement, but in a number of cases, the contracting authorities conclude annexes to the public procurement contract without the application of that law or, without the annex to the original contract, change of the offered conditions for the execution of the contract on the basis of which the bidders' offer was selected with which the contract was concluded. Additional measures need to be taken to prevent this. On the other hand, it is necessary to enable contracting authorities to make changes to the contract whenever it is really needed, and even to a greater extent than the one permitted by the applicable provisions of the PPA, if it is necessary for the implementation of a particular contract and make it more efficient and economical, significant violation of the basic principles of public procurement.

3.1.4.1. Amendments to the public procurement contract – Article 115 of the PPL

The provisions of the Directive regarding the possibility of amending the public procurement contract are considerably more liberal in relation to the provisions of the PPL, i.e. they allow contracting parties and significant changes to the contract without re-conducting the public procurement procedure, in relation to the allowed changes prescribed by Article 115 of the PPL (change of subcontractors and situations in which the provisions of the PPL do not allow a price increase up to 50% of the value of the original contract, etc.). Given the degree of development of the public procurement system of the Republic of Serbia in comparison with some of the “older” member states of the EU, it seems that the state has to restrict its approach to this issue restrictively and not allow significant freedom regarding changes to the public procurement contract. It is certainly necessary to elaborate in a clearer way through the provisions of the new PPL different situations in which it is possible to modify the contract (additional procurement, volume increase, changed circumstances, change of the contracting party, change of subcontractor), as well as clearly identify situations in which it is not possible to amend the contract, a significant increase in procurement volume, a change in the economic balance in favour of the bidder with whom the contract was concluded, etc.).

3.1.4.2. Greater transparency and control at the contract execution stage

It is necessary to introduce even greater transparency at the stage of execution of the public procurement contract, which is currently not adequately "covered" by the provisions of the PPL. Namely, the general impression on the PPL is that there are no clear measures and competencies for controlling the execution of the contract, as a stage of public procurement in which all previously conducted public procurement procedures can be disregarded (if unjustified increase in prices, prolongation of delivery deadlines, etc. is permitted). A significant part of the irregularities in the public procurement process occurs in the stage of execution of the public procurement contract. There are certainly a lot of reasons for this, and one of them is the lack of norms that regulate this phase of the public procurement process. It is clear from the provisions of the Law that this is the case in the Republic of Serbia. Namely, except for the obligation of the contracting authority prescribed by Article 22 of the PPL to regulate the manner of monitoring the execution of the public procurement contract as well as the provisions on the content of the public procurement report by its internal act, the PPL does not contain provisions on this significant part of the public procurement process.

Although the Republic of Serbia is no exception as regards the fact that it does not contain specific provisions regarding the control of the execution of a public procurement contract, this does not mean that by improving the Law in this part it will become an example of good practice for the countries in the region.

In this sense, various mechanisms for controlling the execution of contracts can be envisaged, as indicated in the part of the analysis related to the provisions on the civil supervisor, but also by prescribing the mandatory content of the report on the execution of each individual public procurement contract, which the contracting authorities would be obliged to publications on the Public Procurement Portal in the part in which they published information on the public procurement procedure that led to the conclusion of the contract. In this way, all interested parties, and above all participants in the public procurement procedure to which the contract was not awarded, were familiar with the manner of execution of the contract, which could in some part eliminate the suspicion of the existence of irregularities during the execution of the contract. Also, civil society representatives and the general public would be able to more easily control the way public spending is spent, which could significantly contribute to trust in the public procurement system.

3.1.5. Procedure for protection of rights

In the procedure for protecting the rights, as an appeal procedure in public procurement, the PPL would primarily have to abolish the provision that enables the managers of the contracting authorities to decide on the award of the contract and conclude the contract, regardless of the fact that one of the bidders filed a request for protection rights that have not yet been decided. Also, a more effective system of protection of rights must be ensured, since the procedures on the submitted request often last for several months, which ignores the speed and efficiency as the essence of that procedure. Likewise, more efficient execution of the decisions of the Republic Commission should be ensured, as well as strict adherence to the existing practice of that body through decisions that are made, in order to have legal security and certainty of the parties to the proceedings.

3.1.5.1. Legal standing

The most significant amendment made by the amendments to the PPL of 2015 in the part of the protection of rights is a significant narrowing of the legal standing for the submission of a request for the protection of rights, primarily in the phase after the decision to award the contract (suspension of the procedure or conclusion of the framework agreement). Namely, previously mentioned amendments to the Law, the application for the protection of rights could be practically submitted by any bidder, that is, the applicant. As it has been observed in practice that there are interested persons who abuse their right to submit a request for the protection of rights, and as frequent unjustified filing of claims the procedure of public procurement is stopped by persons who could not, even after a repeated professional assessment of tenders, be in a situation to be awarded a contract, which affects the reduction of efficiency in public procurements, the lawmaker limited this right to the bidder who has the interest in the award of the contract, i.e., the framework agreement in the concrete procedure of public procurement and who suffered or could have suffered the damage due to the action of the contracting authority contrary to the provisions of this law.

In addition to a justifiable reason for attempting to improve the efficiency of the public procurement procedure, the stated definition of legal standing has significantly reduced the ability to eliminate irregularities in public procurement procedures. Thus, for example, in accordance with this provision, the legal standing for filing a claim for the protection of rights would not belong to a bidder whose tender is justifiably deemed inadmissible, although the tender of the only remaining (selected) bidder is also obviously unacceptable, and such a decision would remain in force and could not be disputed, which would lead to the conclusion of a public procurement contract with the bidder whose tender is *de facto* unacceptable.

Thus, after a short period of application of this amended provision, it has been shown that this attempt to improve the efficiency of the procedure has shown its significant shortcomings, and for the sake of efficiency, the rights of the participants in the public procurement procedure have been compromised, and hence the legality of public procurement procedures. In view of this, it is obvious that there is a need and necessity for the legal standing to be expanded to enable it as far as possible to eliminate irregularities in public procurement procedures.

3.1.5.2. Consequences of a filed request for the protection of rights and provisional measures

Starting from 2015, the PPL provides an opportunity for the contracting authorities to continue with the implementation of the public procurement procedure after they filed a request for protection of rights, but cannot make a decision on the award of a contract (or other decision) in the public procurement procedure, and conclude and start with the execution of the contract on public procurement. This

provision, as well as the provision on legal standing, was intended to improve the efficiency in the implementation of public procurement procedures, such as, for example, when the contracting authority receives a request for the protection of the rights challenging the tender documentation, and such a request is obviously unfounded or even untimely, it could proceed with the public procurement procedure, pending the award of the contract award decision.

Removing the obligation of the contracting authority to stop processing until the completion of the procedure for the protection of rights can certainly contribute to efficiency in public procurement, but, like in the case of legal standing, the question arises as to the price of such efficiency. The most important issue that has arisen in practice in this respect is how the contracting authority will act when it continues with the public procurement procedure and opens the tenders, after which the request for protection of rights is assessed as grounded and the public procurement procedure is partially annulled in the part of preparation of the tender documentation.

In addition to the aforementioned provisions contained in paragraph 1 of Article 150 of the PPL, the larger controversies were caused the provision of paragraph 2 of this Article, which enabled the contracting authority to make on its own a decision to award the contract, as well as to conclude a public procurement contract, before passing decisions on the submitted request for protection of the rights, provided that the delay of the activities of the contracting authority in the public procurement procedure, i.e., in the execution of the public procurement contract, would cause major difficulties in the work or business of the contracting authority which are disproportionate values of the public procurement.

In addition to the quite clear unjustifiability of allowing the contracting authority to decide to start practically the execution of the public procurement contract before making a decision on the submitted request for protection of rights, in a situation in which the irregularities which had already been made in the course of the public procurement procedure have yet to be determined, it should be pointed out that this provision is contrary to the EU directive on legal protection (Directive 2007/66/EC), which keeps the making of such decision exclusively for the body competent to decide in the legal protection procedure, i.e., the Republic Commission.

3.1.5.3. Contradiction in the procedure of protection of rights

Article 153 of the PPL stipulates that upon preliminary examination of the submitted request for protection of rights, if the request for protection of rights is considered unfounded, the contracting authority shall deliver to the Republic Commission its response with statements to all contentions from the request for protection of rights. By analysing the provisions of the PPL, it can be concluded that the obligation of the contracting authority to submit a response also to the applicant is not provided, thereby denying its rights and violating the principle of the contradictory nature of the proceedings. In this way, the applicant, who needs to exercise its rights and successfully contest the irregularities in the public procurement procedure, is brought into an inequitable position in relation to the contracting authority, bearing in mind that the contracting authority, which (let’s assume it is the case here) acted contrary to the provisions of the PPL, after a filed request for the protection of rights, it also gets an opportunity to present the facts and evidence in its defence, which remain unknown to the applicant until the decision is made by the Republic Commission.

3.1.5.4. Contesting the decision of the Republic Commission by filing a lawsuit before the Administrative Court

Article 159 of the PPL stipulates that an administrative dispute may be initiated against a decision of the Republic Commission within 30 days from the date of receipt of the decision, and that the initiation of an administrative dispute does not delay the execution of the decision of the Republic Commission.

Regarding the possibility and procedure of judicial protection of participants in the procedure of protection of rights in relation to the decision of the Republic Commission, significant shortcomings were noticed.

First of all, the problem is with the deadlines for the acting of the Administrative Court, where in practice it can be noticed that the judgments will be issued even after one, two or even three years from the date of filing the lawsuit. A long period of time for the adoption of a judgment is not a novelty in our legal system and practice, however, in public procurement procedures, rapid decision-making is of crucial importance, bearing in mind that, after the expiration of a period of, for example, two years from the date of filing the complaint, the public procurement contract had most often been executed (a road has been built, service has been provided, etc.). It follows, therefore, that the judgement possibly annulling the decision of the Republic Commission is often unprovable, bearing in mind that the return to the previous state is practically impossible. Therefore, the proposal is to impose short-term deadlines for the PPL to issue a decision by the Administrative Court, as is the case in some other areas (e.g., in relation to the decisions of the Commission for the Protection of Competition). Related to the above, the initiation of an administrative dispute certainly does not delay the execution of the decision of the Republic Commission, and it is necessary to consider a decision according to which the Administrative Court could, as a provisional measure, in justified cases and at the request of the parties to the dispute, impose a ban on the execution of the decision of the Republic Commission until the judgment is made.

Further on, we should point out to the issue of the legal standing to file a lawsuit before the Administrative Court and the necessity of amending the PPL in the direction of expressly granting rights to the contracting authorities to challenge the decisions of the Republic Commission made in the procedure for the protection of rights. Namely, the practice of the Administrative Court is to reject claims filed by the contracting authorities since it is a body that decided in the procedure for the protection of rights, and the plaintiff under the Law on Administrative Disputes may be the person whose right or law-based interest could be violated by an administrative act.

Also, the proposal is for the PPL to prescribe (as is the case with the decisions of the Republic Commission) that the decisions of the Administrative Court are published on the internet web presentation of this court or the website of the Republic Commission or on the Public Procurement Portal, immediately after their submission to the parties to the dispute.

3.1.5.5. Special authorisations of the Republic Commission

The analysis of the provisions of the PPL in the part of the authorisations of the Republic Commission shows that in addition to deciding in the procedures for the protection of rights, this body also has numerous special authorisations, such as: deciding in the first instance misdemeanour procedure, annulment of the contract, control with the contracting authority, etc.

In this regard, one should, first of all, bear in mind that the purpose of the existence of this body is to effectively protect the rights in public procurement procedures. Consequently, I believe that the Republic Commission should be relieved of certain special authorisations prescribed by the PPL. First of all, this refers to the conduct of a misdemeanour procedure in the first instance, since the misdemeanour

procedures should be conducted by the misdemeanour courts, and not by some other bodies such as the Republic Commission, since the Law on Misdemeanours contains provisions that refer to courts as misdemeanour bodies. The proposal is certainly that the Republic Commission, in accordance with the information in its exercise of its authorisations, submits requests for the enforcement of the misdemeanour procedure.

3.1.5.6. Misdemeanour procedure

According to the concept of the applicable Law on Misdemeanours, misdemeanour proceedings should be conducted by misdemeanour courts, and not by other bodies such as the Republic Commission. The Law on Misdemeanours contains, in particular, provisions relating to courts as misdemeanour bodies. Only several provisions refer to the Republic Commission and the PPL, but insufficiently that the procedure could be carried out based on them. Thus, the PPL and the Law on Misdemeanours are in collision since the judgments are decisions on misdemeanours according to the provisions of the Law on Misdemeanours, while under the provisions of the PPL this is not defined, but it is a conclusion that these decisions would be resolutions. In addition, the impossibility to execute penalties imposed by the Republic Commission to ensure the presence of the defendant, etc., must be pointed out.

I consider that it is more appropriate that the misdemeanour courts decide on misdemeanours from the PPL, and that the Republic Commission will be one of the applicants for the initiation of misdemeanour proceedings before these courts, on the basis of the facts and evidence that are decisive in cases of protection of rights.

Therefore, it should be foreseen that the misdemeanour court will conduct a misdemeanour procedure in the first instance for misdemeanours prescribed by the PPL, and that this procedure is initiated at the request of the Republic Commission, the Public Procurement Administration, the State Audit Institution, as well as other authorised bodies or the damaged party, based on facts and evidence obtained by those authorities, i.e., that have been obtained in performing other activities within their jurisdiction.

3.2. CRIMINAL PROCEEDINGS

It is obvious that in the case of a special criminal offence in the field of public procurement, a change in the description of the substance (essential elements) must be made in order to get more precise definitions. Thus, the description of the essence of this criminal act is at a high level of abstraction, which greatly complicates matters to the police, the prosecution and the courts to prove its execution. Therefore, the impression that these authorities will seek to differentiate the various forms of illegal actions in relation to public procurements, are rather referred to as “classical” misuse of the official position referred to in Article 359 of the CC, for which the penalties for the basic form of execution are identical in the range of in relation to the criminal offense referred to in Article 234a of the CC. The difference in penalties, however, occurs in the criminal act of the responsible person, on the basis of which the responsible person in a local public company would be more easily punished if he illegally obtained RSD 300,000, by abusing the subsidies, while the penalty in the event that the same amount is obtained by misuse of public procurement would be potentially higher.

Items related to public procurement irregularities must have somewhat different treatment by the police, the prosecutor's office and the courts, in the sense that a greater volume of training must be provided for employees in these institutions in the field of public procurement and public-private partnership and concessions, as well as knowledge of regulations on state administration and public enterprises, so that their gradual specialisation is carried out.

3.3. PUBLIC-PRIVATE PARTNERSHIP

Bearing in mind that the procedure of selecting a private partner is carried out according to the provisions of the PPL, when it comes to the project of public-private partnership without elements of the concession with certain specificities and differences in relation to the PPL due to the nature of that procedure, it is quite clear that the coordination and harmonisation of PPL and the Law on Public-Private Partnership and Concessions, that is, the Administration that oversees the implementation of the PPL and the Public-Private Partnership Commission, is of exceptional importance.

3.4 RECOMMENDATIONS FOR COMPETENT AUTHORITIES REGARDING THE MANNER OF IMPLEMENTATION OF AUTHORISATIONS

3.4.1 Planning

During supervision, audit or monitoring, special attention at this stage of public procurement should be devoted to controlling the way in which procurement needs are determined within the organisational units of the contracting authority, in particular in this regard:

- whether the procurements executed by the contracting authority had been previously planned;
- whether the execution and results of previously implemented public procurements and concluded contracts are monitored (in which phase they are: what are the experiences with the bidder who is implementing it, whether it is necessary to change some characteristics or additional conditions for participation);
- whether the stock of inventory and equipment that is required to be replaced or repaired is monitored;
- whether the current market situation is analysed, and whether this analysis only includes the technical characteristics that are offered or collecting the information about the prices in the market, potential bidders, the results of already conducted procedures with other contracting authorities;
- whether at the level of the contracting authority the criteria for determining the needs for the implementation of certain procurement are determined at what point and why the replacement of the official vehicle, printer, etc. is done);
- whether annual and medium-term business plans are taken into consideration;
- whether realistic consideration is given to the tasks assigned to the contracting authority, as well as the available capacities, primarily personnel;
- whether the needs shown by the organisational units of the contracting authority are checked, before these needs are presented as planned procurement in the public procurement plan.

In addition to this, it is important at this stage to pay attention to how the dynamics of the implementation of planned public procurement is determined, and whether the priorities are prioritised in this respect. Likewise, it is also important whether there were reasons for applying exceptions, if the contracting authority does not plan to implement the procedure prescribed by the provisions of the PPL for particular procurements.

3.4.2 Conducting the public procurement procedure

At this stage of public procurement, particular attention should be paid to controlling the following facts:

- selection of the type of procedure;
- the manner in which the estimated value of the public procurement is determined;
- the manner in which the technical characteristics and additional conditions for participation are determined, i.e., whether there is a written trail as to how they are requested and whether they are explained by the organisational unit for which the procurement is carried out;
- whether the contracting authority and to what extent it carried out market research in determining technical characteristics;
- whether the verification of the justification of the required technical characteristics is made, which are presented by the organisational unit for which the procurement is conducted, before the tender documentation is made;
- whether all bidders received responses to the questions they had asked for the purpose of clarifying the tender documentation;
- whether the expert evaluation of the tenders has been carried out in detail, respecting the principle of equality of bidders (that the same reasons lead to the same consequences, for example, the refusal of tenders);
- whether it was possible and whether there were changes in the content of the tender without the knowledge of other bidders who participated in the same public procurement procedure (data exchange, replacement of documents, etc.),
- whether it is possible for bidders to inspect the tenders and to copy the documentation, if they had requested so.

3.4.3 Execution of public procurement contract

It is important at this stage to pay attention to the fact:

- whether the formal changes to the contract (which were followed by completed annexes of the same) were made in accordance with the provisions of the PPL (whether the permitted reasons and quantities were allowed);
- whether there were actual changes to the contract (without formal changes, through the conclusion of an annex to the contract) such as price changes, payment methods, deadline for commitments, etc.;
- whether bidders or subcontractors who were not represented in the tender and in the public procurement contract participated in the execution of the contract;
- whether the financial security was activated if the contractual obligations of the selected bidder were not met;
- whether during the execution of the contract it turned out that the bidder gave false information regarding the conditions for participation (it does not have the required capacities, for example) or is not unable to deliver the goods of the required quality and technical characteristics because it supplied forged catalogues or other evidence for them;
- whether the procurement has actually been carried out in its entirety, and whether there is evidence of the execution of each part of the procurement;

- whether there were, possibly, multiple payments for the same, or whether the same part of the concluded contract was collected two or more times.

All of these can be facts that the citizens or civil society organisations, as well as the media are guided by, when they collect information on certain public procurement that is being implemented, whereby, unlike competent authorities that can do this on the basis of the authorisations granted to them, citizens and the media can receive information by sending a request for access to information of public importance to the contracting authority or to the competent authorities. Certainly, the collection of relevant information can also help the well-developed functionality options of the Public Procurement Portal, which enables the provision of such information in a simple and fast manner. Therefore, it is important that interested persons can learn as many public procurement data as possible on the portal, in particular that they can obtain data from all phases of public procurement, so that these data are as interconnected as other electronic records of the competent authorities (whether in relation to a certain public procurement, a decision of the Republic Commission, the report of the SAI, initiated misdemeanour or criminal proceedings, etc.).

Therefore, on the one hand, it is important to pay special attention to further improvement of transparency in public procurements, and on the other hand, to implement systematic education of all factors that can contribute to the detection, prevention and sanctioning of irregularities in the public procurement system which can be serious indicators of corruption in this system.

As already mentioned, the competent authorities must have clear authorisations in relation to the said activities. Their employees must be adequately professionally trained and technically equipped, and it is necessary for them to cooperate with other competent authorities. It would be desirable that this cooperation be formalised by the conclusion of memoranda or other acts that will oblige these authorities to continuously cooperate and exchange information and experience in the detection, prevention and sanctioning of irregularities in the public procurement system.