**A GUIDE THROUGH MONITORING THE APPLICATION OF PUBLIC PROCUREMENT LEGISLATION**

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INTRODUCTION

The Law on Public Procurement (“Official Gazette of the Republic of Serbia”, No. 91/19, hereinafter referred to as: the PPL), has been in force since 1 July 2020, introducing many novelties in the field of public procurements and greatly influencing the actions of both contracting authorities and bidders in the public procurement procedure. One of the novelties prescribed by the PPL is electronic communication in the public procurement procedure, which takes place on the Public Procurement Portal the operation of which is harmonised with the PPL. In that sense, the electronic preparation of the bid and proving the required criteria for the selection of the economic operator is prescribed, as well as the electronic manner of submitting bids in the public procurement procedure. The new LLP, *inter alia*, prescribes new types of public procurement procedures, as well as new techniques and instruments in public procurement procedures.

Ensuring an efficient implementation of public procurement procedures, without unnecessary administrative requirements and while ensuring the greatest possible economy, is the basis for the proper application of regulations with reduced risk of irregularities. Free competition enables the contracting authorities to, under the most favourable conditions, procure goods, services and works of a required quality and thus use taxpayers’ money in the most economical way. In that way, conditions are created for achieving significant savings and it is possible to use the saved funds to increase the quantity and quality of services provided by the state to citizens, which improves the standard of living. Achieving this goal is based primarily on a new way of communication, i.e., the introduction of mandatory electronic communication in public procurement procedures.

Control over ensuring greater transparency through the new way of communication, together with open and strong competition in the field of public procurement, will indirectly strengthen the competitiveness of domestic companies, which is a key factor in accelerating economic development, employment growth and living standards.

All activities aimed at developing a more modern and efficient public procurement system must be considered in the context of reducing the risk of irregularities. Public procurement is one of the key areas in which the public and private sectors enter into financial interaction to a significant extent and thus represent one of the most critical economic activities in terms of risk of irregularities and corruption. Achieving this goal will be based primarily on further strengthening of the legal framework and full implementation of all legal institutes that reduce irregularities, improving coordination and cooperation of competent institutions and strengthening their administrative capacity, as well as the capacity of contracting authorities and bidders. Accordingly, the confirmation of the achievement of this goal will be based, among other things, on the improvement of the monitoring system over the application of regulations in the field of public procurement.

The role of monitoring in public procurement is to:

• assess the way in which the public procurement system is developing as a whole and the direction in which it is moving;

• identify the need for any changes in the system;

• identify short-term and long-term priorities and assess whether they have been met;

• analyse the potential consequences of alternative solutions;

• provide guidance on public procurement policies and the implementation of decisions made;

• provide relevant information for decisions made by other policy makers.

In order for the monitoring process to provide results, several conditions need to be met. One of them is that the goals of the policies and the goals of the public procurement system will be consistent over time, because otherwise it would be difficult to compare the results obtained through the monitoring process. Then, the availability of reliable data is important. Thirdly, effective monitoring requires that the entities conducting the monitoring process possess good analytical and reporting skills. Namely, they should know what type of data is useful, how to collect such data, what to do next with the collected data, how to draw conclusions and how to present the results obtained by monitoring. Fourthly, the effectiveness of monitoring depends on the content of the notification and the completeness of the data that indicate the observed irregularities.

WHO IS THIS GUIDE FOR?

The guide is intended for all interested persons who have noticed certain irregularities in public procurement procedures conducted by contracting authorities in the Republic of Serbia.

The guide is intended for legal or natural persons, as well as state administration bodies, autonomous province bodies and local self-government units, but also other competent state bodies, such as competent prosecutor’s offices, police administrations, competent courts, the Anti-Corruption Agency, etc.

The guide provides answers to the following questions:

* Who to address in case of observed irregularities
* Which way to address
* When an interested person can apply
* What are the obligations of the monitored entity
* What possibilities are available to the Public Procurement Office (hereinafter referred to as: the Office), in case of observed irregularities
* Who has access to the Annual Report on the conducted monitoring, etc.

MONITORING PROCEDURE - GENERAL RULES

**Who monitors the implementation of regulations in the field of public procurement?**

The Office conducts monitoring of the application of regulations in the field of public procurement, in accordance with the authorisation prescribed by Article 179, paragraph 1, item 2) of the PPL. Pursuant to the mentioned article of the PPL, the Office also prepares the Annual Report on the conducted monitoring.

**Who are the monitored entities?**

The monitored entities are the persons over whom the Office performs monitoring during the application of regulations in the field of public procurement.

Those are:

* Public administration bodies
* Bodies of the autonomous province and bodies of local self-government units
* Other state bodies
* Other contracting authorities

**What types of monitoring are there?**

According to the type, monitoring can be:

* Regular
* Extraordinary
* Controlling
* Supplementary

Regular monitoring is carried out according to the adopted annual monitoring plan and in the case of conducting a negotiation procedure without publishing a public invitation.

Extraordinary monitoring is carried out upon receipt of a notification from a legal or natural person, state administration body, autonomous province body and local self-government unit and other state bodies.

Control monitoring is carried out in order to determine the implementation of the recommendations that the Office sent to the monitored entity in its report on the conducted monitoring.

Additional monitoring is carried out *ex officio* in order to establish facts of importance for monitoring, which are not established in regular, extraordinary or control monitoring.

**How is the monitoring process initiated?**

The monitoring procedure is initiated ex officio or upon the received notification of a legal or natural person, state administration body, autonomous province body and local self-government unit and other state bodies.

Interested parties may submit a notice:

* - in writing to the office address of the Office: 22-26 Nemanjina Street, as well as
* electronically to e-mail: office@ujn.gov.rs.

**When can interested persons submit a notification to the Office about the observed irregularities?**

Interested parties may submit a notification on the observed irregularities both during the public procurement procedure and after the completion of the procedure and the conclusion of the public procurement contract.

When the interested person determines certain irregularities related to the application of regulations in the field of public procurement, he submits a detailed notification on the type of observed irregularities to the Office, on which the further actions of the Office and the monitoring procedure depend.

**How is the monitoring process carried out?**

The monitoring procedure is carried out:

1) based on the annual monitoring plan;

2) in the case of conducting a negotiated procedure without publishing a public invitation referred to in Article 61, paragraph 1, items 1) and 2) of the LLP;

 3) on the basis of a notification from a legal or natural person, state administration body, autonomous province body and local self-government unit and other state bodies.

**How is the annual monitoring plan adopted and how does the Office select the monitored entities to be covered by the plan?**

The annual monitoring plan is adopted by the end of the current year for the next year and is prepared on the basis of the established situation in the field of public procurement and risk assessment. Depending on these circumstances, the Office also determines the monitored entity.

The annual monitoring plan must contain: overview of monitored entities, time period of monitoring implementation, seat of monitored entities, data on the resources of the Office that will be allocated for monitoring and other data of importance for monitoring.

**Is the annual monitoring plan publicly available?**

The annual monitoring plan is not published and is not publicly available.

**In which situations and in what way does the Office conduct monitoring when it comes to the negotiation procedure without publishing a public invitation?**

The monitoring procedure is carried out in the case of a negotiated procedure without publishing a public invitation:

1. If only a certain economic operator can deliver goods, provide services or perform works, for any of the following reasons:

1) the purpose of the procurement is to create or purchase a unique work of art or artistic performance;

2) lack of competition for technical reasons;

3) for the protection of exclusive rights, including intellectual property rights;

2) to the extent necessary, if due to extreme urgency caused by events which the contracting authority could not have foreseen, it is not possible to act within the deadlines set for open procedure or restrictive procedure or competitive negotiated procedure or negotiated procedure with publication, provided that to which the contracting authority justifies extreme urgency must not in any case be caused by its actions.

In case of conducting a negotiated procedure in these cases, the contracting authority must submit an explanation and all documentation related to the reasons justifying this type of procedure to the Office at the same time as publishing the notice on conducting a negotiated procedure without publishing a public invitation.

The Office must examine the existence of grounds for conducting this type of procedure within ten days from the day of receipt of the explanation and documentation and to submit an opinion to the ordering party on the grounds for its application.

When conducting monitoring on this basis, the Office controls whether the contracting authorities act in accordance with the opinion of the Office on the validity of this type of procedure, as well as whether the public procurement procedure is conducted in accordance with the provisions of the PPL.

**What information should be included in the notification of observed irregularities?**

*Example of a notification that the Office can act on immediately*

|  |  |
| --- | --- |
| Name and seat of the controlled entity | Public Enterprise ABBG Beograd |
| Subject matter of procurement | Purchase of computers |
| Type of procedure | Open procedure |
| Value of the procurement, if known | 6,000,000.00 dinars |
| Factual basis of the indicated irregularity | The contracting authority made a significant change to the contract by increasing the scope of procurement by more than 30% of the original value of the contract |
| Evidence supporting the stated facts | Basic public procurement contract, annex to the concluded contract and link to the public procurement procedure in question |
| Legal qualification of the indicated irregularity | The stated actions of the procuring entity are not in accordance with Article 160 of the PPL, which stipulates that the public procurement contract may be amended in such a way as to increase the scope of procurement, but only if the change value is less than 10% of the original contract value. This is a violation prescribed by Article 236, paragraph 1, item 14) of the PPL. |
| Data on the submitter of the notification  | Petar Petrović, bb Solunska Street |

In the process of conducting the monitoring, the applicant may be required by the Office to clarify or provide additional explanations regarding the allegations from the submitted notification, as well as to supplement the notification.

**Does the Office conduct monitoring on the basis of each notification submitted?**

No. The Office does not conduct monitoring:

* If it is determined that the Office is not competent;
* If the period of 3 years has elapsed from the completion of the public procurement procedure or the conclusion of the contract without conducting the procedure;
* If from the notification it is not possible to determine the submitter and data of importance for the procedure.

**What information can the Office request from the monitored entity, and which is important for conducting monitoring?**

The Office may request the following information from the monitored entity:

1) data on the responsible person of the monitored entity (name and surname, personal ID number, address of residence);

 2) procurement documentation;

3) public procurement contract or framework agreement, if concluded;

4) statement of the monitored entity;

5) internet address where the documentation or its part is available;

6) other documentation and data related to the monitored entity.

**What are the consequences for the monitored entity in the event of non-submission of the required documentation at the request of the Office?**

The monitored entity shall submit the requested documentation within 15 days from the day of receipt of the request. If the requested documentation is not submitted within the prescribed deadline, the Office may submit a request to initiate misdemeanour proceedings. The provisions of the PPL state the conduct of the monitored entity prescribed as an offence, for which a fine in the amount of 100,000 to 1,000,000 dinars is envisaged for the contracting authority, i.e., a fine in the amount of 30,000 to 80,000 dinars for the responsible person of the contracting authority.

**How is the required documentation submitted?**

The required documentation shall, as a rule, be submitted in an uncertified copy, unless the request does not explicitly require delivery in the form of an original or a certified copy or in electronic form.

After the monitoring, the documentation submitted in the original form is returned to the monitored entity.

**Does the Office inform the notifier about the results of the conducted monitoring?**

Yes. After the monitoring, the Office informs the submitter of the notification on the results of the conducted monitoring and on that occasion indicates the description of actions carried out during the monitoring, factual basis in case of established irregularities, evidence on which decisive facts were established, legal qualification of established irregularities or conclusion that no irregularities were identified in the implementation of the monitoring, but also a recommendation on the manner of preventing or eliminating irregularities, if applicable.

**Does the Office notify the notifier if it does not conduct monitoring?**

Yes. If it does not conduct monitoring, the Office shall prepare an official note, of which, without delay, it shall notify the notifier, if known.

**Who has access to the Annual Monitoring Report and is it publicly available?**

The Office prepares an annual report on the conducted monitoring, which is submitted to the Government and the National Assembly no later than 31 March of the current year for the previous year. The National Assembly publishes the Annual Report on the conducted monitoring of the Office on its website <http://www.parlament.gov.rs/akti/izvestaji-/izvestaji-.1785.html>, so that it is available to all interested persons.

**What possibilities are available to the Office, if it notices irregularities in the public procurement procedure that was the monitored entity?**

The conduct of the Office after the monitoring depends on the type of identified irregularity.

Depending on the identified irregularities, the Office may:

* submit a request for initiating misdemeanour proceedings, if it is an irregularity that is prescribed as a misdemeanour by the provisions of the LPP;
* file an application for protection of rights;
* submit a request for annulment of the public procurement contract in accordance with Article 233 of the PPL;
* initiate the implementation of other appropriate procedures before the competent authorities.

It is important to note that the statute of limitations for initiating and conducting misdemeanour proceedings, in accordance with the provisions of the PPL, occurs three years after the date of the misdemeanour prescribed by the provisions of this law.

In addition to the above, a request for annulment of a public procurement contract may be submitted by the Office either with a request for protection of rights or as a separate request. If the request for annulment of the public procurement contract is submitted separately, it may be submitted within 60 days from the day of finding out the reason for annulment, and no later than within six months from the day of concluding the contract.

Therefore, in order to successfully implement the monitoring procedure, it is desirable that the notifier first of all correctly recognizes the observed irregularity, and to inform the Office about it in a timely manner, in order to be able to take the measures available to it.

Also, the Office may submit a request for protection of rights in the public interest, within the deadlines prescribed by the provisions of the LPP.

A GRAPHIC OVERVIEW OF THE COURSE OF MONITORING PROCEDURE

Submitter of notification

Report

Request to initiate misdemeanour proceedings

Application for protection of rights

Data

Monitoring

Request for annulment of contract

Monitored entity

MONITORING UPON REPORT OF COMPETENT AUTHORITIES

In order to suppress and prevent irregularities in public procurement procedures, as well as in order to fight corruption in this area, an important factor is inter-institutional cooperation.

The Office, within its legal competencies, cooperates with other bodies in whose scope of work are activities of immediate importance in the field of public procurement. The mentioned inter-institutional cooperation is carried out especially with the following bodies:

* Anti-Corruption Agency,
* State Audit Institution,
* Republic Commission for Protection of Rights in Public Procurement Procedures,
* Commission for Protection of Competition;
* Ministry of the Interior,
* Ministry of European Integration,
* Special Anti-Corruption Departments of the High Public Prosecutor’s Offices,
* Budget inspection at the Ministry of Finance and budget inspection services at local self-government units.

These bodies address the Office in relation to all professional issues related to the field of public procurement, which are important for the performance of tasks within their competence.

In this regard, in order to make the monitoring procedure as fast and efficient as possible, the competent authorities shall submit to the Office as complete information as possible on the basis of which decisive facts on possible violations of regulations in the field of public procurement are determined.

These data relate in particular to:

* Controlled entity
* Subject matter of public procurement
* Type of public procurement procedure
* Estimated value of public procurement, if known
* Factual basis of the indicated irregularity
* Evidence supporting the stated facts
* Legal qualification of the indicated irregularity

In the absence of these data necessary for conducting monitoring, the Office is forced to request additional explanations regarding the allegations from the submitted notification and supplement to the notification, as well as to contact the monitored entity whose actions are subject to monitoring, which leads to longer monitoring procedures.

EXAMPLES FROM PRACTICE

This part presents the most significant irregularities observed so far, which were the basis for submitting requests for protection of rights, but also requests for initiating misdemeanour proceedings and requests for annulment of contracts.

DETERMINING DEADLINES FOR SUBMISSION OF BIDS CONTRARY TO PROVISIONS OF THE PPL

When compiling the procurement documentation, the contracting authorities shall determine the deadline by which the bidders may submit a bid.

It often happens in practice that certain contracting authorities set deadlines for submitting bids contrary to the provisions of the LPP.

Therefore, it is important to point out that the PPL prescribes minimum deadlines for submitting bids, with the possibility of shortening them in certain cases.

Thus, for example, it is prescribed that the minimum deadline for submitting bids in an open procedure is:

1. 35 days (BV ≥ of the amount of European thresholds);
2. 25 days (BV ≥ of the amount of European thresholds);
3. 15) 15 days (BV <from 30,000,000.00) for procurement of works;
4. 10 days (BV <from 10,000,000.00) for procurement of goods and services.

Possibility of shortening deadlines referred to in items 1) and 2)

* in 5 days – if bids can be submitted electronically;
* if the stated deadlines are not appropriate due to justified urgency, for which the contracting authority has valid evidence - but not less than 15 days.

Article 236, paragraph 1, item 4) of the PPL prescribes an offence for the contracting authority and the responsible person of the contracting authority if it does not set deadlines for submitting bids or applications in accordance with the PPL (Articles 52-56 and Articles 58, 60 and 63).

DETERMINING TECHNICAL SPECIFICATIONS CONTRARY TO THE PROVISIONS OF THE LPP

As it is known, technical specifications are an obligatory component of every tender documentation.

Within the technical specification, the contracting authorities determine the characteristics of the works, goods and services to be procured, as well as all other circumstances that are important for the execution of the contract, and thus for the preparation of the bid.

In practice, it may happen that the contracting authorities, when compiling the technical specification, state a specific brand of product and thus give preference to a particular business operator. For example, the contracting authority specifies the colour of the vehicle used exclusively by one vehicle manufacturer.

In this way, the contracting authority acts contrary to the principle of providing competition and non-discrimination, given that the PPL stipulates that the contracting authority may not restrict competition with the intention to unjustifiably put certain economic operators in a more favourable or unfavourable position, and in particular, may not disable any economic operator from participating in the public procurement procedure by using discriminatory criteria for qualitative selection of the economic operator, technical specifications and contract award criteria.

Therefore, if the contracting authority is not able to describe the subject matter of procurement sufficiently precisely and understandably, it is obliged to use the words “or appropriate” in the technical specification, in addition to referring to a particular brand, and thus enable greater competition from bidders.

CONCLUSION OF PUBLIC PROCUREMENT CONTRACT CONTRARY TO PROVISIONS OF PPL

After the public procurement procedure is completed by making a decision on the award of the contract, the contracting authority proceeds to conclude the contract with the bidder who submitted the most economically advantageous bid.

However, in the public procurement procedure in which more than one bidder submitted a bid, the contracting authority shall enable all economic operators, which have an interest in concluding a contract, to submit a request for protection of rights and thus challenge the content of the decision made.

In practice, there are cases when contracting authorities, in addition to this legal obligation, before the deadline for submitting requests for protection of rights, conclude a public procurement contract, which is the basis for initiating misdemeanour proceedings, as well as grounds for annulment.

Article 236, paragraph 1, item 12) of the PPL prescribes an offence for the contracting authority and the responsible person of the contracting authority if it concludes a public procurement contract, without fulfilling the conditions referred to in Article 151 of the PPL.

Article 233, paragraph 1, item 2) of the PPL regulates that the Review Commission (Republic Commission for Protection of Rights in Public Procurement Procedures) will annul public procurement contracts if it is established that the contracting authority conlcuded a public procurement contract before the expiry of the deadline for annullment of the request for protection of rights.

AMENDMENTS TO THE PUBLIC PROCUREMENT CONTRACT CONTRARY TO PROVISIONS OF PPL

The public procurement contract concluded by the contracting authority after the conducted public procurement procedure is subject to changes. The PPL prescribes several bases when the public procurement contract can be amended.

However, it is important to point out that there are some limitations in this regard. Namely, the procuring entity cannot make significant changes to the public procurement contract.

For example, the contracting authority did not envisage advance payment in the tender documentation, while it plans to envisage the same by amending the contract. This would not be in accordance with the provisions of the PPL, given that the introduction of advance payments would enable greater competition and advance payments was crucial to some economic operators in deciding whether to submit a bid in that procedure or not.

Article 236, paragraph 1, item 14) of the PPL prescribes an offence for the contracting authority and the responsible person of the contracting authority if they make changes to the concluded public procurement contract contrary to the provisions of the PPL.

DIVISION OF THE SUBJECT MATTER OF PROCUREMENT CONTRARY TO THE PROVISIONS OF THE PPL

When defining the subject matter of procurement, each contracting authority starts from its objective needs and, in accordance with that, determines the type of procedure in which it will conduct the procurement.

In practice, it may happen that the contracting authorities divide the subject matter of procurement into several procurements, all in order to avoid the application of the PPL, which is not allowed.

For example, if the contracting authority needs to procure computers with a total estimated value of 1,500,000.00 dinars, or above the legally prescribed thresholds, it is contrary to the provisions of the PPL to divide the subject matter of procurement into two procurements - one worth 900,000.00 dinars and another in the amount of 600,000.00 dinars and thus avoid the application of the PPL. This is due to the fact that computers represent a whole and as such must be considered when determining the estimated value of procurement and choosing the type of procurement procedure.

Article 236, paragraph 1, item 1) of the PPL prescribes an offence for the contracting authority and the responsible person of the contracting authority if they divide the subject matter of procurement into several procurements in order to avoid applying the provisions of the PPL or relevant rules of public procurement procedure (Articles 29-35).

Article 233, paragraph 1, item 6) of the PPL regulates that the Review Commission will annul public procurement contracts if it is established that the contracting authority concluded a contract without previously conducting a public procurement procedure, which the contracting authority is obliged to conduct according to the provisions of the PPL.

CRITERIA FOR SELECTION OF AN ECONOMIC OPERATOR DETERMINED CONTRARY TO THE PROVISIONS OF THE PPL

When compiling the tender documentation, the contracting authority may, in addition to the grounds for exclusion referred to in Articles 111 and 112 of the PPL, to define the criteria for the selection of an economic operator, which relate to:

* fulfilment of conditions for performing professional activity;
* financial and economic capacity;
* technical and professional capacity.

However, there are certain limitations for the contracting authority in this regard. Namely, the stated criteria must be:

* proportionate to the subject matter of the procurement;
* in logical connection with the subject of procurement, and
* the contracting authority may require only a level of capacity that ensures that the economic operator will be able to perform the public procurement contract.

For example, if the estimated value of the public procurement is 3,000,000.00 dinars, the contracting authority, in accordance with the provisions of the LPP, may, within the financial and economic capacity, require minimum revenues generated by the economic operator in an amount not exceeding twice the estimated value of the public procurement, i.e., in the amount of more than 6,000,000.00 dinars. Exceptions to this rule exist in exceptional cases when it is necessary due to special risks related to the subject matter of public procurement, which the contracting authority must explain in the procurement documentation.

If the contracting authority determined a minimum revenue that exceeds twice the estimated value of public procurement (except in cases prescribed by law), such conduct of the contracting authority would be contrary to the provisions of the PPL, since the criterion would not be commensurate with the subject matter of procurement of the bidder. We will remind that the provision of Article 7 of the PPL regulates that the contracting authority is obliged to enable as much competition as possible in the public procurement procedure, and that the contracting authority cannot restrict competition with the intention of unjustifiably bringing some economic operators into a more favourable or less favourable position, and in particular it may not prevent any economic operator from participating in the public procurement procedure by using discriminatory criteria for the qualitative selection of the economic operator.

NEGOTIATED PROCEDURE CONDUCTED CONTRARY TO PROVISIONS OF THE PPL

The PPL prescribes in which cases contracting authorities may conduct a negotiated procedure without publishing a public invitation.

One of these cases is if only a certain economic operator can deliver goods, provide services or perform works, as well as if it is necessary due to extreme urgency caused by events that the contracting authority could not have foreseen.

In these cases, in accordance with the provisions of the PPL, contracting authorities are obliged to ask the Office for an opinion on whether the application of this type of procedure is justified, as well as to provide explanations and all documentation regarding the reasons justifying this type of procedure.

Despite the obligation of the contracting authority to act in accordance with the obtained opinion of the Office, in practice it may happen that the contracting authorities that received a negative opinion on the merits of the negotiation procedure, still implement it.

Article 236, paragraph 1, item 3) of the PPL prescribes an offence for the contracting authority and the responsible person of the contracting authority if it procures goods, works or services by applying a negotiated procedure without publishing a public invitation, without meeting the legally prescribed conditions for applying that procedure (Article 61).

Article 233, paragraph 1, item 1) of the PPL stipulates that the Review Commission shall annul the public procurement contract if it determines that the contracting authority concluded the public procurement contract by applying a negotiated procedure without publishing a public invitation, and to apply that procedure there were no conditions envisaged by the PPL or it did not publish a notice on the conduct of the negotiated procedure without publishing a public invitation and a decision on the award of the contract.

CONCLUSION

Public procurement is an important component in any modern economy and has a significant impact on the country’s progress and development. The use of public funds by public and sectoral contracting authorities, i.e., the procurement of goods, services and works of these contracting authorities, significantly affects market competitiveness. That is why it is crucial to protect the integrity of the public procurement procedure, in order to achieve greater benefits for society and protect competition in the free market.

In this sense, public procurement monitoring is any systematic observation of the public procurement system that is conducted in a coherent way in order to assess how the system works and how it develops over time.

In this regard, cooperation and coordination of all competent institutions in the public procurement system, in terms of monitoring the implementation of public procurement regulations is extremely important for the effective elimination of irregularities in the public procurement system.