



ANALYSIS OF THE CURRENT SITUATION REGARDING IRREGULARITIES IN PUBLIC PROCUREMENT PROCEDURES WITH RECOMMENDATIONS FOR IMPROVING MEASURES FOR THEIR EFFECTIVE DETECTION AND SANCTIONING

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# INTRODUCTION

The regulation of public procurement procedures has several goals. In addition to creating conditions for the smooth flow of goods and services, contributing to economic development, and establishing financial discipline, it can be said that achieving economy and efficiency in the use of public funds (the principle “value for money” - the most favourable relationship between what is paid and the value received), as well as combating irregularities, are the two most important goals of public procurement.

Combating irregularities is one of the primary goals of the entire public procurement system. Considering the financial resources that are spent annually on public procurement in the Republic of Serbia, it can be concluded that in this area there is a risk of actions and phenomena that aim to illegally favor certain bidders and discriminate against others, for the purpose of satisfying certain financial and other interests.

Combating irregularities in public procurement must be implemented through various measures that permeate all phases of the public procurement process:

* planning,
* implementation of the public procurement procedure, and
* execution of the contract.

The public procurement system should ensure effective prevention of irregularities and enable more efficient sanctioning if irregularities occur. Therefore, the issue of combating irregularities cannot be considered solely as a matter of implementing some specific measures, but as a goal that is achieved through various aspects of the reform of the public procurement system, but certainly also better informing the public and a higher level of education of all actors in public procurement procedures.

# GENERAL INFORMATION ON IRREGULARITIES IN VARIOUS PHASES OF PUBLIC PROCUREMENT

Public procurement in a broader sense consists of planning, the public procurement procedure itself (awarding a public procurement contract) and the execution of the public procurement contract. Therefore, these are three phases in the process of a public procurement and in each of these phases certain irregularities may occur, which will be presented below.

## Planning

Public procurement planning is the initial phase in the process of a public procurement and involves several actions that the contracting authority undertakes in order to prepare for the implementation of the public procurement procedure and the subsequent conclusion and implementation of the public procurement contract. These actions include: determining procurement needs and market research, as well as adopting a procurement plan that contains the subject of the public procurement and the CPV code, the type of procedure, the estimated value, the approximate time for initiating the procedure, as well as information on whether the procurement is being carried out through a centralised public procurement body.

###  Inadequate identification of procurement needs

By determining the procurement needs, the client, through active communication within its organisational units (such as technical, financial, legal and commercial departments), determines what it will procure in a given year. In doing so, the client is guided by an analysis of procurements and needs in the previous period, current needs and inventory status, an analysis of the current market situation, as well as annual and medium-term business plans.

It is very important that the client realistically and objectively determines the needs from the perspective of the tasks assigned to him, but also from the perspective of available human and technical capacities.

In the planning phase of public procurement, special attention must be paid to timeliness and the method of planning. The problem of delays in drawing up procurement plans and inadequate planning in the sense of planning more or less than necessary is very common among contracting authorities. This problem results in either excessive funds being committed and remaining unused, or in needs being subsequently identified that were not foreseen at the time of planning, which imposes the need to conduct negotiation procedures “as a matter of urgency” or leads to the contracting authority not having the necessary goods or services at its disposal.

The basic prerequisites for good planning are: inventory monitoring, supply chain management and a good understanding of user needs. Also, thorough market research is necessary to provide information on potential bidders, the intensity of competition, the presence of collusion risks between bidders, all of which are important in order to plan the type of procedure in which the procurement will be carried out, as well as the way in which technical specifications and other elements of the tender documentation will be determined.

Practice shows that insufficient attention is paid to the issue of the purposefulness of procurement. When specifying needs that are created by the user within the contracting authority and submitted to the public procurement department for planning purposes, there is usually no clear written justification that should serve as the basis for assessing the purposefulness of the procurement.

In light of the above, the objectivity of the contracting authority in determining procurement needs should be assessed through answers to the following questions:

1. Is it necessary to procure certain procurement items at all?
2. Are the quantities of goods (volume of works or services) requested necessary?
3. What is the adequate quality of what will be procured?
4. Does the subject of procurement, in terms of its characteristics, meet the needs of the contracting authority?

All of the above is in the domain of consideration, first of all, of the economic conduct of the contracting authority in the initial phase of public procurement. Procurement of something that is not really needed by the contracting authority, or procurement in inappropriate quantities, of inadequate quality and inappropriate properties leads to unnecessary spending of public funds. In certain cases, the motive for these phenomena may also be of a corrupt nature.

When it comes to unnecessary purchases, special attention should be paid to purchases:

* intellectual services whose results will not be used by the client, such as various analyses, research, translations, etc.;
* consumables or spare parts, even though the customer's warehouse contains significant quantities that have not been used for a long period of time;
* replacement of equipment that is still usable and in good condition (procurement of new cars, although the contracting authority has vehicles that are not used much and are in perfect working order);
* specialised professional training for persons who do not need such training, given the job they are employed in;
* procurement of special off-road vehicles, although none of the work performed by the contracting authority indicates that these vehicles will be used on specific terrains.

Examples of purchases in larger quantities and scope than necessary are:

* procurement of large quantities of construction materials, even though the facility to be built is small in area and number of floors;
* procurement of computers or pieces of office furniture (desks, chairs, etc.) in a significantly larger number than the number of employees at the contracting authority;

As for procurements that are significantly above the needs of the contracting authority in terms of quality and technical characteristics of the items, examples of these could be procurements:

* official vehicles of unnecessary cubic capacity, dimensions and other characteristics;
* computer equipment and programs that are high-performance (high processor speed, significant amount of available memory, etc.), even though they are purchased for the needs of employees who will use them to perform simple operations such as text processing and printing or exchanging e-mail;
* official phones with unnecessary features, such as a built-in high-resolution camera;
* expensive office furniture.

Examples of procurement of items of significantly lower quality than what is actually required (mainly because it is cheaper) are:

* procurement of surgical sutures and gloves that break during surgical interventions and thus directly endanger the lives of patients;
* procurement of spare parts that have a short lifespan and which, due to poor quality, endanger entire facilities, which can lead to failures and damage that will many times exceed the cost of the spare parts themselves (for example, procurement of ball bearings that are installed in machines in mining facilities);
* procurement of software that prevents the contracting authority from conducting electronic business, to which they are obligated by the provisions of special regulations;
* procurement of low-quality winter tires that prevent the movement of patrol or other off-road vehicles in difficult winter conditions;
* procurement of toner for printers that prevent the production of clear and legible documents;
* paving roads with insufficient asphalt or with poor quality asphalt, which leads to frequent damage to the road surface and the need for frequent repetition of works on the same roads;
* procurement of occupational health and safety equipment that does not protect employees from extreme conditions to which they are exposed in the performance of the contracting authority's activities.

Carrying out unnecessary procurements, as well as procurements whose scope and technical characteristics exceed the real needs of the contracting authority, leads to unnecessary or ineffective spending of public funds, but may also indicate an attempt to enable certain persons to gain unlawful material gain.

### Irregularities in determining the elements of the procurement plan

In addition to conducting unnecessary procurements, or procurements with unrealistic quantities and inadequate quality, there are certainly some other irregularities that must be highlighted in this phase of public procurement. These irregularities are manifested when determining the elements of the procurement plan itself, which is adopted by the contracting authority and published on the Public Procurement Portal, but they have consequences that are certainly not just formal irregularities in the content of that document. These irregularities are:

* + - * application of a certain type of procedure even though the legally prescribed conditions for it have not been met;
			* unjustified application of exceptions;
			* unrealistic determination of the estimated value.

## Implementation of the public procurement procedure

The public procurement procedure, according to the provisions of the applicable Law on Public Procurement[[1]](#footnote-1) (hereinafter referred to as: the PPL), begins with the publication of a public invitation and other advertisements used as a public invitation (except in the case of a negotiated procedure without publication of a public invitation, when the procedure is considered to have been initiated on the day of sending the invitation to submit bids), and ends when the contracting authority publishes a notice of contract award, suspends the procedure or cancels the procedure. In this phase of the public procurement procedure, irregularities occur, primarily in relation to the content of the tender documents on the basis of which bids are submitted, when this content restricts competition and gives an advantage to certain bidders. Also, in this phase, irregularities arise in terms of unauthorised communication and relations between participants in the public procurement procedure, both between representatives of contracting authorities and bidders, and between the bidders themselves. In the first case, various forms of bias are at stake, manifested through conflicts of interest and violations of the integrity of the procedure, and in the second, the conclusion of so-called cartel agreements between the bidders themselves. At this stage of public procurement, irregularities also occur in connection with the expert evaluation of bids, when assessing whether bids comply with the required conditions, technical specifications and other requirements of the contracting authority.

Certainly, the most important part of this phase of public procurement is the preparation of tender documents on the basis of which bids are prepared and submitted. At the same time, it is also the most important document drawn up by the contracting authority, and the entire course of the public procurement procedure and the subsequent execution of the public procurement contract will depend on how it is drawn up, i.e., what its content is. It can be stated that the basic, constitutive elements of tender documents are the criteria for the qualitative selection of an economic entity, technical specifications and contract award criteria. These are important elements, because they show what the contracting authority will value when selecting a bidder with whom it will conclude a public procurement contract. The selection criteria relate to the bidder's ability to implement a specific contract, the technical specifications describe the subject of the public procurement, i.e., what the contracting authority needs to obtain as a result of the public procurement, while the contract award criteria show what will be important to the contracting authority when implementing the procurement (primarily, how much it will cost it, but also other parameters that will be achieved in doing so - for example, how quickly the contract will be implemented). In addition to these elements, the tender documentation contains a number of other information that is necessary for bidders to submit acceptable bids based on them, such as bids that do not have any deficiencies in their content and that indicate that the bidders who submitted them are capable of implementing the specific public procurement contract.

As important as all of the above basic elements of the tender documentation are in order to carry out a proper and quality assessment of submitted bids, each of these elements is susceptible to being used for the purpose of restricting competition and giving an advantage to certain bidders.

### Discrimination through the selection criteria for an economic operator

As for the criteria for the qualitative selection of an economic operator, the contracting authority expresses its requirements regarding the economic operator by specifying the selection criteria in the tender documentation. The stated criteria relate to the fulfilment of the conditions for performing professional activities, financial and economic capacity, technical and professional capacity of the bidder. Requiring a realistically unnecessary number of employees, as well as unnecessary annual income, the value and scope of professional references, as well as equipment that is not proportionate to the subject of the public procurement in terms of quality and quantity, certainly indicates a tendency to give an advantage to a certain bidder, and to prevent others from participating in the procedure.

Examples of discriminatory conditions for participation are:

* + - * the contracting authority’s request that bidders, as references, have completed procurements in terms of volume and value significantly exceeding the value of the specific public procurement (for the construction of a water supply network several hundred meters long, references of several tens of kilometers are required);
			* requesting evidence of references that do not relate to the specific subject of public procurement (the contracting authority requests references for the delivery of specialised computer equipment for some complex systems, and is currently purchasing simple PCs for regular office work);
			* the contracting authority’s requirement that bidders have annual income from activities in a value many times greater (often ten times) than the value of the specific public procurement;
			* requesting unnecessary attestations, certificates or test reports, which are already in the possession of the “favourite” bidder, and which the others need a lot of time to obtain, so that they cannot achieve this within the deadline for submitting bids;
			* the contracting authority’s request that bidders have a certain staff capacity without any explanation as to why it needs it and how it is logically related to the subject of the public procurement and the implementation of the contract (requirement to have a certain number of employees, regardless of the staff structure and their engagement within the implementation of a specific contract);
			* determining the selection criteria in such a way as to prevent the submission of a "joint bid", i.e. a bid by a group of bidders, in such a way that each participant in that bid is required to fully meet the required capacity criteria (this renders meaningless the purpose of submitting a “joint bid”, which is to pool capacities in order to meet the required criteria);
			* the contracting authority’s request that bidders have a certain technical capacity that is not logically related to the subject of the public procurement, and is possessed by the “favourite” bidder (unnecessary vehicles, equipment or technology);
			* seeking selection criteria that are not logically related to the subject of a specific public procurement (for example, insisting that the bidder must prove that it has provided some benefits to the contracting authority in previous years, in the form of donated equipment, donations or sponsorships);
			* determining the time period in which bidders acquired certain references, which is not in accordance with the PPL (for example, predicting that the bidder implemented the contract in a specific year or predicting a period that is shorter than the legally prescribed one);
			* the contracting authority's request that bidders have exclusively employed persons (for a fixed or indefinite period) or the contracting authority's request that persons have acquired appropriate experience within a precisely specified period of time, etc.

### Discrimination through technical specifications

Technical specifications are a set of objectively and precisely described technical characteristics of the subject of a specific public procurement and represent a mandatory content of the tender documentation. This description shows the requirements of the contracting authority in terms of properties, quality, quantity, packaging and other characteristics of the subject-matter of the procurement itself. Bidders are obliged to fully meet the technical specifications that the contracting authority requires in the tender documentation, otherwise, the bid will be rejected. On the other hand, the contracting authority is obliged to describe the subject of the procurement on as objective a basis as possible, and to strictly avoid descriptions that could determine the selected bidder in advance.

Discrimination through technical specifications is perhaps most often seen through the contracting authority's attempt to “copy” the technical characteristics and dimensions of the item offered by a particular bidder in the technical specifications. In such situations, bidders who take over the tender documentation must be very careful and carefully consider the technical specifications of the requested item and determine whether these are, in fact, technical characteristics that only a particular bidder can offer. Namely, in this case, the contracting authority does not openly favor certain bidders by stating their name or by stating the type of product that only they offer, which is not difficult to detect and dispute, but rather, through the definition of characteristics, it tries to award the contract to a specific bidder. It should be noted that objectivity in the description of technical specifications does not mean that the contracting authority defines them in such a way that all economic entities dealing with the subject of public procurement can meet the contracting authority’s requirements. If the contracting authority had to take care to define its requirements in a way that can be met by any economic operator interested in participating in the procedure for awarding a public procurement contract, the consequence would be that the requirements in the procurement documentation would often not correspond to the actual needs of the contracting authority.

The contracting authority would be committing significant discrimination against bidders, and consequently restricting competition, if, when describing the technical characteristics of, for example, the goods it is procuring, it were to require that they be exclusively from certain manufacturers or of a certain type, without the possibility of equivalent products being competitive. Often, contracting authorities, as a justification for such technical specifications, point out in their tender documentation that it is a well-known fact that the products of a certain manufacturer are of higher quality than others, and that the managers or employees of the contracting authority themselves would choose exactly such products when purchasing for personal needs. However, the basic principle in public procurement procedures is the principle of efficiency and economy, and the widest possible competition is the most important means by which this principle is achieved.

Namely, Article 7, paragraph 1 of the PPL stipulates that the contracting authority is obliged to enable the greatest possible competition in the public procurement procedure. The contracting authority may not restrict competition with the intention of unjustifiably placing certain economic operators in a more or less favourable position, and in particular may not prevent any economic operator from participating in the public procurement procedure by using discriminatory criteria for the qualitative selection of an economic operator, technical specifications and contract award criteria.

Therefore, the contracting authority must not be guided by the personal needs of individuals who carry out the public procurement itself or those whose bid “should” be selected, but must objectively determine the needs of the institution itself, or the organisation for whose functioning and regular performance of activities the procurement is being carried out. Therefore, the use of subjective criteria when determining technical specifications, without any concrete and objective justification for it, limits competition and prevents the realisation of the aforementioned principle. In doing so, the unlawful material gain for individuals that will be a consequence of such illegal conduct should not be neglected.

In this sense, it is important to point out the provision of Article 100 of the PPL, which stipulates that technical specifications cannot refer to a specific brand or source or a specific process that characterizes the products or services provided by a particular economic operator, or to trademarks, patents, types or a specific origin or production, which would have the effect of giving advantage to or eliminating certain economic entities or certain products, unless the subject-matter of the contract justifies it.

Exceptionally, reference in the manner referred to in paragraph 1 of this Article is permitted if the subject of the procurement cannot be described sufficiently precisely and comprehensibly, in accordance with Article 99 of this Law, whereby such reference must be accompanied by the words “or appropriate”.

Examples of discrimination of bidders through the technical specifications of the subject-matter of procurement that the contracting authority states in the tender documentation are:

* reference to a specific brand, product type or origin of production (for example, the customer purchases batteries and provides the label “Duracell”);
* simple “copying” of the equipment characteristics of the bidder who is being given an advantage;
* requiring that several different pieces of equipment be from the same manufacturer.

###  Discrimination through contract award criteria

Bidders can also be discriminated against through contract award criteria. If the contracting authority selects criteria that are not related to the execution of a specific public procurement contract, or that are not really needed, and it has knowledge that these are criteria that can be largely satisfied by a favored bidder, this is certainly discrimination and restriction of competition. For example, determining technical and technological advantages as criteria, although these facts, in essence, do not provide any benefit to the contracting authority in terms of economy and efficiency in the implementation of public procurement. Namely, a certain technology that is presented as an advantage and that a certain bidder has at its disposal can only create additional costs for the contracting authority due to, for example, the necessary expensive and long-term training of personnel, higher costs of consumables or necessary changes in the technical equipment of the contracting authority that require additional purchases that were not planned.

Examples of discrimination of bidders and restriction of competition through contract award criteria are:

* application of vague and subjective elements of criteria, such as “quality” or “special benefits” which will be assessed based on the subjective views of the members of the contracting authority's commission;
* application of a weighting methodology that is not objectively verifiable;
* evaluation with a large number of weights of certain quality certificates that are possessed only by certain bidders, and which are, in essence, unnecessary from the point of view of the subject of a specific public procurement;
* application of a methodology for assigning weights that favors certain bidders or one of them, because it unrealistically reflects the differences between what was offered (for example, giving the maximum number of weights only for certain technical advantages, and assigning zero weights for all others, whereby that element loses the nature of a criterion and becomes a condition).

### Conclusion of cartel agreements between bidders for the purpose of influencing the outcome of the public procurement procedure.

There are three main types of agreements: price agreements, delivery agreements, and best-bid agreements. There are certain indicators that indicate the existence of such agreements:

* + - * formal, when offers from different bidders contain the same errors and the same appearance of the offers;
			* large differences in price between the lowest and other offers;
			* several interested parties asked questions, but only one bidder submitted a bid, although the situation on the relevant market is different and indicates that several potential bidders are capable of meeting the selection criteria;
			* intentional withdrawal of the bidder who submitted the most economically advantageous bid, so that the contract is awarded to the next bidder, whose bid is significantly less favourable to the contracting authority.

###  Conflict of interest

Conflict of interest is the name given to situations in which representatives of the contracting authority who are involved in the conduct of the procedure or who can influence the outcome of the procedure have a direct or indirect financial, economic or other private interest, which could be considered to call into question their impartiality and independence in the procedure. It is a conflict between private interest on the one hand and public interest on the other, when there is an excessive risk that private interest will prevail over public interest, i.e., that corruption will occur.

Conflict of interest has several manifestations and can manifest itself before, during and after decision-making in a procedure. It arises when a person participating in decision-making or performing other activities of a body or public institution acts biasedly in favor of the interests of individuals, to the detriment of the public interest. Therefore, a conflict of interest can manifest itself in all phases of public procurement, although it is most difficult to detect it in the planning phase when the needs of the contracting authority for procurement are adjusted to certain individuals or interest groups. The reason why private interest is satisfied to the detriment of the public is a certain relationship of connection that exists between the person representing the public interest (representative of the contracting authority) and the representative of the private interest (potential bidders). These can be family, financial or political connections.

The most common forms of conflict of interest identified so far by the competent authorities in the Republic of Serbia were:

* the members of the contracting authority's commission did not sign a statement confirming that they are not in a conflict of interest;
* the deputy members of the contracting authority's commission, who instead of the members participated in undertaking certain actions in the public procurement procedure, did not sign the aforementioned statement;
* persons who were appointed as members of the contracting authority's commission were simultaneously employed by the bidder.

### Irregularities during the opening and expert evaluation of bids

The opening and expert evaluation of tenders are, therefore, part of the public procurement procedure in which the content of the tenders is determined, and on that basis, they are evaluated in order to arrive at the most economically advantageous tender. The contracting authority is, in doing so, obliged to adhere to what it stated in the tender documentation, and to act impartially and objectively. Deviating from what is stipulated in the tender documentation, and preventing the interested tenderer from being convinced of the objectivity and impartiality of the contracting authority in its decision-making, can certainly be a serious irregularity. An unobjective and biased implementation of the expert evaluation of tenders can result in the unjustified rejection of some tenders, and then in the selection of a tender that should have been rejected or is not the most advantageous based on the application of the elements of the contract award criteria. In this way, certain tenderers are directly prevented from having their tender selected even though they meet everything required by the tender documentation, or one tenderer is allowed to be selected even though his tender should have been rejected or is not the most advantageous.

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

* + - * deliberate neglect of shortcomings in bids regarding the fulfillment of criteria for qualitative selection of an economic operator and awarding the contract to that bidder;
			* awarding the contract to a bidder whose bid does not meet the contracting authority’s requirements set out in the technical specifications;
			* unreasoned suspension of the public procurement procedure after it is determined, after the opening of bids, that the preferred bidder cannot be awarded the contract, either because there are some shortcomings in the bid or because its bid is not the most economically advantageous;
			* rejection of the bid due to an unusually low price, provided that the contracting authority did not request an explanation from the bidder in order to determine whether the public procurement can be implemented at the offered price;
			* not rejecting the bid due to an unusually low price despite the fact that the bidder did not provide a convincing explanation or did not provide an explanation for such price at all, even though the contracting authority requested it;
			* after making a decision on the award of a public procurement contract, the contracting authority postpones the conclusion of the contract, expecting that the validity period of the selected bidder's offer will expire, and that the selected bidder will therefore abandon the conclusion of the contract.

## Execution of a public procurement contract

In order to ensure compliance with the principles of efficiency and economy in the execution phase of public procurement contracts, it is very important that the contracting authority systematically and organisedly monitors the implementation, and takes measures to ensure the implementation of the contract in the manner and under the conditions offered in the tender selected as the most favourable. In comparative law, there are solutions based on which the implementation of procurement procedures and the monitoring of the execution of the contract are two separate functions, carried out by different services, or different persons within the same contracting authority. In this way, greater objectivity in this monitoring is achieved.

Article 154 of the PPL regulates that the contracting authority/entity is obliged to control the execution of the public procurement contract in accordance with the conditions specified in the procurement documentation and the selected offer.

The public procurement procedure is a prerequisite for concluding a public procurement contract. The provisions of the PPL stipulate that the contracting authority may, during the term of the public procurement contract, in accordance with the provisions of Articles 156-161 of the PPL, amend the contract without conducting a public procurement procedure. However, it is important to note that the contracting authority may not make significant amendments to the public procurement contract. An amendment to the contract is considered essential in the event that it results in a change in the character of the contract in a material sense in relation to the contract that was originally concluded, i.e., if the nature of the originally concluded contract would be significantly changed, whereby an essential modification of the contract always exists when one or more of the following conditions:

1) the amendment introduces conditions that, if they had been part of the original public procurement procedure, would have enabled the inclusion of other candidates in relation to those who were originally selected or the acceptance of a different offer in relation to the initially accepted one or would have enabled greater competition in the preceding public procurement procedure conclusion of the contract;

2) the amendment changes the economic balance of the contract in favor of the economic operator with which the contract was concluded in a manner not provided for in the original contract;

3) the amendment significantly increases the scope of the contract;

4) change of the economic operator with which the public procurement contract was concluded, except in the cases referred to in Article 159 of this law.

In practice, it happens that contracting authorities conclude annexes to public procurement contracts without applying the PPL or, even without the annex to the original contract, allow changes to the offered conditions for the implementation of the contract on the basis of which the offer of the bidder with whom the contract was concluded was selected. If, during the implementation phase of the public procurement contract, changes are allowed to be made to what was decisive when the contracting authority made the decision in the public procurement procedure with whom to conclude the contract, then it can be concluded that this procedure did not make sense, i.e. that all participants in the procedure, except for the contracting authority and the selected bidder, were misled and that there was an unjustified expenditure of public funds.

When monitoring the implementation of the contract, the contracting authority should determine whether the bidder fulfils its contractual obligations within the deadline and in the manner specified in the contract itself. The contracting authority is obliged, in doing so, to act with the so-called “care of a good businessman or host”, which means that it should take all measures at its disposal to ensure timely and adequate implementation of the contract. Among the measures available to the contracting authority, the following are certainly distinguished: contractual penalties provided for in the contract itself, means of financial security for contractual obligations (bank guarantees, bills of exchange, insurance policies, etc.), 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 emphasize that the termination of the contract and the realised means of financial security for the fulfilment of contractual obligations, according to the provisions of the applicable Public Procurement Law, constitute grounds for exclusion from Article 112, paragraph 1, item 5) of the PPL. In addition, the contracting authority may file a lawsuit for damages due to failure to fulfil contractual obligations, as well as insist that the supervisory authority fully conduct professional supervision of the completed works during the execution of construction works.

With regard to the purposefulness of public procurement, systematic and regular monitoring of contract execution may indicate two phenomena that may render purposefulness meaningless. On the one hand, situations must be sanctioned in which the contracting authority allows such a change in the subject matter during the execution of the public procurement contract itself that the initial positive assessment of purposefulness, which was reached on the basis of the analysis of the planning phase and the implementation of the public procurement procedure, is seriously questioned or clearly refuted. Examples of this are the following:

* changing the subject of the procurement, by allowing the contracting authority to deliver something of lower quality and technical characteristics than what was offered (the same applies to the provision of services or the performance of works);
* change of the subject of the procurement, by the contracting authority allowing the bidder to deliver something that is not even the subject of the public procurement contract;
* change in the contracted quantity of goods to be delivered, or change in the contracted scope of works or services, by the contracting authority requesting or allowing implementation beyond the legally prescribed limits;
* changes on the part of the selected bidder, by the contracting authority allowing another bidder, or subcontractor, to carry out the procurement instead of the bidder who had to meet the criteria for the qualitative selection of the economic operator and whose bid was selected as the most economically advantageous in that procedure based on the predetermined award criteria, without the legally prescribed conditions being met;
* other changes that represent a change in the offered conditions, based on which the bid was selected, without there being a legal basis for it.

On the other hand, the appropriateness of public procurement at this stage may be called into question when there is inadequate and unsystematic monitoring of the stock status in the contracting authority's warehouse or the condition of equipment, assets or facilities at the contracting authority's disposal that were the subject of previously conducted public procurement procedures. In such cases, there may be consequences that no longer reflect on the specific public procurement in which such items were procured, but rather on the planning and implementation of future public procurements.

# AUTHORISED INSTITUTIONS FOR COMBATING IRREGULARITIES IN THE FIELD OF PUBLIC PROCUREMENT

The key institutions in the public procurement system, whose operations, methods of operation and form of organisation are regulated by the Public Procurement Law, are the Public Procurement Office (hereinafter referred to as: PPO) and the National Commission for Protection of Rights in Public Procurement Procedures (hereinafter referred to as: the National Commission).

At the same time, the State Audit Institution (hereinafter referred to as: SAI), the Anti-Corruption Agency (hereinafter referred to as: the Agency), the Commission for the Protection of Competition, the Ministry of Finance of the Republic of Serbia and the Budget Inspection within that ministry, the Commission for Public-Private Partnership, as well as the competent prosecutor's offices, also play a significant role in the area of ​​public procurement.

## Public Procurement Office

The Public Procurement Office is a special organisation that performs professional activities in the field of public procurement, monitors the implementation of public procurement regulations, participates in drafting laws and other regulations in the field of public procurement and enacts bylaws in the field of public procurement, manages the Public Procurement Portal, records data on public procurement procedures and public procurement contracts, cooperates with domestic and foreign institutions and experts in the field of public procurement in order to improve the public procurement system, provides professional assistance to contracting authorities and bidders, contributes to creating conditions for economical, efficient and transparent use of public funds in the public procurement procedure. In addition, the PPO provides opinions on the implementation of the provisions of the PPL and other regulations in the field of public procurement and examines the existence of grounds for implementing the negotiated procedure referred to in Article 61, paragraph 1, items 1) and 2) of the PPL; The PPO is authorised to submit requests for the protection of rights, as well as requests to initiate misdemeanor proceedings. The PPO also performs tasks related to taking the exam for public procurement officers and maintains a register of public procurement officers.

## Republic Commission for Protection of Rights in Public Procurement Procedures

The Republic Commission is an autonomous and independent body that ensures the protection of rights in public procurement procedures and is accountable to the National Assembly for its work. Within the scope of its prescribed competences, it decides on requests for protection of rights, as well as appeals against the decision of the contracting authority. The Republic Commission monitors the execution and controls the implementation of decisions it has made, annuls public procurement contracts, and imposes fines in accordance with the Public Procurement Act. In addition to the above, the Republic Commission is authorised to submit requests for the initiation of misdemeanour proceedings when, acting within its competences, it determines that a violation of the Public Procurement Act has been committed that may be the basis for misdemeanour liability. Also, the Republic Commission, within its legal competences, decides on the costs of the rights protection procedure and the costs of preparing a bid, decides on the proposal of the contracting authority that the submitted request for protection of rights does not delay further action in the public procurement procedure, and decides on the proposal of the applicant for protection of rights to prohibit the continuation of the public procurement procedure, the conclusion or execution of the public procurement contract. The Republic Commission is authorised to adopt general legal positions regarding the application of regulations within its competence. The Republic Commission has a president and eight members, who are elected and dismissed by the National Assembly, and it works and decides in panels of three members, except when otherwise provided for by the Public Procurement Law.

## State Audit Institution

The SAI is the highest public audit body in the Republic of Serbia, which is accountable to the National Assembly for the performance of its duties. Within its powers, the SAI performs audits of financial statements, audits of business regularity, which include the examination of financial transactions and decisions in the field of public procurement, as well as audits of business efficiency, which include the examination of the spending of budget funds and other public funds in order to report whether they have been used in accordance with the principles of economy, efficiency and effectiveness, as well as in accordance with the planned objectives. The SAI is authorised to submit requests for the initiation of misdemeanour proceedings.

## Anti-Corruption Agency

The Anti-Corruption Agency is an autonomous and independent state body, accountable to the National Assembly. Within its legal authority, the Agency supervises the implementation of the National Anti-Corruption Strategy and the Action Plan for the Implementation of the National Strategy, a special part of which relates to public procurement.

## Commission for the Protection of Competition

The Commission for the Protection of Competition is an autonomous and independent organisation that is responsible for its work to the National Assembly. It is competent to decide on the rights and obligations of market participants. According to this authority, the Commission’s activity includes detecting violations of competition, sanctioning them and eliminating the consequences of violations of competition. Of the PPL commission for the protection of competition may impose a measure of prohibition on the participation of a economic operator in the public procurement procedure if it determines that the economic operator has violated competition in the public procurement procedure in terms of the law governing the protection of competition. The aforementioned measure may last up to two years.

## Commission for Public-Private Partnerships and Concessions

In accordance with the Law on Public-Private Partnership and Concessions,[[2]](#footnote-2) the Public-Private Partnership Commission provides expert assistance in the implementation of public-private partnership and concession projects, as an interdepartmental public body operationally independent in its work. Certainly, the most important work performed by the Commission is giving opinions in the process of approving PPP project proposals without concession elements and in the process of adopting a concession act. Among other tasks, the preparation of methodological materials in the field of PPP by the Commission stands out. In addition to the above, the Commission, at the request of a public body, i.e. a concession grantor (which may also be a contracting authority in the sense of the PPL), provides recommendations on projects, but also facilitates the implementation of these projects by interpreting the best foreign experiences for the Republic of Serbia in terms of PPP with or without concession elements.

## Ministry of Finance

The Ministry of Finance, pursuant to the Law on Ministries,[[3]](#footnote-3) performs state administration tasks related, among other things, to public procurement. Pursuant to Article 154, paragraph 6 of the PPL, the ministry responsible for finance shall regulate in more detail the manner of supervision and shall supervise the execution of public procurement contracts.

The Budget Inspection performs tasks related to the control of the implementation of the law and accompanying regulations in the field of financial and material operations and the designated and lawful use of funds by all beneficiaries of funds specified in the law regulating the budget system. The manner of work and powers of the Budget Inspection are regulated by the Law on the Budget System.[[4]](#footnote-4) The tasks of the Budget Inspection are performed by the Ministry of Finance, with the aim of carrying out inspection control over: 1) direct and indirect beneficiaries of budget funds; 2) organisations for mandatory social insurance; 3) public enterprises established by the Republic of Serbia, legal entities established by such public enterprises, legal entities over which the Republic of Serbia has direct or indirect control over more than 50% of the capital or more than 50% of the votes in the board of directors, as well as over other legal entities in which public funds account for more than 50% of the total revenue; 4) autonomous provinces and local self-government units, public enterprises established by local authorities, legal entities established by such public enterprises, legal entities over which local authorities have direct or indirect control over more than 50% of the capital or more than 50% of the votes in the board of directors, as well as over other legal entities in which public funds account for more than 50% of the total income; 5) legal entities and other entities to which budget funds have been directly or indirectly allocated for a specific purpose, legal entities and other entities that are participants in the business that is the subject of control and entities that use budget funds based on borrowing, subsidies, other state aid in any form, donations, grants, etc.

Budget inspection activities are also organised at the level of the autonomous province and local government unit. The budget inspection has access to all data, documents, reports and information necessary for the performance of its functions in the entities over which inspection control is carried out, and has at its disposal appropriate resources (staff, premises and equipment) that ensure the performance of its functions.

The work of the budget inspection is also subject to the Law on Inspection Supervision.[[5]](#footnote-5) Inspection supervision is a state administration task whose content and concept are determined by the law regulating the work of state administration, carried out by state administration bodies, bodies of autonomous provinces and bodies of local self-government units, with the aim of ensuring the legality and security of the business and conduct of supervised entities by preventive action or imposing measures and preventing or eliminating harmful consequences for goods, rights and interests protected by law and other regulations.

The Decree on the work, powers and characteristics of the budget inspection12 stipulates that the budget inspection carries out inspection control of the implementation of the law in the field of material and financial operations and the designated and lawful use of funds by the subjects of inspection control. The budget inspection carries out inspection control activities according to the work program, while the possibility of carrying out extraordinary inspection control is also envisaged (in this regard, it should be borne in mind that information on the possibility of submitting reports of irregularities and illegalities in the use of public funds is also published on the official website of the Ministry of Finance). Inspection control is carried out by inspecting the business books, reports, records and other documentation of the subject of inspection control, while the budget inspection has the right to inspect the documentation on the business that is the subject of inspection control and of other persons, participants in that business. After the inspection, a record of the inspection is drawn up in which, if illegalities or irregularities are determined during the inspection control procedure, the following is stated: 1) the legal basis; 2) the evidence on the basis of which they were determined; 3) the measures proposed for their elimination; 4) the deadlines for their elimination.

Article 57 of the Law on the Budget System stipulates that contracts for the procurement of goods, financial assets, provision of services or performance of construction works, concluded by direct and indirect beneficiaries of budget funds and beneficiaries of funds of mandatory social insurance organisations, must be concluded in accordance with the regulations governing public procurement, while this law stipulates that failure to comply with the aforementioned provision constitutes a misdemeanour (in this way, the budget inspection is practically enabled to submit a request for the initiation of misdemeanour proceedings in relation to any violation of the provisions of the PPL, in accordance with the authorisation granted by Article 104 of the Law on the Budget System).

When it comes to the area of ​​public procurement, it is important to note that Article 154, paragraph 6 of the PPL regulates that the ministry responsible for finance shall regulate in more detail the manner of supervision and shall supervise the execution of public procurement contracts. In this regard, the Ministry of Finance has adopted a by-law - the Rulebook on the manner of supervision over the execution of public procurement contracts.[[6]](#footnote-6)

## Prosecutor’s offices

The Criminal Code of the Republic of Serbia[[7]](#footnote-7) contains several provisions that may be related to the provisions of the PPL. These are, first of all, general provisions on the validity of criminal legislation, on criminal offenses, perpetrators, penalties, security measures, etc. This law also regulates the powers that the competent authorities - the police, prosecutors' offices and courts - have in different stages of criminal proceedings.

The Law on Organisation and Competences of State Bodies in Combating Organised Crime, Terrorism and Corruption[[8]](#footnote-8) defines the competencies of state bodies in order to cooperate in combating organised crime and terrorism. and corruption, i.e., for the purpose of detecting and prosecuting perpetrators of criminal offences which are specified in the provisions of the said law.

In accordance with the aforesaid, for the purpose of detecting and prosecuting perpetrators of crimes against official duty, receiving and giving bribes as well as groups of crimes against the economy (Article 228 of the Criminal Code - abuse related to public procurement), the special departments of the higher public prosecutor's offices for the suppression of corruption, as well as the Ministry of the Interior - the organisational unit responsible for the suppression of corruption, are responsible for dealing with the cases of the above-mentioned criminal offences. The special departments of the higher public prosecutor’s offices for the suppression of corruption, as well as the Ministry of the Interior - the organisational unit responsible for the suppression of corruption, are responsible for dealing with the cases of the above-mentioned criminal offences. With regard to the mentioned special departments of higher public prosecutor's offices for the suppression of corruption, the law established the competence of four higher public prosecutor's offices in Belgrade, Kraljevo, Novi Sad and Niš, where special departments for the suppression of corruption were established.

1. **MOST FREQUENTLY OBSERVED IRREGULARITIES IN THE PUBLIC PROCUREMENT PROCEDURE**

The PPL, which has been in force since 1 July 2020, has introduced many innovations in the field of public procurement and has greatly influenced the conduct of both contracting authorities and bidders in the public procurement procedure.

One of the innovations prescribed by the PPL is electronic communication in the public procurement procedure, which takes place through the Public Procurement Portal, whose work is fully compliant with the provisions of 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 PPL, among other things, prescribes new types of public procurement procedures, as well as new techniques and instruments in public procurement procedures.

Although the PPL has been in force for a long time, in practice, omissions by contracting authorities when conducting public procurement procedures often occur.

Below, we will present some of the most common irregularities in the public procurement procedure, which can constitute both a basis for misdemeanour liability and a basis for annulment of a public procurement contract, and which are listed in the reports of the authorities authorised to monitor and control the actions of contracting authorities.

* 1. **Dividing a procurement into multiple procurements with the aim of avoiding the application of 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 this regard, it is important to point out the provision of Article 29, paragraph 2 of the PPL, which stipulates that the determination of the estimated value of the subject of public procurement cannot be carried out in a manner aimed at avoiding the application of this law, nor can the subject of public procurement be divided into multiple procurements for that purpose.

Also, paragraph 3 of the aforementioned article of the PPL prescribes that the contracting authority/entity determines the subject-matter of public procurement in such a way that it represents a technical, technological, functional and other objectively determinable whole.

It clearly follows from the above legal provisions that the contracting authority may not divide a single procurement object, which represents a whole within the meaning of Article 29, paragraph 3 of the PPL, into multiple procurements and thus avoid the application of the provisions of the PPL. For example, if the contracting authority needs to procure printers, the total estimated value of which is 1,400,000.00 dinars, it would be contrary to the provisions of the PPL for the contracting authority to divide the aforementioned public procurement object into two procurements – one worth 800,000.00 dinars and the other worth 600,000.00 dinars and to carry out both procurements without applying the provisions of the PPL, with the explanation that the estimated values ​​of the procurements in question are below the thresholds prescribed in Article 27, paragraph 1, item 1) of the PPL, i.e., below the thresholds up to which the PPL does not apply. This is because the printers represent a whole within the meaning of Article 29, paragraph 3 of the PPL and must be viewed as such when applying the provisions of the PPL.

Therefore, in this specific case, the contracting authority is obliged to take into account the total estimated value of the public procurement as a whole when implementing each individual procedure and to apply the provisions of the PPL in relation to the total estimated value.

Acting contrary to the aforementioned legal provision results in the misdemeanour liability of the contracting authority and the responsible person of the contracting authority, as prescribed in Article 236, paragraph 1, item 1) of the PPL.

* 1. **Setting deadlines for submitting bids contrary to the provisions of the PPL**

The provisions of the PPL prescribe minimum deadlines for submitting bids. Article 52 of the PPL, regulates that the minimum deadline for submitting bids in an open procedure is:

1. 35 days from the day of sending for publication a public invitation for public procurement whose estimated value is equal to or greater than the amount of European thresholds;
2. 25 days from the day of sending for publication a public invitation for public procurement whose estimated value is less than the amount of European thresholds.
3. 15 days from the date of sending the public invitation for the procurement of works whose estimated value is lower than 30,000,000.00 dinars;
4. ten days from the day of sending for publication a public invitation for public procurement whose estimated value is less than the amount of European thresholds.

The contracting authority may shorten the specified deadlines under the conditions prescribed by law, as follows:

* in the case of publication of a prior information notice or a periodic indicative notice, the contracting authority may shorten the minimum deadline for submitting tenders referred to in paragraph 3, items 1) and 2) of this Article to 15 days, subject to the conditions set out in Article 107, paragraph 6, and Article 108, paragraph 14, of this Law;
* in the case where tenders can be submitted by electronic means, the contracting authority may shorten the deadlines for submitting tenders referred to in paragraph 3, items 1) and 2) of this Article by five days, and
* in the event that the deadline referred to in paragraph 3, items 1) and 2) of this Article is not appropriate due to justified urgency, for which the contracting authority has valid evidence, the contracting authority may set a shorter deadline for submitting bids, but not shorter than 15 days from the date of sending the public invitation for publication.

Therefore, even if the legally prescribed conditions for shortening the deadlines from paragraph 3, items 1) and 2) of the PPL are met, they cannot be shorter than 15 days from the date of sending the public invitation for publication.

In practice, it often happens that contracting authorities, when conducting a public procurement procedure, set deadlines for submitting bids that are contrary to the aforementioned legal provisions.

Below are examples of incorrectly set deadlines for the submission of tenders, in procedures in which the contracting authority did not publish a prior information notice/periodic indicative notice, or in which there were no reasons of justified urgency for shortening the deadlines:

* Procurement of office supplies, the estimated value of which is 12,000,000.00 dinars. In the public procurement procedure in question, the contracting authority set a deadline for submitting bids of 12 days, although, pursuant to Article 52, paragraph 3, item 2) and paragraph 5 of the same article of the PPL, it could not be shorter than 20 days from the date of sending the public invitation for publication.
* Procurement of cleaning services, the estimated value of which is 10,000,000.00 dinars. In the public procurement procedure in question, the contracting authority set a deadline for submitting bids of 10 days, although, pursuant to Article 52, paragraph 3, item 2) of the PPL and paragraph 5 of the same article of the PPL, it could not be shorter than 20 days from the date of sending the public invitation for publication. In this specific case, the estimated value is the threshold value prescribed in Article 52, paragraph 3, item 4) of the PPL. Therefore, in order for the contracting authority to set a deadline of 10 days, it is necessary for the estimated value to be lower than 10,000,000.00 dinars. Therefore, if the estimated value of the public procurement is exactly 10,000,000.00 dinars, there is no basis for applying the aforementioned point of the PPL.
* Procurement of building renovation works, the estimated value of which is 7,000,000.00 dinars. In the public procurement procedure in question, the contracting authority set a deadline for submitting bids of 11 days, although, pursuant to Article 52, paragraph 3, item 3) of the PPL, the deadline could not be shorter than 15 days from the date of sending the public invitation for publication.
* Procurement of electricity, the estimated value of which is 63,000,000.00 dinars. In the public procurement procedure in question, the contracting authority set a deadline for submitting bids of 17 days, although, pursuant to Article 52, paragraph 3, item 1) of the PPL and paragraph 5 of the same article of the PPL, it could not be shorter than 30 days from the date of sending the public invitation for publication.

It is important to point out that Article 236, paragraph 1, item 4) of the PPL prescribes misdemeanour liability for the contracting authority and the responsible person of the contracting authority if they fail to set deadlines for submitting bids in accordance with the provisions of the PPL (Articles 52-56 and Articles 58, 60 and 63).

* 1. **Determination of technical specifications contrary to the provisions of the PPL**

Technical specifications are a mandatory 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, when conducting a public procurement procedure for a car, the contracting authority specifies in the technical specifications, as a procurement requirement, a specific vehicle colour that is used exclusively by one 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.

In this regard, if the contracting authority is unable to describe the subject of the procurement sufficiently precisely and understandably, it is obliged to use the words "or equivalent" in the technical specification, in addition to referring to a specific brand, and thus enable the greatest possible competition among bidders.

* 1. **Determining the selection criteria for an economic operator contrary to the PPL**

The PPL, in addition to the grounds for exclusion from Articles 111 and 112 of the PPL, also prescribes criteria for the selection of an economic operator relating to:

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

If the contracting authority decides to include certain criteria for the selection of an economic operator in the tender documents, they must be proportionate to the subject-matter of the procurement and logically related to it. 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.

In addition to the above, when it comes to determining the criteria for selecting a business entity, it is particularly important to point out the provision of Article 7. 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.

Below are examples of criteria for the selection of an economic operator that are not determined in accordance with the provisions of the PPL:

* The contracting authority is conducting a public procurement procedure with an estimated value of 4,000,000.00 dinars. Within the selection criteria relating to financial capacity, the contracting authority has stipulated that bidders must have achieved revenue in the previous three financial years in the total amount of at least 25,000,000.00 dinars. In this specific case, the aforementioned selection criterion is not determined in accordance with the provisions of the PPL.

Namely, Article 116, paragraph 1, item 1) of the PPL stipulates that the contracting authority may determine in the procurement documentation the financial and economic capacity which ensures that economic entities have the financial and economic capacity necessary for the performance of the public procurement contract, and in particular that they have a certain minimum income, including a certain minimum income in the area covered by the subject-matter of the public procurement for a period of no more than the last three financial years, depending on the date of establishment of the economic operator, i.e., the start of the economic operator's activities.

Paragraph 2 of the aforementioned article of the PPL stipulates that the minimum revenue from paragraph 1, item 1) of this article may not exceed twice the estimated value of the public procurement.

Having in mind the above legal provisions, and taking into account the amount of the estimated value of the public procurement, it can be concluded that the contracting authority, within the required selection criteria, could have requested an income not exceeding 8,000,000.00 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.

* The contracting authority is conducting a public procurement procedure for computers. The technical specification stipulates the obligation of the bidder to deliver the goods in question in accordance with the requirements of the contracting authority. Within the selection criteria relating to educational and professional qualifications, the contracting authority has stipulated that the bidder must have a graduate electrical engineer employed.

Considering that the requirement from the specification is that the bidder deliver the goods in question, and not to install or maintain them, it can be concluded that the selection criterion determined in this way is not logically related to the subject of the public procurement and that it is not necessary for the implementation of the public procurement contract.

* The contracting authority is conducting a public procurement procedure for the maintenance of hygiene within the premises of the contracting authority. Within the selection criteria relating to technical capacity, the contracting authority has stipulated that the bidder must have, in addition to a vacuum cleaner and other cleaning equipment, a lawn mower and a snow removal machine.

Considering that the selected bidder is obliged to maintain hygiene within the contracting authority's premises, as in the previous example, it can be concluded that the selection criterion determined in this way is not logically related to the subject of the public procurement and that it is not necessary for the implementation of the public procurement contract.

* The contracting authority is conducting a public procurement procedure for office supplies. In the public invitation, the deadline for submitting bids was set at 23 November 2023. Within the selection criteria relating to technical capacity, the contracting authority envisaged that the bidder would have implemented at least three contracts in 2022 that had as their subject the delivery of goods that are the subject-matter of the public procurement. In this specific case, the aforementioned selection criterion is not determined in accordance with the provisions of the PPL.

Namely, Article 124, paragraph 1, item 2) of the PPL stipulates that technical and professional capacity shall be proven by submitting one or more pieces of evidence, namely a list of deliveries of relevant goods during a period of no more than three years before the expiry of the deadline for submission of tenders, i.e., applications, with amounts, dates and names of beneficiaries, and if necessary to ensure an appropriate level of competition, contracting authorities may indicate that evidence of relevant goods delivered over a period longer than three years will be taken into account. Bearing in mind the aforementioned legal provision, and taking into account the time period envisaged within the required criterion (2022), it can be concluded that it was not determined in accordance with the provisions of the PPL. Namely, with the criterion defined in this way, the contracting authority has prevented bidders who delivered the goods in question in 2023, i.e., by the expiry of the deadline for submission of tenders, from proving that they meet the required criterion. In addition to the above, the contracting authority should have considered the possibility of providing for a period longer than one year, all in order to ensure competition.

* 1. **Failure of the contracting authority to act on requests for additional information or clarification of procurement documentation**

Article 97 of the PPL regulates that the economic operator may request from the contracting authority in writing through the Public Procurement Portal additional information or clarifications regarding the procurement documentation, and may indicate to the contracting authority if it considers that there are deficiencies or irregularities in the procurement documentation, no later than:

The provisions of the PPL also prescribe deadlines within which economic operators may request additional information or clarifications, as well as deadlines within which the contracting authority is obliged to act on submitted requests.

In practice, it may happen that the contracting authority does not act in accordance with the legal obligation, that is, it does not respond to a timely request from a potential bidder or does not respond within the legally prescribed deadline.

For example, the contracting authority is conducting a public procurement procedure for goods with an estimated value of 4,800,000.00 dinars. In the public invitation, the deadline for submitting bids was set at 14 August 2022. The potential bidder contacted the contracting authority on 3 August 2022 with a request for clarification of the criteria for selecting an economic operator, to which the contracting authority did not respond. Considering that the potential bidder's request was submitted in a timely manner, i.e., on the tenth day before the deadline for submitting bids, the contracting authority was obliged to publish a response regarding the submitted request on the Public Procurement Portal no later than 10 August 2022, i.e., on the fourth day before the deadline for submitting bids, in accordance with Article 97, paragraph 2, item 2) of the PPL.

* 1. **Conducting a negotiated procedure contrary to the provisions of the PPL**

Article 61 of 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 Article 62 of the PPL, contracting authorities are obliged to ask the PPO 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 PPO, in practice it may happen that the contracting authorities that received a negative opinion on the merits of the negotiation procedure, still implement it.

If contracting authorities act in this manner, i.e. conduct a negotiation procedure, without fulfilling the legally prescribed conditions, this constitutes an offense prescribed by the provision of Article 236, paragraph 1, item 3) of the PPO.

In addition to the above, Article 233, paragraph 1, item 1) of the Public Procurement Law stipulates that the Republic Commission will annul a public procurement contract if it determines that the contracting authority concluded a public procurement contract using a negotiated procedure without publishing a public call for tenders, and the conditions stipulated in the Public Procurement Law for the application of that procedure did not exist.

* 1. **Failure to publish decisions and announcements within the deadlines prescribed by the PPL**

After the contracting authority makes a decision terminating the public procurement procedure, it is obliged to publish it on the Public Procurement Portal within three days of its adoption, in accordance with Articles 146 and 147 of the PPL.

The contracting authority's actions contrary to the aforementioned legal obligation constitute an offense prescribed by Article 236, paragraph 1, item 11) of the PPL.

Also, the PPL prescribes the obligation for contracting authorities to publish a notice on the award of the contract, suspension of the procedure or cancellation of the procedure on the Public Procurement Portal after concluding a public procurement contract, as well as after the suspension or cancellation of the procedure.

Namely, Article 109, paragraph 1 of the PPL stipulates that the contracting authority is obliged to send the contract award notice for publication within 30 days from the date of conclusion of the public procurement contract or framework agreement, while paragraph 4 of the aforementioned Article of the PPL stipulates that in the event of suspension or annulment of the public procurement procedure, the contracting authority is obliged to publish the information in the contract award notice form within 30 days from the date of finality of the decision to suspend or annul the public procurement procedure.

In the event that the contracting authority fails to publish the aforementioned notice on the Public Procurement Portal, this constitutes a violation prescribed by Article 236, paragraph 1, item 8) of the PPL.

Below are examples of contracting authorities' failure to comply with the above legal provisions:

* The contracting authority made the decision to award the contract on 7 November 2022 and published it on the Public Procurement Portal on 15 November 2022. In this way, the contracting authority acted contrary to Article 146, paragraph 5 of the PPL, bearing in mind that the deadline for publishing the decision to award the contract was 10 November 2022.
* Based on the decision to award the contract, the contracting authority concluded a public procurement contract with the selected bidder on 11 September 2022, but did not publish a contract award notice on the Public Procurement Portal. In this way, the contracting authority acted contrary to Article 109, paragraph 1 of the PPL and committed an offense under Article 236, paragraph 1, item 8) of the PPL, given that it was obliged to send the contract award notice for publication no later than 30 October 2022.
* The contracting authority made and published the decision to suspend the public procurement procedure on the Public Procurement Portal on 10 February 2022, and it became final on 20 February 2022. The contracting authority published the notice of suspension of the procedure on 13 April 2022. In this way, the contracting authority acted contrary to Article 109, paragraph 4 of the PPL, bearing in mind that the deadline for publishing the notice of suspension of the procedure was 22 March 2022.
	1. **Conclusion of a public procurement contract in accordance with Article 151 of the** **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.

If more than one bid is submitted in the public procurement procedure, the contracting authority is obliged to wait until the deadline for submitting a request for protection of rights challenging the content of the contract award decision has expired before concluding the public procurement contract.

Namely, Article 151, paragraph 1 of the PPL stipulates that the contracting authority may conclude a public procurement contract, or a framework agreement, after the decision on awarding the contract, or a decision on concluding a framework agreement has been made, even if a request for protection of rights has not been submitted within the period provided for by this law, or if the request for protection of rights has been rejected or refused by a final decision, as well as if the procedure for protection of rights has been suspended.

The PPL also provides for an exception to the above rule. Thus, Article 151, paragraph 2 of the PPL stipulates that the contracting authority may conclude a public procurement contract even before the expiry of the deadline for submitting a request for protection of rights:

1. based on a framework agreement;
2. in the case of application of a system of dynamic procurement;
3. if only one bid has been submitted, which is acceptable;
4. in the case of application of the negotiated procedure without prior publication of a public invitation referred to in Article 61, paragraph 1, item 2) of this Law.

In practice, it happens that contracting authorities, after a public procurement procedure in which two or more bids were submitted, conclude a public procurement contract before the expiry of the ten-day period from the date of publication of the contract award decision on the Public Procurement Portal, i.e. before the expiry of the legally prescribed deadline for submitting a request for protection of rights.

The aforementioned conduct is prescribed as a violation of the contracting authority and the responsible person of the contracting authority under Article 236, paragraph 1, item 12) of the PPL.

Also, Article 233, paragraph 1, item 2) of the PPL stipulates that the Republic Commission will annul a public procurement contract if it determines that the contracting authority concluded the public procurement contract before the expiry of the deadline for submitting a request for protection of rights.

Below are examples in which contracting authorities acted contrary to the provisions of Article 151, paragraph 1 of the PPL:

* The contracting authority conducted a public procurement procedure in which a total of five bids were submitted. Based on the decision on the award of the contract, which was published on the Public Procurement Portal on 15 May 2022, the contracting authority concluded a contract with the selected bidder on 16 May 2022. In this way, the contracting authority acted contrary to Article 151 of the PPL. Namely, in the specific case, the public procurement contract could only have been concluded on 26 May 2022, bearing in mind that the deadline for submitting a request for protection of rights challenging the decision on the award of the contract was 25 May 2022.
* The contracting authority conducted a public procurement procedure in which a total of two bids were submitted, of which only one was assessed as acceptable. The contracting authority published the decision on the award of the contract on the Public Procurement Portal on 5 June 2022 and on the same day concluded a public procurement contract with the selected bidder, with the explanation that the conditions set out in Article 151, paragraph 2, item 3) of the PPL were met in the procedure in question, i.e. that one acceptable bid was submitted in the public procurement procedure. In this way, as in the previous example, the contracting authority acted contrary to Article 151 of the PPL. Namely, in the specific case, the public procurement contract could only have been concluded on 16 May 2022, bearing in mind that the deadline for submitting a request for protection of rights challenging the decision on the award of the contract was 15 May 2022. In relation to the contracting authority's explanation that the conditions set out in Article 151, paragraph 2, item 3) of the PPL were met in the procedure in question, it is important to note that the aforementioned exception to the rule set out in paragraph 1 of the aforementioned Article of the PPL may be used only in the event that only one tender has been submitted in the public procurement procedure, which is also acceptable. Therefore, if two or more tenders have been submitted in the public procurement procedure, the contracting authority is obliged to wait until the ten-day period within which a request for protection of rights may be submitted has elapsed before concluding the public procurement contract, regardless of whether the other tenders have been assessed as acceptable or not.
	1. **Amendment of the public procurement contract contrary to provisions of the PPL**

Article 155 of the PPL stipulates that the contracting authority may, during the term of the public procurement contract, in accordance with the provisions of Articles 156-161 of this Law, amend the contract without conducting a public procurement procedure.

However, it is important to point out that there are some limitations in this regard. Namely, Article 154, paragraph 3 of the PPL regulates that the contracting authority cannot make significant changes to the public procurement contract. In this regard, paragraph 4 of the aforementioned Article of the PPL clearly stipulates what is considered a significant change to the contract.

Below are examples of contract amendments that are not in accordance with the provisions of the PPL:

* 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.
* The contracting authority has stipulated in the tender documentation that bidders are obliged to submit a bank guarantee for good performance after the conclusion of the contract. After the conclusion of the contract, the contracting authority plans to amend the contract by allowing the selected bidder to submit a bill of exchange as security instead of a bank guarantee. As in the previous example, the above is not in accordance with the provisions of the PPL, given that the aforementioned amendment to the public procurement contract could have influenced potential bidders in the public procurement procedure whether or not to submit a bid. Namely, if the tender documentation had originally provided for the submission of a bill of exchange, rather than a bank guarantee, it is likely that a larger number of bidders would have submitted a bid in the public procurement procedure in question, bearing in mind that the costs and conditions for issuing a bill of exchange are significantly cheaper and simpler than when it comes to issuing a bank guarantee.
	1. **Conclusion of a public procurement contract contrary to the terms and conditions of the framework agreement**

Article 66, paragraph 1 of the PPL stipulates that a framework agreement is an agreement between one or more contracting authorities and one or more tenderers, which determines the terms and conditions of the award of the contract during the period of validity of the framework agreement, in particular with regard to price and, where appropriate, quantity.

Therefore, in a situation where contracting authorities cannot predict the exact quantities of the subject of procurement, they have the option of concluding a framework agreement with one or more bidders, stipulating the framework quantities in the procurement documentation, with the proviso that individual contracts will be concluded on the basis of the framework agreement when the need for the subject of procurement arises.

Paragraph 2 of the aforementioned article of the PPL stipulates that a public procurement contract concluded on the basis of a framework agreement cannot contain substantial changes to the conditions set out in that agreement.

If the contracting authority acts contrary to the aforementioned legal provision, or if it concludes a public procurement contract in violation of the provisions and conditions of the framework agreement, this constitutes grounds for the cancellation of the contract by the Republic Commission for the Protection of Rights in Public Procurement Procedures, pursuant to Article 233, paragraph 1, item 5) of the PPL.

For example, after the public procurement procedure was conducted, the contracting authority concluded a framework agreement with several bidders, providing for the reopening of competition among bidders. The concluded framework agreement contains a provision stipulating that unit prices when concluding an individual public procurement contract cannot be higher than the prices specified in the framework agreement. When reopening the competition, one of the bidders with whom the public procurement contract was concluded offered unit prices that were higher than the prices from the framework agreement. The aforementioned conduct is not in accordance with the provision of Article 66 of the PPL, considering that the public procurement contract was not concluded in full accordance with the terms and conditions of the framework agreement.

# RECOMMENDATIONS FOR IMPROVING MEASURES FOR EFFECTIVE DETECTION AND SANCTIONING IRREGULARITIES IN PUBLIC PROCUREMENT

### 4.1 Planning

When conducting the supervision, audit or monitoring procedure, special attention at this stage of public procurement should be paid to the control of the manner in which procurement needs are determined within the contracting authority's organisational units, and in particular in this regard:

* + - * whether the procurements carried out by the contracting authority have been previously planned;
			* whether the implementation and results of previously conducted public procurements and concluded contracts are monitored (at what stage are they, what are the experiences with the bidder implementing them, etc.);
			* whether the condition of supplies and equipment that needs to be replaced or repaired is monitored;
			* whether an analysis of the current market situation is being carried out, and whether this analysis includes only the technical characteristics offered or also the collection of information about market prices, potential bidders, and the results of procedures already carried out with other contracting authorities;
			* whether annual and medium-term business plans are taken into account;
			* whether the tasks assigned to the contracting authority are realistically taken into account, as well as the available capacities, primarily in terms of personnel;
			* whether the needs expressed by the contracting authority's organisational units are checked before these needs are presented as planned procurements in the public procurement plan.

In addition to the above, at this stage it is important to pay attention to how the dynamics of the implementation of planned public procurements are determined, and whether priorities are determined in advance in this regard. It is also important to ask 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 certain procurements.

### Implementation of the public procurement procedure

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

* selection of type of procedure;
* the manner in which the estimated value of the public procurement was determined;
* the manner in which technical characteristics and criteria for the selection of the economic operator are determined, i.e., whether there is a written record of how they were requested and whether they were explained by the organisational unit for whose needs the procurement is being carried out;
* whether and to what extent the contracting authority conducted market research when determining the technical characteristics of the subject of procurement;
* whether the justification of the required technical characteristics stated by the organisational unit for whose needs the procurement is being carried out was checked before the tender documentation was drawn up;
* whether all bidders were provided with answers to the questions they asked in order to clarify the tender documentation;
* whether the expert assessment of the bids was carried out in detail, respecting the principle of equality of bidders (that the same reasons lead to the same consequences, for example, rejection of bids);
* whether the request for additional explanations during the review and expert evaluation of the bids led to a change in the elements of the bid that are relevant for the application of the contract award criteria or to a change in the offered subject of procurement;
* whether bidders were allowed to inspect the bids and copy the documentation, if they requested it.

### Execution of a public procurement contract

At this stage it is important to pay attention to the fact:

* whether the contract amendments were made in accordance with the provisions of the PPL;
* whether bidders or subcontractors not listed in the bid and the public procurement contract participated in the execution of the contract;
* whether the financial security funds have been realised if the contractual obligations have not been respected by the selected bidder;
* whether during the execution of the contract it turned out that the bidder provided false information regarding the selection criteria (for example, does not have the required capacities) or is unable to deliver goods of the required quality and technical characteristics, because it submitted falsified catalogues or other evidence for the same;
* whether the procurement was actually carried out in full, and whether there is evidence of the execution of each part of the procurement;
* whether, if possible, there were multiple payments for the same, or whether the same part of the implemented contract was charged two or more times.

All of the above can be facts that guide citizens or civil society organisations, as well as the media, when collecting information about individual public procurements that are being implemented. In addition, unlike the competent authorities that can do so based on the authorities granted to them, citizens and the media can obtain information by sending a request for access to information of public importance to the contracting authority or competent authorities. Of course, the collection of relevant information can also be assisted by the developed functionalities of the Public Procurement Portal, which allow such information to be obtained in a simple and quick manner.

In this regard, it should be noted that on 4 November 2023, the Law on Amendments to the Public Procurement Law[[9]](#footnote-9) entered into force and has been applied since January 1, 2024, except for the provision of Article 21, paragraph 1 of this Law (registration of new economic entities on the Public Procurement Portal) which applies from the date of entry into force of this Law.

One of the important novelties provided for in the Draft Law on Amendments to the Law on Public Procurement is the creation of a database on the Public Procurement Portal, which, in addition to information on all contracts concluded after the public procurement procedure and all amendments thereto, also contains data on contracts/orders concluded, i.e., issued in accordance with Article 27 of the PPL, which prescribes the thresholds up to which the provisions of this they do not apply the law;

In addition to the above, inter-institutional cooperation is of great importance when it comes to combating irregularities. The cooperation established between the competent institutions should be continued in the future, bearing in mind that it contributes to a better understanding of public procurement regulations. The above contributes to undertaking adequate activities with the aim of detecting, preventing and sanctioning irregularities in the public procurement system.



1. “Official Gazette of the Republic of Serbia”, Nos. 91/19 and 92/23 [↑](#footnote-ref-1)
2. “Official Gazette of the Republic of Serbia”, Nos. 88/2011, 15/2016 and 104/2016 [↑](#footnote-ref-2)
3. “Official Gazette of the Republic of Serbia”, Nos. 128/2020, 116/2022 and 92/2023 – as amended [↑](#footnote-ref-3)
4. “Official Gazette of the Republic of Serbia”, Nos. 54/2009, 73/2010, 101/2010, 101/2011, 93/2012, 62/2013, 63/2013 - corr., 108/2013, 142/2014, 68/2015 - as amended, 103/2015, 99/2016, 113/2017, 95/2018, 31/2019, 72/2019, 149/2020, 118/2021, 138/2022, 118/2021 - as amended and 92/2023 [↑](#footnote-ref-4)
5. “Official Gazette of the Republic of Serbia”, Nos. 36/2015, 44/2018 – as amended i 95/2018 [↑](#footnote-ref-5)
6. “Official Gazette of the Republic of Serbia”, No. 110/2023 [↑](#footnote-ref-6)
7. “Official Gazette of the Republic of Serbia”, Nos. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019 [↑](#footnote-ref-7)
8. “Official Gazette of the Republic of Serba”, Nos. 94/16, 44/2018 - as amended and 10/2023 [↑](#footnote-ref-8)
9. “Official Gazette of the Republic of Serbia”, No. 92/23 [↑](#footnote-ref-9)