

Analysis of Legal Protection in Public Procurement Procedures in Bosnia and Herzegovina



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Analysis of Legal Protection in Public Procurement Procedures in Bosnia and Herzegovina

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Sarajevo, 2015

Title: Analysis of Legal Protection in Public Procurement Procedures in Bosnia and Herzegovina

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Editor:
Editorial Board of Analitika – Center for Social Research

Peer Review:
Marko Turudić

Published by:
Analitika – Center for Social Research

Year of Publication: 2015
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Address of the Publisher:
Kaptol 5, 71000 Sarajevo, Bosna i Hercegovina
info@analitika.ba
www.analitika.ba

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This publication is published within the project “Open Public Procurement in Bosnia and Herzegovina” jointly implemented by Centre for Investigative Reporting (CIN), Analitika - Center for Social Research and Public Interest Advocacy Centre (CPI).



The project is funded by the European Union and co-funded by the UK Government. Responsibility for the views set out in this publication lies entirely with the Analitika - Center for Social Research, and they do not reflect the official opinion of the European Union or the UK Government.



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1.

Introduction

Legal protection in public procurement procedures implies a set of legal norms which govern the mechanisms available to participants in these procedures with the objective of protecting their rights and interests. The legal protection framework ensures the realization of several important objectives of public procurement. Competitive and transparent procedures in public procurement¹ assist legal public authorities to get the best value for money when they procure products and services. This results in cost-effective spending of public funds, faster economic growth and greater competitiveness among entrepreneurs. Open and transparent procedures in public procurement influence prevention of discrimination, cronyism and corruption.² From the standpoint of the European Union (EU) the objective of public procurement is also to open the market of public procurement for member states, enabling the participation of entrepreneurs in public procurement procedures outside the boundaries of a particular state.

Legal protection is very important for the realization of the above objectives of public procurement. Legal protection regulations should ensure equal legal position for all entrepreneurs in public procurement, the efficient and timely implementation of public procurement procedures, and should also enhance legal security in this area. Unregulated or insufficiently regulated legal protection may cause direct damage to the economy as it enables the choosing of bids that are not necessarily the best. The fallout of this includes other negative effects (political, economic, sociological). Efficient legal protection increases the trust of the public in the transparency of procedures, and encourages entrepreneurs to participate in public procurement procedures. Efficient legal protection can also act as a preventive measure against a concrete contracting authority or other contracting authorities,³ in the sense of ensuring that there is no infringement of public procurement rules.

¹ We refer to procedures (plural) in public procurement in order to differentiate between the procedures in public procurement regarding their openness. Procedures in public procurement in the existing legislation are as follows: 1 open procedure, 2 restricted procedure, 3 negotiated procedure, 4 competitive dialogue and 5 design contest.

² On the objectives of public procurement see Dragan Medvedović and Ivan Šprajc, “Postupak javnih nabavki i zaštita sudionika” [Public Procurement Procedure and Protection of Participants], *Pravo u gospodarstvu*, no. 4 (2003), 1–306, pp. 166 and 167.

³ The notion of contracting authorities in the Law on Public Procurement in Bosnia and Herzegovina implies the authorities that implement procedures in public procurement.

Apart from their prominent position in any legal system, national norms regarding legal protection in the EU member states, candidate states and accession states are founded in European Law, and as such, they are the result of the harmonization of national legislation with the requirements of European law. In this way the harmonization of legal protection in member states, candidate states and potential candidates is achieved. The request for harmonized procedures in member states derives from an understanding that different procedures in different states have a negative impact on the functioning of a unified European market. The European legislation is important for Bosnia and Herzegovina (BiH) not only as an instrument for the strengthening of the economy, but also in respect of the commitments undertaken earlier to gradually harmonize BiH legislation with that of the EU. One of the areas where BiH legislation is harmonized with European law is the area of public procurement.

The subject-matter of this study is legal protection in public procurement procedures in Bosnia and Herzegovina, which is implemented as an administrative and administrative-judicial protection, in the manner of critically deliberating the relevant issues of legal protection of participants in public procurement procedures. The present analysis deals with the existing rules that govern legal protection in public procurement procedures having in mind the potential consequences of incomplete or inadequate regulation, which affects the rights and interests of participants in public procurement procedures. Above all, this study is focused on the analysis of rules which govern the basic legal remedy available to participants in the public procurement procedures against the decision of the contracting authority of the aforementioned action or omission of action or the procedure of the contracting authority, followed by an analysis of appeal in an administrative dispute. In this sense, the present study suggests the direction of possible legal intervention which could improve the legal protection rules in public procurement procedures in BiH with regard to the relevant European and comparative law. Accordingly, in addition to a review of legal protection in accordance with the existing *de lege lata*, this study also includes questions with regard to what this protection should be in view of the requirements of European law (*de lege ferenda*).

The initial assumption in this analysis is that legal protection in any state is regulated independently, but the autonomy of member states (and future member states that have already undertaken some commitments) is restricted by EU rules. As a result, the conclusions in this study inevitably deal with the influence of the relevant European law regarding the provision of effective legal remedies in public procurement procedures by observing the practice of the European Court of Justice in Luxembourg (the European Court), and the regulations that govern the availability of legal remedies in the area of legal protection in some member states that have implemented European law (such as Croatia and Slovenia). The objective of this study is to see what lessons can be drawn from the experience of the aforementioned states and in what manner these lessons can be applied in BiH law with the aim of further improving the legislation of legal protection. Thus

an insight is gained about the relationship between legal regulation and practice, and in this respect the inadequacies in the existing legal protection norms in public procurement procedures in BiH can be observed.

The presentation of the methodological and analytical framework of this study (Chapter 2) is followed by a summary of the relevant EU legal acts (Chapter 3) and a subsequent analysis of the legal and institutional framework of public procurement in BiH (Chapter 4). In the chapter on legal protection (Chapter 5) procedural rules are analyzed. The results of this analysis are summed up in the Conclusion (Chapter 6). In Chapter 7 there is a list of proposals for possible decisions with regard to the previously recognized problems.

2.

Methodological and Analytical Framework

The aim of this study is to find answers to the question as to whether the existing legal framework in BiH meets the requirements of efficient legal protection in public procurement procedures from the perspective of the relevant EU legal standards. Administrative protection as a basic and initial legal protection in public procurement procedures has been considered from the standpoint of both individual interests and the public interest along with legal protection in administrative-judicial procedures. In fact, thanks to the mere existence of the control system, the formal requirement of a state governed by the rule of law has been met, but this raises the inevitable question concerning the efficiency and effectiveness of the competent authorities in charge of the control of public procurement procedures. In this respect efficient action is ensured only by adequate regulation. With regard to the current relationship between BiH and the EU, the legal regulation in BiH is in the phase of examining its harmonization with the EU legal system. This understandably implies the examination of the harmonization of the BiH public procurement regulations with those in the EU, but also the part which refers to legal protection. This analysis points to the deficiencies of procedural provisions per se, and to subsidiary application of administrative procedure rules.

In respect of methodology, this analysis is based on a comparison between the relevant legislation in BiH with that of individual EU member states. The comparative legal review provides an insight into similarities and differences between the legislation in Bosnia and Herzegovina with that in the Republic of Croatia and the Republic of Slovenia as EU member states whose legal systems have been harmonized with the EU legislation. Considering that they previously belonged to the same state sharing a common tradition and standards in special branches of law, it is logical to take the model of the Croatian and Slovenian legislations, respectively. Their experiences in the development of the legal protection system may serve as a model for accepting some of their decisions. One should not lose sight of the restricting factors, primarily in respect of the BiH government system.⁴

⁴ In respect of constitutional law Croatia and Slovenia are simple states while BiH is a specific state, i.e. a complex federal state. The entity system of government in BiH necessitates different systems of legal norms.

The restricting factor in the context of this analysis is a lack of established procedural practice, since the new legislation on public procurement was put into effect only at the end of last year (i.e. in 2014). This is a reason why the present analysis is not based on practical problems but rather on detecting possible problems that could make it difficult to practically implement the legal protection procedure. The subject matter of this analysis is not a description of the course of legal protection procedure as a whole pursuant to the legal provisions which govern public procurement procedures in BiH.⁵ The analysis deals with the provisions which define the underlying concepts, suggesting possible improvements of the provisions which have not been completely harmonized with the European law. For methodological reasons the subject matter of this analysis does not include compensation of damages, which is not a primary request of injured participants in public procurement procedures.⁶ For the same reasons the subject matter does not include so-called indirect legal protection in public procurement procedures (protection of market competition, criminal law protection).

For the purpose of this analysis telephone interviews were conducted with representatives of the competent authorities for the implementation of legal protection in public procurement procedures. The interviews conducted with targeted respondents serve to confirm the reliability of the findings in this analysis. The collected data point to some practical problems in the implementation of some legal decisions in the initial phase of the application of the new legislation on public procurement in BiH. The perspective of the individual respondents is based on the knowledge and experience gained in the application of the prior legislation on public procurement. This is undoubtedly an essential factor in estimating the improvement of legislation, but also the degree of optimization of the existing legal framework of the legal protection system in public procurement procedures in BiH.

⁵ We have to bear in mind that legal protection in public procurement is an exceptionally wide area. A detailed review of a comprehensive public procurement procedure would be a goal beyond the scope of this analysis.

⁶ In this regard Fernandez refers to indemnity as a *second best choice*, namely, as a *final alternative*. José M. Fernández Martín, *The EC Public Procurement Rules – A Critical Analysis* (Oxford: Clarendon Press, 1996), pp. 213–248.

3.

Relevant EU Acts

The EU's legislation has exceptional importance for BiH as an instrument for strengthening the economy, but also with regard to the reform of the public procurement system in BiH aimed at harmonizing it with EU law. Bringing about national norms on public procurement is required in order to harmonize that part of our legal system with EU law. The underlying argument for the harmonization of proceedings in all member states of the EU is to prevent the negative impact of different procedural rules on the functioning of a unified market.⁷ The harmonization of national public procurement systems of member states is one of the most important instruments of the internal market, which serves to eliminate obstacles to free trade within EU.

Apart from the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), the basic sources of legal protection at EU level are legal protection directives and the court practice of the European Court. Of exceptional importance are the following legal protection directives: Directive 89/665/EEC of December 21, 1989 on the harmonization of laws and other rules with regard to application of the procedures for the control of public procurement contracts for goods and public works, and Directive 92/13/EEC of February 25, 1992 on the harmonization of laws and other rules with regard to application of the EU rules in procurement procedures of operators who work in the area of water supply, energy, transport and telecommunications. The above directives have been amended by Directive 2007/66/EEC on the improved efficiency of auditing procedure in respect of the contracts award for public procurement. These directives are important legal acts, whereby member states must harmonize the content of their respective national legislations.⁸

Although from the legal standpoint the above directives are not binding for BiH at the present moment, it is preferable that the above directives should be

⁷ Sue Arrowsmith, *Remedies for Enforcing the Public Procurement Rules* (Winteringham, South Humberside: Earlsgate Press, 1993), p. 87.

⁸ Generally speaking, directives are such legal acts that are binding in respect of the results achieved by them, but they allow national authorities to choose the form and method of their implementation. The directives serve to achieve rapprochement rather than comprehensive harmonization of law in EU member states. Therefore, the directives have an objective which must be achieved, so that member states are obliged to introduce them into their national systems, but free to choose the form how to implement them [“Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union,” *Official Journal of the European Union*, C 83, 2010, Article 288, para. 3 (hereinafter referred TFEU)].

considered as a source of law which will soon take effect in BiH. Legal protection directives ensure the implementation of the public procurement procedures as stipulated by material directives,⁹ but also by other European sources on public procurement. Legal protection directives set certain requirements that must be met by member states when they regulate legal protection in their respective national legislation. These requirements should ensure the quality of the legal protection system, and they pertain to the establishment, authority and functioning of the institutions that implement legal protection, but also to the procedure in front of the institutions of legal protection.¹⁰

⁹ Relevant legal framework in this sense includes “Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC,” *Official Journal of the European Union* L94, March 28, 2014; and “Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services and repealing Directive 2004/17/EEC,” *Official Journal of the European Union* L94, March 28, 2015. These Directives came into force on April 17, 2014 while the time limit for their implementation in member states is April 18, 2016.

¹⁰ Damir Aviani, “Pravna zaštita u postupku dodjele javnih ugovora – harmonizacija hrvatskog prava s *acquis communautaire*” [Legal Protection in the Procedure for Public Contracts Award – Harmonization of Croatian Law with the *Acquis Communautaire*], *Zbornik radova Pravnog fakulteta u Splitu* 45, 1 (2008), p. 184.

4.

Legal and Institutional Framework of Public Procurement in Bosnia and Herzegovina

The legal and institutional framework of public procurement in BiH is largely a result of its acceptance of the relevant European norms in this area. By signing the Agreement on Stabilization and Accession (ASA), BiH is committed to gradually harmonize its legislation with that of the EU, but also to gradually ensure the harmonization of existing acts and future legislation with EU law.¹¹ The harmonization of legislation in the public procurement area is one of the priorities in respect of the harmonization of legislation with EU sources of law.¹² Public procurement is a priority area because of its importance for the economy in any state, but also, as indicated above, for the functioning of a unified market. This point was also emphasized in the ASA, which, inter alia, regulates the area of public procurement.¹³ The harmonization of legislation in the area of public procurement consists of both the legal and institutional framework.

4.1. Legal Framework

The existing Law on Public Procurement (LPP)¹⁴ is a unique and basic act which regulates the area of public procurement in BiH. A special chapter in this law refers to legal protection. In this manner BiH has become part of a group of countries that have regulated public procurement procedures by way of a

¹¹ “Sporazum o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica, sa jedne strane, i Bosne i Hercegovine, sa druge strane” [Stabilisation and Association Agreement between the European communities, and their Member States, of the one part, and *Bosnia* and Herzegovina, of the other part], April 27, 2012, Article 70.

¹² On the sources of European law in the public procurement area see Sue Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet and Maxwell, 2005), pp. 135–136.

¹³ “Stabilisation and Association Agreement between the European communities, and their Member States, of the one part, and Bosnia and Herzegovina, of the other part,” Article 74.

¹⁴ “Zakon o javnim nabavama” [Law on Public Procurement], *Official Gazette of BiH* 39/14.

unique act of a wider scope.¹⁵ The LPP came into force after its publication in the Official Gazette of BiH of May 19, 2014. Nevertheless, its application was postponed for six (6) months from its entry into force.¹⁶ Prior to this the area of public procurement was regulated by the Law on Public Procurement in Bosnia and Herzegovina,¹⁷ which was put out of force after adopting the new valid LPP.¹⁸ The changes in the legislation were undertaken to improve the system¹⁹ and harmonize the legislation of public procurement with the European Law.

Legal protection procedure according to the valid LPP – administrative and judicial – is incorporated in the provisions of the LPP²⁰ and regulated in the third part (Chapters I and II), under the title “Legal Protection”. In view of the relatively small number of provisions which refer to legal protection, and especially regarding the content of some provisions, we can notice inadequacy of norms. In essence, the LPP consists of 27 provisions which refer to the legal protection procedure, which is a relatively small number when we take into consideration the fact that in the legal protection procedure only a small number of provisions of the relevant law in the framework of the legal system are applicable in a subsidiary manner.²¹ Notwithstanding this, some other deficiencies have been noticed, above all, those that refer to the nomotechnical correctness of the Law.

In the part of the LPP that refers to legal protection one can observe that the normative sequence of legal protection is not correct in the nomotechnical

¹⁵ Generally speaking, there are three different ways to apply directives: by means of concise provisions or rules as is the case in Denmark, France, Germany, Ireland, Italy, and Luxembourg; by incorporating directives in a unique act of a wider scope which includes a chapter on legal protection as is the case in Austria, Finland, the Netherlands (only for works), Sweden and the United Kingdom; or by relying on the existing rules in application as is the case in Belgium, Greece, the Netherlands (except for works), Portugal, and Spain: Organisation for Economic Co-operation and Development (OECD), “Public Procurement Review Procedures,” *SIGMA Papers* no. 30 (2000), pp. 12 and 13.

¹⁶ “Law on Public Procurement,” Article 125, para. 1. Disengagement from the publication and coming into effect (*vacatio legis*) is a result of high standards and novelties brought about by the Law as a whole, especially the part which refers to legal protection.

¹⁷ It refers to the “Zakon o javnim nabavama Bosne i Hercegovine” [Law on Public Procurement of Bosnia and Herzegovina], *Official Gazette of BiH* 49/04, 19/05, 52/05, 8/06, 24/06, 70/06, 12/09, 60/10 and 87/13.

¹⁸ “Law on Public Procurement,” Article 124, para. 1.

¹⁹ On deficiencies of the practical application of the previous Law on Public Procurement see Slavica Rokvić, *Analiza stanja u oblasti javnih nabavki u Bosni i Hercegovini s preporukama za dalje akcije* [An Analysis of the Situation in the Public Procurement Area in Bosnia and Herzegovina with Recommendations for Further Action], (Banja Luka: Transparency International BiH, 2007).

²⁰ In Croatia legal protection is also incorporated into the law which governs public procurement procedures while in Slovenia legal protection is regulated by a special law.

²¹ For comparison the Croatian Public Procurement Act consists of 38 provisions which refer to legal protection with comprehensive content related to the LPP, while in Slovenia legal protection is regulated by a special law – “Zakon o pravnem varstvu v postopkih javnega naročanja” [Law on the Legal Protection in Public Procurement Procedures], *Official Gazette of Republic of Slovenia* 43/11, 60/11, 63/13 and 90/14 (ZPVPJN).

respect. It appears that the need to tackle the issue of legal protection in a logical order has not been sufficiently observed, so that the Law in its current form is not systematic. This implies that the content of provisions on legal protection is such that the logical sequence of the course of a legal protection procedure is not taken into consideration. Therefore the question may be raised about the validity of this part of the Law from the standpoint of the elaboration of legal rules.²² For example, at the very beginning of the third part, in Chapter I, Section A, entitled “General Provisions” the LPP cites parties in procedure (Article 94) without prior decision on the competencies for resolving appeals, the right to appeal and procedural principles. For comparison one should refer to the relevant provisions in the Croatian Public Procurement Act which only after determining the issue of competencies for resolving appeals, the principles and the legal nature of the appeal procedure, the language of the procedure and the right to appeal,²³ determines who the parties in an appeal procedure are.²⁴ Furthermore, in Section B of the same chapter under the title “Filing Appeals” in Article 100, the LPP determines the procedure of the contracting authority in the case of an appeal, and thereafter, in the next Article (Article 101) it determines the time limits for filing an appeal, although the determining of the time limits for filing an appeal should precede the procedure of the contracting authority. In Chapter II of the same part, Section A, under the title “Legal Protection” the LPP regulates legal protection (Article 115), and thereafter in the same chapter in the next Article (Article 116) it includes infringement provisions, although legal protection in an administrative dispute has no connection whatsoever with the infringement provisions of the LPP (especially in view of the authority of different courts). Section C of Chapter II of the third part under the title “Reimbursement of Costs of the Procedure” (Articles 119 and 120) determines the right to reimbursement of procedure costs due to the violation of the public procurement procedure committed by the contracting authority,²⁵ decided upon by the supervisory authority, while in the same section in the next Article it talks about damages compensation in accordance with general rules on compensation of damages (Article 121). Thus in one section issues pertaining to administrative and civil law are regulated concurrently. In addition, the subsuming of the whole of Chapter VI in the second part is not adequate. Namely, the institutions for monitoring the implementation of law are subsumed in the second part of the Law which regulates the course of procedure in public procurement, although

²² Ivo Borković, *Postupak i tehnika izrade pravnih propisa* [Procedure and Technique of Elaborating Legal Provisions], (Zagreb: Informator, 1987), p. 83.

²³ Croatian “Zakon o javnoj nabavi” [Public Procurement Act], *Official Gazette of Republic of Croatia* 90/11, 83/13, 143/13 and 13/14, Articles 138-141.

²⁴ *Ibid.*, Article 142.

²⁵ For the legal definition of a contracting authority see “Law on Public Procurement,” Article 2, para. 3, Item b.

the institutional framework of legal protection with regard to the existing systematization of the LPP should be separated into a special part of the Law.

4.2. Institutional Framework

The complex procedure of harmonizing the legislation in the area of public procurement requires the establishment and adjustment of indispensable institutions and structures which should ensure efficient legal protection. This part of the analysis deals with the normative framework which is closely connected with the institutional framework that includes the relevant institutions: the Public Procurement Agency and the Procurement Review Body.

4.2.1 Public Procurement Agency

The Public Procurement Agency (PPA) is an independent administrative entity with the status of a legal personality whose task is to ensure fair implementation of the LPP. The PPA is represented and managed by its director who organizes and ensures the legal and efficient execution of work. The director has the status of secretary entrusted with a special task. He brings about implementing regulations and other acts which ensure the legal and efficient execution of work and he is responsible for the work of the PPA. Along with the director, the PPA has a Committee which deliberates the issues regarding the functioning and improvement of the institute of public procurement. The activities and tasks within the scope of the PPA²⁶ are related to legislative activities such as preparing and drafting laws, cooperating with contracting authorities and bidders so as to improve their awareness of rules, providing technical assistance as well as providing opinions to ensure fair treatment of contracting authorities and bidders, monitoring the implementation of procedures in order to enhance awareness and eliminate irregularities, developing a system of electronic communication, training lecturers and officials in charge of public procurement as well as monitoring their work. The PPA is responsible for reporting on its work to the Council of Ministers of BiH.

Accordingly, in addition to tasks regarding the harmonization of legislation, the PPA also has an important advisory role in the application of legislation. Nevertheless, with regard to this role of the PPA, its competencies are not adequately or properly defined. Thus, one of the competences of the PPA is to provide advisory opinions to contracting authorities and bidders with regard to the correct application of legislation.²⁷ The point here is that the provision of advisory opinions should not be restricted exclusively to contracting authorities

²⁶ Tasks are listed in "Law on Public Procurement," Article 92.

²⁷ Ibid., Article 92, para. 3, Item d.

and bidders, as determined by the LPP. All economic operators should potentially be authorized to submit a request for an opinion.²⁸ It is not legitimate that the LPP grants this right only to bidders and not candidates. In addition, one should consider the possibility of granting this role to the wider public. In this manner the principle of transparency, namely, the public nature of the work of this agency would be achieved, and consequently, it would contribute to the trust of the public in the system. Otherwise, the PPA should estimate the legal capacity of the submission of request for each individually submitted request for an opinion, and this, in turn would be unacceptable with regard to the role of this agency (which is primarily advisory). Since there are no provisions in the LPP on the PPA's procedure if the latter determines that the request has not been submitted by a competent authority, or an economic operator or a bidder, there is scope for a selective approach and arbitrary action. As a comparable example of a just solution one can take the example from the Croatian Public Procurement Act which also envisages the possibility of providing opinions with regard to the application of legislation on public procurement without restricting the provision of expert opinions to a certain circle of persons.²⁹

In respect of the PPA's competence to establish a monitoring system in order to eliminate irregularities there is incongruence which should be corrected in the next legal intervention. With regard to the PPA's competence to establish a system of monitoring procedures by means of education and elimination of the observed irregularities in individual procedures of public procurement,³⁰ the legislator has not explicitly regulated who can eliminate irregularities on the part of the PPA. We can only assume that a contracting authority can exercise this right since there are no provisions in the LPP which could authorize the PPA to eliminate such irregularities. Obviously, the intended meaning of this provision is that the irregularities in the proceedings of the contracting authority are eliminated by the contracting authority itself but the deficiencies, namely, irregularities, should have been observed by the PPA. Nevertheless, the aforementioned provision is incompletely worded.

It is not within the PPA's competency to implement supervision with the aim of preventing or eliminating deficiencies that can occur as a result of the violation of the LPP and its procedural rules. This refers to the description of the duties of the PPA with regard to Chapter VI of the second part of the LPP which is formulated as "Institutions for Monitoring of Law Implementation". In fact, if the PPA is authorized to monitor the implementation of procedures executed by

²⁸ An economic operator can be a participant in the public procurement procedure as a bidder, candidate, member of a group of candidates/bidders and a supplier (Ibid., Article 2, Item c).

²⁹ Croatian "Public Procurement Act," Article 177, para. 4.

³⁰ Provision of "Law on Public Procurement," Article 92, para. 3, Item e, states: "to establish the system of monitoring of procedures that are implemented by contracting authorities for procurement of supplies, services, and works with the aim of educating and eliminating irregularities noticed in individual public procurement procedures."

the contracting authorities, it follows that within the competency of this entity the provision regarding its duty to supervise the application of the LPP and its procedural rules is omitted. The implementation of administrative supervision is inherent to the state administration entities and the PPA has such a status. This possibility should have been envisaged by the LPP by emphasizing the supervisory role of this entity. If it were authorized to implement a supervisory role, the PPA could initiate an infringement procedure by filing charges to a competent magistrates' court. A comparable example of a possible decision on the aforementioned problem can be found in the Croatian Public Procurement Act. This Law authorizes the central authority in the state administration in charge of the system of public procurement (a counterpart to the PPA) to exercise supervision with the objective of preventing or eliminating the irregularities that may occur or have occurred as a result of the implementation of the Public Procurement Act and of procedural rules.³¹ The implementation of supervision includes competences for proceedings if violations of the LPP have been observed in the execution of supervision. In this sense the Croatian Public Procurement Act authorizes the entity in charge of public procurement to initiate an infringement procedure to a competent magistrates' court regulating concurrently that supervision should not be implemented if an economic operator who has requested the execution of supervision has filed an appeal.³²

The PPA also files appeals for misdemeanors within its authority in the absence of the procedure for an appeal.³³ The controversial point about the above article is the explicit lack of a system. The LPP lists tasks that were omitted from the list of its prior competences³⁴ and this is wrong from the nomotechnical standpoint. In the infringement provisions of the LPP it is stated that "in cases in which review procedure has not been initiated, the Agency shall submit an infringement report to the competent misdemeanor court, once it establishes violations of this Law that fall within its scope of competence."³⁵ The content of the above provision in the LPP is problematic in the context of its application since the LPP does not explicitly state what violations are within the competencies of the PPA. In view of this, the PPA is left with the possibility of estimating its own competency, namely, of estimating a possibility and a need of acting in a concrete case. Furthermore, the question is raised in what manner a competent misdemeanor court shall estimate the legal capacity of the infringement proceedings for a violation which was not listed within the competency of the PPA. In view of the fact that the PPA

³¹ Croatian "Public Procurement Act," Article 179, para. 1.

³² Ibid., para. 3 and 4.

³³ "Law on Public Procurement," Article 116, para. 2, determines the kinds of misdemeanor and sanctions (fines) for offenders.

³⁴ In Ibid., Article 92, para. 3.

³⁵ Ibid., Article 116, para. 1.

files an appeal in the absence of an appeal procedure,³⁶ the question remains open regarding by what means the PPA shall learn whether an appeal has been filed or an appeal procedure undertaken if the Law does not stipulate that an appeal shall be forwarded to the PPA. Another indication of inadequate regulation of the question of filing an appeal on the part of the PPA is corroborated by the fact that this entity has hitherto filed no appeal.³⁷

4.2.2 Procurement Review Body

The underlying competency of the Procurement Review Body (PRB) is to resolve appeals, namely, to decide on appeals.³⁸ The PRB adopts decisions which represent an introduction into an administrative dispute, while the role of the PRB is of operative-administrative character. The important role that the PRB occupies in public procurement procedures, namely, the competency it is invested with to decide institutionally on the legality of a conducted public procurement procedure, requires a precise definition of the PRB's position within the legal system and a precise definition of the review procedure. The review procedure should ensure legality in public procurement procedures and on account of this, the organizational and functional independence of the PRB is necessary (independent decision making). It is also necessary to provide explicit guarantees for the independence of persons who decide on legal remedies (immunity, exemption rules, term-of-office rules).

Pursuant to the explicit provision of the LPP, the PRB is an independent entity with the status of a legal person.³⁹ The status of this entity is more precisely defined by the Law on Ministries,⁴⁰ which defines the PRB as an independent administrative entity.⁴¹ Nevertheless, the authority which decides on appeals in public procurement procedures should not be an administrative entity but rather a quasi-judicial entity, intersecting with the role of a specialized judiciary since it involves a mix of both administrative and judicial elements. The PRB conducts an administrative procedure which draws closer to a form of judicial procedure, and yet it does not entirely comply with the definition of a judicial procedure. Unlike judicial control, the examination of administrative activities conducted by this entity is not constrained to strictly legal issues but extends to issues of

³⁶ Ibid.

³⁷ According to an interview conducted with a representative of the Public Procurement Agency (PPA) the reason for this is a lack of staff and material funds.

³⁸ "Law on Public Procurement," Article 93, para. 8.

³⁹ Ibid., para. 1.

⁴⁰ "Zakon o ministarstvima i drugim organima uprave Bosne i Hercegovine" [Law on Ministries and Other Administrative Bodies of Bosnia and Herzegovina], *Official Gazette of BiH* 5/03, 42/03, 26/04, 42/04, 45/06, 88/07, 35/09, 59/09 and 103/09.

⁴¹ Ibid., Article 17, para. 1, Item 26.

opportunism (justifiability) of decisions reached by contracting authorities, but still according to the cogent legal provisions.⁴² Consequently, with regard to the role of this entity, it is both judicial and administrative in character, and as such, it cannot be classified without reserve either as an administrative or judicial entity. This is a strong argument in favor of the assertion that this entity should be founded in a special law which would regulate its scope, organization, manner of work, personnel and remuneration schemes and other relevant issues for the work of this entity.

The view that the PRB should be invested with the status of a quasi-judicial entity is justified by the fact that with the expected full membership of BiH in the EU, it could forward preliminary rulings to the European Court. The precondition for this is its status either as a court or tribunal pursuant to Article 267 of the TFEU. The concept of court or tribunal is the EU concept, and consequently, the status of this entity does not depend on the respective national legislation. In the majority of EU member states a request for legal protection is not decided by courts, but by special *prima facie out-of-court* non-judicial entities (an exemption to this is compensation for damages, which lies within the authority of civic courts).⁴³ In procedures conducted in such entities, the issue of legal interpretation may appear, i.e. an estimate of validity of the EU law.⁴⁴ A national entity which conducts a procedure where European law needs to be applied may demand that the European Court decide on preliminary rulings. The European court will consider the preliminary ruling only when it determines that the entity that has forwarded a preliminary ruling has the status either of a court or tribunal.

Therefore, starting from the general criteria whereby the status of a court or tribunal is recognized, it is necessary to analyze whether the PRB has such a status. The above criteria have been proclaimed in the European Court's decisions in cases such as *Dorsch Consult*⁴⁵ and *Josef Köllensperger*.⁴⁶

⁴² In some cases the decisions of contracting authorities may be legal but unjustified at the same time. For example, the contracting authority may reject a bid due to considerably significant deficiencies ("Law on Public Procurement," Article 45, para. 5) although the Procurement Review Body (PRB) may estimate that it is not a case of such deficiencies.

⁴³ OECD, "Public Procurement Review Procedures," p. 10.

⁴⁴ Pursuant to "TFEU," Article 267, the European Court is authorized to decide on preliminary rulings on:

- a) Interpretation of the Contract;
- b) Validity and interpretation of the acts of institutions, authorities, entities or agencies of the Union.

⁴⁵ Court of Justice of the European Communities, Case No. C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH vs. Bundesbaugesellschaft Berlin mbH*, ECR (1997) I-4961, September 17, 1997, para. 23 of the judgment.

⁴⁶ Court of Justice of the European Communities, Case C-103/97, *Josef Köllensperger GmbH & CO. Kg, Atzwanger AG vs. Gemeindeverband Bezirkskrankenhaus Schwaz*, ECR (1999) I-151, para. 29 of the judgement.

Accordingly, this entity shall be: 1) based in law 2) permanent in nature, 3) one whose decisions are binding, 4) one whose procedure is conducted *inter partes*,⁴⁷ 5) one whose decisions are based in legal norms and 6) independent and autonomous. Legal-protective directives and the European Court's judgments were used as a foundation for establishing the PRB. The PRB has its foundation in the LPP but it is an independent and autonomous entity,⁴⁸ permanent in nature,⁴⁹ its decisions are binding for parties,⁵⁰ its procedure is conducted on the basis of the LPP⁵¹ and it decides on the legitimacy of the appeal of a dissatisfied economic operator against a decision of the contracting authority based in the LPP. Consequently, the conclusion can be reached that although the PRB does not have the status of a court pursuant to the national legislation, it has such a status according to the requirements of European law. With BiH's accession to the EU, this entity could be authorized to forward preliminary rulings to the European Court. Despite this, the PRB's status will depend to a great extent on the estimate of the European Court as regards the fulfillment of the abovementioned criteria. One of the moot points could relate to the qualifications of the PRB's members in the section which refers to work experience, and specifically to the qualifications of the three members among whom the chairman is selected.⁵² In fact, the LPP does not envisage work experience as a precondition for estimating the qualifications of the PRB's members among whom the chairman is selected.⁵³ Nevertheless, in accordance with the requirements of the directives, in order to qualify as a member of

⁴⁷ *Inter partes* means that a procedure is conducted between certain persons, authorities in a legal protection procedure ("Law on Public Procurement," Article 94), who should be notified about the course of a procedure in front of the PRB and have a possibility to voice their own attitudes related to the subject of a dispute.

⁴⁸ "Law on Public Procurement," Article 93, para. 1. Moreover, with regard to the criteria of independence and autonomy, it is indispensable to emphasize that in the context of impossibility of acquittal and the right to exemption in procedure in the case of a conflict of interests, the LPP includes precise provisions on acquittal of a member of the PRB (*Ibid.*, Article 93, para. 14).

⁴⁹ Cited because the LPP which defines the remit and organization of this entity was passed without a restricted time limit.

⁵⁰ LPP envisages a possibility to initiate an infringement procedure against a contracting authority that fails to implement the decision of the PRB ("Law on Public Procurement," Article 116, para. 2, Item n).

⁵¹ The proceedings of the PRB upon an appeal is regulated by "Law on Public Procurement," Article 109.

⁵² *Ibid.*, Article 93, para. 3.

⁵³ "Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts," *Official Journal of the European Union* L395, December 30, 1989, Article 2, para. 9, sub-para. 2 requires that at least the chairman of this entity must have the same legal and expert qualifications as members of the judiciary.

the PRB, certain work experience is necessary in addition to qualifications.⁵⁴ The realization of the EU legislation requirement which refers to the entity being based in law is also questionable. Furthermore, work should be done on adversarial proceedings (*inter partes*) in front of the PRB (in view of the absence of possibility to conduct an oral discussion in front of the PRB).

Taking into consideration the aforementioned arguments, it is essential to define the status of this entity in more precise terms. Nevertheless, the legislator in BiH did not perceive this fact and thus failed to define the status of the PRB in more precise terms. In other words, the legislator omitted to define the status of the PRB by one law (a preferable option). There are grounds in the BiH legislation for this since there is a possibility to establish independent administrative organizations within the remit of the Council of Ministers of BiH by a special law.⁵⁵ Regardless, the PRB shall still be an administrative entity, but the definition of its status by one law could express more precisely a view on the position and role of this entity. Examples from comparative laws corroborate this reasoning. In this manner the State Commission for Supervision of Public Procurement Procedures in Croatia, authorized to supervise the legality of work of procurement officials was established by the Act on the State Commission for Supervision of Public Procurement Procedures, which defines precisely the status of this entity.⁵⁶

It is vital to promptly adopt the envisaged acts which refer to the internal organization and manner of work of the PRB. In fact, although the legal regulation of the PRB is incorporated in the provisions of the LPP its internal organization should be regulated by the Rulebook on Work and the Rules of Procedure of the PRB. Nevertheless, neither the Rulebook on internal organization nor the new Rules of Procedure of the PRB have been passed, although by these acts the rules on the work of the PRB could be regulated along with other issues pertaining to the appeal procedure. The time limit for passing these acts has not been defined by the Law which is also a serious omission on the part of the legislator.⁵⁷ The Rulebook for the PRB that is currently in force was passed before the new LPP was

⁵⁴ Experience in the legal profession in accordance with the “Zakon o Visokom sudskom i tužilačkom vijeću Bosne i Hercegovine” [Law on Higher Judiciary and Prosecution Council of Bosnia and Herzegovina], *Official Gazette of BiH* 25/04, 93/05, 48/07 and 15/08.

⁵⁵ *Ibid.*, para. 2.

⁵⁶ The State Commission for the Control of Public Procurement Procedures in Croatia was established by the “Zakon o Državnoj komisiji za kontrolu postupaka javne nabave” [Act on the State Commission for the Supervision of Public Procurement Procedures], *Official Gazette of Republic of Croatia* 18/13, 127/13 and 74/14. To find more on this entity see Stanka Pejaković, “Pravni status Državne komisije za kontrolu postupaka javne nabave” [Legal status of the State Commission for the Supervision of Public Procurement Procedures], *Pravo i porezi*, no. 11 (2011), pp. 63–70.

⁵⁷ When the law envisages an obligation to pass a certain implementing regulation, it means that the law cannot be implemented without this regulation. Therefore it is necessary to pass the implementing regulation simultaneously with the law or at the latest immediately after the law takes effect.

adopted and it is not in compliance with the current LPP. Thus the current Rules of Procedure determine that the issues which are not regulated by it are governed by the provisions of the Rulebook on the internal set-up and systematization of jobs of the PRB. The LPP does not envisage adopting such a Rulebook. If this refers to the Rulebook on internal organization it cannot be applied because it has not been passed yet.

Another unsatisfactory decision about the PRB is the decentralization (delegating) of competences to other entities, in particular those who are not legal persons⁵⁸ but authorized to decide on appeals in public procurement procedures. The LPP regulates that the PRB has two branch offices – one located in Banja Luka and the other in Mostar,⁵⁹ both authorized to decide on appeals for the value of procurement up to 800,000.00 KM.⁶⁰ With regard to the entity authorized to decide on appeals, while at the same time taking into consideration the sensitive nature of the situation and exceptionally important legal protection in public procurement procedures, decentralization is not a preferable option. Centralization of the work of this entity would have a positive impact on the quality of work itself, unified proceedings, decreased costs and its responsible, successful operation.⁶¹ Furthermore, regardless of the exceptional importance of this entity, which is authorized to decide on appeals in public procurement procedures, the LPP does not adequately regulate the functional and personal aspect of the PRB's branch offices. Nevertheless, the underlying idea of the transfer of functions to branch offices is based on the assumption that this shall ensure better communication with the parties. However, the branch offices are also governed by the cogent rules regarding the appeal procedure, and as a result, one could not argue that there is better communication with the parties. The question raised is whether the branch offices can communicate better with the parties since the provisions of the LPP regarding work of the PRB are also implied for them. Regarding the personal status of the branch office members, or

⁵⁸ According to "Law on Public Procurement," Article 93, para. 4, the PRB's branch offices shall not have the status of a legal person.

⁵⁹ "Law on Public Procurement," Article 93, para. 4.

⁶⁰ *Ibid.*, Article 93, para. 7.

⁶¹ Legal protection in public procurement procedures is centralized even in complex member states. For example, in Belgium, which is a federal state, there is no special entity for review procedure, but the procedure for the annulment of a decision of contracting authorities may be launched in the State Council (Conseil d'État) – OECD, "Public Procurement Review Procedures," p. 18. The State Council is solely authorized to bring judgments with regard to the decisions of the administrative entities. Some contracting authorities cannot be characterized as administrative entities. In such cases an injured bidder can challenge the decision on the selection only in civil courts or tribunals – Organization for Economic Co-operation and Development (OECD), "Public Procurement Review and Remedies Systems in the European Union," *SIGMA Paper* no. 41 (2007) (OECD Publishing, 2007), p. 42. In Austria, which is a nation state, legal protection is ensured in the National Office for Public Procurement, which meets the requirements of the legal-protective directives in the sense of granting the status of a court or tribunal to this entity – *Ibid.*, p. 39.

more precisely, the requirements related to their qualifications, it is obvious that members of the PRB's branch offices may have lower qualifications in comparison with members of the PRB which is located in Sarajevo.⁶² Nevertheless, it is not fair that the same tasks, regardless of the value of procurement, are performed by members with different qualifications, especially in the same procedures.⁶³

⁶² "Law on Public Procurement," Article 93, para. 5 related to the same Article, para. 3. For comparison, herein differences are cited regarding the qualifications of the PRB's members in Sarajevo in relation to the members in the PRB's branch offices. Three members of the PRB in Sarajevo, among whom a chairman is selected, must have a degree in law and the bar exam while the remaining three members must have a university degree. On the other hand, three members of the PRB's branch offices are recognized experts in administrative law and/or administrative procedure while two members are experts in different fields. Accordingly, members in the PRB's branch offices need not have a university degree.

⁶³ For the necessary qualifications of the members of this entity see "Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts," Article 2, para. 9, sub-para. 2.

5.

Legal Protection – Procedural Requirements

This Chapter deals with procedural requirements with regard to legal protection in public procurement. The fundamentals of appeal procedure in BiH are critically analyzed, and thereupon the main characteristics of appeal as a basic and only legal remedy. This is followed by critical scrutiny of the provisions related to the competences of the contracting authority and the PRB upon appeal. The provisions should be defined in a precise and normative manner in order to enable adequate protection of the rights and interests of participants in the public procurement procedures.

5.1. Procedure Principles⁶⁴

General principles of legal protection have a significant role in the EU Law. They fill up legal lacunae or provide answers to questions arising from the interpretation of the existing legal acts. Legal-protective directives set requirements that member states have to meet when they regulate legal protection in their respective national legislations. General principles of legal protection are not explicitly stated in legal-protective directives, but are pervasive in all directives, or in other words, they underlie all their provisions. This is followed by a review of these general principles, which the legislator in any state should heed in the application of legal-protective directives, whereby the said directives should explicitly be proclaimed in the respective national legislation that regulates the legal protection of participants in public procurement procedures.

Principle of legality. In brief, this principle implies that all acts and actions of contracting authorities must be based in the law. Member states must ensure the respect of the principle of legality in their national laws. This implies that the contracting authorities in BiH are obliged to implement public procurement

⁶⁴ Principles are a fundamental part of any law. On the role of general legal principles see Duško Vrbanić, *Država i pravo [The State and Law]*, (Zagreb: Golden Marketing – Tehnička knjiga, 2003), pp. 102–106.

procedures in accordance with the LPP and implementation rules.⁶⁵ Regarding the character of contracting authorities, the dominant position among them is occupied by the public legal authorities and authorities which are decisively influenced by the public legal authorities (financing, management, supervision),⁶⁶ specifically indicating a need to implement the principle of legality in public procurement procedures.⁶⁷ The principle of legality is applied in public procurement procedures prior to initiating a legal protection procedure. The legality of the implementation of the procedure is estimated by the PRB in an appeal procedure. The principle of legality is applied in a legal protection procedure, which implies that contracting authorities and the PRB must act in accordance with the provisions on legal protection.

Principle of efficiency.⁶⁸ The purpose of this principle is to ensure the availability and prompt conduct of a procedure in addition to the simple and straightforward protection of the rights of the parties in the course of a legal protection procedure. This principle ensures speedy execution of the legal protection procedure (which is in the interest of all the parties in the public procurement procedures, but also of the public).

Adversarial principle. This implies the hearing of any person whose interests are referred to in a procedure or a decision. The underlying characteristic of this principle is in its oral and immediate nature. It implies that the parties can exercise their right to participate in a procedure and be heard before a decision is reached. Adversarial dispute, although primarily conducted by means of reports, is realized in entirety in an oral hearing of the parties involved in it.⁶⁹

⁶⁵ One of the reasons for bringing “Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts,” *Official Journal of the European Union* L335, December 12, 2007, Item 3 of the preamble is to ensure respect of EU law.

⁶⁶ See “Law on Public Procurement,” Article 4, which lists contracting authorities as those obliged to implement the legislation on public procurement. If a legal entity, established with the purpose to meet some general interests, but deprived of any commercial or industrial interest, is obliged to implement the legislation on public procurement, it is necessary for such an entity to meet the requirement of being financed from public funds, or that it is supervised by other contracting authorities, or that managerial functions in that contracting authority (more than half of its members) are performed by representatives from other contracting authorities.

⁶⁷ Cited in view of the fact that public legal entities, before all others, must strictly adhere to the law in their action. The rule of law is cited in “TFEU,” Article 2, as one of the key values of the *acquis communautaire*.

⁶⁸ For example, the principle of efficiency is emphasized in “Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts,” Article 1, para. 1, Item 3, whereby member states are obliged to undertake measures to ensure that the decisions brought by contracting authorities can be scrutinized efficiently, in the promptest possible manner.

⁶⁹ Court of Justice of the European Communities, Case C-17/00, *De Coster vs. College van Burgermeester en Schepenen van Watermaal-Bosvoorde*, ECR (2001) I-9445, November 29, 2001.

This eliminates a situation where a decision is brought only on the basis of the documents submitted by the parties.⁷⁰

Principle of transparency. This requirement arises from the term “public” in the name of the institute of “public procurement”. By regulating and implementing this principle it is made possible for the public to be informed about the execution of a task and the results of the work of an authority that conducts a legal protection procedure.⁷¹ This principle should be guaranteed in all stages of a public procurement procedure, but also in the appeal stage of a public procurement procedure, and as such it should be emphasized. This principle is realized in the legal protection procedure in the manner that each authority, and the wider public as well, can have insight into the appeal procedure and the decisions adopted in the procedure itself.

Nevertheless, the form in which the principles related to legal protection are pronounced in the LPP, including the content of the principles as such, are not harmonized with the requirements of the legal protection procedure. There is omission in the LPP with regard to a precise and explicit proclamation of the general principles of public procurement procedures – such as the principles of transparency, equality, non-discrimination, market competition and cost-effective spending of funds,⁷² which are applied and respected in the legal protection procedure. The fundamental principles of public procurement are contained in Article 3 Paragraph 2 of the LPP. Nevertheless, the general principles of public procurement do not necessarily refer to the legal protection procedure since they do not reflect in entirety the purpose and the meaning of this procedure. One can observe that even those generally proclaimed principles of public procurement procedures are incomplete, i.e. they do not comply in entirety with the requirements of the Stabilization and Association Agreement (SAA). Thus, the LPP does not include the principle of mutual recognition or proportionality. The principle of mutual recognition implies that the legislation of another state has effects equivalent to those of the domestic law. The principle of proportionality ensures proportionality between the objectives which are to be

⁷⁰ This principle arises from the provision of “Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts,” Article 2, para. 9, sub-para. 2, wherein it is cited that an independent authority adopts decisions in a procedure where both parties are heard.

⁷¹ Transparency of public procurement procedure is preferable in all stages of public procurement procedures. Related to the part of the public procurement procedure pertaining to legal protection, “Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts,” Item 3 of the preamble, emphasizes in its preamble a need to strengthen the transparency of procedure.

⁷² On principles of public procurement in the Croatian law see Ivan Šprajc, “Temeljna načela postupka javne nabave” [Fundamental Principles of Public Procurement Procedure], *Suvremeno poduzetništvo*, no. 8 (2003), pp. 94–98.

realized and the means used to achieve these objectives. This principle requires that the measures undertaken do not exceed the limits of what is appropriate and necessary to achieve the objectives.

As regards the inadequate application of the proclaimed fundamental principles of public procurement, the legislator in BiH ought to have precisely and explicitly prescribed the principles related to the legal protection procedure. Comparable legal examples indicate a need to proclaim the fundamental principles of legal protection. Thus the Croatian Public Procurement Act prescribes that legal protection is based on the principles of legality, efficiency, cost effectiveness and adversariness in addition to being based on the general principles of public procurement.⁷³ The Slovenian ZPVPJN states that the principles of legal protection are the principles of legality, promptness, availability, openness and adversariness.⁷⁴

5.2. Subsidiary Application of the Law on Administrative Procedure (LAP)⁷⁵

Subsidiary application of the appropriate law in the framework of a legal system depends on the legal nature of the institute of public procurement. The institute of public procurement in BiH has a dual legal nature - i.e. administrative and civil. The right of public procurement in BiH is to a great extent convergent with administrative and civil law; in the pre-tender and tender stages of public procurement administrative law has the dominant role, in contrast to the contract (post-tender) stage where civil law prevails.⁷⁶

In the part which regulates the public protection procedure⁷⁷ the LPP envisages the subsidiary application of rules on the administrative procedure. Nevertheless, the subsidiary application of the LPP in the appeal stage of the public procurement procedure does not concurrently imply its application in public procurement procedures, i.e. in procedures in front of the contracting authorities. But, considering that the LPP provisions are applied in the procedure conducted in front of the PRB and taking into account the uniqueness of the administrative

⁷³ Croatian "Public Procurement Act," Article 139, para. 1.

⁷⁴ Slovenian "ZPVPJN," Article 7, cites these principles, while further in the text it defines the content of each individual principle (Ibid., Articles 8-11).

⁷⁵ "Zakon o upravnom postupku" [Law on Administrative Procedure], *Official Gazette of BiH* 29/02, 12/04, 88/07, 93/09 and 41/13.

⁷⁶ We should bear in mind that by its nature public procurement is a mixed institute where the norms of public and private law are applicable which is, in turn, caused by the mixed normative-personal status of the contracting authorities which implement public procurement procedures ("Law on Public Procurement," Article 4).

⁷⁷ "Law on Public Procurement," Article 117.

procedure,⁷⁸ we can draw the conclusion that the public procurement procedure is an administrative procedure until a contract is concluded. The application of the rules of administrative procedure is not valid in respect of the contract (post-tender) stage. The LPP emphasizes the civil-administrative nature of the public procurement contract and defines the responsibility of the contracting authorities to fulfill the contract provisions as compliant with the relevant provisions in the Law on Obligations.⁷⁹ In this stage of the public procurement procedure the subsidiary application of the LPP is excluded.

Since the dual legal nature of the institute of public procurement raises some questions regarding the practical subsidiary application of the appropriate law in the framework of the legal system it would be more correct if the particular stages in public procurement were submitted to a unique legal regime. This problem could be resolved in such a way that the primarily civil nature of the contract of public procurement retroactively influences the legal nature of the competitive (tender) stage in public procurement or that the legal nature of the public procurement contract is compliant with the primarily administrative-legal nature of the competitive (tender) stage in public procurement. In the absence of precise criteria that would enable the legislator to classify public procurement within either administrative or civil law, the above decision would be, above all, a political decision.⁸⁰ The legislator in any individual state would choose the criteria that it deems a priority: either the realization of stronger procedural guarantees (civil law) or promptness of procedure (administrative law). By placing public procurement in administrative law the legislator in BiH has expressed the view that the realization of the principle of promptness is a priority. At the same time this does not imply a disregard of the required procedural guarantees and EU law standards with regard to the rights of contracting authorities in the legal protection procedure.

The EU Law does not state precisely the legal nature of public procurement but leaves this question to the legislator of each state, and as a result, this area is regulated differently in EU states. By comparing the Croatian legislation with the legislation of public procurement in BiH important similarities can be observed in the regulation of legal protection. Above all, there is a similarity with regard to the review procedure, which is considered an administrative procedure in both legislations, while legal protection against the decision of the authority which

⁷⁸ Perović emphasizes that in an administrative dispute “second-degree and administrative acts should be considered in unity” – Mirko Perović, *Komentar Zakona o upravnim sporovima* [Commentary on the Law of Administrative Disputes], (Belgrade: Savremena administracija, 1972), p. 116.

⁷⁹ “Law on Public Procurement,” Article 118.

⁸⁰ Siniša Triva and Mihajlo Dika, *Građansko parnično procesno pravo* [Civil Criminal Process Law], (Zagreb: Narodne novine, 2004), p. 95.

decides on appeal is ensured in the administrative dispute.⁸¹ On the other hand, the practice in applying the Slovenian legislation in public procurement has indicated redundancy in regard of ensuring additional forms of legal protection. As a result, the current legal protection is ensured in the auditing procedure accompanied by the appropriate (meaningful) application of the criminal procedure rules,⁸² while the judicial protection is ensured by means of damages compensation in the courts of general jurisdiction.

Despite the alleged similarity between the Croatian Public Procurement Act with that in BiH, the Croatian Public Procurement Act envisages that the appeal procedure conducted in accordance with the provisions of that Act is an administrative procedure.⁸³ Accordingly, the Croatian Public Procurement Act does not provide for the subsidiary application of the law which regulates the general administrative procedure. The subsidiary application implies that the general law is always applied when a special law does not resolve a particular question or does not resolve it in entirety. The relevant Article of the Croatian Act (Article 139, Paragraph 2) expresses strong reservations about the subsidiary application of rules pertaining to the general administrative procedure on grounds of the pronounced specific quality of public procurement procedures. Namely, by using the formulation that the appeal procedure is administrative, thereby excluding the subsidiary application of the LAP,⁸⁴ the Croatian legislator has expressed the attitude that a decision on a particular problem needs to be sought for in the appropriate application. This, in turn, does not exclude the application of the general law, but indicates a need to seek for appropriate decisions for a particular problem in accordance with the spirit, and not exclusively the content of the law. The Slovenian ZPVPJN⁸⁵ also defines the appropriate (meaningful) and subsidiary application of provisions of the relevant law. By this formulation the Slovenian legislator has also distanced itself from the subsidiary application of the appropriate law (criminal and administrative). Namely, on grounds of the specific quality of the institute for public procurement the subsidiary application of the LAP does not in entirety meet the requirements of a need of the appeal stage in the public procurement procedure. Sometimes the question of whether

⁸¹ On legal protection in Croatia see Dragan Medvedović, "Upravna zaštita sudionika u postupku javne nabave" [Administrative Protection of Participants in Public Procurement Procedure], *Zbornik radova Pravnog fakulteta u Splitu* 48, 2 (2011), pp. 381–406.

⁸² Except in the pre-auditing procedure regarding the delivery of decision on the rejection of the request or when the procurement official decides on the auditing request, annuls the procedure or rectifies the violation, in which cases the law which regulates the administrative procedure is applied (Slovenian "ZPVPJN," Article 13, para. 3).

⁸³ Croatian "Public Procurement Act," Article 139, para. 2.

⁸⁴ The previous Public Procurement Act in Croatia also envisaged the subsidiary application of the law which regulates the administrative procedure, but the currently valid Public Procurement Act has abandoned this formulation.

⁸⁵ In Slovenian "ZPVPJN," Article 13.

it is possible to adequately apply the appropriate provisions of the LPP is also raised.

Due to the specific quality of public procurement procedures only a limited number of provisions of the LPP are applicable in the appeal stage of the public procurement procedure. The legislator is obliged to enter the majority of these provisions into the legal text but this has not been done in an optimal manner in BiH as yet. A need for a greater number of norms, especially with regard to a more comprehensive regulation of these norms, was indicated by some institutes of the administrative procedure which are either inapplicable or hardly applicable in the appeal stage of the public procurement procedure, or they raise questions of the appropriate application of the LAP. For example, it appears that the application of the institute of restoration to the previous status which exists in the LAP is not adequate in the appeal stage of the public procurement procedure.⁸⁶ Considering that the time limit for restoration to the previous status is eight days from the day of termination of the reason that caused the omission,⁸⁷ strengthened by the fact that the submitted proposal does not stop the course of the procedure,⁸⁸ it becomes obvious that the application by this institute is of little use. If the interested authority has missed the appeal time limit, and has subsequently submitted a proposal for restoration to the previous status, the public procurement contract is concluded and is in the stage of execution, if not entirely executed. In such a situation, even if the proposal is accepted and the appeal decided in favor of the appellant, the appellant is left only with the possibility to demand damages compensation, which is not a primary requirement in public procurement procedures.⁸⁹ Nevertheless, taking into consideration that the appeal procedure must not depend on the possibility of compensation upon conclusion of the contract,⁹⁰ the appellants should also be entitled to resort to the institute of restoration to the previous status, which implies that in this case the principle of appropriateness, i.e. of efficiency of a legal remedy in public procurement procedures, could not be realized. As a result, the institute of restoration to the previous status cannot be excluded from application in the appeal stage of the public procurement procedure, but the application of this institute raises the question of its adequacy in view of the specific quality of the institute for public procurement.

⁸⁶ Restoration to the previous status is regulated by provisions of “Law on Administrative Procedure,” Articles 94 -99.

⁸⁷ “Law on Administrative Procedure,” Article 96, para. 1.

⁸⁸ Ibid., Article 99.

⁸⁹ Arrowsmith, *Remedies for Enforcing the Public procurement Rules*.

⁹⁰ Such an attitude was expressed by Court of Justice of the European Communities, Case C-81/98, *Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG vs. Bundesministerium für Wissenschaft und Verkehr*, ECR (1999) I-7671, October 28, 1999.

5.3. Instruments of Legal Protection

In the normative construction of the LPP legal protection is organized in such a manner that there is one regular legal remedy – appeal (the new LPP, unlike the earlier valid Law on Public Procurement, does not envisage objection as a legal remedy). The subject matter of this chapter of analysis are, in addition to the characteristics of appeal in public procurement procedures, the procedure and competences of the competent authorities upon appeal, both of the contracting authority (remonstrative effect of the appeal) and of the PRB (demonstrative effect of the appeal). The analysis has been conducted through a review of the legal regulation of the basic legal remedy that stands at the disposal of the participants in public procurement procedures (bidders, candidates and other interested persons) against the decision of the contracting body, and the actions, omissions, failure to act, or procedure of the contracting authority. After that the procedure of the contracting authority is analyzed per appeal, followed by the procedure of the PRB.

5.3.1 Appeal as a Legal Remedy

The right to appeal is a particularly important procedural right by which all economic operators are given the possibility to initiate the question in front of the PRB regarding the legality and regularity of a decision, action, or failure to act of the contracting authority. It is a general rule that an appeal can always be filed⁹¹ and that by an appeal one can deny the legality of the issued decision, action or failure to act, and the implementation by the contracting authority. One of the measures determined by the legal protection directives is also the possibility of filing an appeal in individual stages of procedure.⁹² In addition, the right to appeal exists independently of values of the procurement subject matter. This also comes out of legal protection directives, since these directives refer to the right to appeal generally and independently of the value of the procurement subject matter. The analysis furthermore deals with the question of how much the LPP is harmonized with the aforementioned general requirements with regard to the right to appeal.

⁹¹ Legal Protection Directives do not envisage the possibility to exclude an appeal in public procurement procedures.

⁹² “Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts,” Article 2, para. 1b; “Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,” *Official Journal of the European Union* L76, March 23, 1992, Article 2, para. 1b.

5.3.1.1 Filing an Appeal

The procedure of legal protection is usually initiated by an appeal. The provision of legal protection – estimate of the legality of the decision of action, failure to act or the implementation of a concrete public procurement procedure – can be sought only when a legitimate party has submitted a request, i.e. an appeal. It is the general rule of the administrative procedure that the appeal is filed to the first-instance authority (the contracting authority), and is also filed to the second-instance authority. By filing an appeal to the contracting authority, the legal protection procedure is initiated. In BiH, as previously stated, the PRB decides on appeal, and the appeal is filed to the contracting authority.⁹³ The main reason for filing an appeal to the contracting authority lies in the fact that the case, with all files, is at the contracting authority and the authority, as a rule, delivers a report to the PRB upon the filed appeal. Upon appeal the contracting authority examines certain circumstances, and can issue certain decisions (remonstrative effect of the appeal). The contracting authority deals with enforceability of the decision, action or failure to act, so there is a possibility to proceed with the implementation of the procedure and concluding agreement if it is not acquainted with the existence and conduct of review procedure. Nevertheless, filing an appeal directly to the PRB, and excluding the contracting authority as a mediator, would help speed up the procedure. This is why the Croatian Public Procurement Act determines for an appeal to be filed to the State Commission for Supervision of Public Procurement Procedures, while one copy of the appeal is delivered to the client.⁹⁴

The main objection that can be given to the LPP in this segment is the normative misconduct in the sense of discrepancy in terminology. Namely, the LPP determines that an appeal is to be filed to the contracting authority.⁹⁵ However, an appeal can be submitted – made – lodged to the contracting authority, but not filed. An appeal is always filed to the second-instance authority (PRB), which means that competence to decide upon appeal is transferred to the second-instance authority. Yet, an appeal is not submitted to the second-instance authority, but to the authority that issued the first-instance decree (the contracting authority). Inconsistency in the usage of legal terminology is present in other sections of the LPP as well. For instance, in the second Article the LPP determines that an appeal is filed to the PRB through the contracting authority,⁹⁶ which would certainly be more acceptable. But there is a problem of equivalent terminology within the LPP. The edition of the LPP in the Croatian language also shows a certain inconsistency since it states that the appeal is lodged to the

⁹³ “Law on Public Procurement,” Article 107.

⁹⁴ Croatian “Public Procurement Act,” Article 145, para. 1 and 3.

⁹⁵ “Law on Public Procurement,” Article 99, para. 1 (version in the Bosnian language).

⁹⁶ *Ibid.*, Article 107.

contracting authority,⁹⁷ while in another article it is stated that an appeal is lodged to the PRB.⁹⁸ Neither is the notion “lodge” the best solution for all situations, because it implies lodging something which already exists. It would be correct to say that an appeal is lodged to the contracting authority, where the case with all its documentation lies, but it cannot be lodged to the second-instance authority, because it does not have any data in connection with the concrete procurement subject matter. These are just some examples of inconsistency in the application of legal terminology in the LPP.

The LPP envisages the possibility of filing an appeal electronically, under the condition that such a way of filing is determined in the bidding documentation.⁹⁹ Technical and technological equipment is certainly an important point in ensuring efficient legal protection and it is necessary to work on improving information systems and use of the internet in this sense.¹⁰⁰ Technological advancement dictates the need for computer data processing and electronic communication in public procurement procedures. However, it remains an open question whether for such a means of filing an appeal, mutual conditions have been met for delivery of electronic documentation. Namely, filing an appeal in this way cannot be completely and properly realized if the conditions for electronic business have not been met.¹⁰¹ Thus, even if such a way of filing an appeal is envisaged in the bidding documentation, it cannot be realized without meeting other conditions linked to the delivery of electronic documentation. As an example of a possible solution we can take the Croatian Public Procurement Act, which envisages the possibility of filing an appeal electronically, but such a means of delivery is conditional on meeting mutual conditions of electronic documentation in accordance with the regulation on electronic signature.¹⁰² The Slovenian ZPVPJN contains a similar decision.¹⁰³

5.3.1.2 Who Can File an Appeal (Legal Capacity)

The LPP widely determines the circle of operators competent for initiating public procurement procedures. Appeals may be filed by any economic operator having or having had an interest in a public procurement contract award, who

⁹⁷ “Law on Public Procurement,” Article 99, para. 1 (version in the Croatian language).

⁹⁸ *Ibid.*, Article 107.

⁹⁹ *Ibid.*, Article 99, para. 1.

¹⁰⁰ It should be noted that in this sense the European Commission in April 2012 adopted the strategy of e-public procurement with the objective of achieving comprehensive informatization of public procurement by the middle of 2016 - Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: A strategy for e-procurement, COM(2012) 179 final (Brussels: European Commission, 2012).

¹⁰¹ That there is not a possibility to submit appeals electronically is confirmed by a statement of the interviewed member of the PRB Ostoja Kremenović.

¹⁰² Croatian “Public Procurement Act,” Article 145.

¹⁰³ Slovenian “ZPVPJN,” Article 24, para. 1.

demonstrates probability that damage was or could have been caused.¹⁰⁴ From this it can be concluded that legal capacity in public procurement procedures in BiH is set in accordance with the requirements of relevant provisions of legal protection directives,¹⁰⁵ but with the requirements of legal practice of the European Court as well. Thus, for instance, in the case *Werner Hackermüller*,¹⁰⁶ regarding the question of whether on initiating procedure upon appeal each person who wishes to obtain the contract has legal capacity, the European Court answered that the availability of review procedures needs to be ensured for persons competing for a certain public contract, under the condition that they suffered or could suffer damage from the alleged violation of rights and interests. If the aforementioned conditions have not been met cumulatively (interest and damage), the PRB will dismiss the appeal on the basis of lack of legal capacity.¹⁰⁷ As regards the infliction of damage, it is not sufficient that the appellant only invokes the probability of damage infliction, but they should also prove it, in the manner that they state in the appeal the circumstances which they consider to be the reason that damage has already been or could be inflicted. Then, they should preferably corroborate it with relevant evidence. Otherwise, if the appellant was not obliged to prove the damage, the wide concept of legal capacity could have negative consequences on the public procurement procedure itself, for such legal capacity could serve as a means of abuse in the hands of economic operators to whom damage cannot occur (for instance, bidders fundamentally excluded from the public procurement procedure, who are not competitive by their prices, etc.).

Considering the fact that in public procurement procedures not only private, but public interest is engaged as well, it is necessary that with the objective of protection of the public interest, availability to public remedies is open to those authorities who naturally watch for legality and are competent to respect public interest. However, the LPP has not envisaged this. From the content of the notion

¹⁰⁴ “Law on Public Procurement,” Article 97.

¹⁰⁵ *Ibid.*, Article 1, para. 3 of the legal protection directives imposes the obligation on the member states that legal protection means are made available “at least to each operator who is or was interested in obtaining a concrete contract and who suffered or is in danger of suffering damage for alleged violation.”

¹⁰⁶ In Court of Justice of the European Communities, Case C-249/01, *Werner Hackermüller vs. Bundesimmobiliengesellschaft mbH (BIG), Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED)*, ECR (2003) I-6319, June 19, 2003, para. 19, of the judgment, while para. 29 of the judgment the European Court states: “Article 1 Paragraph 3 of Directive 89/665 does not permit a bidder to be refused access to the review procedures laid down by the directive to contest the lawfulness of the decision of the contracting authority not to consider their bid as the best bid on the ground that their bid should have been eliminated at the outset by the contracting authority for other reasons and that therefore they neither have been harmed nor risk being harmed by the unlawfulness which they allege. In the review procedure thus open to the bidder, they must be allowed to challenge the ground of exclusion on the basis of which the review body intends to conclude that they neither have been nor that they risk being harmed by the decision they allege to be unlawful.”

¹⁰⁷ “Law on Public Procurement,” Article 111, para. 1, Item b.

of legal capacity it is clear that the legal protection procedure by the LPP is dependent explicitly on the initiative of the economic operator, i.e. the procedure is initiated and conducted by the interest of the economic operator. Yet, public interest demands that the state authorities in the legal protection procedure have legal capacity as well, which is not the case in BiH. The specific state authorities which are competent, i.e. obliged to respect legality and the public interest, should also have legal capacity, which is conditioned by the need of stronger protection of interests (both private and public) in public procurement procedures.¹⁰⁸ In the first place, the authority such as the PPA could have the right to file an appeal. This competence should be given to the Prosecutor's Office of Bosnia and Herzegovina and/or the Council of Competition. The examples from the comparative law confirm the correctness of such reasoning and point to possible solutions to this question.¹⁰⁹ Such a solution is justified especially since the LAP, applied in a subsidiary manner, and aimed to protect public interest, determines that: "The Prosecutor, Defense Attorney and other authorities, when authorized by law, may lodge an appeal against a decision violating the law in favor of an individual or a legal entity and detrimental to the public interest."¹¹⁰ The additional argument in this direction is the fact that the state bears responsibility before the European Court for all contracting authorities.¹¹¹ If the state must already bear responsibility for all contracting authorities, it is logical that it should be enabled to use an appeal with the objective of correcting possible irregularities in the work.

The LPP does not deal explicitly with the question of legal capacity in the context of joint bid, i.e. the possibility of filing an appeal by a community of physical and/or legal persons. However, since the LPP determines that an appeal in public procurement procedures can be filed by every economic operator, and the notion of economic operator also includes a group of candidates/bidders, it can be expected that the PRB will admit the right to appeal to those groups as well. The Croatian legislation also allows filing an offer by a community of

¹⁰⁸ This is stated in accordance with the view of the European Court in the case: European Communities, Case C-236/95, *Commission of the European Communities vs. Hellenic Republic*, ECR (1996) I-4459, September 19, 1996.

¹⁰⁹ According to the Croatian legislation, the right to appeal in public procurement procedures is given to the authority of the state administration competent for the public procurement system and the competent state Attorney's Office (Croatian "Public Procurement Act," Article 141, para. 2). The Slovenian legislation gives such competence to the Ministry of Finance, Court of Audit, the authority competent for protection of competition and the authority competent for preventing corruption (Slovenian "ZVPJN," Article 6).

¹¹⁰ "Law on Administrative Procedure," Article 213, para. 2.

¹¹¹ In the procedure before the European Court the sued party is always a member state. The procedure before the European Court is regulated by the TFEU.

physical and/or legal personalities.¹¹² The Slovenian legislation envisages that an appeal can be filed by a community of bidders as well, wherein in a case where the joint bid is filed by a group of people, the request for review can be filed by anyone individually and by all persons together.¹¹³ The question is how the PRB will act in practice by the new LPP, i.e. whether it would accept the legal capacity of a group of candidates/bidders individually or only together. Legal practice of the European Court allows the possibility that by the national law a consensus can be demanded in the case of joint bid.¹¹⁴ Although filing an appeal in this way is more difficult to a certain degree, such action, according to the attitude of the European Court, is not adversarial to the legal protection directives. Legal practice of the European Court allows the national law to enable each member of the group to file an appeal in the name of the group of bidders in that every member of the group of bidders who as such participated in the public procurement procedure can file an appeal against the decision on the choice.¹¹⁵ Consequently, it can be expected that the practice of the PRB will allow each person of the common offer to file an appeal individually, but also all members of the group of candidates/bidders together, because in this way there would be no limit to the right to availability of appeal. Only such action would be in accordance with the aforementioned legal practice of the European Court.

5.3.1.3 Suspension Effect of the Appeal

The LPP explicitly determines that the appeal has unconditional suspension effect, i.e. that it postpones the continuation of the public procurement procedure, conclusion of contract and/or implementation of the public procurement contract or tentative agreement until the PRB reaches its decision.¹¹⁶ The suspension effect of an appeal in public procurement procedures serves as a means of legal protection of economic operators who have filed an appeal. *Ex lege* suspension

¹¹² Croatian “Public Procurement Act,” Article 141, para. 1, wherein this Act, just like the LPP, does not decide if the appeal can be filed by every person individually or all persons together.

¹¹³ Slovenian “ZPVPJN,” Article 14, para. 3.

¹¹⁴ Court of Justice of the European Communities, Case C-129/04, *Espace Trianon SA, Société wallonne de location-financement SA (Sofibail) vs. Office communautaire et régional de la Formation professionnelle et de l’Emploi (FOREM)*, ECR (2005) I-7805, September 8, 2005, para. 25 of the judgment.

¹¹⁵ Court of Justice of the European Communities, Case C-492/06, *Consorzio Elisoccorso San Raffaele vs. Elilombarda Srl and Azienda Ospedaliera Ospedale Niguarda Ca’ Granda di Milano*, ECR (2007) I-8189, October 4, 2007, para. 31. In the stated decision the European Court declared that given the circumstances and in case C-129/04, there was no obstacle to all members of a group of bidders initiating review procedure.

¹¹⁶ “Law on Public Procurement,” Article 110.

of the appeal is a consequence of respecting the legal protection directives.¹¹⁷ The decision on suspension effect is left to the legislator of each of the member states, who is obliged to ensure that the decision on suspension effect be in accordance with the national legislation. National legislations must take into account that the suspension effect itself can lead to abuse in the sense of postponement of procedure. This is why there are other measures in the LPP that can prevent potential abuse. One of these measures is the obligation of paying the adequate amount of compensation for initiating the review procedure.¹¹⁸

The major objection with regard to the institute of the suspension effect of the appeal is its insufficient normative regularity. The specifics of the institute of the suspension effect of the appeal, with regard to its important characteristics and influence on the rights of the parties in the procedure, demand the comprehensive regulation of this institute. In the case of filing an appeal the contracting authority should certainly have a significant role in the sense of undertaking certain actions for the sake of ensuring suspension effect. Otherwise, the failure to take certain actions by the contracting authority implies uncertainty with regard to the suspension effect of the appeal, which is not acceptable. In spite of this, the LPP unjustifiably leaves this issue out, outside the reach of normative regulation. For instance, an important issue that the LPP does not regulate is the issue of action of the contracting authority, who should, immediately after the receipt of an appeal on the bidding documentation, publish the information that the appeal has been filed and that the public procurement procedure is interrupted. Otherwise, if economic operators do not know that the appeal has been filed, they could file bids, which they should not do because of the suspension effect of the appeal. There is also the question of the action of the contracting authority regarding such bids, for such tenders should not even be taken into consideration. The contracting authority would be obliged to return them unopened to the economic operators, but there is no basis for this in the LPP.

In addition, the legal text does not contain a provision on the actions of the contracting authority depending on the decision of the PRB. For instance, if the PRB rejects or dismisses an appeal or if it suspends the review procedure, the procurement procedure could be continued in such a manner that the contracting authority publishes the correction of documentation, and if needed, determines a new time limit for submitting bids. The Croatian Public Procurement Act, for instance, envisages the obligation of the client, in the case of the filing of an

¹¹⁷ “Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts,” Article 2, para. 4; i.e. “Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,” Article 2, para. 3a.

¹¹⁸ Fee for appeal of “Law on Public Procurement,” Article 108.

appeal on the bidding documentation or on changes to the bidding documentation in an open public procurement procedure, to publish information that the appeal has been filed and that the public procurement procedure has stopped, in the same manner and on the same Internet pages in which the basic documentation for competition is published.¹¹⁹ The Slovenian ZPVPJN envisages that within the time limit of three days from the receipt of the proposal for suspension effect of the appeal, the client must stop further activities in the public procurement procedure, about which they must inform all those who filed a bid in the public procurement procedure.¹²⁰

5.3.1.4 Temporary Measures

Defining temporary measures in European Law is envisaged with the objective of enabling intervention before issuing a decision about the continuation of the procedure. This means that defining temporary measures in member states depends on the possibility of postponing the procedure during the legal protection procedure. Temporary measures are desirable in those states where there is the possibility of concluding a contract during the legal protection procedure while the putting out of force of the concluded contract is not envisaged, so the injured party is left with the compensation of damage as the only measure.¹²¹ The stronghold for temporary measures is, hence, in the legal protection directives, which envisage that temporary measures are to be undertaken for postponing or ensuring implementation of the postponement of a concluding public procurement contract or any other decision issued by the client.¹²² The directives then leave the possibility to the member states to envisage criteria (protection of interests) by which authorities competent for the implementation of revision will operate, in issuing a decision about temporary measures.¹²³

¹¹⁹ Croatian “Public Procurement Act,” Article 157, para. 1. In the continuation of the text of the stated provision and in the next article (Article 158) the Croatian Public Procurement Act prescribes in detail, but clearly and precisely, the procedure of a client in the case of filing an appeal on documentation for competition.

¹²⁰ Slovenian “ZPVPJN,” Article 19, para. 6.

¹²¹ Arrowsmith, *The Law of Public and Utilities Procurement*, p. 1416.

¹²² “Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts,” Article 2, para. 1, Item a; “Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,” Article 2, para. 1a.

¹²³ “Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts,” Article 2, para. 5; “Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,” Article 2, para. 4.

The LPP envisages an exception to the suspension effect of the appeal by determining indirectly that at the request of the contracting authority the PRB can decide on the request of the contracting authority to continue the public procurement procedure.¹²⁴ This request, which should serve to enable continuation of the procedure, apart from being indirectly envisaged as a possibility, is completely unregulated. And there are many questions linked to this request that should be regulated by the Law. In the first place, the legislator in BiH failed to regulate the question of when the contracting authority can file the request and within what time limit. In addition, the LPP does not decide on the criteria that would serve the PRB in issuing a decision on such a request of the contracting authority. In fact, one should take into account that the possibility of approving the continuation of the public procurement procedure is an exception to the adversarial rule, which means restraint of the PRB in approving the request, given the need for narrow interpretation of the exceptions.¹²⁵ The LPP does not provide any criteria that would be used in estimating the partial implementation of procedure or complete implementation of procedure without postponement. As possible criteria for estimating the balance of interests, the LPP could, for instance, envisage: possible damage that is disproportionately larger than the value of the subject of procurement, the protection of the public interest and the possibility of endangering the lives and health of people or other serious dangers or possible damage.¹²⁶ The Slovenian Law in this sense, for instance, determines the circumstances that the State Review Commission needs to take into account in requesting that the client postpone the public procurement procedure – all circumstances of the individual case and the relation between the detrimental consequences of meeting the request and the benefits for the public interest and for private interests, and the prevailing reasons for the public interest that require the proposal to be met.¹²⁷

The LPP does not contain special provisions that would, with the competence of the contracting authority to demand to continue the procedure,¹²⁸ enable the appellant to file a request for postponing the procedure. A proposal for determining the possibility of postponement at the request of the appellant

¹²⁴ “Law on Public Procurement,” Article 111, para. 1, Item e.

¹²⁵ Stated regarding the rule that exceptions are generally narrowly interpreted: *Exceptiones sunt strictissimae interpretationis*.

¹²⁶ As is suggested by Croatian “Public Procurement Act,” Article 162, para. 1.

¹²⁷ Slovenian “ZPVPJN,” Article 20, para. 4.

¹²⁸ Since according to “Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts,” Article 2, para. 4: “review procedures need not necessarily have an automatic suspense effect on the contract award procedures to which they relate;” Also “Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,” Article 2, para. 3a.

should be a counterpart to the filed request made by the contracting authority to continue the procedure so that in this way the adversarial procedure would be ensured with regard to the maxim *audiatur et altera pars* (let the other party be heard as well). It concerns the fundamental principle including the right of a party to confront the allegations of the opposite party and to declare itself concerning the evidence presented, i.e. filed by the other party. Respecting that principle in this context dictates the need for giving the possibility to the appellant to require postponement of the procedure if the contracting authority files a request to continue the procedure.

5.3.2 Procedure upon Appeal

The subject of the forthcoming analysis is the procedure and competences of the competent authorities upon appeal, specifically the procedure of the contracting authority (remonstrative effect of the appeal) and of the PRB (demonstrative effect of the appeal). The procedure in front of the contracting authority has the significance of a corrective action, because upon appeal, the contracting authority is in a position to correct the omissions in a public procurement procedure previously conducted. The procedure before the PRB is also a very significant component of the protection of the rights and interests of the participants in public procurement procedures, because through this procedure the violation of rights and interests can be eliminated most efficiently. The competences of these authorities in the procedure upon appeal should be normatively clearly defined and sufficiently precise, so that they, as such, allow for the adequate protection of the rights and interests of the entities whose rights or interests are violated by a concrete decision, procedure, action or failure to act.

5.3.2.1 Procedure and Competences of the Contracting Authority upon Appeal

The contracting authority can decide on the merits of the appeal, so the appeal can temporarily have remonstrative character (exception to devolution). The contracting authority can dismiss the appeal if it is untimely, inadmissible and filed by an unauthorized person.¹²⁹ On the other hand, the contracting authority can acknowledge the appeal if it determines that it is partly or fully grounded and can correct the action by issuing a decree, taking action or canceling the

¹²⁹ “Law on Public Procurement,” Article 100, para. 2. Dismissing an appeal by the contracting authority might cause a new appeal, which is against the principle of procedure rationality because it does not contribute to speeding up the procedure. Besides, the PRB has this competence (Ibid., Article 111, Item 1, para. b), which will in any case (regardless of whether the client has this competence or not), in the previous procedure, estimate legislative preconditions on appeal.

public procurement procedure.¹³⁰ If it fails to do so, the contracting authority will forward the appeal to the PRB, with its opinion on the allegations and with documentation related to the procedure subject.¹³¹ If the contracting authority dismisses the appeal in its conclusion, a new appeal shall be submitted to the PRB, and if it issues a decision that corrects the action, taking action or decision and putting out of force the existing decision, the appeal can be re-submitted to the contracting authority.

There are a number of shortcomings in the LPP regarding the procedure and competences of the contracting authority upon appeal. Primarily, it seems that objectivity and impartiality are not sufficiently ensured if the same entity that conducted the public procurement procedure decides upon appeal. In addition, it seems that these competences of the contracting authority upon appeal are not entirely acceptable, particularly with regard to the principle of efficiency of legal remedy. Namely, the contracting authority should not be left the option to dismiss the appeal as inadmissible, untimely or filed by a person lacking legal capacity, because these preconditions shall at any rate be estimated by the PRB.¹³² Furthermore, by defining as the competence of the contracting authority that it may “put out of force the existing decision or decree and replace it with another decision or decree,”¹³³ the Law suggests that under a new appeal in the same case, the contracting authority may again decide on the merits, which is not in accordance with the rules of the Administrative Procedure nor with the requirements of efficient legal protection. Namely, the legal protection procedure should not be additionally prolonged by the re-submission of appeal against the new decision, i.e. the decision of the contracting authority, and especially not in terms of a possible repeated decision on the merits. For the sake of comparison,

¹³⁰ “Law on Public Procurement,” Article 100, para. 3. It remains unclear how the contracting authority acts in the case of partial adoption of appeal. This question might be resolved by the corresponding legal practice, and in the manner that in that case a new decision of the contracting authority is submitted by the same appeal to the PRB, with evidence and explanation of the partial adoption of appeal. For, according to the present state of affairs, partial meeting of appeals causes a repeated appeal, which goes directly at the expense of the expeditiousness principle.

¹³¹ “Law on Public Procurement,” Article 100, para. 5.

¹³² Ibid., Article 111, para. 1, Item b.

¹³³ Ibid., Article 100, para. 3.

legal decisions in Croatia¹³⁴ and Slovenia¹³⁵ do not envisage the possibility of estimate of timeliness, suitability and legal capacity by the client. The Slovenian law allows the possibility that the client takes measures (the request can be dismissed, refused or met), but it does not leave the possibility for the client to re-file the appeal.

The passivity of the contracting authority remains an open question in terms of possible non-submission of appeal to the PRB. Namely, the LPP regulates the obligation of the contracting authority to forward the appeal to the PRB within five days from the day of receipt of the appeal if it determines that the appeal is timely, allowed, and filed by an authorized person, but is ungrounded.¹³⁶ However, the question is, what if the contracting authority does not submit the appeal to the PRB within the time limit and in the manner determined by the LPP? The problem comes from the fact that the LPP has not properly regulated the issue of obtaining files by the PRB. This issue is important for ensuring legal security, but for the authority of the PRB as well, which should be confirmed through the contents of the corresponding norms of the LPP. By proclaiming the obligation of the contracting authority to submit the appeal with its opinion and the documentation of the case files to the PRB, the problem is not completely resolved. In this sense, neither is the provision of the LPP helpful according to which the contracting authority shall, upon the request of the PRB, submit the documentation within the time limit set by the PRB.¹³⁷ Namely, the question is how the PRB shall require submission of documentation if it does not even know that the appeal has been filed. Given that the PRB is not informed about the filing of appeal, but what they know depends on the actions of the contracting authority, it cannot require submission of documentation and thus cannot decide on the appeal. As the LPP does not envisage in more detail the means of cooperation of the contracting authority and the PRB upon appeal, nor does it sanction the obligation of the contracting authority upon submission of appeal to provide its opinion and the documentation of the case file to the PRB, the

¹³⁴ The Croatian Public Procurement Act envisages submission of the appeal to the State Commission for Supervision of Public Procurement Procedures, and the submission of one copy of the appeal to the client (Croatian “Public Procurement Act,” Article 145, para. 3), wherein the client does not have significant competences in relation to the filed appeal.

¹³⁵ In Slovenia legal protection is ensured in pre-revision and revision procedures. Upon request for revision, the client can refuse or adopt a request, but cannot dismiss the request. The client can refuse the request as ungrounded if they determine that there is no space for a different decision, and it can meet the request partially or completely cancel the procedure or remove the observed violations (Slovenian “ZPVPJN,” Article 28, para. 1). When the client refuses the request, they must, not later than within three days from the day of adopting the decision, forward the request for review with documentation of procedure to the State Review Commission. If the client meets the request, the one who filed the request can, within three days from the day of the receipt of decision, file a suggestion for initiation of review procedure (Ibid., Article 29, para. 1 and 2).

¹³⁶ “Law on Public Procurement,” Article 100, para. 5.

¹³⁷ Ibid., Article 94, para. 5.

contracting authority may see an opportunity therein, i.e., the possibility to avoid the stipulated obligation. Besides, by not stipulating the possibility for the PRB to be informed about the existence and conduct of a review procedure, control over the action of the contracting authority is made more difficult. With regard to the specifics of public procurement procedures in relation to other administrative procedures,¹³⁸ actions on the provisions of the LAP relating to appeal submission to the appellate body¹³⁹ are not satisfactory, which is why this issue should have been resolved in more detail in the LPP.

Concerning the sanctioning of the contracting authority in the case that an appeal is not submitted with opinion and documentation, one can see another significant deficiency. This concerns initiating the infringement procedure against the contracting authority if it fails, upon request of the PRB, to provide the requested documentation or prevents insight into documentation.¹⁴⁰ The question, in fact, is how to sanction the failure to provide requested documentation to the PRB as a misdemeanor, if the LPP does not determine when and how the PRB can require it, even though it does envisage the possibility that the PRB requires the provision of documentation by the contracting authority. Likewise, regarding the fact that preventing insight into documentation is specified as an infringement as well, it is not clear whether the infringement refers to insight into the file by the PRB. If so, then it should have been determined. Yet, in this case, this provision would be unenforceable, because the LPP does not envisage the possibility of insight into documentation, nor the way in which the PRB would gain it.

5.3.2.2 Procedure before the PRB

One of the actions that the PRB takes in the review procedure is the notification about the procedure for the participation of interested persons, which appears unenforceable. This is a provision according to which the PRB notifies the selected bidder on the conducting of the procedure upon appeal *ex officio*, whereas other persons in the capacity of a party may apply for participation in the procedure upon appeal.¹⁴¹ Given that the economic operators with legal interest in the relevant public procurement procedure may also have the capacity of a party,¹⁴² the question is how these persons can register their participation if they are

¹³⁸ Contracting authorities, namely, in public procurement procedures do not act exclusively with stronger will, authoritatively, but this area is classified in Administrative Law because the legislator considered that it was very important to ensure implementation of the requirement of expeditious legal protection. For no circumstance linked to public procurement procedures justifies postponement in the implementation of public procurement procedures or in providing legal protection in such procedures.

¹³⁹ "Law on Administrative Procedure," Article 235.

¹⁴⁰ "Law on Public Procurement," Article 116, para. 2, Item m.

¹⁴¹ *Ibid.*, Article 94, para. 2.

¹⁴² According to *Ibid.*, Article 94, para. 1.

not informed about the existence of the review procedure. A similar provision¹⁴³ existed in the earlier version of the Croatian Public Procurement Act,¹⁴⁴ but it was reformulated, so that the valid Public Procurement Act determines that the State Commission for Supervision of Public Procurement notifies the bidder and competitors about the existence of the review procedure, if it exists in the stage in which the appeal was filed.¹⁴⁵ In this way, the Croatian legislator, seeing the failures in terms of unenforceability of the earlier provision, formulated the obligation of the State Commission for Supervision of Public Procurement in the correct and practically feasible way about the obligation of informing certain persons about the existence of the review procedure. In addition, the issue concerns the report to the selected bidder or candidate, i.e. it is about the persons who are definitely the most appropriate to be admitted into the circle of people who should be informed about the existence of the review procedure by the supervisory authority.

The Legislator in BiH failed to ensure the procedure *inter partes* in order to ensure equal legal status, which is a substantial defect of the valid LPP. In the public procurement procedure legality the adversarial principle must be applied in estimate of legality, i.e. the principle of the hearing of each person whose rights and interests the decision, action or procedure refers to. This is in accordance with Article 6 Section 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, judgments of the European Court¹⁴⁶ and legally protected directives.¹⁴⁷ Each party should have the possibility to orally express their views, regarding both facts and legal basis, propose evidence and respond to the allegations of the other party. With this the issuing of a decision only by the status of case files would be excluded. The LPP does not explicitly require adversarial procedure before the PRB, but the adversariness stems from its individual, unsystematically proclaimed provisions. In some cases the LPP allows adversariness, as for example when it gives the possibility to the contracting authority to comment on the appeal allegations in writing.¹⁴⁸ In the procedure before the PRB, instead of the principle of oral statement, the principle

¹⁴³ As a provision of the valid “Law on Public Procurement,” Article 94, para. 2.

¹⁴⁴ Earlier valid “Zakon o javnoj nabavi” [Public Procurement Act], *Official Gazette of Republic of Croatia* 110/07 and 125/08, Article 155, para. 2.

¹⁴⁵ Croatian “Public Procurement Act,” Article 156, para. 1.

¹⁴⁶ Transparency of public procurement procedure is preferable in all stages of public procurement procedures. Related to the part of the public procurement procedure pertaining to legal protection, “Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts,” Item 3 of the preamble, emphasizes in its preamble a need to strengthen the transparency of procedure.

¹⁴⁷ On principles of public procurement in the Croatian law see Šprajc, “Fundamental Principles of Public Procurement Procedure,” pp. 94–98.

¹⁴⁸ “Law on Public Procurement,” Article 100, para. 5.

of written statement dominates. Communication between the contracting authority and the PRB only takes place in writing.¹⁴⁹ However, in practice the adversariness is incomplete if it is reduced to written communication by the submission to the PRB, which is why the LPP should have left the possibility to the parties to present allegations in an oral debate.¹⁵⁰ What is more problematic is that the LPP allows the PRB to decide about the request of the contracting authority to continue the procedure,¹⁵¹ but without leaving the possibility to the appellant to declare themselves at the request of the contracting authority.

The LPP does not proclaim explicitly the public principle in the appeal stage of a public procurement procedure. The public principle can be found in some of its provisions, for instance in the provision in which it enables filing an appeal to a wider circle of people. Although in the procedure upon appeal the wider public is excluded, the narrow public is widened, since the appeal, other than by bidders or competitors, can be filed by every economic operator who has a legal interest in the public procurement contract award and who suffered or could suffer damage because of the alleged violation of the subjective rights.¹⁵² However, this is not enough to conclude that the optimal approach to the public quality of the work of this authority exists as well. The public quality needs to be provided through the provisions of the LPP related to the work of the PRB, since it is of great importance for legal security. Given that holding an oral debate is necessary at least before one instance in the sense of Article 6 Section 1 of the European Convention on Human Rights and Fundamental Freedoms, and that holding the oral hearing upon appeal in administrative dispute before the Court of BiH is optional, i.e. it is an exception to the adverse rule,¹⁵³ it was necessary to anticipate an oral hearing before the PRB. However, from the provisions of the LPP a completely nonpublic character of the work of the PRB arises,¹⁵⁴ which is why the fundamental requirement for the public quality of the work is not met. The complete disabling of the public monitoring of the work of this authority must not be the rule. The public principle is based on the requirement of informing the public by enabling the transparency of the practice of the PRB. It is an essential

¹⁴⁹ For instance, the declaration of the contracting authority on the allegations of the appeal according to “Law on Public Procurement,” Article 100, para. 5, providing evidence in the procedure upon appeal according to *Ibid.*, Article 102.

¹⁵⁰ Such are the judgments of the European Court in cases: Court of Justice of the European Communities, Case C-54/96, *Dorsch Ingeniewgesellschaft mbh vs. Bundesbaugesellschaft Berlin mbH*; Court of Justice of the European Communities, Case No. C-17/00, *François De Coster vs. Collège des bourgmestre et échevins de Watermael-Boitsfort*.

¹⁵¹ According to “Law on Public Procurement,” Article 111, para. 1, Item e.

¹⁵² *Ibid.*, Article 97.

¹⁵³ See “Zakon o upravnim sporovima” [Law on Administrative Disputes], *Official Gazette of BiH* 19/02, 88/07, 83/08 and 74/10, Article 29.

¹⁵⁴ Although “Law on Public Procurement,” Article 113 standardizes the decision process of the PRB, it does not mention by any word the possibility of implementing oral debate before the PRB.

element of legal security, i.e. of predictability and likelihood of successful usage of the legal remedy. In this sense it is important to emphasize that the PRB has not systematically approached the publication of its decisions, and it should, for it would certainly mean good business practice, and it would contribute to the realization of the requirements for the decisions of the PRB to be made public.¹⁵⁵

The legislator in BiH also failed to clearly define the time limit for appeal decisions.¹⁵⁶ The provision regarding the beginning of the time limit for issuing a decision on appeal is vaguely formulated in that it causes a dilemma regarding when the limit begins. Even if one understands that the LPP links the beginning of the limit for an appeal decision to the day of filing an appeal, one must conclude that the formulation used by the LPP is nomotechnically not clear enough.¹⁵⁷ Specifically, the question is what the formulation “within 15 days from the day of completion of the appeal by the contracting authority” means. It indicates that the time limit for appeal decisions of the PRB is accounted for by the conduct of the contracting authority, which should not be the rule. Furthermore, does the formulation “not later than 30 days from the day of receipt of the appeal by the contracting authority” mean that the beginning of the time limit for the appeal decision starts from the submission of appeal by the contracting authority or from the submission of appeal to the contracting authority? This formulation can mean both, which makes it unclear and imprecise because it leaves the possibility of different interpretations. In any case, the conclusion is that the time limit for an appeal decision by the PRB is vaguely formulated. Because of this, as the only right solution, the time limit for an appeal decision of the PRB should explicitly be counted from the day of appeal submission to the contracting authority. Thus confusion and other possible interpretations of the time limit for appeal decision would be avoided. In relation to the question of the time limit for appeal decision, the examples of comparative law show that the time limit for appeal is linked to the day of appeal submission, while the formulations regarding the limit for appeal decision are clear and precise. In Croatia, for instance, there is an obligation of the State Commission for Supervision of Public Procurement (to which the appeal is submitted) to issue and publish the decision within 30 days from the day of submission of the proper appeal. If it does not issue the decision within this time limit, it must explain in the decision the reasons for the delay.¹⁵⁸ In Slovenia, the time limit for the appeal decision of the National

¹⁵⁵ From “Law on Public Procurement,” Article 113, para. 8.

¹⁵⁶ *Ibid.*, Article 111, para. 11: “PRB shall be under obligation to adopt a conclusion or a decision on the appeal within 15 days from the day of completion of appeal by the contracting authority, but not later than 30 days from the day of receipt of the appeal by the contracting authority.”

¹⁵⁷ It is not clear what the statement in the text of the provision “not later than 30 days from the day of receipt of the appeal by the contracting authority.” Does it mean 30 days from the day of receipt of the appeal in the contracting authority or 30 days from the receipt of the appeal in the PRB by the contracting authority?

¹⁵⁸ Croatian “Public Procurement Act,” Article 171, para. 2 and 5.

Review Commission is 15 working days from receipt of proper request and the documentation of the case file. Exceptionally, in justified cases, this time limit may be extended for a maximum of 15 working days, of which, before the expiry of the previous time limit the client, the applicant and the selected bidder must be notified.¹⁵⁹

5.3.3 Costs of the Procedure

The question of special costs of the review procedure of the public procurement is also insufficiently regulated (administrative fee for appeal¹⁶⁰ and fee for appeal¹⁶¹). We refer to the costs that the party incurs for filing an appeal. When it comes to the fee for appeal, these costs are not low.¹⁶² The level of fees for conducting procedures is particularly significant as a deterrent to ungrounded and harassing appeals. On the other hand, the amount of the fee also affects restrictions in initiating the review procedure. The amount of the fee for the conduct of the review procedure should be appropriate in the sense that it encourages the filing of an appeal, but high enough at the same time to avoid harassing appeals.¹⁶³ Because of the importance of these kinds of costs, the fee in the appellate stage of the public procurement procedure should have been explicitly prescribed by the Law. However, the issue of the fee for the costs of the review procedure remains insufficient, i.e. incompletely regulated, and especially regarding the fact that the provisions about the costs of procedure of the LAP, applied in a subsidiary manner, are difficult to apply, namely, they are not applicable in the review procedure.

Concerning the amount of fee for appeal, it should be noted that one of the factors is that which measures the adequacy of the amount of fee for appeal and the number of appeals that will be filed after the entering into force of the new LPP. Such statistics might give indicators about the justification of the amount

¹⁵⁹ Slovenian “ZPVPJN,” Article 37.

¹⁶⁰ “Zakon o administrativnim taksama” [Law on Administrative Fees], *Official Gazette of BiH* 16/02, 19/02, 43/04, 8/06, 76/06, 76/07 and 3/10.

¹⁶¹ “Law on Public Procurement,” Article 108.

¹⁶² Compensation for appeal is determined depending on the estimated value (case) of the procurement (*Ibid.*).

¹⁶³ Concerning the amount, one can notice that these compensations for appeal in BiH are somewhat higher than in Croatia (about the amount of compensation for appeal see Croatian “Public Procurement Act,” Article 169). In Slovenia, if the request for revision does not relate to the content of the publication, bidding documentation, invitation for submitting bids or bidding documentation, procedure on procuring rough agreement or in the dynamic system of public procurement, the amount of compensation is determined in the percent of the estimated value of procurement, but not less than 200, and not more than 10,000 Euros (Slovenian “ZPVPJN,” Article 71, para. 2). It can roughly be concluded that the amount of compensation for appeal in BiH is the same or even somewhat higher in relation to the amount of compensation in Croatia and Slovenia.

of fee.¹⁶⁴ However, generally speaking, the number of formal appeals does not represent a real measure of verification of justification of the amount of fee for appeal. A great number of appeals could mean that appeals are filed because of delays of legal protection, regarding the suspensive effect of appeal. A small number of appeals, on the other hand, could mean that bidders, due to lack of trust, are afraid to file appeal because of consequences for future competitions. Consequently, although the number of appeals can be correlated with the amount of fee for appeal, the statistics for the number of appeals is not the only relevant indicator of the adequacy of the amount of the fee.

According to the explicit provision of the LPP, the PRB is obliged to determine whether the appellant has paid the fee for appeal,¹⁶⁵ and if the appellant fails to submit proof of fee payment, the PRB will dismiss the appeal as irregular.¹⁶⁶ However, if the appellant does not pay the fee for appeal and does not submit proof to the PRB, the PRB should dismiss such an appeal as inadmissible, but not as irregular. For, if the condition for filing the appeal is paying the fee for appeal, and the appellant is not left the possibility to subsequently deliver proof of it, then it is a matter of inadmissible, but not irregular appeal. This is why this question should have been resolved in the provision in which the LPP regulates the fee for appeal,¹⁶⁷ and in such a way that the legislator should have determined that the payment of the fee and delivery of evidence about it together with the appeal is a procedural precondition for appeal. Specifically, according to the rules of administrative procedure, the PRB could not dismiss the appeal as irregular, and previously it did not leave a time limit for the correction of irregular appeal.¹⁶⁸ However, in any case, it would be more correct if the LPP legalized a solution that is more favorable for the appellant, that is, if it envisaged that the PRB will allow the appellant an additional time limit in which they can provide proof about the paid fee before it dismissed the appeal as irregular. Such a solution is preconditioned by the Croatian Public Procurement Act. According to the legal solution in Croatia, if the proof of paying the fee is not delivered with the appeal, and the payment cannot be determined with verification, the State Commission for Supervision of Public Procurement calls on the appellant to, within a certain time limit which cannot be longer than five days, pay the fee and deliver the proof of paying the fee for appeal, and if he does not do so, the appeal shall be dismissed as irregular.¹⁶⁹ The Slovenian ZPVPJN envisages the obligation

¹⁶⁴ Such a conclusion is referred to in the statement of the interviewed assistant director of the PPA, Ademir Čebić.

¹⁶⁵ “Law on Public Procurement,” Article 108, para. 3.

¹⁶⁶ One can come to such a conclusion by interpreting the provision of *Ibid.*, Article 106, para. 2.

¹⁶⁷ In “Law on Public Procurement,” Article 108.

¹⁶⁸ In this sense we should refer to the provision of “Law on Administrative Procedure,” Article 67, para. 1, according to which, the report, if not complete, cannot be dismissed solely for that reason.

¹⁶⁹ Croatian “Public Procurement Act,” Article 169, para. 5.

of the State Audit Committee to call on the appellant to pay the fee, and if he does not do so, the request for review will be dismissed.¹⁷⁰

Claims about insufficient regularity of questions of procedure costs are heightened also by the legal definition that the fees for the procedure in the case of ungrounded appeal are nonrefundable.¹⁷¹ This is at the same time the only provision of the LPP regulating the question of the fee for costs depending on the outcome of the review procedure. The provision of the LPP¹⁷² that the Ministry of Finance and Treasury of BiH shall provide instruction about the method of payment, control and recovery of fees¹⁷³ does not mean that the issue of fee for costs will be resolved properly, because this Instruction is the implementing regulation that regulates the technical side of the fee for appeal. Therefore it is not clear on which regulation the LPP bases its decision about the fee for the procedure costs.¹⁷⁴ It is also not clear on what basis the LPP will determine the amount of fees and the method of compensation if there is no explicit legal instruction about it.¹⁷⁵ The LAP, applied in a subsidiary manner, determines that when two parties with opposite interests participate in the appeal procedure, the compensation of the procedure costs should be linked to success in the review procedure. However, the LAP, applied in a subsidiary manner, does not regulate the issue of returning fees for procedure conduct in the case of a partially founded appeal.¹⁷⁶ Therefore the key question is how the PRB should decide on the reimbursement of the fee for appeal in the case of a partially founded appeal.¹⁷⁷ Given all this, one can conclude that the LPP should regulate more precisely the review procedure costs fee. And the legislation on public procurement in Croatia¹⁷⁸

¹⁷⁰ Slovenian “ZPVPJN,” Article 31, para. 3.

¹⁷¹ “Law on Public Procurement,” Article 108, para. 6.

¹⁷² *Ibid.*, Article 108, para. 7.

¹⁷³ “Instrukcija o načinu uplate, kontrole i povrata naknada propisanih člankom 108. Zakona o javnim nabavama” [Instruction about the method of paying, control and return of compensations prescribed by Article 108 of the Law on Public Procurement], *Official Gazette of BiH* 86/14.

¹⁷⁴ In its decisions the PRB does not invoke legal basis for issuing decision on costs, but refers to the Instruction. Thus for example the Decision of the PRB number: Procurement Review Body, Decision No. UP2-01-07.1-291-7/15, April 21, 2015.

¹⁷⁵ “Instruction about the method of paying, control and return of compensations prescribed by Article 108 of the Law on Public Procurement,” Article 4, para. 1 it is stated that “the reimbursement of compensation is done based on the decision of reimbursing of compensation that is made by the PRB.” It is not justified that provisions on the functioning of the PRB be contained in the prescription regulating the technical side of paying compensation for the appeal.

¹⁷⁶ Many member states link paying of the procedure costs to the achieved success and the party who does not succeed in the procedure compensates for the costs to the opposite party. OECD, “Public Procurement Review and Remedies Systems in the European Union,” p. 29.

¹⁷⁷ An interviewed member of the PRB states that the complete amount is to be returned if the appeal is partially adopted and at the same time states the opinion that this issue in the LPP is not resolved to a sufficient extent.

¹⁷⁸ The Croatian “Public Procurement Act,” Article 170, regulates costs of the review procedure.

and Slovenia¹⁷⁹ shows that due to the specificity of the review procedure, the LPP should contain more precise provisions about who ultimately bears the costs of the review procedure, their amount, to whom and in which time limit they must be paid. Primarily, it should have been explicitly determined that the LPP decides about the return of the fee for appeal.¹⁸⁰

Although the question of the fee reimbursement for an appeal is not regulated in the LPP, the LPP regulates the question of the reimbursement for the preparation of bids and the costs of participation in the public procurement procedure.¹⁸¹ The reimbursement of these costs is not linked exclusively to the review procedure conduct, but the request for the reimbursement of the costs can be submitted if the appeal is not filed.¹⁸² Hence, the intention of the legislator was that the PRB decides about the costs of the public procurement procedure that were incurred in pre-tender and tender stages of public procurement, regardless of the fact that there is an appeal and review procedure. The question is how the PRB can decide on the reimbursement of the costs in the pre-tender and tender stage of public procurement if simultaneously this Law does not envisage the possibility of filing an appeal against the decision on these costs. Therefore, the only correct conclusion is that the question should not be subject to the decision of the PRB, nor to the regulation of the LPP in the part about legal protection.¹⁸³ On the other hand, the question of the reimbursement of the costs of the review procedure (fee for appeal), as presented above, is unjustly left outside the legal regulation.

¹⁷⁹ The Slovenian “ZPVPJN,” Chapter 9 regulates compensation of costs of pre-review and review procedure.

¹⁸⁰ This is necessary for the reason that the PRB could issue solutions with regular content and for equivalent action of this authority. The practice of the PRB shows that this authority in the statement of decisions does not bring in the part relating to the costs of procedure in the case of ungrounded appeal. Thus for instance the Procurement Review Body, Decision No. UP2-01-07.1-441-8/5, May 13, 2015. It is not enough to state in the explanation of appeal that the costs are not adopted for the reason that the appeal is ungrounded, but in the statement of decision it should be stated that the request for compensation of costs is rejected. On the other hand, in Decision, Procurement Review Body, Decision No. UP2-01-07.1-450-8/15, May 20, 2015, the statement of the decision by which the appeal is refused contains a part on refusing the costs of the procedure, which points to the unequal practice of the PRB.

¹⁸¹ “Law on Public Procurement,” Article 119.

¹⁸² *Ibid.*, para. 2.

¹⁸³ Already upon request for compensation of damage, which the injured economic operator could realize by the rules of the legal proceedings.

5.3.4 Submission of Decisions of the PRB

The method of submission of decisions of the PRB is completely outside the regulation of the LPP. Specifically, the LPP does not mention the submission of decisions of the PRB, which was certainly necessary, *inter alia* because the LPP envisages the possibility of an appeal submission electronically.¹⁸⁴ If the Law already permits the possibility of an appeal submission electronically, the question is why the legislator in BiH has not remained consistent and prescribed the possibility of submission of decisions of the PRB electronically. The issue of submission of decisions of the PRB remains inadequately regulated, which means that in that case, the LAP is to be applied, regarding its subsidiary application. Yet, the LAP does not either envisage the possibility of decision submission electronically. Furthermore, the decision submission of the PRB, regarding subsidiary application of the LAP, is done in such a way that the decision is submitted to the contracting authority, which shall within five days, submit the decision to the parties.¹⁸⁵ However, such indirect submission of the decisions of the PRB further delays the procedure.

The legislator in BiH failed to envisage the obligation of submission of decisions about appeal directly to the parties of the review procedure. In this way the procedure would be significantly shortened and it would contribute to the realization of the principle of efficiency in the review stage of the public procurement procedure. It would be good if the legislator had envisaged the possibility of submission of decisions by public announcement, which would also contribute to the realization of the principle of urgent action. By anticipating such possibility of submission, besides the fact that the time limit for submitting the decision of the PRB would be significantly shortened, the request for publication of decisions of the PRB would be entirely and correctly fulfilled.¹⁸⁶ Such a means of submission is acknowledged by the Croatian Public Procurement Act, which envisages that the State Commission for Supervision of Public Procurement submits the decisions by public announcement on its Internet pages, and the decision is considered submitted upon the expiry of the eighth day from the day of public announcement.¹⁸⁷ Only exceptionally, if it estimates that there are justified reasons, the State Commission for Supervision of Public Procurement will supply the decision by registered mail, by mail or in another verifiable manner.¹⁸⁸

¹⁸⁴ “Law on Public Procurement,” Article 99, para. 1.

¹⁸⁵ See “Law on Administrative Procedure,” Article 237.

¹⁸⁶ “Law on Public Procurement,” Article 113, para. 8.

¹⁸⁷ Croatian “Public Procurement Act,” Article 171, para. 5.

¹⁸⁸ *Ibid.*, para. 6.

5.4. Legal Protection

The unique and equal application of the law should be provided by the legal practice of the Court of Bosnia and Herzegovina (Court of BiH), which acts on appeal in an administrative dispute. An administrative dispute can be implemented practically only after the regular way has been exhausted (upon appeal as the only legal remedy in the frame of administrative procedure).¹⁸⁹ In formal terms, this is a dispute the resolution for which the administrative court is competent, and it is possible that organizationally separate councils (departments) for administrative disputes can be competent, as is the case in BiH. The competence, organization and structure of the Court of BiH are regulated by the Court of Bosnia and Herzegovina,¹⁹⁰ according to which the Court of BiH has three parts: criminal, administrative and appellate. The administrative department of the Court of BiH estimates the legality of decisions of the PRB. The final decision of the Court must be respected, i.e. executed. The duty of the legal entity that committed the violation is to comply with the final decision that determined the violation, and it should be subjected to sanctions in the case of adverse behavior. The realization of the request for the public announcement of the judgments of the Court of BiH¹⁹¹ should contribute to the respect of judgments of this authority.

With regard to standardization of the legal protection procedure, one can notice deficiencies that additionally burden the legal protection procedure, but they also hinder the realization of the right to legal protection in an administrative dispute. We are referring to the determination of the subject of the dispute, i.e. on who runs the dispute (the question of legal capacity).¹⁹² According to the explicit provision of the LPP, an administrative dispute can be initiated by contracting authorities. Using the plural indicates that it can be done by any contracting authority, even that which is not the contracting authority in the concrete public procurement procedure. The doubt is further enhanced by the fact that, using the legal capacity, the LPP does not include provision about the legal interest for initiating the dispute. Only the contracting authority that procured goods, works or services in the concrete case can have legal interest. The contracting authority

¹⁸⁹ In administrative dispute see Ivo Borković, *Upravno pravo* [Administrative Law], (Zagreb: Narodne novine, 2002), pp. 448–490.

¹⁹⁰ “Zakon o Sudu Bosne i Hercegovine” [Law on the Court of Bosnia and Herzegovina], *Official Gazette of BiH* 49/09, 74/09 and 97/09.

¹⁹¹ “Law on Public Procurement,” Article 113, para. 8.

¹⁹² The *Ibid.*, Article 115, para. 1 prescribes: “Contracting authority and parties to the procedure may initiate an administrative dispute before the Court of Bosnia and Herzegovina (hereinafter: the Court of BiH) against a PRB decision within 30 days from the day of the receipt of the decision.”

may draw the interest for initiating the dispute from the LAD.¹⁹³ Therefore, the contracting authority that carried out the public procurement procedure may have primary legitimate right to use an appeal in the administrative dispute, in the first place.¹⁹⁴ This is about its rights and interests, but also about duties because of the involved public interest. Furthermore, it is not clear whether an administrative dispute can be initiated by the participants of the review procedure or by the participants of the public procurement procedure. The assumption is that this is about participants of the previously conducted procedure of administrative protection, but in this case the active legitimacy is widely set. Specifically, each participant in the review procedure does not and cannot have a legal interest for initiation of an administrative dispute. For instance, a bidder who did not file an appeal or whose offer is not competitive by its price cannot file an appeal due to the absence of legal interest.

The LPP is also incomplete in the part in which it provides for the possibility of postponing the lawsuit in the Court of BiH. The provision of the LPP that the contracting authority and a participant in the procedure may submit a request for postponing the final decision or conclusion of the PRB¹⁹⁵ causes doubt in the validity of the formulation of the very requirement and procedure on the request. First of all, in the procedure before the Court of BiH one may ask for postponement of the execution, but not for undefined postponement. In addition, one cannot ask for postponement of the decision of the PRB, but for postponement of the execution of the decision of the contracting authority as a final administrative decision, since the finality means the legal force that an administrative act, in this case the final decision of the contracting authority, has at the moment when there can no longer be appeal against it. Even if one understands the request of the LPP to postpone execution of the decision of the contracting authority, and not the PRB, as it is stated in the LPP, this does not mean that the concluded public procurement contract can be postponed, for suspension of the decision of the contracting authority does not necessarily mean postponing the conclusion of the contract. In fact, considering that the administrative dispute is initiated within 30 days from the receipt of the decision of the PRB, in that period a public contract can be signed, and certainly is already signed up until the decision of the Court about the delay. Therefore, the Court's decision to postpone generally

¹⁹³ From the provision of "Law on Administrative Disputes," Article 2, para. 1, Items 1 and 4. The aforementioned point determines that the appeal can be filed by a "citizen or legal person if the final administrative act violated his/her right or direct personal interest based on law" while the other point determines that those that can have legal capacity are "groups representing collective interests (associations and foundations, corporations, trade unions) if the final administrative act violated their rights or collective interests they represent."

¹⁹⁴ Regarding the state authority as a prosecutor in the administrative dispute see Pero Križan, *Komentar Zakona o upravnim sporovima* [Commentary on the Law on Administrative Disputes], (Zagreb: Informator, 2001), p. 45.

¹⁹⁵ "Law on Public Procurement," Article 115, para. 3.

comes too late. Shortening the time limit for a lawsuit in the administrative dispute in relation to the time limit that is determined by the LAD¹⁹⁶ does not mean a sufficient speeding up of the process because, as was pointed out above, and considering the fact that the decision of the contracting authority becomes enforceable on the day of receipt of the decision of the PRB, it is clear that agreement may be concluded even before the action and decision of the Court to postpone the execution of the decision of the contracting authority.

The speed with which the Court of BiH decides on appeals filed against the decisions of the PRB is of great importance for the realization of the principle of effective legal protection in public procurement procedures. Restricting the time limit for decision in administrative court procedure has a huge impact on the insurance of effective legal protection. Therefore, the LPP envisages that the administrative dispute conducted upon the action in the public procurement procedures is of urgent nature.¹⁹⁷ Although the LPP stipulates the urgency of procedure before the Court of BiH, in reality slowness and delays in procedures before this body are not prevented. Specifically, although the previously existing Law on Public Procurement envisaged for urgency in the procedures before the Court of BiH,¹⁹⁸ the legal procedure is still long and takes between one and three years.¹⁹⁹ The correct implementation of the principle of effectiveness requires shortening of the time period. Excessively long decision-making reduces legal certainty and confidence in the rule of law. Given the fact that the application to the Court of BiH as a rule does not delay the conclusion of contracts and that the possibility of delaying the execution of the client's decision (i.e. postponing the decisions of the PRB – as wrongly determined by the LPP) under the LPP is not resolved properly, the court decision always comes with delay.

The LPP contains a provision that the Court of BiH on the basis of a request for postponing the final decision of the PRB estimates the public interest and damage,²⁰⁰ but does not mention the private interest and the damage that postponing could cause to private interest. If the intention of the legislator was

¹⁹⁶ According to “Law on Administrative Disputes,” Article 19, para. 2: “The action shall be filed within two months from the day when the party which filed the action was informed or when it received the final disputed administrative act or decision or from the day of publishing of the disputed regulation.”

¹⁹⁷ “Law on Public Procurement,” Article 115, para. 2.

¹⁹⁸ The earlier valid “Law on Public Procurement of BiH,” Article 52, para. 6

¹⁹⁹ Nermina Voloder, *Mapiranje ključnih prepreka za ravnopravno učešće privrednih subjekata u javnim nabavkama u Bosni i Hercegovini* [Mapping of Key Obstacles to Equal Participation of Private Companies in Public Procurement in Bosnia and Herzegovina], (Sarajevo: Analitika- Center for Social Research, 2015), p. 43. Statistics of solving cases are devastating as well, since in six years, the Court received 367 complaints and issued only 147 judgments - Transparency International BiH, *Monitoring implementacije Zakona o javnim nabavkama BiH* [Monitoring of Implementation of the Law on Public Procurement], (Transparency International BiH, 2012), p. 11.

²⁰⁰ Provision “Law on Public Procurement,” Article 115, para. 4 says: “Respecting public interest and taking into account the damages that may be caused by postponing the final PRB decision.”

that such a formulation includes damage that may occur to private interests, then it should have been explicitly specified. However, if one considers that postponing may be required by a participant in the process, then the Court should estimate the possible damage to private interests. In that case, the Court ought to estimate, at the request of the economic operator, damage that may occur to the private interest, and it is the Court's decision on whether to give priority to private interests, at the expense, so to speak, of the public interest. Thus, the task of weighing the specific gravity of interests that are not clear and conclusive is put before the Court. The task of finding a balance between the public and private interests of the team is thus more difficult if the balance needs to be estimated by means of vague provisions, which do not give a clear direction (criteria) to the Court of BiH for the estimate of interests, i.e. damages that may result to any of the interests.²⁰¹

²⁰¹ For the sake of comparison, "Law on Administrative Disputes," Article 18, para. 2 as the criteria for postponing: "if the execution would inflict damage to the prosecutor that could not be easily corrected, and the postponing is not contrary to the public interest and with it there would be not bigger irreparable damage to the opposite party."

6.

Conclusion: The Major Challenges of Legal Protection in Bosnia and Herzegovina

The overall estimate of the situation in Bosnia-Herzegovina in terms of compliance with European legislation shows that the needed legal framework for the functioning of the public procurement system is established, and the institutions necessary for the implementation of legislation on public procurement have been established. However, this does not mean that the public procurement procedures are in full compliance with all the requirements of European law. Some normative solutions show deviations from European law in terms of insufficient assurance of legality, legal security, predictability, transparency, openness and efficiency in the implementation of public procurement procedures. Normative sequence of the Law in the part concerning legal protection does not follow a logical sequence of procedure. The text of certain provisions opens dilemmas regarding the content of the Law, and there is also significant inadequacy of norms of the relevant segments. Competences of the contracting authorities do not cover all the activities that these bodies should have, and the status of the PRB does not conform entirely with the requirements of European law. The method of submission of appeal electronically is inadequately solved. Meritry competences of the contracting authorities are set too wide and the PRB is not given the opportunity to influence the contracting authority in connection with the delivery of documentation. In addition, there was insufficient allowance for insurance of the adversarial and public interest in the procedure before the PRB. There is inconsistency in terminology, and fragmentation in the legal regulation of the procedure upon appeal (especially in the part referring to the collaboration of the contracting authority and the PRB). There are also legal lacunae because the legislator failed to regulate certain aspects (e.g. the question of fee for costs of review procedure). Even the legal protection which is carried out before the Court of BiH, implemented under the provisions of the PPL, is not without drawbacks, since it is not entirely clear and consistent, i.e. compatible with the law regulating administrative disputes.

These are all significant reasons as to why amendments to the LPP are required, but given the unsystematic laws and abundance of objections, one should consider the need to adopt a completely new law. All observed deficiencies in the study can be corrected by the appropriate practice of the competent authorities (the practice of the PRB and the practice of the Court of BiH), and show that a

legislative intervention which could not possibly be partial is necessary. It takes a systematic approach to devise a clear, not contradictory, correlated set of standards, which would ensure more effective protection of the rights and legal interests of injured subjects in public procurement procedures. Future legislative activity requires premeditated actions so that good decisions of the LPP are retained and new ones standardized. In connection with this one should take into account the mutual compliance of certain laws, compliance of certain standards in the framework of the law, and also connecting the requirements of European law with the tradition of the legal protection system in BiH. The importance of public procurement procedures and decisions for the economy, with a commitment to adapt BiH legislation to European Law, requires careful definition of the institute of public procurement as a whole, and consequently the part relating to legal protection. It is very important to provide an accessible and effective system of legal protection. Otherwise, the final result of unregulated legal protection will mean the loss of confidence of economic operators in the proper protection of their rights and interests. Ensuring effective legal protection would strengthen the confidence of both economic operators²⁰² and the public in the fairness of the procurement procedure, and would also increase the reputation of Bosnia and Herzegovina in international relations. This is particularly important with regard to the signing of the SAA and with it the commitment to harmonization, including the area of public procurement, which is one of the most important and most sensitive areas.

Given the importance of public procurement for the economy and other segments of society, as well as damages that may arise due to incomplete protection of participants in public procurement procedures, it is necessary to carefully regulate this institute. A special problem that needs to be analyzed and resolved as quickly as possible is the action of the contracting authority on appeal, the cooperation of the contracting authority and the PRB and the competence of the PRB. The question of the status of the PRB should also be problematized, in the direction of possible legalization of all criteria for achieving the status of a court or tribunal. Attention should be paid to and an analysis published of the decisions of the PRB, because this practice can contribute to a better understanding of the problems. In addition, the dynamic regulatory activity in this area at European level determines the need for further study and adjustment of regulations and practices. It is necessary to further study the system of legal protection in public procurement procedures in BiH for possible extension in terms of integrity, as well as transparency and efficiency. Particular attention should be paid to the obligation to respect the fundamental principles of legal protection in public procurement procedures and other European standards. Attention should also be drawn to the analysis of published decisions

²⁰² About the level of mistrust of the examined entrepreneurs see Voloder, *Mapping of Key Obstacles to Equal Participation of Private Companies in Public Procurement in Bosnia and Herzegovina*, p. 52.

of the PRB, because this practice can help a better understanding of the problems. In addition, the dynamic regulatory activity in this area at the European level determines the need for further study and adjustment of regulations and practices. The system of legal protection in public procurement procedures in BiH needs to be studied further for possible extension in terms of integrity, as well as transparency and efficiency. Particular attention should be paid to the obligation to respect the fundamental principles of legal protection in public procurement procedures and other European standards.

7.

Recommendations

From the series of the above insufficiently legally resolved, i.e. unresolved, questions, one can see the scale of the incomplete nature of the legal framework of public procurement in BiH in the analyzed segment. The complexity of the problems in the legal framework, elaborated in this analysis, influence restrictions in the right to legal protection in public procurement procedures. After the analysis of the identified contentious issues, recommendations for possible improvements of the legal text are given, as a contribution to the practical application and further development of the institute of legal protection in public procurement procedures in BiH. The recommendations could be used as an aid in the practical realization of some insufficiently specific solutions, but also for the legislator in BiH, which should, during the next amendments to the Public Procurement Act or the enactment of new laws, bear in mind the recommendations highlighted in this study.

LEGAL AND INSTITUTIONAL FRAMEWORK

1. During the next legislative intervention it is necessary to take more account of the systematization of the provisions of the LPP relating to legal protection. The law should be divided into chapters, the chapters into sections, and the sections into subsections. Because of the importance of legal protection an entire chapter should be allocated to legal protection in public procurement procedures, which by analogy can be classified (as is the case now) under the contents of the Law. This would greatly contribute to the clarity and quality of the style of the Law, and therefore the application of effective and accessible legal protection. The institutional framework of legal protection, because of the importance of the function, should also be set aside in a separate chapter of the Law.

FRAMEWORK

Public Procurement Agency (PPA)

2. Apart from repairing the visible ambiguities and understatements in regard to defined competences of the PPA,²⁰³ the advisory role of this authority should be emphasized in the LPP, so that this role includes giving advisory opinions to the wider public. This is not to be limited only to the contracting authorities and bidders, which has been the case so far. This is very important because in this way it would contribute to the realization of the fundamental principles of legal protection, and especially to the trust of the public in the transparency of the work of this authority.
3. In the content of the work of the PPA there should be work that corresponds to the competence of this authority, and among the competences of the PPA one should classify the provision on filing misdemeanor charges for all misdemeanors envisaged by the PPL. The actual formulation of the provision on initiating misdemeanor procedures by the PPA is not conclusive or clear,²⁰⁴ and as this provision seems unenforceable in the sense of the rule of law, this should certainly be corrected.
4. To achieve the goal of realizing the possibility of filing misdemeanor charges by the PPA, and of keeping the existing provision that the PPA files the misdemeanor charges to the competent court if there was no procedure upon appeal, the obligation of submitting the appeal to the PPA should be prescribed by the Law.
5. To achieve the goal of realizing the request for filing misdemeanor charges, the LPP should introduce a provision on the supervision over the implementation of the LPP and the implementation of the regulations of the LPP, as one of the competences of the PPA. The supervision would be implemented at the request of economic operators, whereas it should not be implemented in the case that an economic operator who asked for the implementation of the supervision, files the appeal.

Procurement Review Body (PRB)

6. It is necessary as soon as possible to adopt implementing regulation envisaged by the LPP which is related to the organization and the manner of working of the PRB. This is necessary because in this way sufficient organizational and functional autonomy and independence of this authority

²⁰³ For instance, the provision of “Law on Public Procurement,” Article 92, para. 3, sub-para. e, should be amended in such a manner that the established system of monitoring procedures is implemented by the PPA with the objective that observed defects be removed by the contracting authority. The aforementioned provision currently refers to the fact that the observed defects are to be removed by the PPA, which is not acceptable given the role of the PPA in the legal protection procedure (prevalently advisory).

²⁰⁴ “Law on Public Procurement,” Article 116, para. 1.

- could be ensured. Namely, the aforementioned regulations should contain more precise provisions on the status of the PRB, the procedure of naming the members, the conditions for their election, the procedure of issuing decisions, the means of issuing decisions, competences, obligation of decisions and the public quality of work.
7. Concerning the organizational structure of the PRB, activities have already been carried out leading to the PRB acquiring the status of court or tribunal in the sense of Article 267 of the TFEU and in terms of judgments of the EU Court. However, for now it would be good to consider some adjustments that are not extensive, so that once BiH is admitted as a full member of the EU, the PRB is able to present the above issues to the EU Court. In order to ensure the status of court or tribunal, some improvements should be worked on – for instance, tightening up the conditions for naming the three members of the PRB among whom the representative is chosen, because these members should meet the condition of having experience.
 8. Given the fact that it concerns the supervisory authority, and because of the significance of the work we are speaking about, the possibility should be considered that the competence and other questions important for the work of the PRB be regulated by a special law.²⁰⁵ By the same law, one could regulate the content of the personnel of the PRB, the appointing and duration of the mandate of members, prerequisites for appointing members, and the remuneration of members.
 9. Measures should be taken to ensure the issuing of decisions of the PRB in the contradictory procedure. The PRB should unconditionally leave to the parties possibilities to participate in the procedure, but at the same time it should not be an obligation of the parties. Therefore in the part of the LPP relating to the review procedure before the PRB there should be provisions on holding oral debate. Thus, resolving of appeals based on the data of the case files would be limited, i.e. on the basis of the written statements of the parties in procedure. Oral debate should be held at the suggestion of the party of the review procedure, and the PRB would decide about this suggestion. Yet in such a decision the PRB could also determine when holding oral debate is necessary, because of clarification of a complex factual situation or legal issues.

²⁰⁵ In Croatia the organization and competence of the supervisory authority are regulated by a special (organic) law as well.

LEGAL PROTECTION

Principles of the procedure

10. In order to remove every dilemma in the practical application of the principles in the review stage of a public procurement procedure, it would be very useful if the legislator in BiH explicitly and clearly proclaimed the principles of the legal protection. The existence of special principles that would be applied explicitly in the review stage of the public procurement procedure would serve as directions for interpreting the provisions of legal protection. Thus, the attitude regarding requests, in connection with the means of implementation of legal protection, would be clearly expressed by the legislator.

Subsidiary application of the LAP

11. It would be useful if the legislator determined that the procedure conducted by the provisions of the LPP is administrative procedure. Alternatively, the Law could envisage that the provisions of the LAP in the public procurement procedures are applied in a proper way. Thus it would, at least generally, point to the specifics of this procedure. Certainly, it would not resolve all the issues of application of the LAP in the review stage of the public procurement procedure, but the attitude about the need for more restrictive subsidiary application of the LAP would be pronounced.

Filing an appeal

12. In order to facilitate understanding and satisfy the request for clear and precise standardization, it is necessary to equalize the legal terminology in the context of filing appeals (files, lodges, makes). The acceptable, and, it seems, the only correct solution would be that the terminology be harmonized with the LAP applied in a subsidiary manner.²⁰⁶

13. During the subsequent amendments of the LPP the legislator should establish boundaries in relation to the filing of appeals electronically, so as to envisage that the appeal can be filed electronically if mutual conditions of submitting electronic documents are met in accordance with the regulations of electronic business and electronic signature.

Who can file an appeal (Legal Capacity)

14. Although the issue of legal capacity is resolved in accordance with legal protection directives, the issue of legal capacity for filing an appeal by state authorities who are competent and obliged to protect the legality and

²⁰⁶ "Law on Administrative Procedure," Article 221, para. 1: "Appeal is directly filed or sent by mail to the first-instance authority" and Article 218, para. 1 determines that "an appeal is filed against the decision."

public interest remained unresolved (PPA, Prosecutor's Office of Bosnia and Herzegovina, Council of Competition). Because of this, during the next legislative changes, legal capacity should be given to all or at least some of the authorities.

Suspense effect of the appeal

15. Because of the importance of the suspense effect of the appeal, this institute should be further regulated by the LPP. In the following changes in legislation on public procurement in BiH, it is necessary to bear in mind particularly the need to address the issues of treatment of the contracting authority, in the case of an appeal regarding tender documents, and given the suspense effect of the appeal. Otherwise, it could happen that operators submit bids that should endure. The contracting body, immediately upon receipt of the appeal, should disclose the information that the appeal was lodged, and stop the procedure of public procurement. It should also stipulate the further procedure of the contracting authority, depending on the decision of the PRB.

Temporary measures

16. Given that the LPP leaves the possibility of decisions to the PRB on the request of the contracting authority for the continuation of the public procurement procedure, this request should be more precisely regulated, so that it is regulated separately in a special section. It should clarify when and within what time limit the contracting body can submit the request (for instance in opinion or along with the opinion on allegations of the appeal). It should also precisely state the criteria that could serve the PRB in estimating the request and deciding on it. The LPP should, in any case, along with the possibility for the contracting authority to propose the continuation of the procedure, enable the appellant to require the postponement of the continuation of the procedure up to the issuing of the decision upon appeal.
17. The criteria for estimating the balance of interests should be explicitly stated so that the PRB could have legal basis for its decision in estimating the request of the contracting authority for the continuation of the procedure.
18. The LPP should also regulate the issue of burden of proof regarding the circumstances on which the bid submitters base their requests. Thus it should be determined by the LPP that the contracting authority carries the burden of proving the circumstances for the continuation of the procedure, and the appellant the circumstances because of which he demands the postponement of the procedure. As a counterweight to a client's request to continue proceedings in cases where the appellant was allowed the possibility to apply for postponement, the PRB would consider the request of the contracting authority to proceed with regard to the interests involved

and the possible damage to the parties to the proceedings. Upon the request of the appellant consideration would be given to the appellant's motion to delay the proceedings, taking into account the balance of the interests involved and the possibility of damage to some of the parties.

PROCEDURE UPON APPEAL

Procedure and competences of the contracting authority upon appeal

19. Competences of the contracting authority should be limited so that the contracting authority should not be given competence of estimating timeliness and admissibility of appeal, nor legal capacity of the appellant. Otherwise the procedure can be delayed, and neither objectivity nor lack of bias is ensured, since the same operator who implemented the public procurement procedure decides upon appeal.
20. Concerning the competences of the contracting authority, that it can decide on the merits of appeal, it should be envisaged in any case that an appeal cannot be re-filed to the contracting authority against the new decision, but the new decision should be submitted by the contracting authority to the PRB.
21. For the sake of enabling the implementation of the provision according to which the PRB can demand that the contracting authority submit documentation,²⁰⁷ the decision that a copy of the appeal is submitted to the PRB should be legalized. In this way implementation of the stated provision would be enabled, but it would also open the possibility of sanctioning the contracting authority.²⁰⁸ Given the similarity of the basic settings of the LPP with the Public Procurement Act in Croatia, the solution that the appeal is declared to the PRB could also be accepted, in which case it should be envisaged that one copy of the appeal is submitted to the contracting authority.

Procedure before the PRB

22. The provision of the LPP, according to which the "PRB shall ex officio inform the selected bidder on the conducting of the procedure upon appeal, whereas other persons in the capacity of a party may apply for participation in the procedure upon appeal"²⁰⁹ and which is inapplicable for now, should be reformulated in the manner that the PRB, without postponing, informs the chosen bidder or candidate, if such exists in the stage in which the appeal has been filed.

²⁰⁷ "Law on Public Procurement," Article 94, para. 5.

²⁰⁸ Pursuant to the Provision of "Law on Public Procurement," Article 116, para. 2, Item m.

²⁰⁹ Ibid., Article 94, para. 2.

23. The LPP should ensure the transparency and public quality of the procedure before the PRB. In this sense one should envisage that each party has the possibility to orally state its attitudes, regarding factual and legal basis as well, propose evidence and respond to the allegations of the opposite party. The provision on reviewing the case file²¹⁰ should be supplemented in such a manner that the parties are enabled to note data from the case file.
24. One should consider giving the possibility to the PRB to resolve the appeal even without submission of the documentation²¹¹ if the contracting authority does not act at the request of the Office,²¹² i.e. if at the request of the PRB it does not submit documentation within a certain time limit. In this case the PRB can issue a decision depending on the allegation of the appeal. The precondition for such a decision is undoubtedly that the LPP envisages the obligation of the appellant to submit a copy of the appeal to the PRB (besides the fact that, according to the existing decision, the appeal is filed to the contracting authority).
25. The time limit for deciding upon appeal should be more precisely regulated. Instead of the present formulation, that the PRB is obliged to issue a decision within the time limit of 15 days from the day of completion of an appeal by the contracting authority, and not later than 30 days after receiving an appeal from the contracting authority, it should be noted that the PRB needs to issue a decision upon appeal within the time limit of 15 days from the day of submission of the regular appeal, and not later than 30 days from submission of an appeal.
26. As in practice the adversariness is incomplete if it is reduced to written communication through reports to the PRB, the Law should leave the parties the possibility to state their allegations in oral debate.²¹³

Costs of the Procedure

27. The LPP should leave the possibility to the PRB to request that the appellant brings proof of payment or to pay compensation for appeal after filing an appeal if this is not done before filing an appeal.
28. The LPP should, furthermore, contain more precise instruction about compensation of costs for the conduct of review procedure (compensation for appeal). Primarily it should decide that the PRB decides on compensation

²¹⁰ Ibid., Article 94, para. 4.

²¹¹ The recommendation is based on the Provision of Croatian “Public Procurement Act,” Article 155, para. 2, according to which the State Commission for Control of Public Procurement Procedure can issue a decision without documentation if the client fails to deliver documentation.

²¹² According to “Law on Public Procurement,” Article 94, para. 5.

²¹³ Such a determination would be in accordance with the judgment of the European Court in cases: Court of Justice of the European Communities, Case C-54/96, *Dorsch Ingeniewgesellschaft mbH vs. Bundesbaugesellschaft Berlin mbH*; Court of Justice of the European Communities, Case C-17/00, *François De Coster vs. Collège des bourgmestres et échevins de Watermael-Boitsfort*.

of costs in the review stage of public procurement procedure and that the PRB decides on the compensation of those costs depending on the outcome of the review procedure.

29. It should be envisaged that the compensation of costs of review procedure is linked to success in review procedure. In the case of giving up on an appeal, or refusal or dismissal of an appeal, the appellant should not have the right to compensation of the costs of review procedure, and in the case of adopting the appeal the PRB should order the contracting authority to pay the costs of the review procedure to the appellant. In the case of partial adoption of the appeal competence should be given to the PRB to decide how the costs are to be allocated.
30. The costs of procedure in the pre-tender and tender stage should be excluded from the part of the LPP relating to the legal protection, i.e. they should not be the subject of decision in the procedure before the PRB.

Submitting Decisions to the PRB

31. Introducing the possibility to deliver decisions to the PRB by using the Internet should be considered, e-delivery or for instance, by publishing on the portal of public announcements, as envisaged by the Croatian Public Procurement Act.²¹⁴

LEGAL PROTECION

Procedure before the Court of BiH

32. Concerning the inadequate regularity of legal capacity and requests for postponement of the procedure, it is necessary to revise more significantly the provision regarding the question of legal capacity in the administrative dispute.²¹⁵ In this sense, primarily the circle of persons who would be competent for initiating administrative dispute should be determined more precisely, and the recommendation is that this question be completely left to the LAP.
33. Along with the provision that the administrative dispute be led by urgent procedure, it would be desirable to think about precise determination of the time limit within which the administrative legal procedure is to be ended, and especially when the Court of BiH, as the LPP requires, decides on the submitted request for postponing an individual decision of the contracting authority.

²¹⁴ In Croatian "Public Procurement Act," Article 171, para. 5 and 6 envisage publishing of decisions of the State Commission for Control of Public Procurement Procedures on its Internet pages.

²¹⁵ "Law on Public Procurement," Article 11.

34. If the existing decision is kept, according to which the appeal can have a postponing effect, it should be concretized that the postponing effect is related to the decision of the contracting authority, and inevitably the criteria for postponing should be envisaged. Those criteria could be, as stated in the LAP: possible damage that could be hard to repair, that the delay is not contrary to the public interest, and the principle that the Court should be mindful that there is not bigger irrecoverable damage to the opposite party.²¹⁶

²¹⁶ Such determination would considerably amend the existing decree from “Law on Administrative Disputes,” Article 115, para. 4, and that is that in resolving a request for a delay, the Court estimates public interest and damage.

8.

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