

Mapping of Key Obstacles to Equal Participation of Companies in Public Procurement in Bosnia and Herzegovina



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Nermina Voloder



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Author:

Nermina Voloder

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Translator:

Ulvija Tanović

Proofreading:

Gina Landor

Copy Editing:

Sanela Hrlović

Design:

Branka Ilić

DTP:

Jasmin Leventa

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1.

Introduction

The public procurement system in Bosnia and Herzegovina (BiH) is characterised by numerous weaknesses and shortcomings. In the ten years of application of the BiH Law on Public Procurement, a range of irregularities in public procurement procedures have been identified, including practices of privileging individual bidders through discriminatory criteria and technical specifications in tender documentation, dividing procurement value into smaller amounts to avoid implementing the public procurement procedure for higher amounts, procurements of goods, services or works without a public procurement procedure, use of annexes to existing contracts to increase the value of procurement, and other ways of changing the terms of contracts based on public procurement procedures.¹

Irregularities and abuses in public procurement have, among other things, contributed significantly to the spread of corruption and to hindering the

¹ Public Procurement Agency of BiH, Izvještaj o monitoringu postupaka javnih nabavki u 2012. godini [Public Procurement Procedure Monitoring Report for 2012], (Sarajevo: Public Procurement Agency of BiH, 2013); Public Procurement Agency of BiH, Izvještaj o monitoringu postupaka javnih nabavki u 2013. godini [Public Procurement Procedure Monitoring Report for 2013], (Sarajevo: Public Procurement Agency of BiH, 2014); Audit Office of the Institutions of BiH, Izvještaj o reviziji izvještaja o izvršenju budžeta institucija Bosne i Hercegovine za 2012. godinu [Audit Report on the Budget Execution Report of Institutions of Bosnia and Herzegovina for 2012], (Sarajevo: Audit Office of the Institutions of BiH, 2013); Audit Office of the Institutions of BiH, Izvještaj o reviziji izvještaja o izvršenju budžeta institucija Bosne i Hercegovine za 2013. godinu [Audit Report on the Budget Execution Report of Institutions of Bosnia and Herzegovina for 2013], (Sarajevo: Audit Office of the Institutions of BiH, 2014); Audit Office for the Institutions in Federation BiH, Revizorski izvještaj o izvršenju budžeta Federacije BiH za 2013. godinu [Audit Report on Budget Execution in the Federation of BiH for 2013], (Sarajevo: Audit Office for the Institutions in Federation BiH, 2014); Audit Office for the Institutions in Federation BiH, Revizorski izvještaj o izvršenju budžeta Federacije BiH za 2012. godinu [Audit Report on Budget Execution in the Federation of BiH for 2012], (Sarajevo: Audit Office for the Institutions in Federation BiH, 2013); Supreme Office for the Republic of Srpska Public Sector Auditing, Izvještaj o reviziji Konsolidovanog godišnjeg finansijskog izvještaja za korisnike budžeta Republike Srpske za period 01. 01. do 31. 12. 2012. godine [Audit Report on the Annual Consolidated Financial Report on Republika Srpska Budget Execution for the period January 1 to December 31, 2012], (Banja Luka: Supreme Office for the Republic of Srpska Public Sector Auditing, August 20, 2013); Supreme Office for the Republic of Srpska Public Sector Auditing, Izvještaj o reviziji Konsolidovanog godišnjeg finansijskog izvještaja za korisnike budžeta Republike Srpske za period 01. 01. do 31. 12. 2013. godine [Audit Report on the Annual Consolidated Financial Report on Republika Srpska Budget Execution for the period January 1 to December 31, 2013], (Banja Luka: Supreme Office for the Republic of Srpska Public Sector Auditing, July 15, 2014).

operation of the private sector in BiH.² Research has shown that corruption is one of the most significant obstacles to the work of private companies and to overall economic development, not just in BiH, but in countries of the region as well.³ Reports by international and non-governmental organisations and representatives of the business sector in BiH have for the past few years pointed out failings and irregularities in the public procurement system that undermine the basic principles of fair and active competition, transparency, equal treatment of bidders, and efficient and responsible public spending.⁴

This report resulted from the need to identify key problems in public procurement based on surveying a representative sample of the business community with direct experience of public procurement in BiH. The report is based on the findings of research conducted during 2014 with the main aim of mapping the major obstacles faced by companies in BiH entering public procurement procedures in BiH. Representatives of private enterprises of various sizes (micro, small, medium and large enterprises) and from various branches of the economy throughout BiH participated in the study.

² United Nations Office on Drugs and Crime (UNODC), *Poslovanje, korupcija i kriminal u Bosni i Hercegovini: utjecaj mita i kriminala na privatna preduzeća* [Business, Corruption and Crime in Bosnia and Herzegovina: The Impact of Bribery and Other Crime on Private Enterprise], (Vienna: UNODC, 2013).

³ United Nations Office on Drugs and Crime (UNODC), *Business, Corruption and Crime in the Western Balkans: The Impact of Bribery and Other Crime on Private Enterprise* (Vienna: UNODC, 2013); Munir Podumljak and YES Foundation, *Percepcija i stavovi o korupciji na Zapadnom Balkanu: regionalni pregled* [Perception and Attitudes on Corruption in the Western Balkans: A Regional Overview], (Zagreb: Partnerstvo za društveni razvoj, 2010).

⁴ Slavica Rokvić, *Analiza stanja u oblasti javnih nabavki u Bosni i Hercegovini s preporukama za dalje akcije* [Analysis of the Situation in Public Procurement in Bosnia and Herzegovina with Recommendations for Further Action], (Banja Luka: Transparency International BiH, 2007); Transparency International BiH, *Monitoring implementacije Zakona o javnim nabavkama BiH* [Monitoring of the Implementation of the Law on Public Procurement of BiH], (Banja Luka: Transparency International BiH, 2012); Transparency International BiH, *National Integrity System Assessment: Bosnia and Herzegovina 2013* (Banja Luka: Transparency International BiH, 2013); Open Society Fund BiH, *Procjena rizika od korupcije u javnim nabavkama: Analiza stanja u Bosni i Hercegovini* [Corruption Risk Assessment in Public Procurement: Analysis of the Situation in Bosnia and Herzegovina], (Sarajevo: Open Society Fund BiH, 2013); Mervan Miraščija, *Analiza zakonskog okvira javnih nabavki – Bosna i Hercegovina* [Analysis of the Legal Framework for Public Procurement – Bosnia and Herzegovina], (Sarajevo: Open Society Fund BiH, 2013); Anti-Corruption Civic Organizations' Unified Network in BiH – ACCOUNT, "Veliko istraživanje: Ko, kako i koliko krade na javnim nabavkama" [Large Study: Who Steals through Public Procurement, How and How Much], ACCOUNT, March 29, 2013; Support for Improvement in Governance and Management (SIGMA), *Bosnia and Herzegovina: Public Procurement Assessment* (Paris: SIGMA, 2012); Tender, *Rezultati provođenja javnih nabavki za četvrti kvartal i ukupan period 2012. godine, dobijeni realizacijom Projekta "Praćenje i analiza provođenja javnih nabavki u BiH"* [Results of Public Procurement Procedures for the Fourth Quarter and Overall Period of 2012 Derived from the Project "Monitoring and Analysis of Public Procurement Procedure in BiH"], (Banja Luka: Tender, 2013).

The study provides insight into the views and perceptions, as well as the real-life experience of business sector representatives in BiH when it comes to various aspects and phases of public procurement. In that context, this is the first survey study in BiH that identifies key problems in public procurement by relying on the views and experiences of business sector representatives that have participated in public procurement procedures. For the purposes of this report, which presents the main obstacles to the participation of enterprises in public procurement, the respondents answered questions about issues such as availability of public procurement invitations for submitting bids, definitions of eligibility criteria and technical specifications, application of appropriate procedures, transparency of outcomes, legal protection, public procurement contract implementation control, perception of the degree of corruption in public procurement, trust in the fairness and justice of public procurement procedures, etc.

The examination of practices that hinder efficient market functioning and the identification of areas of heightened risk of corruption were also recognised in strategic documents of BiH authorities as a necessary measure for the development of efficient anti-corruption policies in BiH.⁵ The present study naturally fits into this normative and strategic framework. Namely, given that public procurement is particularly vulnerable to corruption,⁶ data from this report can prove useful as guidance for decision makers in BiH working to improve the public procurement regulatory framework and practices.

The report first presents the main features of the public procurement system and gives details of the research methodology. Research results that reflect the experience of private sector representatives in public procurement in BiH are set out in the fourth chapter and divided among all the phases of the public procurement cycle.⁷ The conclusion sums up the key results and indicates further research and analyses necessary in this area.

⁵ Agency for the Prevention of Corruption and Coordination of the Fight against Corruption, *Strategija za borbu protiv korupcije (2009-2014)* [Anti-Corruption Strategy (2009-2014)], (Istočno Sarajevo: Agency for the Prevention of Corruption and Coordination of the Fight against Corruption), p. 13; Agency for the Prevention of Corruption and Coordination of the Fight against Corruption, *Akcionni plan za provedbu Strategije za borbu protiv korupcije (2009-2014)* [Action Plan for the Implementation of the Anti-Corruption Strategy (2009-2014)], (Istočno Sarajevo: Agency for the Prevention of Corruption and Coordination of the Fight against Corruption), p. 4.

⁶ Organisation for Economic Cooperation and Development (OECD), *Enhancing Integrity in Public Procurement: A Checklist* (Paris: OECD, 2008), p. 8.

⁷ *Ibid.*, p. 10.

2.

Main Features of the Public Procurement System in BiH

The Law on Public Procurement of Bosnia and Herzegovina (hereinafter: LPP BiH) was adopted in 2004, stipulating the rights, obligations and responsibilities of participants in public procurement procedures in BiH.⁸ The Law also determined the procedure for implementing public procurement including, among other things, preparing tender documentation defining the object of public procurement and bidder eligibility criteria, publishing the invitation to submit bids or apply for participation, collecting and evaluating bids and awarding contracts, as well as the audit procedure. As part of the process of harmonising domestic legislation with the European Union acquis, the Parliamentary Assembly of BiH adopted a new Law on Public Procurement of BiH in 2014.⁹ Below is a brief overview of the key characteristics of the public procurement system in BiH.

In line with the LPP BiH, public procurement procedures should adhere to the principles of efficient use of public funds, transparency, and active competition and equal treatment of all bidders.¹⁰ Apart from the Law, public procurement is also regulated by a host of bylaws such as rulebooks, rules of procedure, decisions, instructions, and standard tender document models.¹¹

LPP BiH established a decentralised public procurement system where responsibility for implementing the procedure lies solely with the contracting authorities. The contracting authorities, i.e. bodies responsible for applying this law, include all administrative bodies at all levels of government, legal persons engaged in a non-commercial and non-industrial activity of public interest, as well as public entities predominantly funded by administrative bodies, supervised by administrative bodies or with a steering, managing or supervisory board where more than half of the members are appointed by administrative bodies.¹² The new

⁸ “Zakon o javnim nabavkama BiH” [Law on Public Procurement of BiH], *Official Gazette of BiH* 49/04, 19/05, 52/05, 8/06, 24/06, 70/06, 12/09 and 60/10.

⁹ “Zakon o javnim nabavkama” [Law on Public Procurement], *Official Gazette of BiH* 39/14. The new Law came into force at the end of November 2014.

¹⁰ “Law on Public Procurement,” Article 3; “Law on Public Procurement of BiH,” Article 1.

¹¹ A certain number of bylaws harmonised with the new Law on Public Procurement of BiH has been adopted, while some bylaws are still to be drafted.

¹² “Law on Public Procurement,” Article 4; “Law on Public Procurement of BiH,” Article 3.

Law divides contracting authorities into so-called classic contracting authorities that include administrative authorities on all levels, and sector bodies engaged in activities in energy, transport, postal services, and water supply.¹³

The Law regulates the implementation of all types of public procurement, be it procurement of goods, services or works.¹⁴ Contracting authorities may employ various types of procedure to award public procurement contracts. As a rule, contracts are awarded through an open procedure that includes the publication of the call for bids and where every interested bidder may submit a bid, or a restricted procedure with eligibility criteria where all suppliers may apply for eligibility, but only those identified as eligible by the contracting authority are invited to submit bids.¹⁵ An exception to this rule in public procurement is the possibility to use the negotiation process with or without prior notice of procurement, whereby the contracting authority negotiates the terms of the contract with one or more suppliers that are invited into the negotiations.¹⁶ Contracts of lower value apply specific procedures, such as competitive requests, used for contracts below domestic threshold values, which entail sending a request for bids to a limited number of suppliers,¹⁷ and direct agreement, whereby the contracting authority solicits a price proposal or quotation from a single supplier, which is applicable to contracts of up to 6000 BAM in value. In certain areas, such as architecture, civil engineering and interior design, the contracting authority may conduct a competition for the best solution and award the winners of the competition – those that submitted the best solution – the public procurement service contract or prize.¹⁸ The new Law has also introduced a new type of procedure, competitive dialogue, which is used in complex public procurement where the contracting authority needs to define one or more suitable solutions in cooperation with the bidders in order to implement the procedure. In this case, each interested party may apply to participate in the procedure, and the contracting authority conducts a dialogue with the participants invited into the procedure in order to define the suitable solution that will be the basis for inviting the selected bidders to submit their bids.¹⁹

¹³ “Law on Public Procurement,” Articles 4 and 5.

¹⁴ Ibid., Article 6; “Law on Public Procurement of BiH,” Article 4.

¹⁵ “Law on Public Procurement of BiH,” Article 11.

¹⁶ Marian Lemke, “Uvod u direktive o javnim nabavkama EU” [Introduction to EU Directives on Public Procurement], in *Direktive Evropske unije o javnim nabavkama* [European Union Directives on Public Procurement], ed. Marian Lemke (Sarajevo: Program podrške sistemu javnih nabavki u Bosni i Hercegovini, 2006), p. 61.

¹⁷ The amounts should be below 50,000 BAM for goods and services, and below 80,000 BAM for works.

¹⁸ “Law on Public Procurement of BiH,” Articles 43, 46, and 47.

¹⁹ “Law on Public Procurement,” Article 2, para. 1, pt. j.

The 2004 Law on Public Procurement of BiH established the institutions responsible for its implementation. The BiH Public Procurement Agency has the role of an advisory body and is responsible for activities such as proposing changes and amendments to the law, developing standard templates and models, manuals and instructions, interpreting legislative and regulatory provisions, and providing technical and advisory assistance to all participants in public procurement. The Agency is also responsible for monitoring public procurement procedure for all contracting authorities, and collecting, analysing and publishing information on public procurement procedures.²⁰ The other important institution in the public procurement system is the Procurement Review Body (hereinafter: PRB), whose main task is to ensure the legal protection of bidders in the public procurement procedure. The PRB acts as a second-instance body for bidders' complaints.²¹ PRB decisions may be appealed through the Court of BiH.²²

New legislation in public procurement adopted in 2014 resulted from the need to remove shortcomings from previous legislation and harmonise the legal framework with EU directives, primarily those pertaining to the regulation of public procurement implemented by so-called classical and sector contracting authorities, as well as directives on legal remedies.²³ According to the interpretation by the Public Procurement Agency of BiH, apart from increased compliance with EU directives, the main characteristics of the new law include twice as many articles that more precisely regulate public procurement, improved application of the basic principles of equality, transparency, cost-effectiveness and competitiveness, as well as increased social control, and greater use of information technology.²⁴

However, civil society organisations have assessed the new legislation as not providing for essential progress in terms of transparency, cost-effectiveness and

²⁰ "Law on Public Procurement of BiH," Article 48; "Pravilnik o monitoringu postupaka javnih nabavki" [Rulebook on Public Procurement Procedure Monitoring], *Official Gazette of BiH* 48/08.

²¹ "Law on Public Procurement of BiH," Article 49.

²² *Ibid.*, Article 51, para. 6.

²³ European Parliament and Council of the European Union, "Directive 2004/18/EC of the European Parliament and of the Council," March 31, 2004; European Parliament and Council of the European Union, "Directive 2004/17/EC of the European Parliament and of the Council," March 31, 2004; European Parliament and Council of the European Union, "Directive 2007/66/EC of the European Parliament and of the Council," December 11, 2007.

²⁴ Public Procurement Agency of BiH, *Obrazloženja Nacrta Zakona o javnim nabavkama* [Justification for the Draft Law on Public Procurement], (Sarajevo: Public Procurement Agency of BiH), p. 2.

accountability, or of preventing corruption in public procurement.²⁵ According to their assessment, the current legislative framework lacks, among other things, harsher sanctions for violations of law, provisions stipulating the obligation to report corruption, a higher level of transparency when implementing negotiation procedures, more suitable fees for initiating complaints procedures, as opposed to the current fees that were deemed too high, and restrictions of procurement eligible for direct agreement.²⁶ Given that the new Law on Public Procurement has been in force only since November 2014, potential weaknesses and/or strengths of this new legislation remain to be seen through the application of the Law in the future.

²⁵ BiH Employers Association et al., “Otvoreno pismo protiv usvajanja novog zakona o javnim nabavkama” [Open Letter against the Adoption of the New Law on Public Procurement], Transparency International BiH, April 25, 2014; Anti-Corruption Civic Organizations’ Unified Network in BiH – ACCOUNT, “Novi Zakon o javnim nabavkama ne treba usvojiti jer će povećati korupciju” [The new Law on Public Procurement should not be Adopted because it will Increase Corruption], ACCOUNT, May 28, 2013; BiH Employers Association et al., “Prijedlog amandmana na rješenja sadržana u prijedlogu novog Zakona o javnim nabavkama BiH” [Proposed Amendment to Provisions of the proposed New Law on Public Procurement in BiH]; Transparency International BiH, “Prijedlog amandmana na rješenja sadržana u prijedlogu novog Zakona o javnim nabavkama BiH” [Proposed Amendment to Provisions of the proposed New Law on Public Procurement in BiH].

²⁶ Ibid.

3.

Notes on the Methodology

This report seeks to identify the key problems in public procurement in BiH that affect private companies as potential or actual participants in this process. The report is, therefore, primarily based on research conducted within the business community in BiH with the aim of identifying the key problems, experiences and challenges encountered by the private sector when participating in public procurement procedures.

For the purposes of the study, two surveys were conducted among representatives of private companies from across BiH: one through computer-assisted telephone interviewing (CATI survey) and the other through face to face interviews (FtF survey).²⁷

The first step in gathering data for the study was the CATI survey on a representative sample of 2500 randomly selected respondents, representatives of private companies from across BiH,²⁸ in order to identify the share of companies in the total number of companies that have participated in public procurement disaggregated by their size, and to thus define the representative sample for the subsequent face to face survey. Apart from questions on the basic characteristics of the company and the manner of participation in public procurement, the CATI survey also asked a number of questions about trust in the public procurement system and the perception of corruption and experience of corruption in public procurement procedures.²⁹

Of the 2500 private companies from across BiH included in the CATI survey, 67.1 percent, or 1677 private companies, stated that they had participated in a public procurement procedure, irrespective of outcome, independently or with other companies. Of those that had participated, 48.9 percent were micro enterprises (from 1 to 9 employees), 38.9 percent were small enterprises (from 10 to 49 employees), 11 percent were medium enterprises (from 50 to 249 employees) and

²⁷ The research was conducted by the Mareco Index Bosnia agency, commissioned by Analitika – Center for Social Research.

²⁸ The sample was defined based on geographic location and size of company in terms of number of employees against the total population of private companies that submitted final financial accounts for 2012, a total of a little over 25,000 in the whole of BiH.

²⁹ Responses to the questions are presented in section 4.4. of the report.

1.2 percent were large enterprises (more than 250 employees).³⁰ These findings were used to determine the sample for the face to face survey.³¹

The questionnaire for the face to face survey was modelled on similar instruments used for research about the private sector in other countries, with a focus on key problems and irregularities that may crop up in practice at various stages of the public procurement process, but was adapted to the legal framework in BiH.³² Survey questions on corruption were largely based on questions about corruption in public procurement used in the Eurobarometer survey on business community attitudes towards corruption in the European Union.³³ A draft of the survey was sent to various public procurement stakeholders for comments, including the BiH Public Procurement Agency, the Procurement Review Body, the Agency for the Prevention of Corruption and Coordination of the Fight against Corruption, employers' associations of BiH, FBiH and RS, as well as to representatives of non-governmental organisations active in the field of public procurement in BiH.

The revised survey was then piloted and implemented in April and May 2014.³⁴ Apart from the survey, desk research was also conducted on available secondary sources, including monitoring reports and other analyses from this field. Laws and bylaws regulating public procurement in BiH applicable at the time of research were also analysed. In that context, it is important to note that the experiences of business community representatives are based on the application of the old law on public procurement that was repealed on 27 November 2014.

Nevertheless, this report is still relevant in the context of the current stage of development of the public procurement system in BiH. Namely, the research results map some of the main weaknesses of the previous law on public procurement and its application in the past ten years. In that sense, this report is an overview of

³⁰ It should be noted that of the respondents to the survey, 54.6% were micro enterprises, 34.4% were small enterprises, 10% were medium enterprises, and 1% were large enterprises, which is in line with their ratio within the total population of private enterprises in BiH.

³¹ In defining the sample, we took into account geographic representation, as well as the size of the enterprises that had participated in public procurement procedures.

³² UNODC, *Business, Corruption and Crime in the Western Balkans*; Cardno Emerging Markets USA, *USAID Projekat za bolje uslove poslovanja. Poslovna anketa: Srbija 2012* [USAID Business Enabling Project. Business Survey: Serbia 2012], (Belgrade: Cardno Emerging Markets USA, 2012).

³³ TNS Political & Social, *Flash Eurobarometer 374: Businesses' Attitudes towards Corruption in the EU* (TNS Political & Social, 2014).

³⁴ Like other surveys, this one had a number of limitations. Notwithstanding their participation in public procurement procedures, it is impossible to ascertain whether the views and perceptions of respondents regarding the public procurement system are always based on their direct experience or were formed under the influence of other factors. It is also possible that there is a difference between respondents in terms of their understanding and recognition of certain phenomena such as corruption, for instance, which may be mistaken for other phenomena such as inefficiency or lack of professionalism in contracting authorities, the dysfunctionality of the public procurement system, etc.

the state of play in public procurement and can be used as a reference point to estimate the effects of the new Law on Public Procurement.

The key obstacles faced by the private sector in public procurement in BiH are presented in the following chapters. They were identified based on research findings and a review of the legislative framework and previous research on public procurement in BiH. Data based on responses to the face to face survey are presented through the key phases in the public procurement process. Research results on the perception of corruption in public procurement in BiH, including both the CATI and FtF survey findings, are given in a separate section of the report.

4.

Public Procurement in BiH From The Perspective of Private Companies: Overview of Research Results

Specialised literature on public procurement analyses not just the procedure for awarding contracts, but the overall public procurement cycle. This cycle is made up of: a) the pre-tender phase, which includes needs assessment, planning and budgeting, defining criteria for awarding contracts and selection of type of procedure to be applied in the particular public procurement; b) the tender phase, which includes publishing the public procurement notice, collecting and evaluating bids and awarding the contract, and c) the post-tender phase, which includes implementation of the public procurement contract. This part of the report presents the results of the conducted survey for the various phases of the public procurement cycle in BiH.³⁵

4.1. Pre-tender phase

In the public procurement preparatory phase, the contracting authority defines the goods, services or works it intends to procure, and the main conditions, procedures and criteria for evaluating bids. Accordingly, contracting authorities in BiH are obliged to ensure fair and active competition among potential bidders in the public procurement procedure.³⁶

This principle is particularly relevant to the preparation of tender documents, when criteria for bidders eligible to participate in the public procurement procedure are defined and the object of public procurement is described, including technical specifications and the type of procedure that will be applied for a specific public

³⁵ See, for example: OECD, *Enhancing Integrity in Public Procurement*.

³⁶ "Law on Public Procurement of BiH," Article 1.

procurement.³⁷ As a rule, contracting authorities are obliged to ensure complete information on the public procurement procedure and conditions for awarding the contract so that bidders may prepare their bids on a genuinely competitive basis.³⁸ Within that process, it is important that the conditions for awarding the contract defined in the tender documentation in no way discriminate or disadvantage potential bidders in the public procurement procedure.³⁹ In order to additionally ensure that the set criteria do not restrict free market competition, the Law prohibits contracting authorities from consulting any third party that may have a direct or indirect interest in the outcome of the contract awarding procedure if it is likely that this may affect genuine competition for the contract at stake.⁴⁰

During preparations for the procedure, the contracting authority decides on the type of procedure that will be applied for the specific instance of public procurement. As explained above, the recommended type or procedure is an open or restricted procedure that entails publishing of notice of public procurement and the possibility for interested companies to submit bids or requests for participation in the procedure.⁴¹ Exceptionally, public procurement may be conducted through a negotiated procedure with or without publishing a procurement notice. This procedure is specific because it allows the contracting authority to negotiate the financial, technical, administrative or any other aspect of a candidate's bid.⁴² The negotiated procedure with notice comprises the pre-qualification phase in which candidates submit requests for participation in the procedure, and the negotiation phase in which the contracting authority negotiates the terms of the contract with one or more invited candidates.⁴³ Under certain circumstances, the contracting authority may apply the negotiated procedure without prior publication of notice. This procedure is not open to competition, because invitations to participate in this procedure are sent directly to selected companies that are then engaged

³⁷ For more, see: Public Procurement Agency of BiH, Modeli standardne tenderske dokumentacije [Standard Tender Documentation Models], <http://www.javnenabavke.ba/index.php?id=10b5&jezik=bs> (Accessed December 10, 2014).

³⁸ "Law on Public Procurement of BiH," Article 13, para. 1.

³⁹ Ibid.

⁴⁰ Ibid., Article 13, para. 5.

⁴¹ Ibid., Article 11, para. 1.

⁴² Lemke, "Introduction to EU Directives on Public Procurement," p. 61.

⁴³ As a rule, the negotiated procedure is used exceptionally when certain conditions stipulated by the Law are met: when none of the tenders obtained through an open or restricted procedure meet the set conditions and when the contracting authority has repeated the procedure on appropriately amended terms, provided that the contract conditions of the most recent procedure have not been substantially altered. The negotiated procedure may be applied in exceptional cases of works or services contracts, when the nature of the works or services or the risks attaching thereto do not permit prior overall pricing; and in respect of public works contracts, for works which are performed solely for purposes of research, experiment or development and not to establish commercial viability or to recover research and development costs. "Law on Public Procurement of BiH," Article 11, para. 3.

in negotiation on certain aspects of the offer. This procedure is the least transparent, and its application is therefore limited only to exceptional conditions such as emergency situations brought about by circumstances not caused by the contracting authority and objectively unforeseeable.⁴⁴ In certain areas, the contracting authority may also apply the above procedure for design contests.⁴⁵ For contracts of lower value, the contracting authority may apply a competitive request for quotations⁴⁶ procedure by sending requests for offers to at least three suppliers.⁴⁷ Direct agreement may be applied for amounts up to 6000 BAM.⁴⁸

The object of public procurement and the conditions under which the procedure is conducted largely determine the application of a certain type of procedure. Apart from that, it is also important for the type of procedure to be appropriate to the value of procurement, whereby the public procurement contract must not be split up into smaller values in order to qualify for less transparent procedures.

4.1.1. Qualification criteria and technical specifications

Research results seem to indicate that the process of defining the basic requirements and conditions for awarding the contract is the most sensitive phase in public procurement in terms of potential for abuse and irregularities. A high percentage of the respondents, 83.3 percent in fact, believe that adapting specifications to certain enterprises is a very or a somewhat widespread phenomenon in public procurement in BiH (Graph 1). A significant percentage of surveyed businesspeople (70.1 percent) believe that involving bidders in the preparation of tender documentation is very or somewhat widespread in public procurement in BiH (Graph 2).

⁴⁴ Ibid., Article 11, para. 4.

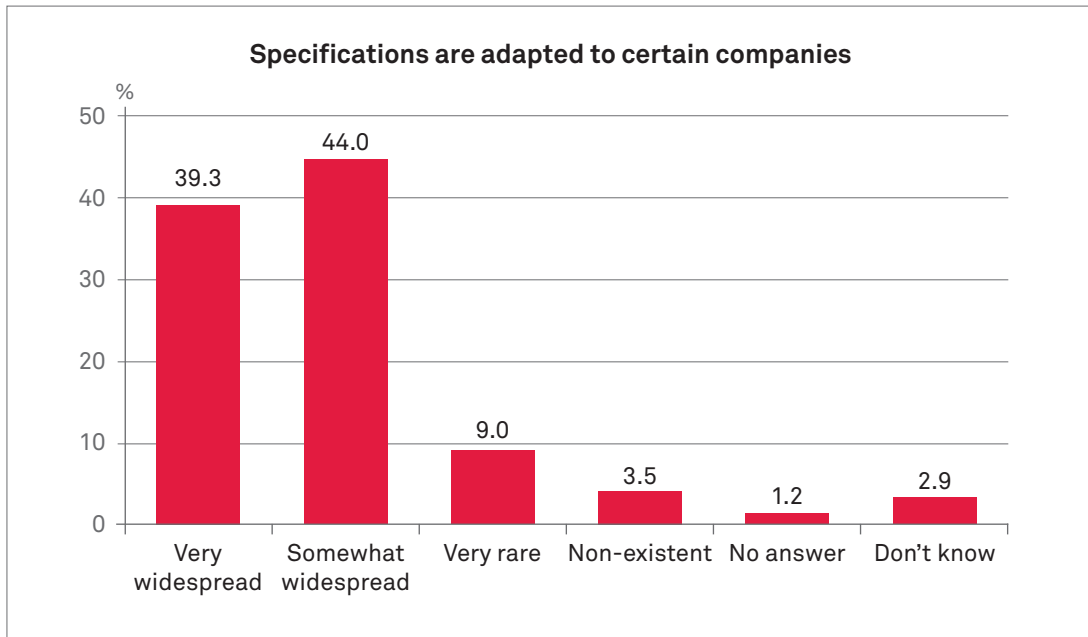
⁴⁵ Ibid., Article 43.

⁴⁶ The new “Law on Public Procurement” stipulates that competitive requests for quotations also be published on the public procurement portal (Article 35, para. 1), and following the procedure, public opening of tenders is obligatory (Article 88, para. 4).

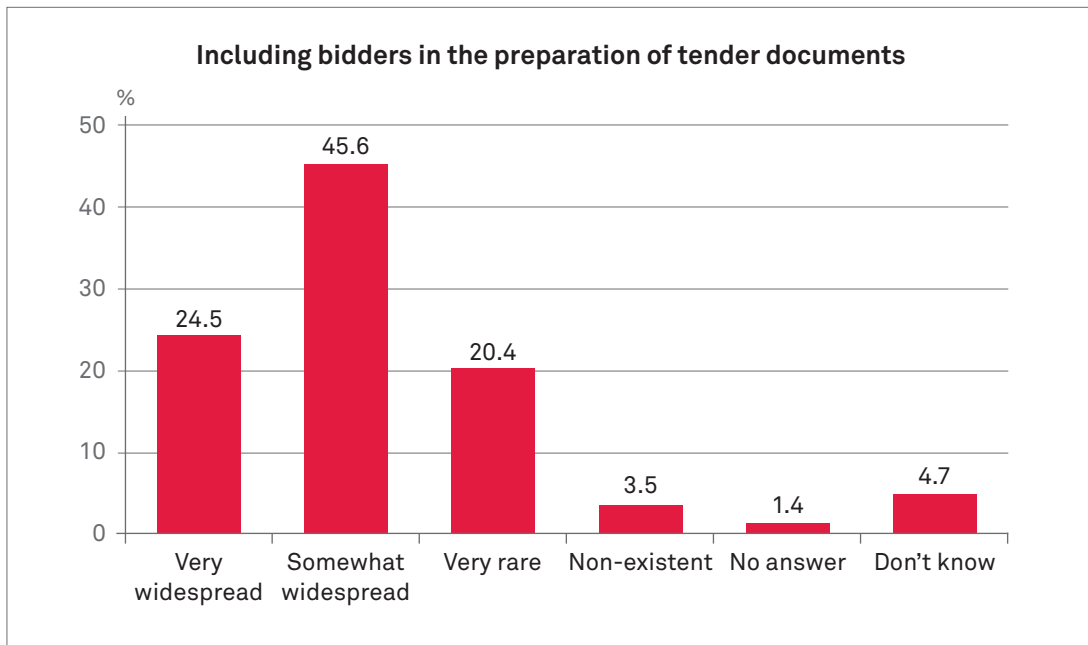
⁴⁷ “Law on Public Procurement of BiH,” Article 46, para. 1.

⁴⁸ Ibid., Article 45, para. 2.

Graph 1. Perception of the prevalence of adapting specifications in public procurement procedures in BiH (N=511, FtF survey)



Graph 2. Perception of the prevalence of involving bidders in preparing tender documentation (N=511, FtF survey)

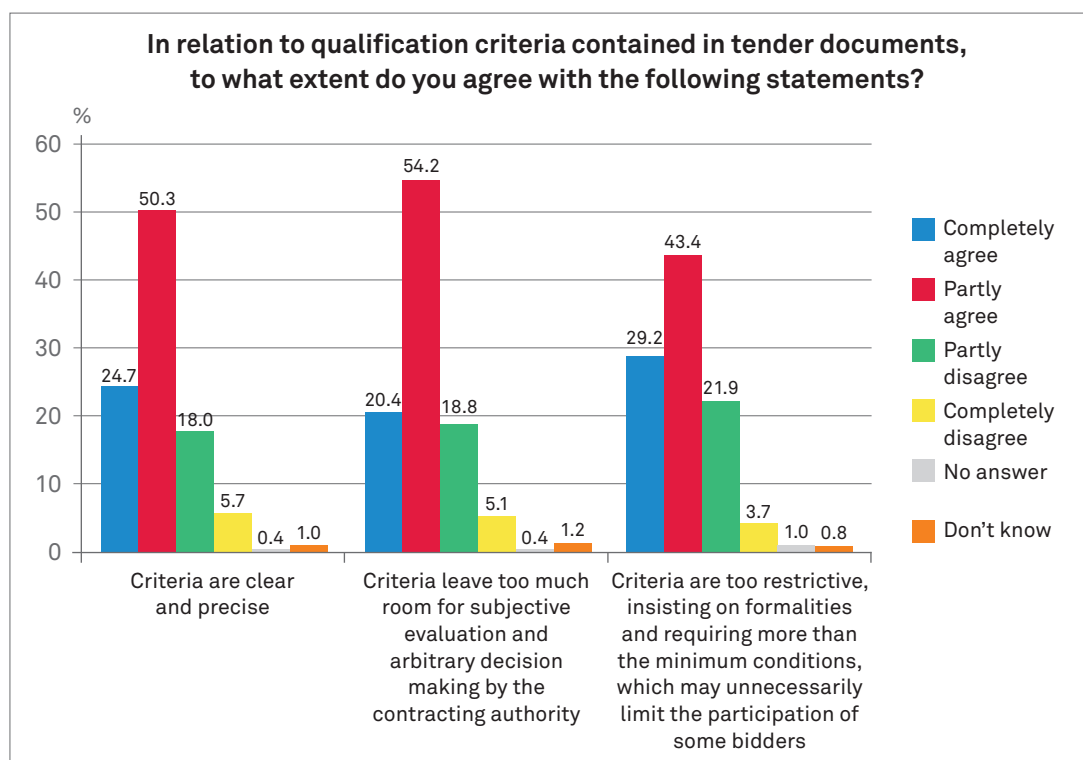


The fact that a large number of respondents believe that criteria and technical specifications are shaped to fit the references of favoured candidates is no surprise given the findings of the Audit Office of the Institutions of BiH and the BiH Public Procurement Agency, whose regular controls of public procurement procedures revealed cases of limiting competition during preparations for the public procurement process. The annual reports of these institutions offer examples of tender documentation citing overly precise technical data, such as a certain type of product or even brand, to privilege a certain candidate.⁴⁹ The results of our research indicate that equal treatment is possibly further derogated given that a large number of respondents believe certain candidates are included in preparations of tender documents.

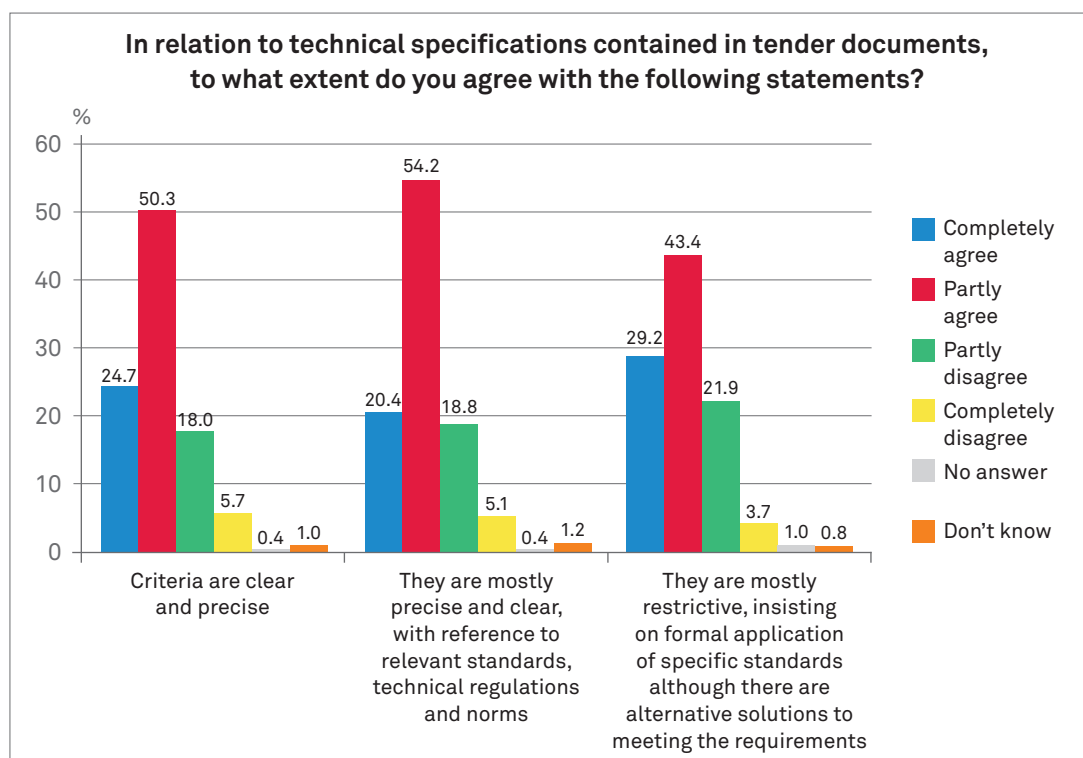
Business sector representatives were also asked to assess key elements of tender documentation based on their experience in public procurement in terms of the clarity and precision of the definitions of basic terms and conditions of public procurement, possibilities for flexible interpretation of criteria, and proportionality between set conditions and procurement values. The majority of respondents stated that the parts of the tender documentation pertaining to qualification of candidates and determination of the object of procurement are sufficiently clear: 75 percent of the respondents completely or partially agree with the statement that qualification criteria are clear and precise, while a slightly higher percentage, 76.7 percent, believe technical specifications are mostly clear and precise, with references to relevant standards, technical regulations or norms (Graphs 3 and 4). However, 74.6 percent of respondents partly or completely agree with the fact that qualification criteria leave too much room for contracting authorities to make subjective judgements and arbitrary decisions (Graph 3), and a significant portion – 72.6 percent of respondents – characterised as limiting the conditions for qualification of candidates, given that they completely or partly agree with the statement that qualification criteria are too restrictive, insist on formalities and ask for more than the minimum conditions (Graph 3). At the same time, 72.8 percent of respondents believe that technical specifications are mostly restrictive because they insist on formal application of specific standards, although there are other solutions to satisfying the requirements (Graph 4).

⁴⁹ Audit Office of the Institutions of BiH, Report for 2012; Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2013; Public Procurement Agency of BiH, Godišnji izvještaj o zaključenim ugovorima u postupcima javnih nabavki u 2012. godini [Annual Report on Public Procurement Contracts in 2012], (Banja Luka: Public Procurement Agency of BiH, 2013); Public Procurement Agency of BiH, Godišnji izvještaj o zaključenim ugovorima u postupcima javnih nabavki u 2013. godini [Annual Report on Public Procurement Contracts in 2013], (Mostar: Public Procurement Agency of BiH 2014).

Graph 3. Assessment of qualification criteria contained in tender documentation (N=511, FtF survey)



Graph 4. Assessment of technical specifications contained in tender documentation (N=511, FtF survey)



Annual reports of public sector audit services cite unclear and imprecise tender documentation as a key problem in implementing public procurement procedures.⁵⁰ According to these findings, the main failings of contracting authorities in developing tender documentation include setting unclear qualification criteria, terms and conditions, and inadequate descriptions of the object of procurement or the necessary guarantees. As a result of these failings, potential candidates are forced to seek additional clarification and there is an increased likelihood of complaints and annulled procedures. The above mentioned reports have indicated the weaknesses that diminish the efficiency of public procurement procedures, while the results of our research emphasise the problem of limiting competition and flexibility in choice of best supplier. Much like the conclusions of previous analyses,⁵¹ business entities see unreasonable qualification requirements that go beyond minimal conditions and are disproportionate to the object of the contract as a hindrance to active and fair competition.

4.1.2. Types of procedure

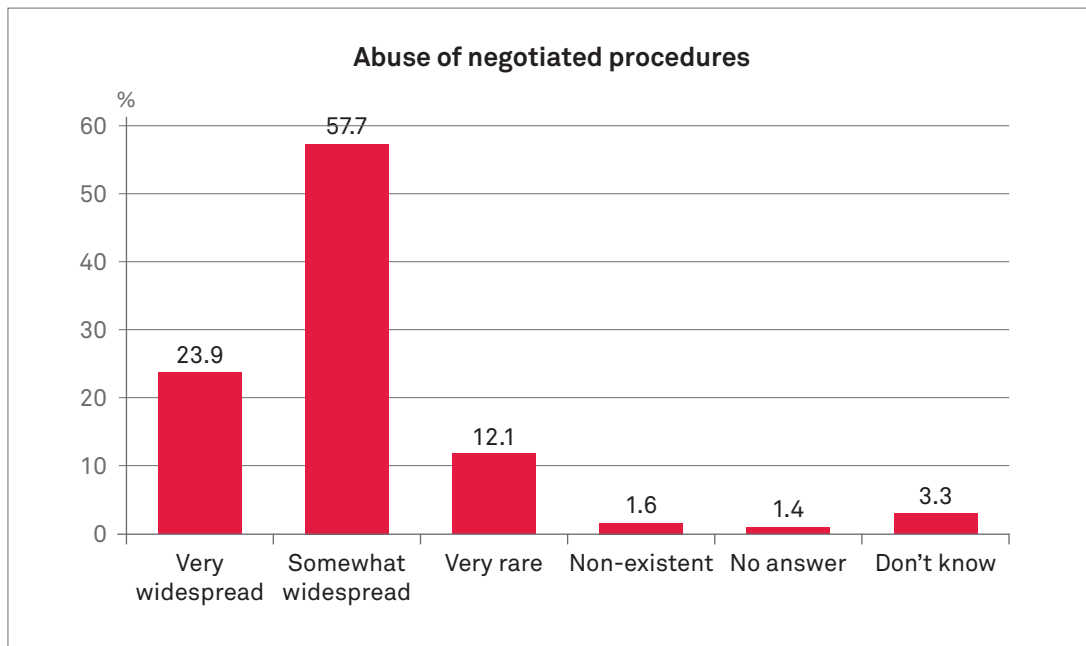
The negotiated procedure, which should be used only in rare cases such as emergencies,⁵² has been identified in this research as a procedure susceptible to abuse. As many as 81.6 percent of respondents believe that abuse of negotiated procedures is very or somewhat widespread in public procurement in BiH (Graph 5). Asked whether the use of emergency circumstances to justify urgent or non-competitive procedures is widespread, 71 percent of respondents answered affirmatively (Graph 6).

⁵⁰ Audit Office of the Institutions of BiH, Report for 2012; Audit Office of the Institutions of BiH, Report for 2013; Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2012; Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2013; Supreme Office for the Republic of Srpska Public Sector Auditing, Audit Report on the Annual Consolidated Financial Report on Republika Srpska Budget Execution for the period January 1 to December 31, 2012, p. 17.

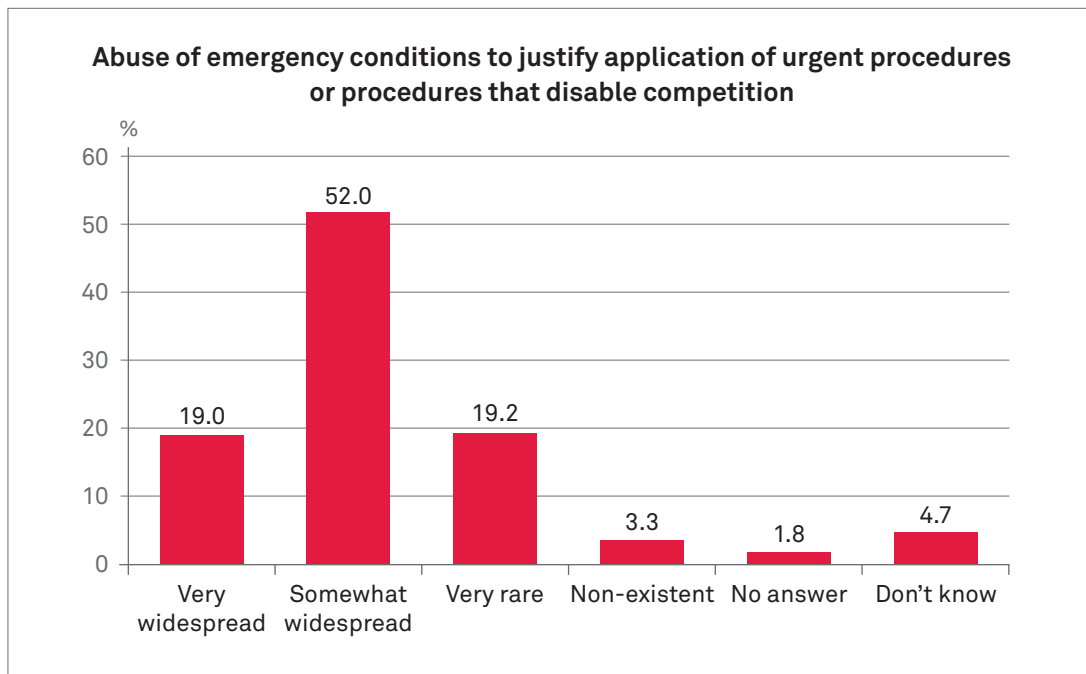
⁵¹ Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2012, p. 10.

⁵² As opposed to the old law, the new Law on Public Procurement describes in more detail the special conditions under which contracting authorities may apply the negotiated procedure without publishing a notice for the procurement of goods, services or works. "Law on Public Procurement," Articles 22, 23 and 24.

Graph 5. Perception of the prevalence of abuse of negotiated procedure in public procurement in BiH (N=511, FtF survey)



Graph 6. Perception of prevalence of abuse of emergency circumstances in public procurement procedures in BiH (N=511, FtF survey)



Reports of competent institutions and non-governmental organisations from the past few years warn that the value of contracts awarded through open procedures decreases each year. Further confirmation of this claim can be found in the research results of UG Tender about the number of open procedures published in the *Official Gazette of BiH*. There were 6376 in 2012, which is considerably less than the share of open procedures in the total structure of public procurement from previous years. For the sake of comparison, the number of published open procedures in 2008 was 9074, in 2009 it was 7174, and in 2010 there were 7148 open procedures.⁵³

Of particular concern is the high value of contracts awarded based on negotiated procedures without prior publication of notice, which implies a reduced degree of transparency. Of the total value of public procurement for 2012, 55.78 percent accounts for contracts awarded based on negotiated procedures without prior publication of notice,⁵⁴ and the trend of increasing value of contracts awarded through negotiated procedures without prior publication of notice continued in 2013.⁵⁵ A report by the BiH Public Procurement Agency analysing the application of negotiated procedure without prior notice states that the high value of these contracts resulted from procurement among connected enterprises such as power companies that procure coal from mines to produce electricity. These contracting authorities have started submitting reports for this type of procurement only in the past few years because they had previously thought such procurement was an exception. Additionally, one of the reasons that led to increasing values of negotiated procedures is that all natural and legal monopolies in the WisPPA system (information system for delivery of reports on public procurement procedures) are entered as negotiated procedures without prior notice.⁵⁶

Audits at various levels of government found that individual contracting authorities conducted negotiated procedures without prior notice under the excuse of emergency procurement only to have it become clear later that conditions that would justify applying this type of procedure had not been met.⁵⁷ Moreover,

⁵³ There is no data for 2011. Tender, *Results of Public Procurement Procedures for the Fourth Quarter and Overall Period of 2012*, p. 5.

⁵⁴ Public Procurement Agency of BiH, *Annual Report on Public Procurement Contracts in 2012*, p. 6.

⁵⁵ Public Procurement Agency of BiH, *Annual Report on Public Procurement Contracts in 2013*.

⁵⁶ Data on the total annual number of negotiated procedures without prior notice is not available. Public Procurement Agency of BiH, *Analiza pregovaračkog postupka bez objavljivanja obavještenja o nabavci za period 01. 01. - 31. 08. 2013. godine* [Analysis of Negotiated Procedures without Prior Procurement Notice for the Period January 1 - August 31, 2013], (Sarajevo: Public Procurement Agency of BiH, 2013), p. 8.

⁵⁷ Public Procurement Agency of BiH, *Public Procurement Procedure Monitoring Report for 2013*, p. 9; Supreme Office for the Republic of Srpska Public Sector Auditing, *Audit Report on the Annual Consolidated Financial Report on Republika Srpska Budget Execution for the period January 1 to December 31, 2012*, p. 17.

according to the annual report on public procurement contracts in BiH for 2013, the number of negotiated procedures without notice was 4113, compared to 3856 open procedures.⁵⁸

When it comes to selecting the appropriate procedure, contracting authorities are not allowed to split up procurement contracts in order to avoid conducting an open procedure and revert to a less transparent public procurement procedure such as the competitive request for quotations or direct agreement. Of the total 511 respondents from the business sector, 65.6 percent believe that splitting procurement contracts to avoid applying the appropriate procedure is a very or somewhat widespread practice in public procurement in BiH (Graph 7).

Graph 7. Perception of the prevalence of splitting procurement (N=511, FtF survey)



According to analyses conducted to date, changes to the Law on Public Procurement adopted in 2009, which provided for higher values of public procurement to be eligible for procedures with limited transparency, contributed to the increase in the number of competitive requests and direct agreements.⁵⁹ The changes stipulated that procurement of goods and services below 50,000

⁵⁸ It should be noted that this data does not account for all public procurement procedures, given that 1431 contracting authorities report to the Agency through the WisPPA software, but according to the Agency's estimates, there are over 2000 contracting authorities. Public Procurement Agency of BiH, Annual Report on Public Procurement Contracts in 2013, p. 8.

⁵⁹ Open Society Fund BiH, *Corruption Risk Assessment in Public Procurement*, p. 12.

BAM, as opposed to the previous amount of 30,000 BAM, and the procurement of works below 80,000 BAM, as opposed to the previously applicable 60,000 BAM limit, could be procured through competitive request without publication of notice.⁶⁰ The same changes to the Law enabled contracting authorities to conduct direct agreement procedures for procurement up to 6000 BAM instead of the previous limit of 3000 BAM. As stated in previous analyses, increasing the census for the application of procurement procedures for lower values is conducive to the practice of splitting public procurement.⁶¹

Apart from that, the development of tender documentation can be susceptible to abuse if qualification and evaluation criteria are designed so as to limit competition among the candidates. Therefore, survey responses stating that criteria are adapted to certain candidates indicate failings in the application of the law in the pre-tender phase, which can determine the outcome of the procedure before it is even open for competition.

4.2. Tendering phase

The tendering phase in the public procurement process sees the selection of the best candidate, and entails publishing the public procurement notice, collecting and evaluating tenders, and awarding the contract.⁶² The Law on Public Procurement of BiH stipulates that all notices on public procurement, awarding of contracts and cancellations of calls for tenders are to be published in the Official Gazette of BiH and on the public procurement website, but they can also be published in other media such as newspapers, TV and other websites.⁶³ The public procurement notice should contain the basic information on the important elements of tender documents based on which potential candidates can decide whether to submit their tenders or not.⁶⁴ Following the publication of the public procurement notice, the contracting authority is obliged to deliver tender documents to interested candidates upon request. The tender documents contain complete information on the terms of the contract and the contract

⁶⁰ “Zakon o izmjenama i dopunama Zakona o javnim nabavkama BiH” [Law on Changes and Amendments to the Law on Public Procurement of BiH], *Official Gazette of BiH* 12/09, Article 6.

⁶¹ Tender, *Results of Public Procurement Procedures for the Fourth Quarter and Overall Period of 2012*, p. 5.

⁶² According to the new LPP, each contracting authority shall define five key elements that must be included in the decision to initiate the procedure: 1) legal basis for conducting the public procurement procedure; 2) object of public procurement; 3) estimated value of public procurement; 4) source of financing; 5) type of public procurement procedure. “Law on Public Procurement,” Article 18.

⁶³ “Law on Public Procurement of BiH,” Article 20.

⁶⁴ *Ibid.*, Article 19.

award procedure, including the notice of procurement, call for submission of tenders, technical specifications, qualification criteria and contract awarding, as well as other relevant documents and clarifications.⁶⁵ In line with the principle of transparency, tender documentation must be easily accessible to users, in this case the potential candidates. In that sense, any fee attached to the tender documents must not exceed the amount sufficient to cover the costs of copying and delivering the documentation,⁶⁶ because any fees in excess of this could limit the number of potential tenders.

As of 1 September 2011, public procurement notices are published *online*, which is a significant step forward in terms of access to information. The information system for electronic publication of public procurement notices (Go-Procure) enables contracting authorities to prepare and publish notices on procurement of goods, services, or works *online*. According to the Public Procurement Agency, in the year after the launch of the public procurement portal, 95 percent of contracting authorities used the Go-Procure system for publication of notices.⁶⁷ Notices are also published in print form in the *Official Gazette of BiH*. However, tender documents are still not made available through the public procurement portal, even though that possibility is provided for by law.⁶⁸

After the expiry of the public notice period, the procurement commission appointed by the contracting authority publicly opens the tenders submitted by candidates and evaluates them based on the criteria set out in the tender documentation.⁶⁹ Contracts are awarded based on one of two criteria: lowest price of technically acceptable tender and most cost-effective tender that, apart from the price, takes into account other sub-criteria such as quality, technical capacity, functional and environmental characteristics, cost-effectiveness, operative costs, servicing and technical assistance, delivery period, etc.⁷⁰ When conducting public procurement procedures, contracting authorities must make a clear distinction between the criteria for selecting the supplier that pertain to the supplier's qualification to execute the contract and the criteria for awarding the contract that pertain to the supplier's tender.⁷¹ Apart from paying for tender documentation, companies that participate in public procurement are exposed to additional costs stemming from the requirement to submit documents to prove the supplier's ability to execute the contract.

⁶⁵ Ibid., Article 2, para. 17.

⁶⁶ Ibid., Article 18, para. 4.

⁶⁷ Public Procurement Agency of BiH, Annual Report on Public Procurement Contracts in 2012, p. 42.

⁶⁸ "Law on Public Procurement of BiH," Article 18, para. 2.

⁶⁹ Ibid., Article 44.

⁷⁰ Ibid., Article 43.

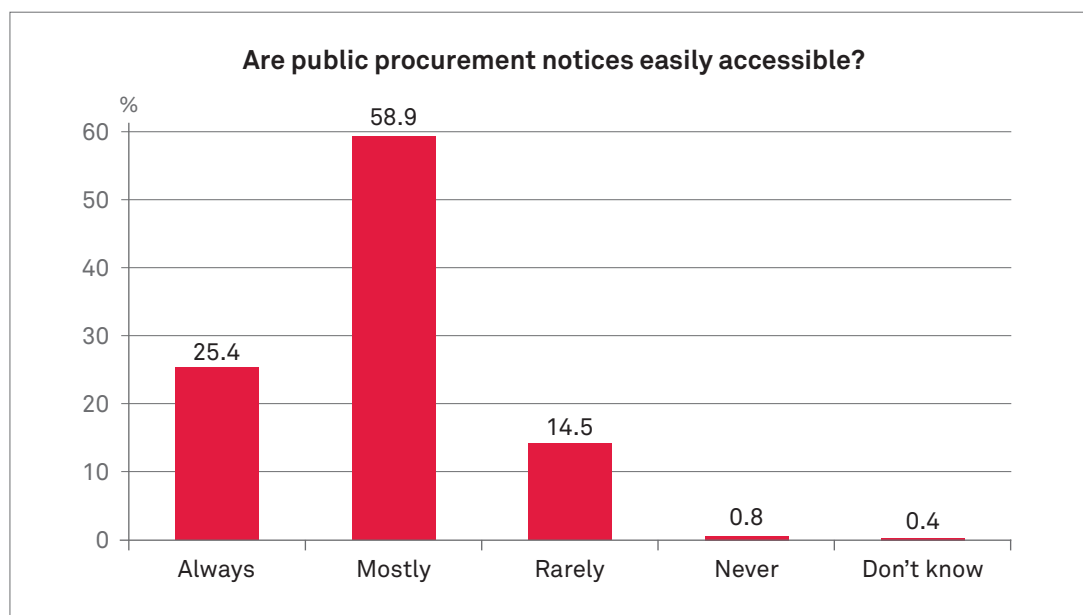
⁷¹ Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2013, p. 6.

The Law on Public Procurement in BiH grants companies the right to appeal decisions on award of contract if they believe the contracting authority has violated one or more provisions of the Law and/or the bylaws during the procedure.⁷² Legal protection of economic operators is achieved through a three-instance appeal procedure. In the first instance, a complaint is submitted to the contracting authority that conducted the public procurement procedure that the supplier believes contained violations of the law. If the contracting authority rejects the complaint, the supplier has the right to initiate appeal proceedings with the Procurement Review Body (PRB) as the second instance body. PRB decisions may be appealed through administrative proceedings at the Court of Bosnia and Herzegovina, whose decision is final.⁷³

4.2.1. Public procurement notices

Public procurement notices are easily accessible as confirmed by 84.3 percent of our respondents. At the same time, 14.5 percent of respondents stated that public calls for submission of tenders are rarely easily accessible.

*Graph 8. Assessment of accessibility of public procurement notices
(N=511, FtF survey)*



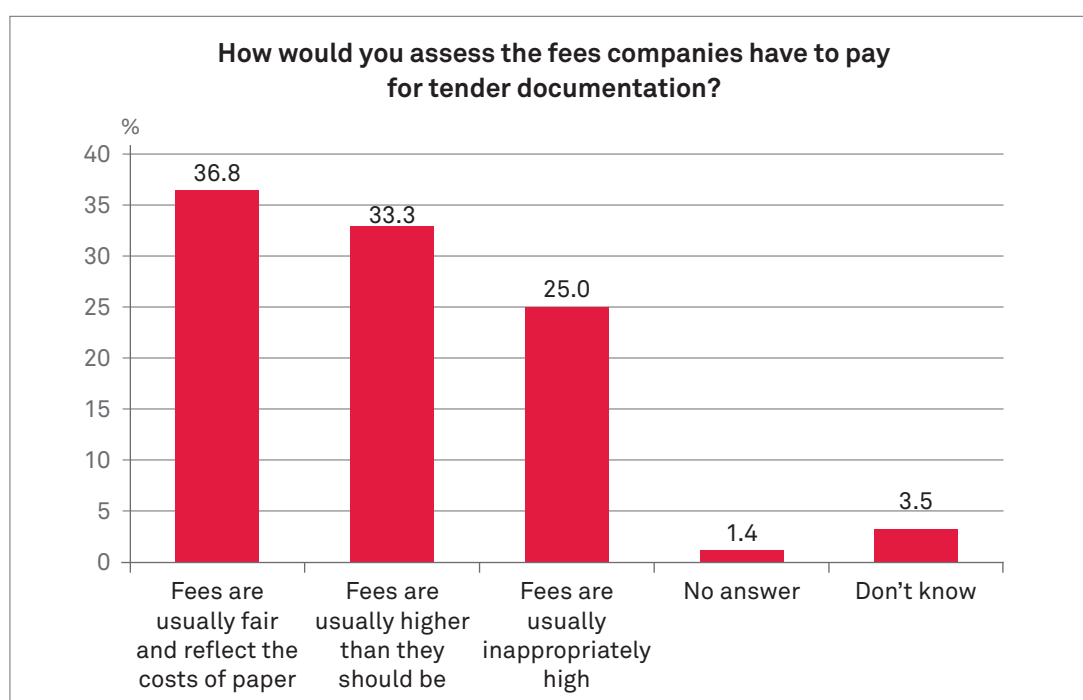
⁷² “Law on Public Procurement of BiH,” Articles 50, 51, and 52.

⁷³ Ibid., Article 52.

The research shows that official gazettes are still the dominant source of information on public procurement procedures (62.04 percent). They are followed by the media, including newspapers and web portals (36.80 percent), and the third source of information is the official public procurement web portal (32.30 percent). Official websites of contracting authorities were the least popular with private companies seeking information on public procurement – as singled out by 28.80 percent of respondents (see Annex 2).⁷⁴

When it comes to the fee charged for tender documents, a quarter of the respondents were of the opinion that tender documentation fees were unreasonably high and 33.3 percent believed they were higher than they ought to be, while 36.8 percent of respondents believed the fees to be fair and to reflect the reproduction costs (Graph 9).

Graph 9. Assessment of tender documentation fees (N=511, FtF survey)



The high price of tender documentation was assessed as a significant obstacle to equal participation in public procurement in almost all analyses and reports to date. This practice discourages candidates, especially small and medium enterprises that are unable to pay high prices for tender documentation and are therefore hindered and sometimes even prevented from participating in

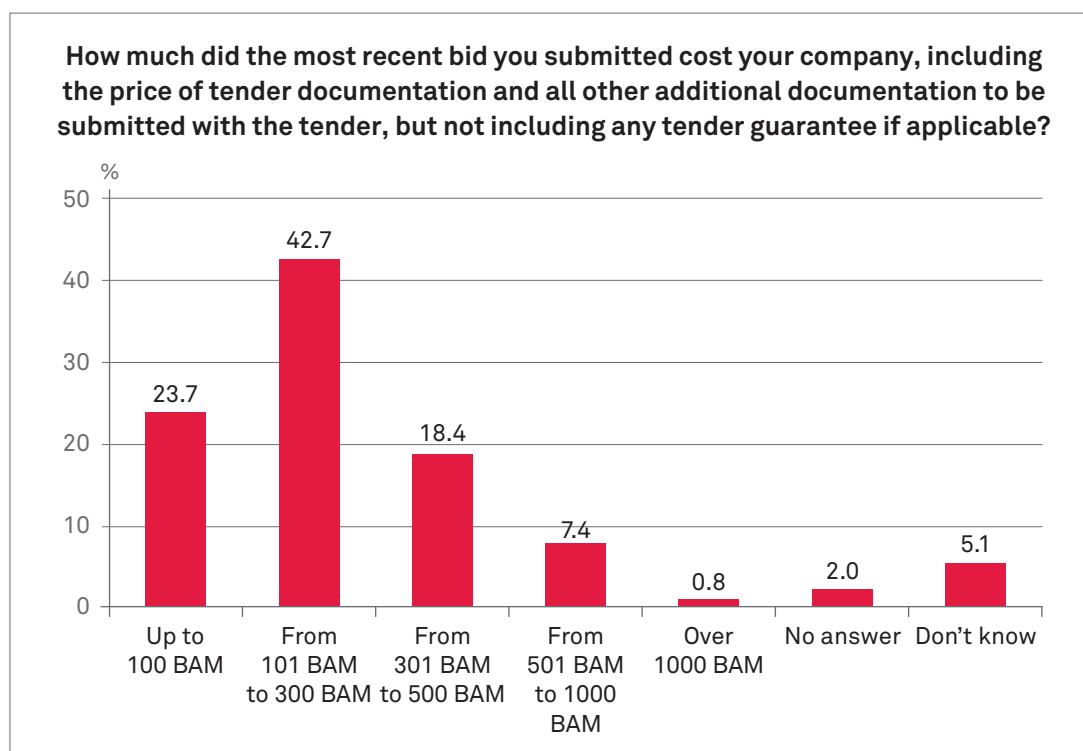
⁷⁴ Respondents could select multiple answers to this question.

public procurement.⁷⁵ According to the monitoring reports of the BiH Public Procurement Agency, the greatest number of irregularities recorded by the Agency in public procurement monitoring in 2013 pertained to the high price of tender documentation.⁷⁶

4.2.2. Preparation of tenders

In terms of the experience of preparing tenders, 42.7 percent of respondents stated that the price of submitting a final tender, including the price of tender documentation and additional documentation, was between 101 and 300 BAM, 23.7 percent of respondents stated that submitting a tender cost them up to 100 BAM, while 18.4 percent claimed the price was between 301 and 500 BAM (Graph 10). Almost half of all respondents, or 48.5 percent, stated that the costs of submitting documentation to accompany the tender was high, while 46.6 percent of respondents believe the costs to be neither high nor low (Graph 11).

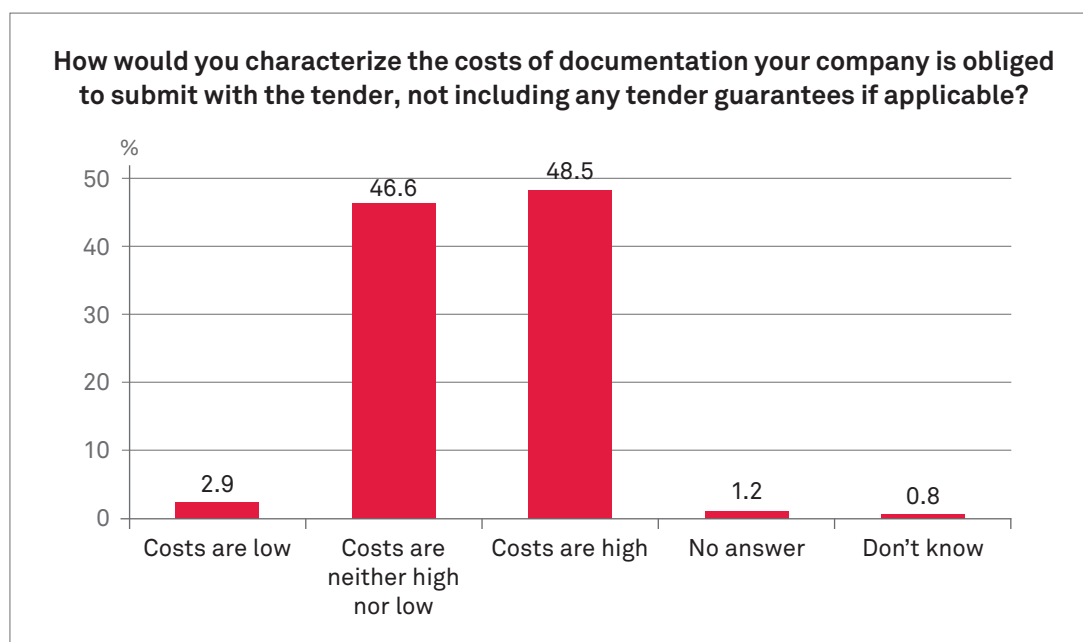
Graph 10. Price of submitting a tender (N=511, FtF survey)



⁷⁵ Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2012; Open Society Fund BiH, *Corruption Risk Assessment in Public Procurement*.

⁷⁶ Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2013, p. 10.

Graph 11. Assessment of price of submitting documentation accompanying a tender (N=511, FtF survey)



According to experts of the SIGMA programme, the high costs of submitting tenders result from a rigid interpretation of the law whereby candidates are obliged to submit all documents either in the original or as certified copies.⁷⁷ This bureaucratic system leads to tenders being rejected for formal reasons while disregarding the economic value of such tenders.⁷⁸ This problem should be resolved through the application of the new Law on Public Procurement, which allows candidates to submit a certified statement attesting that they fulfil the set conditions, and only the selected candidate need submit documentation in support of this statement.⁷⁹

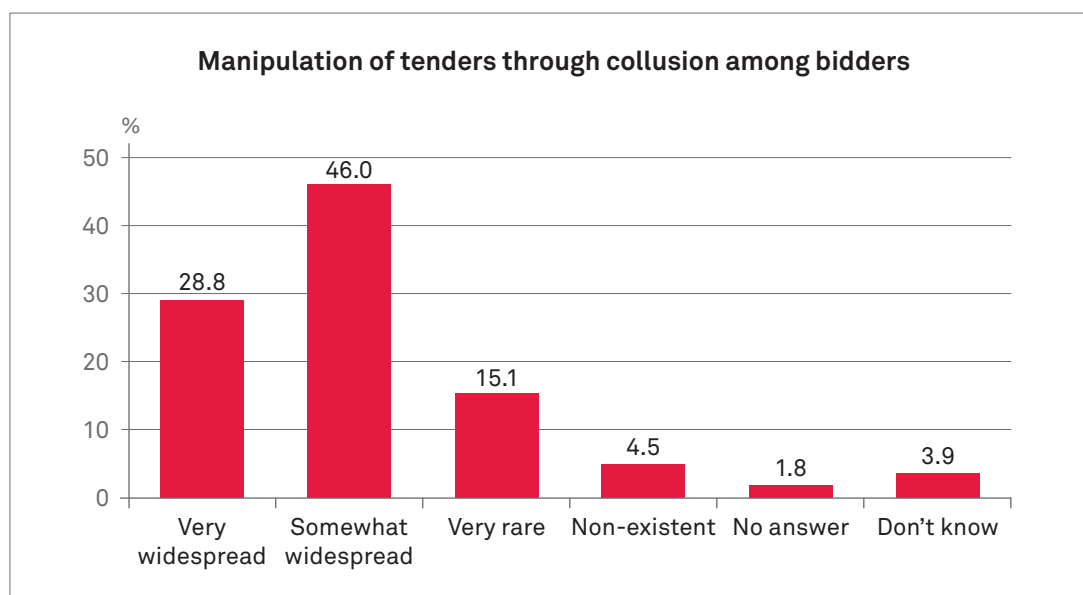
Apart from contracting authorities, private companies are also obliged to adhere to the rules ensuring competition among candidates. One of the questions in the survey was concerned with possible manipulation of tenders in public procurement through prohibited agreements between candidates, and the results show that as many as 74.8 percent of respondents believe that this practice is very or somewhat widespread in BiH (Graph 12).

⁷⁷ Open Society Fund BiH, *Corruption Risk Assessment in Public Procurement*; SIGMA, *Bosnia and Herzegovina: Public Procurement Assessment*.

⁷⁸ Ibid.

⁷⁹ "Law on Public Procurement."

Graph 12. Perception of prevalence of manipulation of tenders through mutual agreement between candidates (N=511, FtF survey)



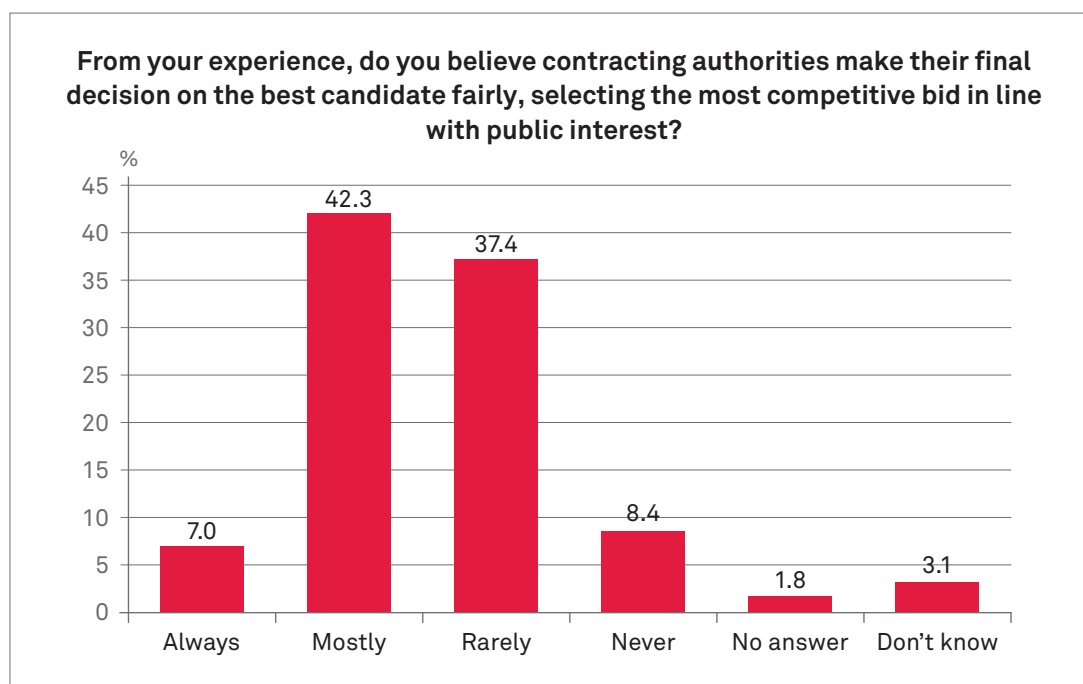
Research to date has not treated the aspect of tender manipulation through collusion among candidates, despite assessments by experts that such practices pose a significant threat to efficient public spending because cartels aim to eliminate competition and increase the prices paid by the public sector for procurement of goods, services, or works.⁸⁰

4.2.3. Selecting the best candidate

According to the results of our research, respondents have divided opinions on the regularity and soundness of decisions taken by contracting authorities to select the best candidate. Half of the respondents (49.3 percent) said that decisions on the best candidate are always or mostly fair, selecting the most competitive tender in line with public interest, while 45.8 percent stated that this happens only rarely or never (Graph 13).

⁸⁰ Prohibited association may take various forms: submitting fictitious, non-competitive tenders that will benefit the selection of one candidate from the cartel, refraining from participation in public procurement to take turns being awarded contracts, mutual division of the market, etc. Organisation for Economic Cooperation and Development (OECD), *Detecting Bid-rigging in Public Procurement* (Paris: OECD), p. 5.

Graph 13. Assessment of decision making on choice of best candidate (N=511, FtF survey)



According to representatives of the BiH business community, the criterion whereby tenders are selected solely on the basis of lowest price has many limitations, primarily because elements such as quality and long-term cost-effectiveness are not taken into account.⁸¹ Having the lowest price as the main criterion for awarding contracts also incurs the risk of receiving tenders with unnaturally low prices, which can lead to poorer quality of delivered services or payment of additional funds in the course of contract implementation.⁸²

When it comes to selecting on the basis of the most economical offer, the contracting authority decides which of the sub-criteria to apply in the concrete procedure, which in turn depends on the size and type of procurement. These sub-criteria must be based on precise instructions for evaluating tenders. Otherwise, the application of non-measurable and unclear criteria might lead to conditions that would advantage a favoured candidate. In this context, reports by Transparency International BiH warn that free choice of sub-criteria leaves room for abuse by contracting authorities, including setting sub-criteria that favour a specific candidate, subjective awarding of points and setting sub-criteria that

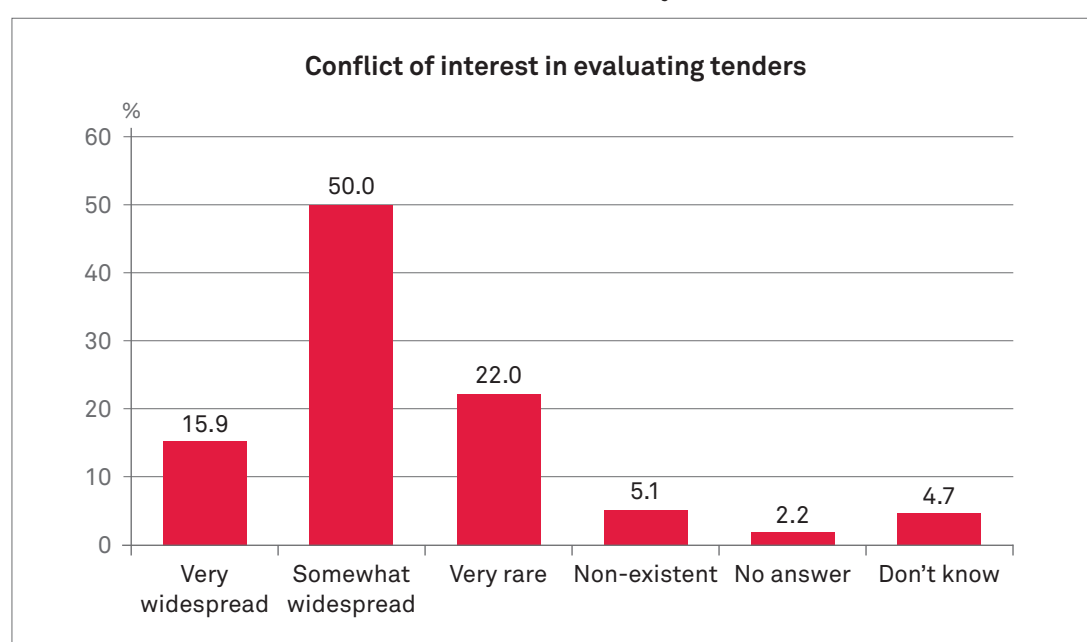
⁸¹ SIGMA, *Bosnia and Herzegovina: Public Procurement Assessment*, p. 4. This view was reiterated by representatives of employers associations and chambers of commerce in BiH at a round table on public procurement organised by Analitika in November 2014.

⁸² *Ibid.*, p. 4.

do not correspond to the type and size of a specific procurement contract.⁸³ According to SIGMA experts, particular caution is needed when defining sub-criteria for evaluating quality of execution.⁸⁴

Responses from the business community also indicate potential conflicts of interest inherent in evaluating tenders. Thus, 65.9 percent of respondents believe that conflict of interest in evaluating tenders is very or somewhat widespread in public procurement in BiH, while 27.1 percent of respondents believe that such practices are very rare or non-existent (Graph 14).

Graph 14. Perception of prevalence of conflict of interest in evaluating tenders
(N=511, FtF survey)



According to audit reports and expert analyses, conflict of interest may also arise due to the lack of rules separating responsibilities for various phases of public procurement. It also happens in practice that the commission members evaluating tenders are the same people who prepared the tender documents (including technical specifications) and who will enter into contracts with the selected candidate, despite the fact that these responsibilities are incompatible and may give rise to conflict of interest.⁸⁵ Apart from stemming from simultaneously

⁸³ Transparency International BiH, *National Integrity System Assessment*, p. 105; Rokvić, *Analysis of the Situation in Public Procurement in Bosnia and Herzegovina with Recommendations for Further Action*, p. 9.

⁸⁴ SIGMA, *Bosnia and Herzegovina: Public Procurement Assessment*, p. 18.

⁸⁵ Audit Office of the Institutions of BiH, Report for 2012, p. 80 and 94; Rokvić, *Analysis of the Situation in Public Procurement in Bosnia and Herzegovina with Recommendations for Further Action*, p. 12.

performing various functions in the public procurement procedure, conflict of interest may also result from long-term performance of a single function. Audit reports from the past few years take issue with commissions having the same composition for many years, as well as long-term cooperation with the same suppliers, all of which may indicate corruption and privileging of certain suppliers.⁸⁶

Ensuring transparency and impartiality in the selection of suppliers means that the contracting authority must send a notice on the award of the contract to the best supplier to all the suppliers and that this notice must include justification for the decision.⁸⁷ Our research indicates a potentially high degree of compliance in practice with this provision – 81.5 percent of respondents⁸⁸ stated that in cases where their tender was rejected, they always or mostly received a notice stating the reasons why the contract was awarded to a different supplier, including an assessment in line with the criteria from the tender documentation (see Annex 2).

4.2.4. Appeal procedure

All potential and actual participants in public procurement procedures have the right of appeal, but in 2013, fees for filing a complaint were significantly increased.⁸⁹ 38.4 percent of respondents are of the opinion that fees should not be applied at all, 30.5 percent of respondents believe that the rate is too high, while a little less than a fifth find the set fees acceptable (Graph 15).

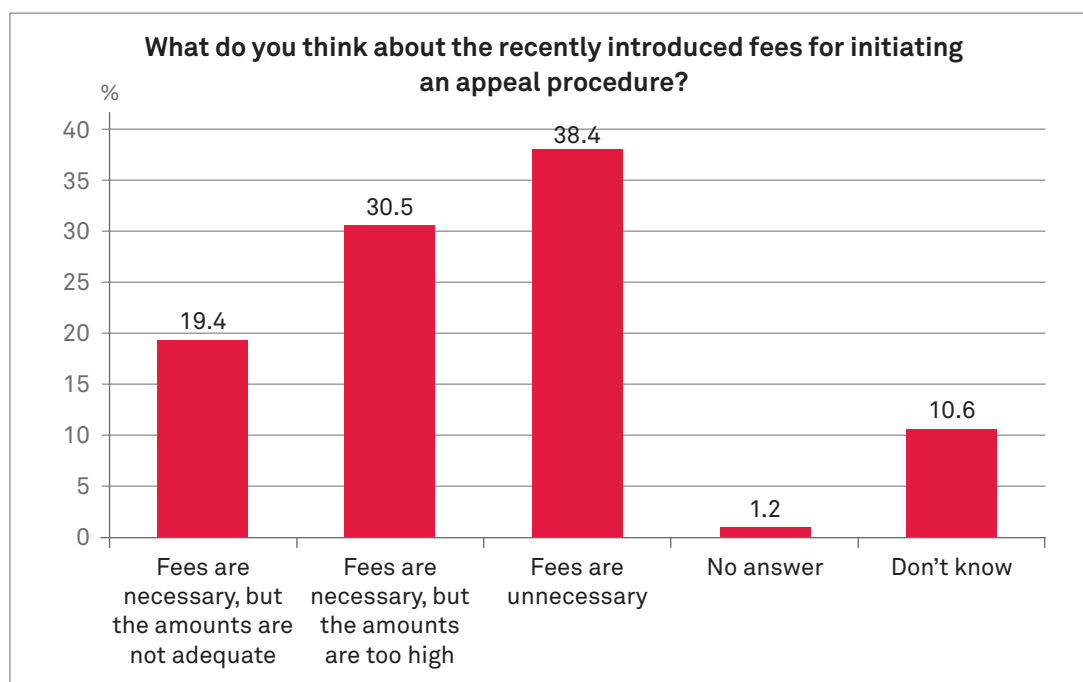
⁸⁶ Audit Office of the Institutions of BiH, Report for 2013, pp. 94-95.

⁸⁷ “Law on Public Procurement of BiH,” Article 33.

⁸⁸ This question was answered by 488 respondents who had previously stated they had been notified of their tender being rejected.

⁸⁹ According to changes to the Law, depending on the value of the public procurement, the fees were between 500 BAM and 25,000 BAM. According to the new Law on Public Procurement of 2014, the fees were decreased and are now in the range between 500 BAM and 10,000 BAM. “Zakon o izmjenama i dopunama Zakona o javnim nabavkama BiH” [Law on Changes and Amendments to the Law on Public Procurement of BiH], *Official Gazette of BiH* 87/13, Article 50 (b); “Law on Public Procurement,” Article 108. At the time of the survey, the higher fees were applicable in line with the changes to the Law adopted in 2013.

Graph 15. Opinion of respondents on fees for initiating appeal proceedings
(N=511, FtF survey)



The drastic increase in fees resulted from an effort to reduce the number of unfounded complaints that slowed down the implementation of projects of public interest. However, in the opinion of the non-governmental and business sectors, an adequate balance between unfounded complaints and legitimate legal protection was not achieved.⁹⁰ This is also supported by the fact that in neighbouring and EU countries fees for this practice are half those stipulated in Bosnia and Herzegovina.⁹¹

When it comes to deciding on complaints filed by candidates, the survey results show that 62.5 percent of respondents with experience of the complaint procedure⁹² believe that contracting authorities act in line with stipulated rules and procedures, while 37.5 percent of respondents believe that contracting authorities do not respect the rules and procedures for complaints (see Annex 2). When it comes to the experience of private companies in second instance appeal procedures, 65.7 percent of respondents stated that in cases where appeal procedures conclude with final administrative decisions in favour of the

⁹⁰ BiH Employers Association et al., "Proposed Amendment to Provisions of the proposed New Law on Public Procurement in BiH," pp. 16 and 17; Transparency International BiH, "Proposed Amendment to Provisions of the proposed New Law on Public Procurement in BiH," pp. 24 and 25.

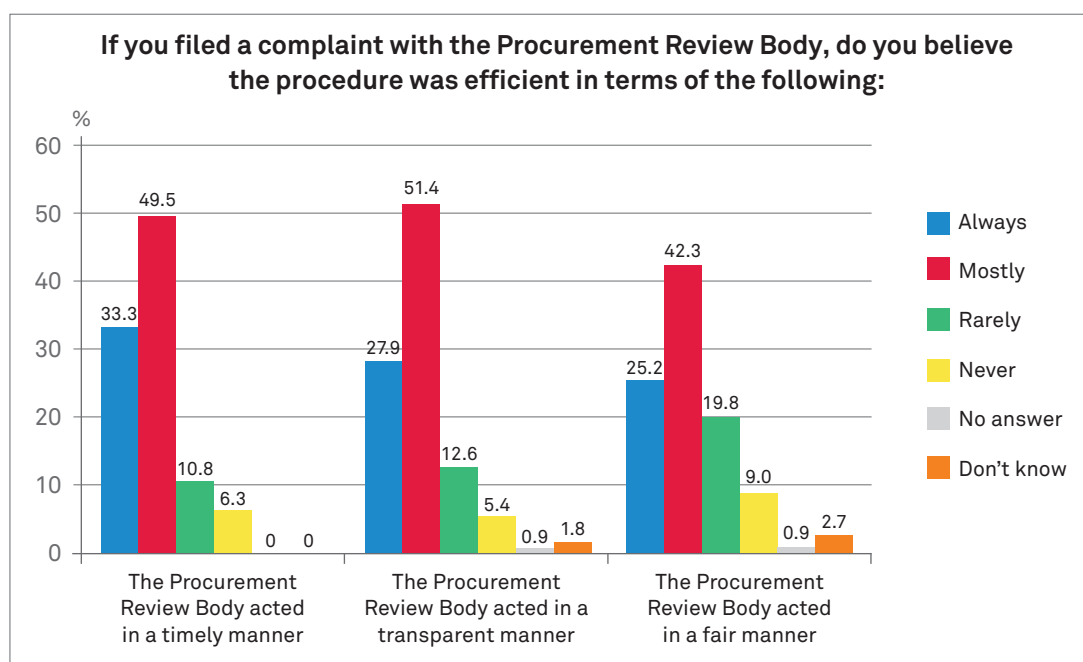
⁹¹ Elvira M. Jukić, "EU Warns Bosnia over Public Procurement Law," *Balkan Insight*, July 31, 2013.

⁹² 111 respondents, or 21.7% of the total number of respondents to the FtF survey had direct experience of the appeal process.

candidate, contracting authorities uphold such PRB decisions, while 19.8 percent of respondents with experience in these procedures state that contracting authorities rarely or never act in line with PRB decisions (see Annex 2).

Our research found that representatives of private companies find the Procurement Review Body always or mostly acts in a timely manner (82.8 percent), transparently (79.3) and fairly (67.5 percent).⁹³

Graph 16. Assessment of the work of the Procurement Review Body (N=511, FtF survey)



On the other hand, the SIGMA report cites numerous weaknesses of appeal procedures in public procurement in BiH, with key criticism pertaining to the inconsistency of decisions, and lengthy and overly bureaucratic procedures.⁹⁴ As stated in the report, the main criticism of the private sector is that decisions of the Procurement Review Body are often superficial and disregard real failings, focusing instead on irrelevant formal requirements that are sometimes unclear and inconsistent.⁹⁵ Examples were given of cases where this body adopted inconsistent or contradictory decisions in identical or similar situations.⁹⁶

⁹³ This question was answered by 111 respondents, or 21.7% of the total number of respondents to the FtF survey that had experience with the appeal procedure.

⁹⁴ SIGMA, *Bosnia and Herzegovina: Public Procurement Assessment*, p. 3.

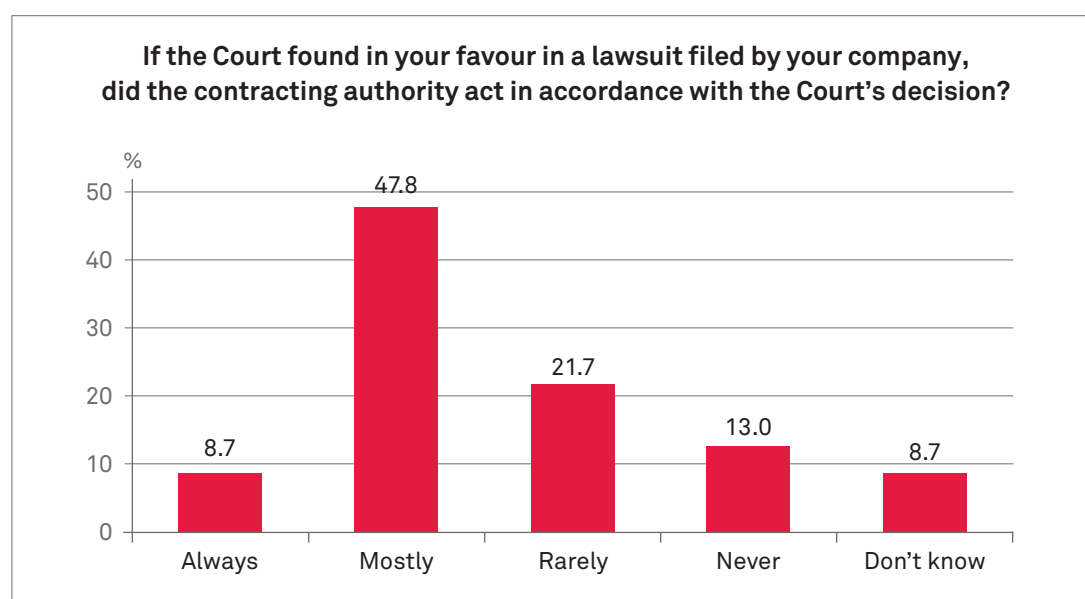
⁹⁵ Ibid.

⁹⁶ Ibid.

Even though the Law provides for such a possibility, the Procurement Review Body rarely uses its powers to file offence or criminal charges against officials of the contracting authority with the competent court or to impose monetary fines in the amount of up to 4000 BAM for violations of legal provisions.⁹⁷ Previous analyses have indicated the problem of lack of transparency in the work of the PRB, i.e. the fact that decisions passed by this institution are not publicly available. In December 2010, the PRB started publishing its decisions on the public procurement website, but had already abandoned this practice by April 2011, citing lack of financial resources as justification.⁹⁸

When it comes to administrative disputes before the Court of BiH, 56.5 percent of respondents that have direct experience with such administrative disputes⁹⁹ said that contracting authorities always or mostly adhere to the Court's decision when it finds in favour of the private enterprise, but 34.7 percent of respondents stated that contracting authorities rarely or never act in line with the Court's decision in public procurement cases (Graph 17).

*Graph 17. Experience of enterprises with administrative disputes
(N=511, FtF survey)*



According to the survey results, the shortest length of proceedings before the Court of BiH brought a decision within three months. The longest duration of proceedings according to the majority of respondents (34.8 percent) lasted from

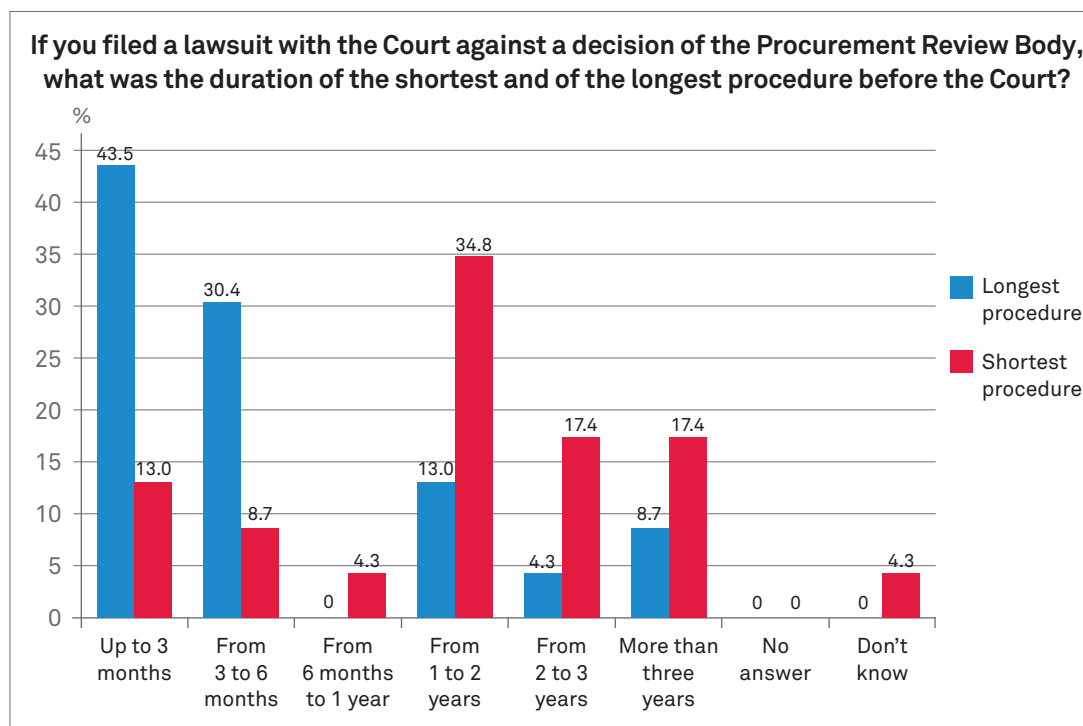
⁹⁷ Ibid.

⁹⁸ Transparency International BiH, *Monitoring of the Implementation of the Law on Public Procurement of BiH*.

⁹⁹ It should be mentioned that only 4.5% of respondents, or 23 out of 511, said that they had filed an appeal with the Court of BiH against a decision of the Procurement Review Body.

one to two years. Curiously, for 8.7 percent of respondents, the shortest length of proceedings was over three years (Graph 18).

Graph 18. Experience of duration of proceedings before the Court
(N=511, FtF survey)



According to the data of the Procurement Review Body, an administrative dispute before the Court of BiH lasts one to three years, and only rarely are proceedings completed in less than a year,¹⁰⁰ which would indicate that court decisions in public procurement cases are not expedited as provided for by law.

Compared to statistics from other countries in the region, Bosnia and Herzegovina has a relatively high number of complaints from dissatisfied candidates.¹⁰¹ There were 2052 complaints against decisions of contracting authorities in 2013, and in the previous year there were 2165.¹⁰²

¹⁰⁰ Procurement Review Body, Izvještaj o radu Ureda za razmatranje žalbi u 2012. godini [Procurement Review Body Annual Report for 2012], (Sarajevo: Procurement Review Body, 2013); Procurement Review Body, Izvještaj o radu Ureda za razmatranje žalbi u 2013. godini [Procurement Review Body Annual Report for 2013], (Sarajevo: Procurement Review Body, 2014).

¹⁰¹ Ibid.

¹⁰² Due to the increased fees for initiating proceedings introduced in late 2013, the number of complaints significantly decreased in 2014: Thus, based on data of the Procurement Review Body, in the first 10 months of 2013, 1874 complaints were filed, while in the same period in 2014, the number of complaints decreased by more than 50% with only 964 complaints filed, SRNA, “Sistem javnih nabavki mora biti transparentniji” [The Public Procurement System Must Be More Transparent], *Oslobođenje*, December 11, 2014.

The large number of complaints is clearly contradictory to indicators from the survey on business community confidence in the appeal procedure. Namely, 77 percent of respondents did not have experience with the appeal procedure, and when asked why they did not initiate appeal proceedings even though they had the grounds for it, 50.25 percent stated they did not trust the procedure would be implemented impartially, 56.75 percent stated that they believed it was not worth initiating appeal procedures, and 31.50 percent believed the procedure would last too long (for all responses, see Annex 2).¹⁰³

Overall, the results presented in this section clearly indicate that the main challenges in the tendering phase of public procurement pertain to determining an appropriate fee for purchase of tender documents, the application of appropriate criteria for awarding contracts, and establishing an efficient system for checking the capacity of candidates to execute contracts. There is also the issue of resolving potential conflicts of interest and illegal collusions among candidates to fix the outcomes of procedures in this phase. The research results also indicate that legal protection of candidates is another challenge, given that a significant number of respondents expressed doubt about appeal procedures being worthwhile and/or impartial.

4.3. Post-tender phase

Although the public procurement procedure ends with the award of a contract, its implementation is an important segment of public procurement. The Law on Public Procurement of BiH regulates the public procurement procedure up to the moment when a contract is entered into with the selected supplier. The execution of a public procurement contract is regulated by laws on obligations. The LPP did not provide for the establishment of bodies responsible for overseeing activities in public procurement procedures and execution of contracts. The Public Procurement Agency has no competence over contract execution and therefore does not collect information on the implementation of awarded contracts.¹⁰⁴ External control bodies in public procurement procedure include audits that control already concluded and implemented contracts and are not responsible for monitoring the course of implementation of a contract.¹⁰⁵

¹⁰³ 400 out of 511 respondents answered this question. Respondents could select multiple answers to this question.

¹⁰⁴ Miraščija, *Analysis of the Legal Framework for Public Procurement*; Rokvić, *Analysis of the Situation in Public Procurement in Bosnia and Herzegovina with Recommendations for Further Action*; Transparency International BiH, *National Integrity System Study*.

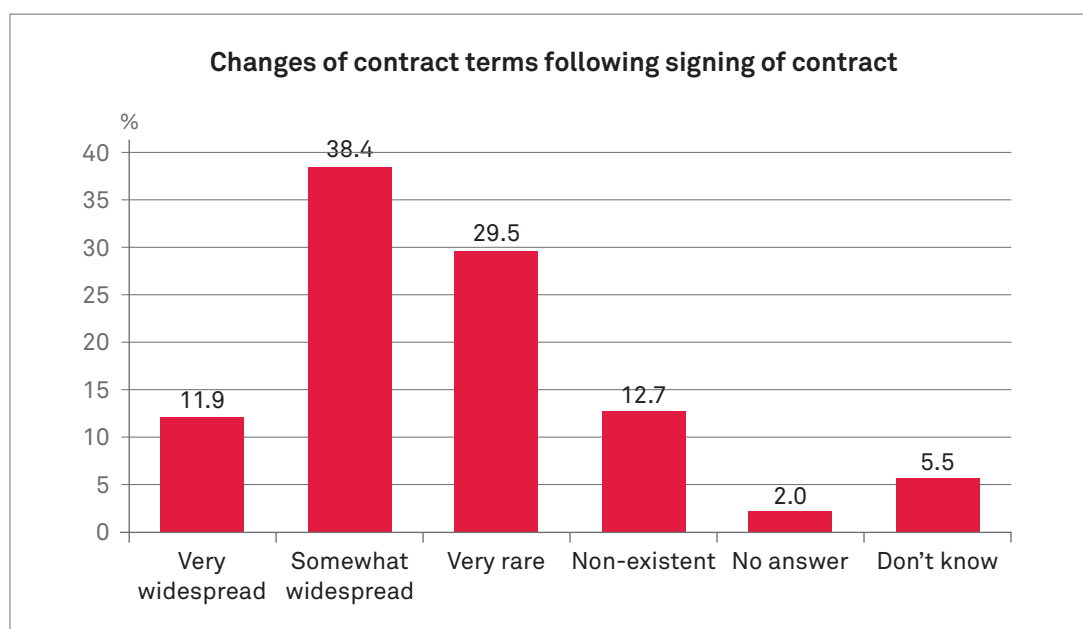
¹⁰⁵ Ibid.

When it comes to the implementation of contracts, the PRB does stipulate a general principle whereby the price cited in the winning tender, as well as the terms determined in the tender documentation cannot be changed when the public procurement contract is awarded. If there are justified reasons for changing the contract, a new procedure must be conducted and a new contract awarded.¹⁰⁶

4.3.1. Contract implementation

Over 50 percent of business community representatives in the survey stated that they believed changes to the terms of contracts are widespread in public procurement (Graph 19).

Graph 19. Perception of prevalence of changes to the terms of contracts after they are signed in public procurement procedures (N=511, FtF survey)



According to past reports in this field, it often happens in practice that the conditions determined by tender documents or the contract, such as delivery deadlines, quantity and quality of goods, services and works, are not upheld during contract implementation, but are instead changed at the initiative of the supplier

¹⁰⁶ Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2012; Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2013.

and/or the contracting authority.¹⁰⁷ These conditions are one of the criteria for the selection of the supplier and the tender, so that subsequent derogations devalue and undermine the public procurement process. Even though the LPP does not foresee the possibility of adding annexes to the main contract, this is by no means a rare practice in public procurement in BiH. Numerous reports warn that one of the foremost irregularities in public procurement procedures is the adding of annexes to already signed contracts and significant additional and unforeseen works that change the terms and values of goods, services or works to be delivered.¹⁰⁸

Numerous failings in contract implementation are also caused by poor internal controls.¹⁰⁹ Laws in force in BiH foresee the establishment of a system of internal auditing,¹¹⁰ but these controls have not been set up in some public bodies, and even in those with internal controls, they do not play a significant role in overseeing the implementation of public procurement contracts.¹¹¹ Lack of adequate internal control mechanisms can lead to various irregularities in contract implementation, such as derogation from agreed quantities and prices, as well as deadlines for delivery or completion of works.¹¹²

However, our research shows that respondents have experience of contracting authorities ensuring internal control of contract implementation to a significant degree, while external financial audits and quality or impact control of procedures is somewhat less prevalent. Within the survey, 73.5 percent of respondents¹¹³ stated that public procurement contract implementation is always or mostly

¹⁰⁷ Audit Office of the Institutions of BiH, Izvještaj o reviziji izvještaja o izvršenju budžeta institucija Bosne i Hercegovine za 2011. godinu [Audit Report on the Budget Execution Report of Institutions of Bosnia and Herzegovina for 2011], (Sarajevo: Audit Office of the Institutions of BiH, 2012), p. 50; Audit Office of the Institutions of BiH, Report for 2012, p. 79; Audit Office of the Institutions of BiH, Report for 2013, p. 94.

¹⁰⁸ Audit Office of the Institutions of BiH, Report for 2012; Audit Office of the Institutions of BiH, Report for 2013; Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2012; Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2013.

¹⁰⁹ Ibid.

¹¹⁰ "Zakon o internoj reviziji institucija BiH" [Law on Internal Audit of Institutions of BiH], *Official Gazette of BiH* 27/08; "Zakon o internoj reviziji u javnom sektoru u Federaciji BiH" [Law on Internal Audit in the Public Sector in Federation of BiH], *Official Gazette of the Federation of BiH* 47/08; "Zakon o internoj reviziji u javnom sektoru Republike Srpske" [Law on Internal Audit in the Public Sector of Republika Srpska], *Official Gazette of Republika Srpska* 17/08.

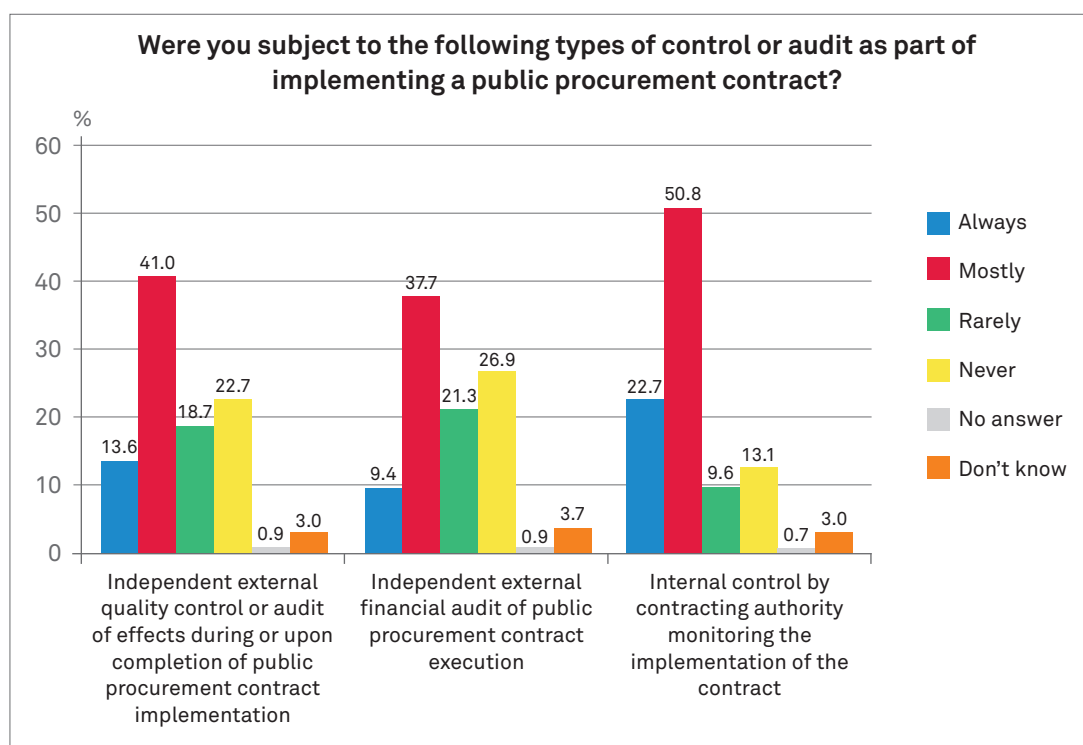
¹¹¹ Audit Office of the Institutions of BiH, Report for 2012; Audit Office of the Institutions of BiH, Report for 2013; Transparency International BiH, *National Integrity System Assessment*.

¹¹² Audit Office of the Institutions of BiH, Report for 2012; Audit Office of the Institutions of BiH, Report for 2013; Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2012; Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for 2013.

¹¹³ Answers to questions about control of implementation of contracts were given by 427 respondents that had previously stated they possessed experience in implementing public procurement contracts.

subject to internal control, while 22.7 percent of respondents said they were rarely or never subjected to internal controls during contract implementation. When it comes to external quality control and impact review during or upon completion of public procurement contract implementation, 54.6 percent of respondents stated that they were always or mostly subject to this type of review, while 41.4 percent stated they were rarely or never subject to external audit controls. Moreover, 47.1 percent were always or mostly subject to independent external financial audits of public procurement contract implementation, while 48.2 percent of respondents were rarely or never subject to such controls (Graph 20).

Graph 20. Experience with controls and audits in public procurement contract implementation (N=427, FtF survey)



Apart from the absence of adequate supervision over the implementation of public procurement contracts, there is no direct obligation in the Law on Public Procurement in BiH to report on the implementation of individual contracts.¹¹⁴ Since contracting authorities do not have an obligation to monitor and report on contract implementation, they are also under no obligation to disclose such information to the public. As a result, information on how a certain contract was executed is generally not available to the public.

¹¹⁴ Mirašćija, *Analysis of the Legal Framework for Public Procurement*; Rokvić, *Analysis of the Situation in Public Procurement in Bosnia and Herzegovina with Recommendations for Further Action*.

4.4. Corruption in public procurement in BiH

Compared to other public sector economic activities, public procurement is particularly susceptible to fraud and corruption.¹¹⁵ The risk of corruption mainly arises due to the significant financial value of a public procurement contract and the close interaction between the public and private sectors required for the implementation of such contracts. It is estimated that in OECD countries, bribery increases the actual value of public procurement by 10 to 20 percent.¹¹⁶ Without strong preventive and control mechanisms, bribery and other forms of corruption in public procurement may develop into business as usual.¹¹⁷ The repercussions of such negative practices are manifold: corruption limits competition between business entities, increases the price that the public sector, or rather tax payers, pay for the procurement of goods, services and works, and undermines public trust both in public institutions and the business sector.¹¹⁸

Public procurement contract values in BiH make up a considerable portion of the total gross domestic product.¹¹⁹ Past research has indicated that the business sector in BiH is exposed to corruption in everyday business operations. The UN Office on Drugs and Crime conducted a survey in 2012 to identify the actual experience of corruption among the business community in BiH in relation to various business sector fields of operation that involve interaction with public officials, including licensing procedures, tax inspections, customs, as well as public procurement procedures. The results showed that every tenth businessperson that participated in the survey had given a bribe to a public official in the 12 months prior to the survey. On average, private companies in BiH bribed public officials 6.6 times a year, or approximately once every eight weeks.¹²⁰ Measuring perceptions as an indicator of corruption, a regional survey from 2010 found that

¹¹⁵ In this survey, the definition of corruption from the Eurobarometer survey was used: offering, giving, requesting and accepting bribes or kickbacks, valuable gifts and important favours, as well as any abuse of power for private gain. TNS Political & Social, *Flash Eurobarometer 374*.

¹¹⁶ Organisation for Economic Cooperation and Development (OECD), *OECD Principles for Integrity in Public Procurement* (Paris: OECD, 2009), p. 9.

¹¹⁷ Organisation for Economic Cooperation and Development (OECD), *Bribery in Public Procurement: Methods, Actors and Counter-measures* (Paris: OECD, 2007), p. 9.

¹¹⁸ Ibid.

¹¹⁹ The total value of public procurement contracts concluded in Bosnia and Herzegovina in 2013 was 2,736,346,294.96 BAM. The share of public procurement in overall gross domestic product for 2013 was 9.68%. In 2012, public procurement accounted for 12.95% of GDP, and in 2011 for 12.38%. Public Procurement Agency of BiH, Annual Report on Public Procurement Contracts in 2013, p. 15.

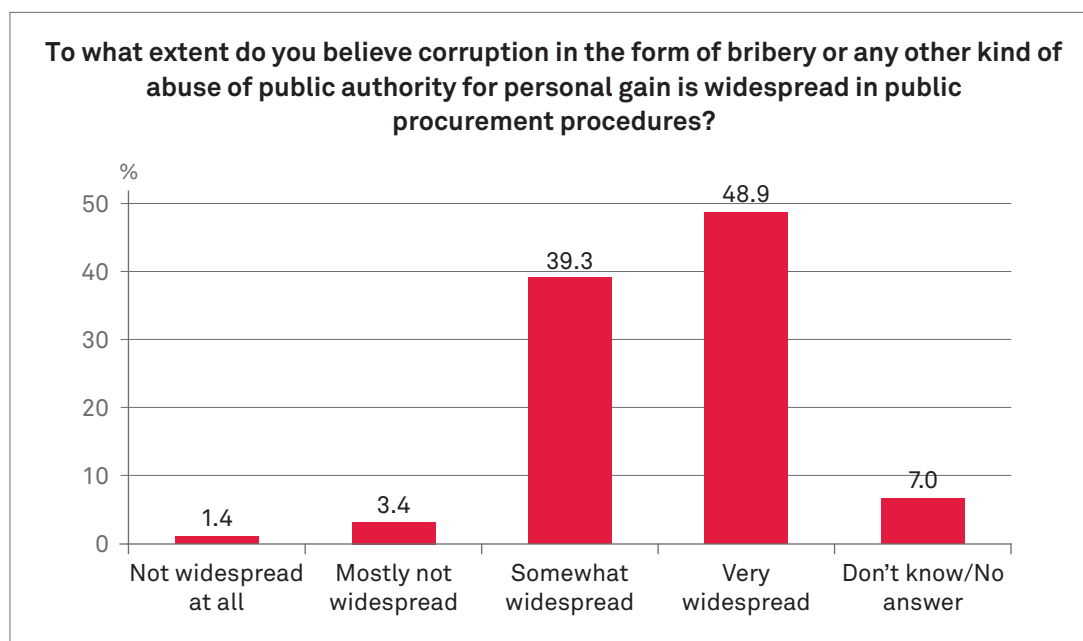
¹²⁰ UNODC, *Business, Corruption and Crime in Bosnia and Herzegovina*, p. 17.

72.7 percent of managers of private companies in BiH believed that corruption was an obstacle to business in BiH.¹²¹

The Law on Public Procurement of BiH obliges contracting authorities to reject requests for participation in public procurement and tenders of candidates or tenderers that have given or were prepared to give a current or a former employee of the contracting authority a gift in the form of cash or in any non-cash form whatsoever as an attempt to influence an action or a decision or the course of the public procurement procedure.¹²² However, at least in the past few years, there has been no case on record that a tender by a candidate was rejected or that a tendering procedure was annulled due to corruption.¹²³

Results of both surveys – the face to face (FtF) and the telephone survey (CATI) – showed that the business sector in BiH perceives corruption as widespread in public procurement. The CATI survey of a sample of 2500 respondents found that 88.2 percent of respondents believe that corruption in the form of bribery and other types of abuse of public authority for personal gain is somewhat or very widespread in public procurement in BiH (Graph 21).

Graph 21. Perceptions of corruption in public procurement procedures (N=2500, CATI survey)



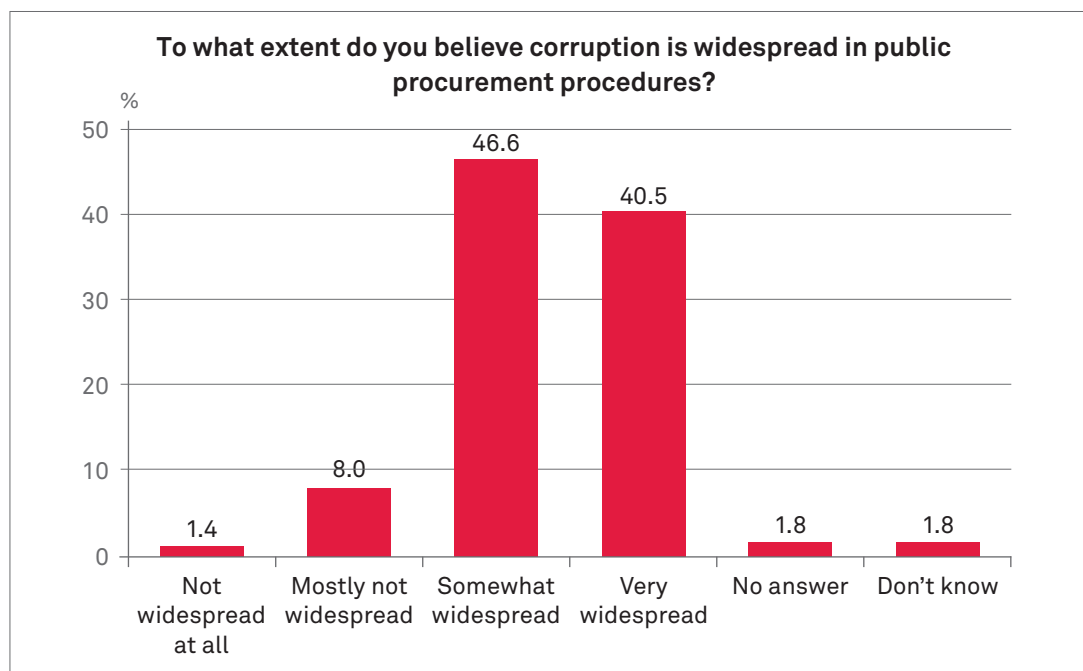
¹²¹ Podumljak and YES Foundation, *Perception and Attitudes on Corruption in the Western Balkans*, p. 19.

¹²² “Law on Public Procurement of BiH,” Article 27.

¹²³ Council of Ministers of Bosnia and Herzegovina, *Answers to the list of EU Questions on Chapter 5: Public Procurement* (Sarajevo: Council of Ministers of Bosnia and Herzegovina, 2012), p. 46.

The second survey conducted face to face on a sample of 511 respondents also found that as many as 87.1 percent of respondents believed that corruption was somewhat or very widespread in public procurement procedures (Graph 22).

Graph 22. Perceptions of corruption in public procurement procedures
(N=511, FtF anketa)



Respondents to the FtF survey who believe that corruption is somewhat or very widespread in public procurement procedures¹²⁴ indicate that, according to their perception, corruption is most widespread at the local level (71.7 percent), and equally widespread at other government levels (ranging from 56.8 to 58.4 percent)¹²⁵ (see Annex 2).

Among the respondents who believed that corruption was somewhat or very widespread in public procurement procedures, the energy sector was singled out as the public sector with the most widespread corruption (46 percent), followed by healthcare and social security (40.9 percent), the justice system (37.5 percent), education (24.7 percent), and telecommunication and postal services (23.4 percent) (see Annex 2).¹²⁶

On the level of personal experience, the situation is significantly different from the general perception of prevalence of corruption. One out of twenty respondents

¹²⁴ 445 out of 511 respondents.

¹²⁵ Respondents could select multiple answers to this question.

¹²⁶ This question was answered by 445 respondents to the FtF survey who believed corruption was widespread in public procurement. Respondents could list three public sectors they believed had the most widespread corruption in public procurement.

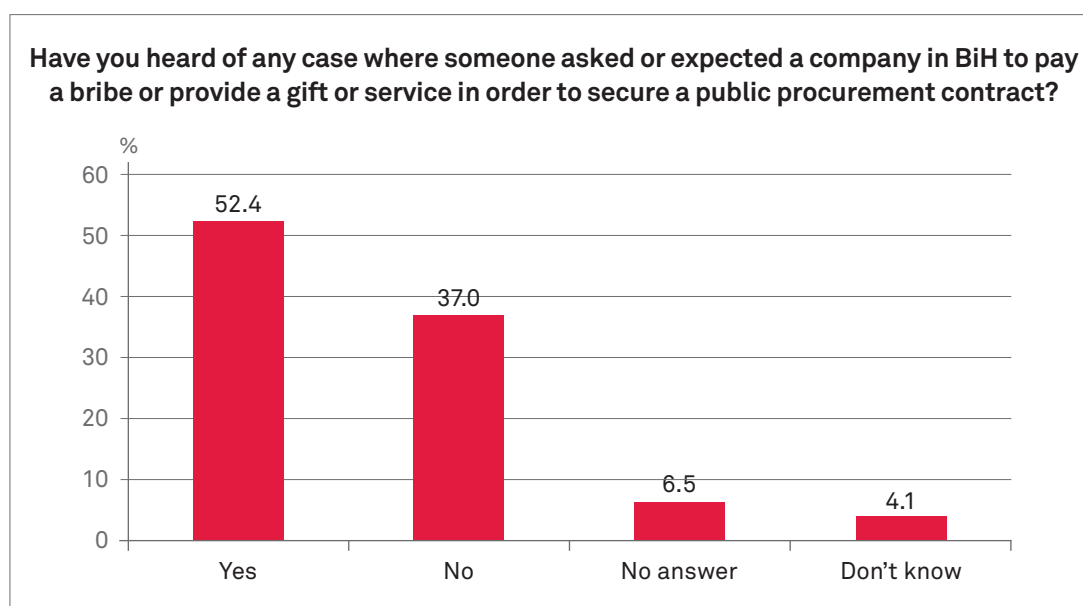
answered in the affirmative when asked whether anyone asked or expected the company to pay a bribe, contribute a gift or a specific service in order to be awarded a public procurement contract, while 68.3 percent said they had not had this type of experience (Graph 23). However, given the sensitive nature of this question, it is possible that the respondents were reluctant to answer truthfully.

Moreover, 52.4 percent of respondents confirmed having heard of cases where private companies were asked for or expected to give bribes (Graph 24).

Graph 23. Experience with corruption in public procurement (N=511, FtF survey)

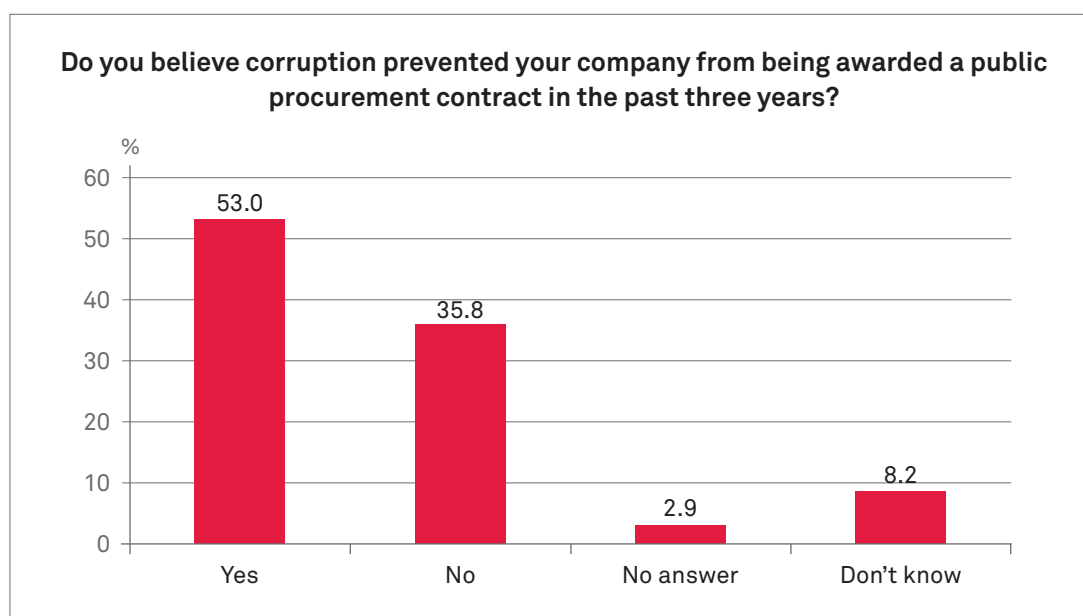


Graph 24. Familiarity with cases of corruption in public procurement (N=511, FtF survey)



In terms of corruption affecting the business operations of companies, it is indicative that a significant portion of respondents, 53 percent of them, believe that corruption prevented them from being awarded a public procurement contract in the past three years (Graph 25). When asked to provide a reason, 70.5 percent of respondents with this opinion¹²⁷ indicated adapting public procurement criteria to certain bidders, while 57.2 percent of respondents believe that decisions on choice of bidder were made before the public procurement notice was even published. In addition, 39.9 percent of respondents said that the reason for their not being awarded the contract was an agreement between bidders to avoid the rules of free and competitive participation in the procedure¹²⁸ (see Annex 2).

Graph 25. Perception of the impact of corruption on bidder performance in public procurement procedures (N=511, FtF survey)

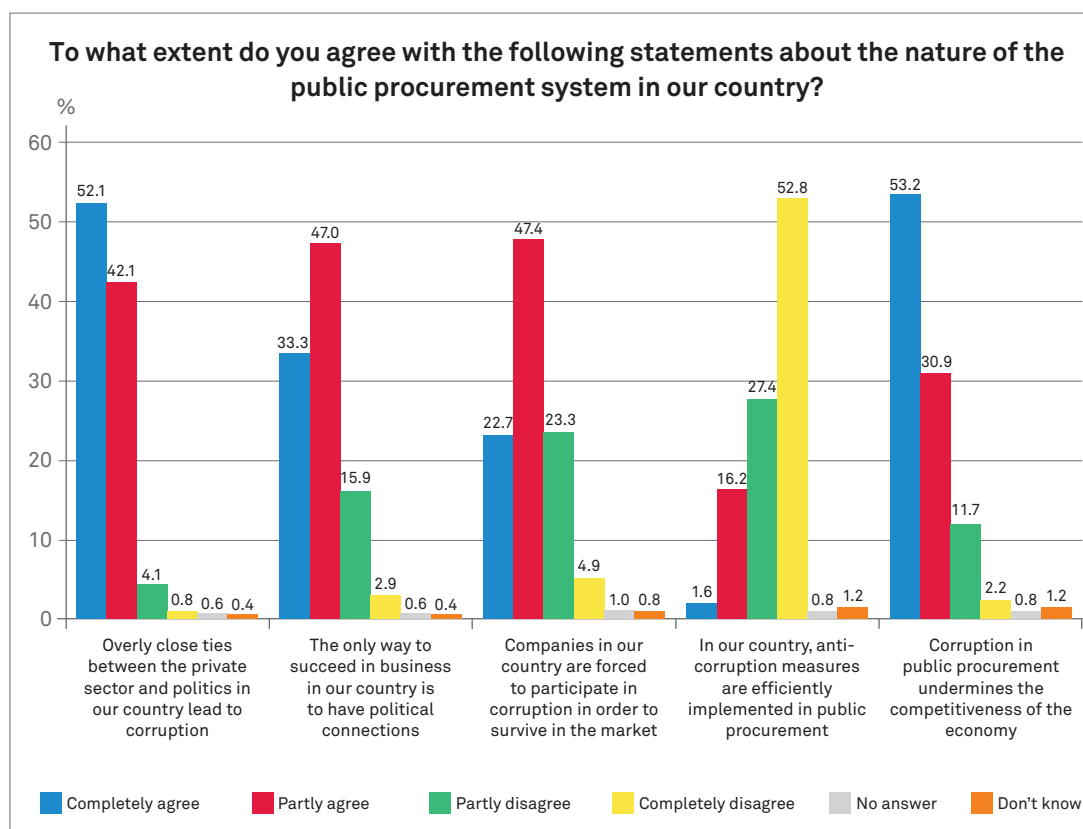


According to 94.2 percent of respondents, corruption in public procurement is caused by overly close relations between the private sector and politics in BiH. Respondents also overwhelmingly agree (84.1 percent) with the statement that corruption in public procurement undermines the competitiveness of the economy. Around 80 percent of respondents believe that having political connections is the only way to survive in the BiH market, while around 70 percent of respondents believe that enterprises are forced to participate in corruptive practices in order to survive in the market. Only 17.8 percent of respondents believe that anti-corruption measures are efficiently implemented in public procurement (Graph 26).

¹²⁷ 271 out of 511 respondents.

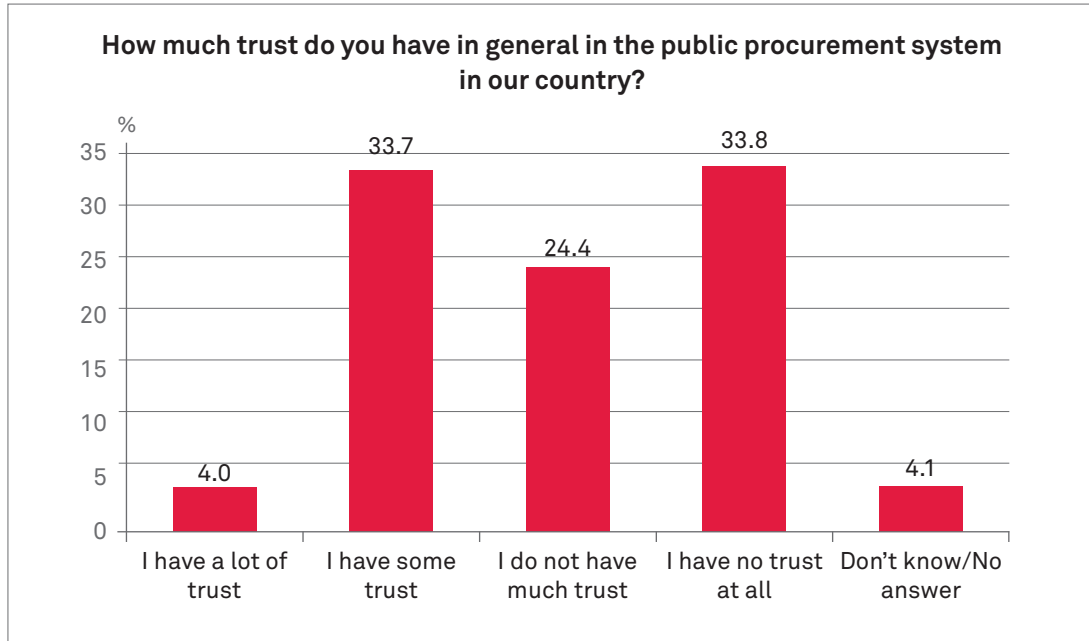
¹²⁸ Respondents could select multiple answers to this question.

Graph 26. Agreement with statements on the nature of the public procurement system in BiH (N=511, FtF survey)



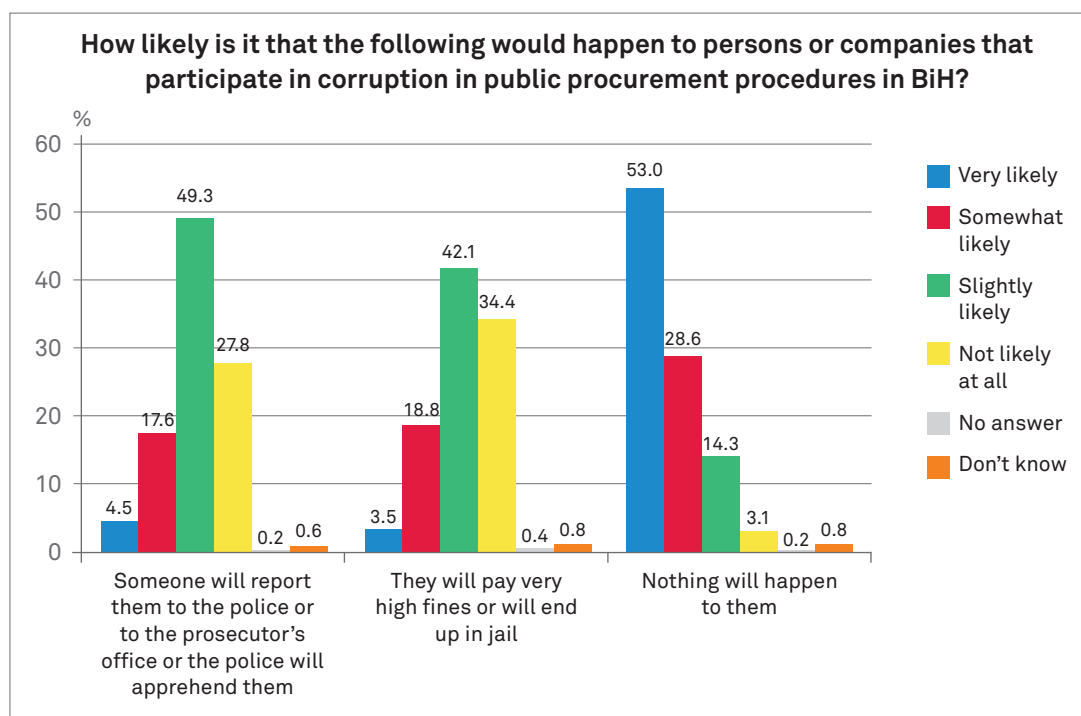
Perception and experience of corruption may negatively impact trust of the business sector in the public sector, as well as the overall public procurement system. Given all of the above, a low level of trust in the public procurement system is not surprising: out of a total of 2500 respondents to the CATI survey, 58.2 percent said they had little to no trust in the public procurement system in BiH (Graph 27).

Graph 27. Trust in the public procurement system in BiH (N=2500, CATI survey)



The majority of representatives of private companies that participated in the FtF survey did not show much trust in the mechanisms to sanction corruption: the respondents believe that perpetrators and participants in corruption are not sanctioned. Namely, 77.1 percent of respondents believe that there is little to no likelihood that participants in corruption would be reported to the police or prosecutor's offices, or that they would be arrested. Additionally, 76.5 percent of respondents do not believe that perpetrators of corruption would pay high fines or end up in jail, and 81.6 percent of respondents believe that nothing would happen to persons and enterprises that participate in corruption (Graph 28).

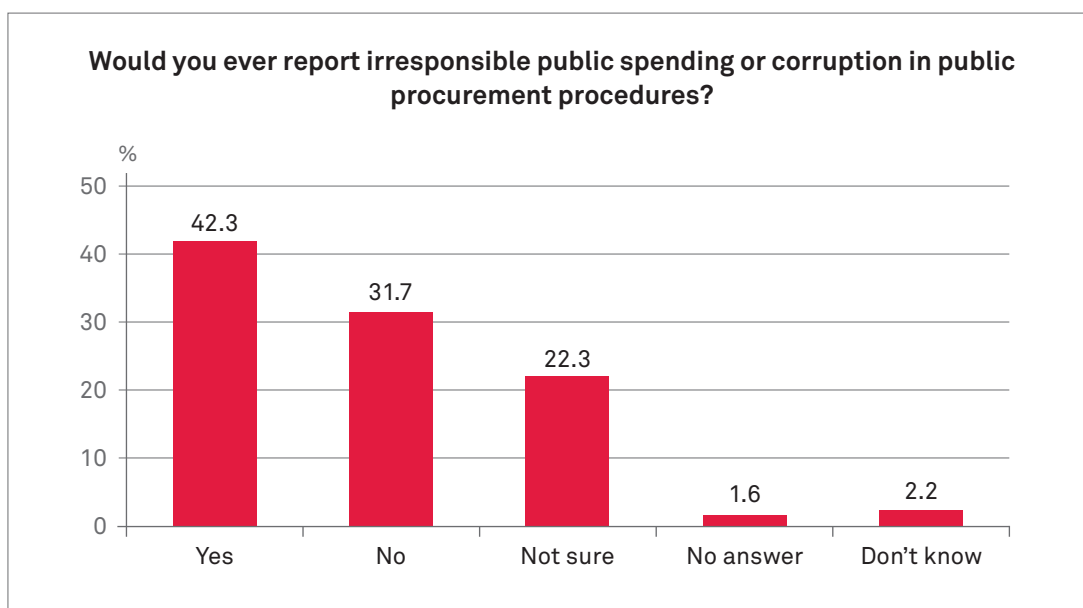
Graph 28. Opinion on outcome for individuals participating in corruption in public procurement procedures (N=511, FtF survey)



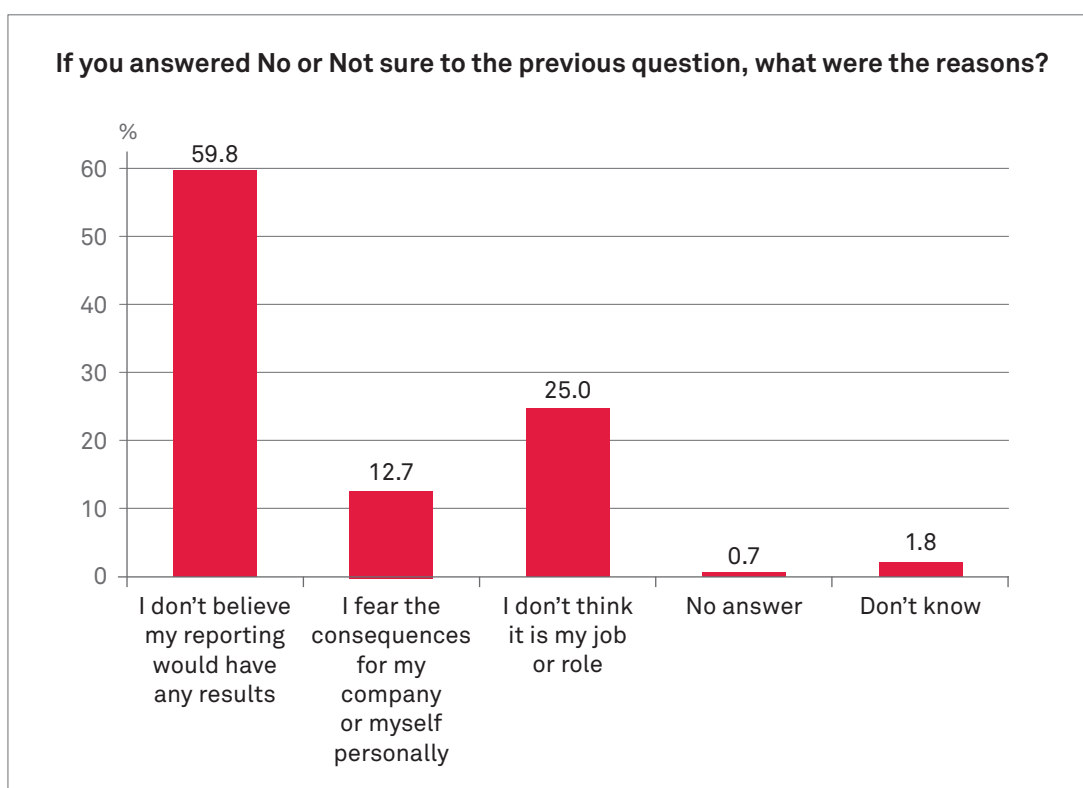
Further supporting the lack of trust in sanctioning mechanisms is the fact that the majority of respondents would not or are not sure they would report corruption. More than half of the respondents, 54 percent to be exact, would never or are not sure they would ever report irresponsible public spending or corruption in public procurement procedures (Graph 29). 59.8 percent of respondents¹²⁹ do not believe that their action to report would have any results, while 25 percent of respondents believe it is not their job or responsibility. A somewhat lesser proportion, 12.7 percent, would not report corruption out of fear for their own person or company (Graph 30). It is also worrisome that almost 40 percent of respondents do not know who to go to and how to report irresponsible public spending and corruption in public procurement procedures (see Annex 2).

¹²⁹ This question was answered by 276 respondents that had previously stated they would never or were unsure if they would ever report irresponsible public spending or corruption.

Graph 29. Reporting irresponsible public spending and corruption (1)
(N=511, FtF survey)

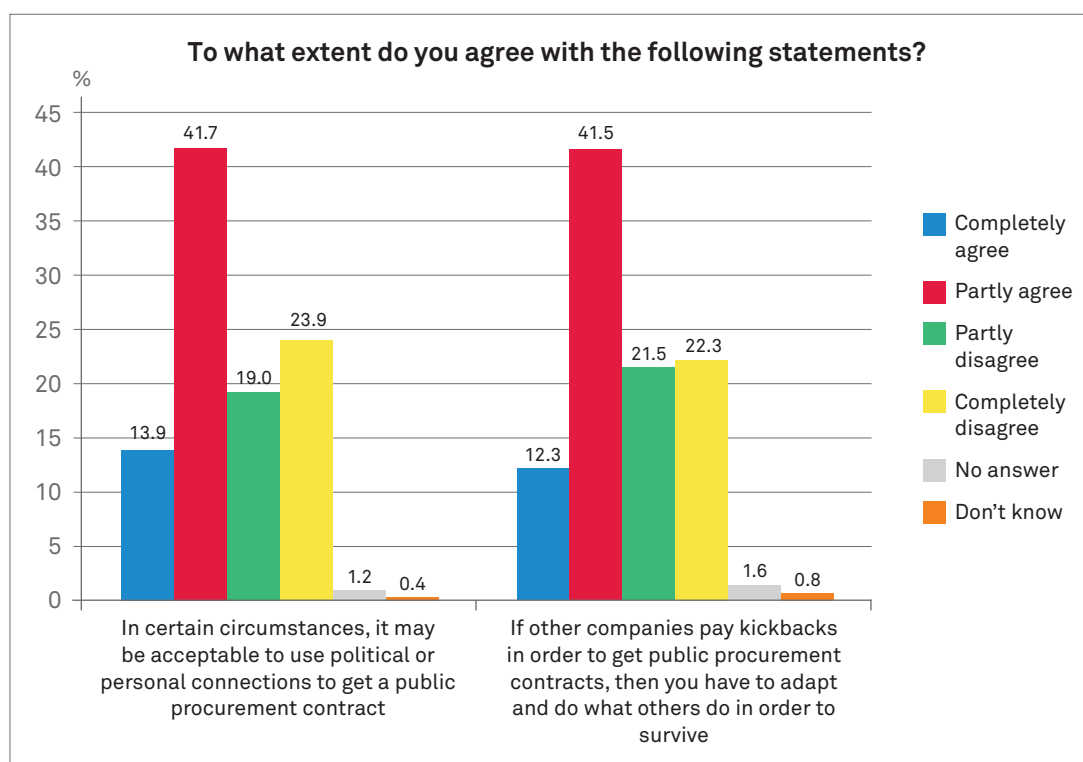


Graph 30. Reporting irresponsible public spending and corruption (2)
(N=276, FtF survey)



Apart from a lack of trust of the private sector in the public procurement system and the likelihood of sanctions for corruption, the survey results also indicate that there is a certain degree of tolerance for various forms of corrupt conduct in public procurement. Thus, 55.6 percent of respondents completely or partially agree with the statement that under certain circumstances it may be acceptable to use personal contacts to get a contract in public procurement procedures. Also, 53.8 percent of respondents believe that in order to survive in the market, companies must adapt and pay kickbacks for getting public procurement contracts if other companies do this (Graph 31).

Graph 31. Views of respondents on justification for corruption in public procurement (N=511, FtF survey)



These data indicate that money invested in the public sector through public procurement is a significant business opportunity for private companies, but one that is available only through creating political or personal connections that ultimately lead to deals or participation in corruption. The rules of the game face companies with the choice of either consenting to corruption or risking survival in the market. To a certain degree, corruption may become a universally accepted mode of action, as is shown by the widespread perception that, due to lack of trust in the fairness and justice of public procurement procedures, as well as lack of trust in the mechanisms to sanction unlawful conduct, private companies are mostly forced to accept corruption as a normal part of doing business or, ultimately, as a necessary evil.

5.

Conclusion

This report identifies some of the main obstacles to the participation of private companies in public procurement procedures in BiH. Based on the results of a survey conducted on a representative sample of respondents representing private companies, it can be concluded that a host of indicators must be taken into account when it comes to efforts to improve the public procurement system in BiH.

In certain segments, public procurement procedures are conducted without applying the principles of competitiveness and non-discrimination, which can result in privileging certain bidders in the market and raising prices paid by public bodies, or rather by tax-payers. According to the responses of private sector representatives, there is an evident problem in public procurement in BiH when it comes to defining qualification criteria, technical specifications and types of procedure, which, according to our respondents, are abused to limit fair competition among bidders and to privilege individual bidders. The survey results indicate that it is necessary to ensure a higher level of compliance of public procurement conditions with the basic principle of non-discrimination, as well as higher levels of control over preparation of tender documents, including the determination of qualification criteria and description of the object of public procurement, especially the technical terms.

Respondents to the survey also stated that significant derogation from the principles of competitiveness and equal treatment of bidders is also caused by high prices charged for tender documents and the requirement of extensive documentation to be submitted for participation in individual public procurement procedures. The survey results indicate that companies allocate considerable financial resources to participate in public procurement procedures. The results also suggest that the price of tender documentation exceeds the limit of appropriate compensation for the costs of reproducing and sending documentation and turns into a profit. In that sense, improving the public procurement system requires reducing costs to increase the efficiency of public procurement procedures.

According to research results, private companies are also impeded in accessing legal protection. This primarily pertains to excessive fees for filing complaints, which can be as high as 10,000 BAM. Apart from these high fees, representatives of the business sector have also shown a high degree of distrust of legal protection and public procurement review, which are mainly seen as expensive and unprofitable. The private sector partially distrusts that their complaints would be handled with impartiality. Therefore, bidders that are not selected should be

provided with accessible and effective review of public procurement procedures in keeping with the principles of equal and fair treatment.

Private companies, at least judging by the respondents, also have their role in violating the rules and principles of public procurement, especially those that secure free market competition. Some private businesses have indicated that there are practices of illegal collusion among bidders in public procurement in BiH, established to manipulate bids and limit active competition in public procurement. Survey data also indicate that implementation of contracts is a weak point in public procurement, primarily because of the still present practice of amending the terms of a contract after it is signed. Stronger control mechanisms are, therefore, also needed in this domain.

According to the respondents, corruption in the form of bribery and other types of abuse of public authority for personal gain is a significant obstacle to the equal participation of private companies in public procurement procedures. There is a widely held belief in the business community that political and personal connections are a deciding factor for being awarded public procurement contracts.

Trust in the public procurement system and the mechanisms for sanctioning irregularities is at a very low level. Only a small number of business representatives have reported corruption or irresponsible public spending, while the majority of the business community does not believe that efforts to fight corruption would be fruitful. A large number of respondents have expressed distrust in the fairness of the public procurement system, and it can be concluded that they may feel coerced to participate in corruptive practices in order to survive in the market. Consequently, respondents also show a certain degree of tolerance or acceptance of corruption as permissible behaviour, which may impede anti-corruption efforts.

This survey sought to provide an insight into the state of public procurement in BiH with a particular focus on the key problems and challenges faced by business entities as important stakeholders in the process. In that context, these research results should be taken into account when creating efficient policies and strategies to strengthen the public procurement system, including anti-corruption measures. At the same time, in order to determine effective measures to strengthen the public procurement system, more in-depth research of the problems indicated in this report is needed, including those concerned with ensuring transparency, non-discrimination of bidders and responsible public spending. Given the objective limitations of this piece of research, which mainly relies on the views and experiences of the private sector, it would also be important to address other issues not covered in this report, such as, for example, public procurement planning, exemptions from procedures, and institutional preconditions necessary to create a more functional and fair public procurement system.

6.

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About the Author

Nermina Voloder received an MA Degree in 2013 within the European Regional Programme “Democracy and Human Rights in Southeast Europe”, a joint degree programme of the University of Sarajevo and the University of Bologna. She graduated from the Faculty of Political Science in Sarajevo, Department of Journalism. From 2007 to 2012, she worked as a journalist for a number of print and online media in Bosnia and Herzegovina. Since 2014, she has been employed at the Analitika - Center for Social Research as a project coordinator and junior researcher. Her research interests include issues of transparency, accountability and good governance in public institutions.

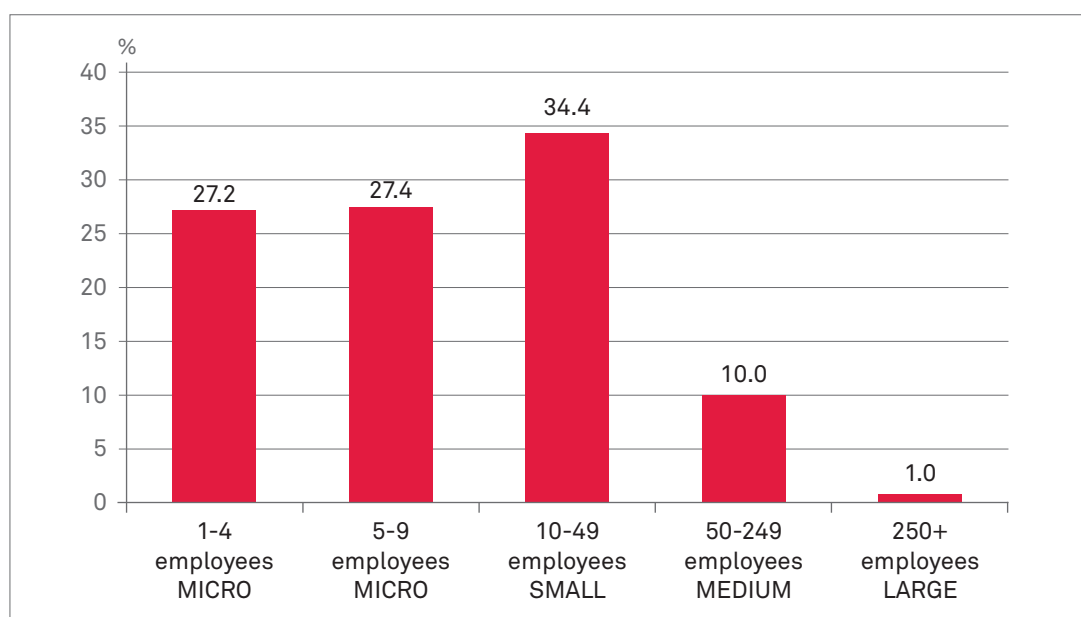
Annex 1.

Results of the Telephone Survey (CATI)¹³⁰

Table 1. Number of companies by geographic location (N=2500)

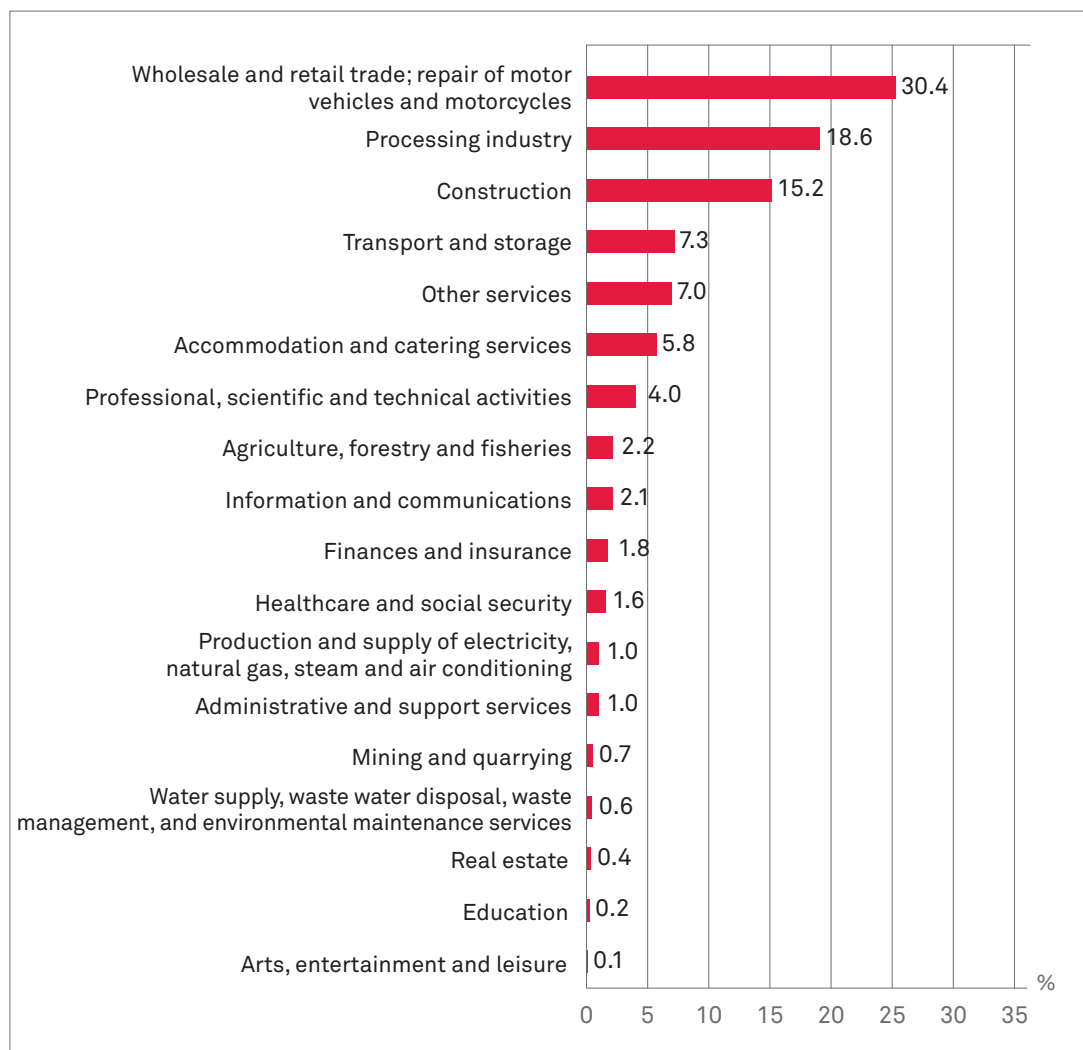
Entity	Number	Percentage
Federation of BiH	1773	70.9
Republika Srpska	709	28.4
Brčko District	18	0.7
Total	2500	100.0

Graph 1. Size of company based on number of employees (N=2500)

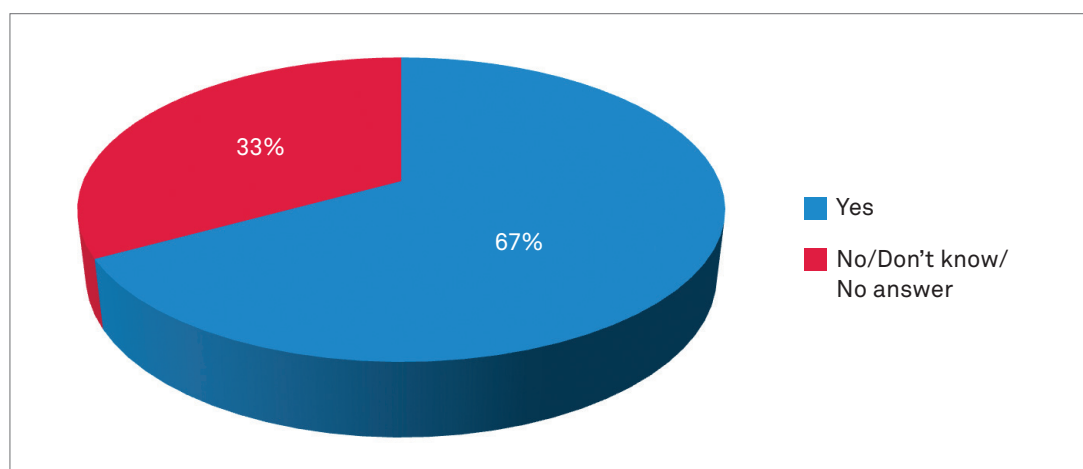


¹³⁰ This Annex does not contain the graphs included in the main text of the Report.

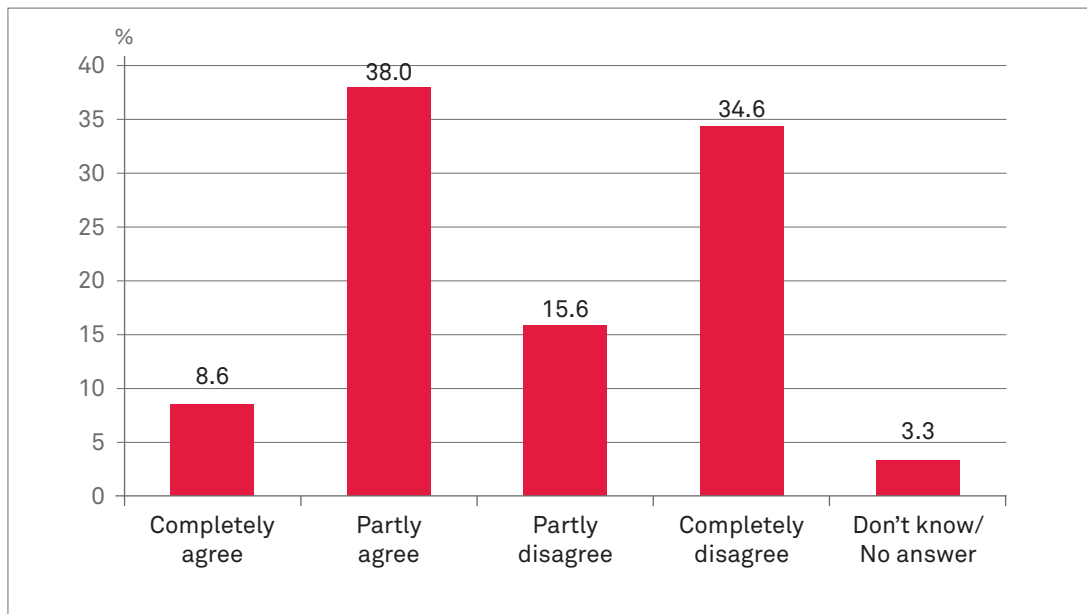
Graph 2. Main/major registered activity of company (N=2500)



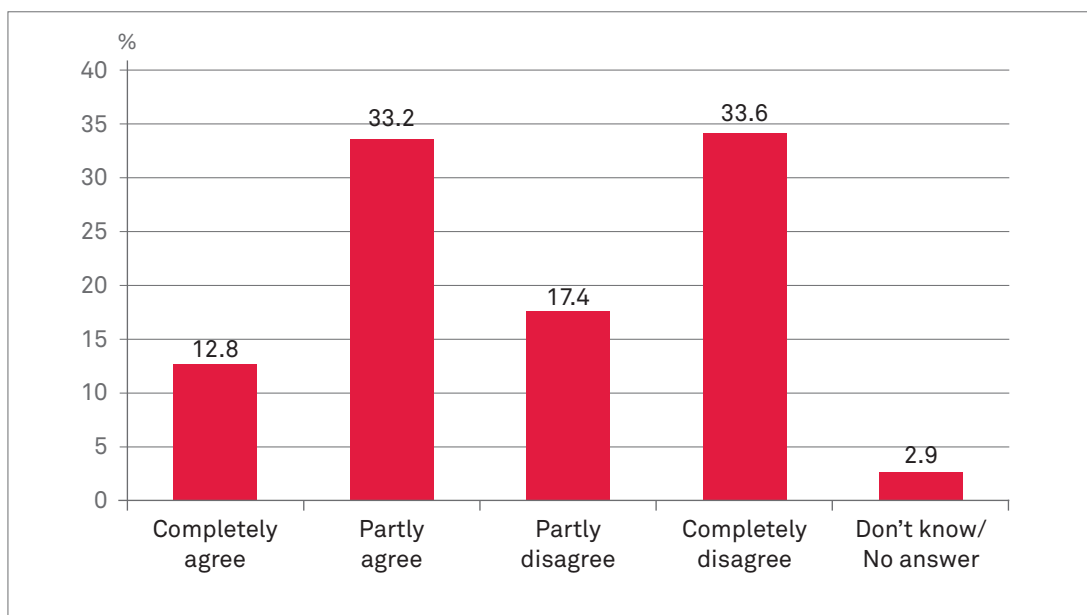
Graph 3. Participation in public procurement procedures of any type (N=2500)



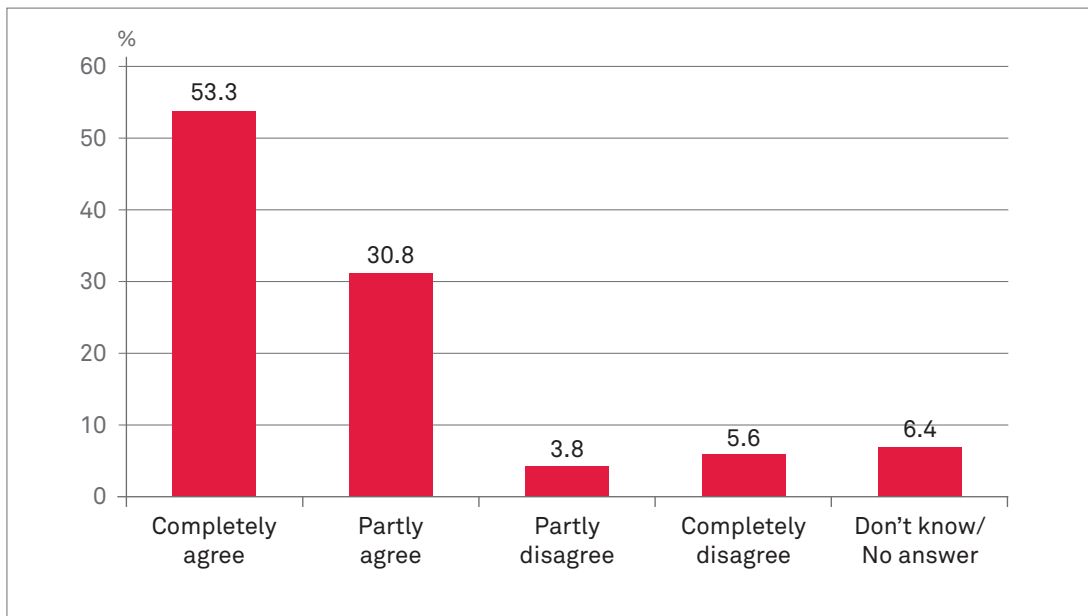
Graph 4. Agreement with the statement: “Decisions on awarding public procurement contracts are made in a transparent fashion.” (N=2500)



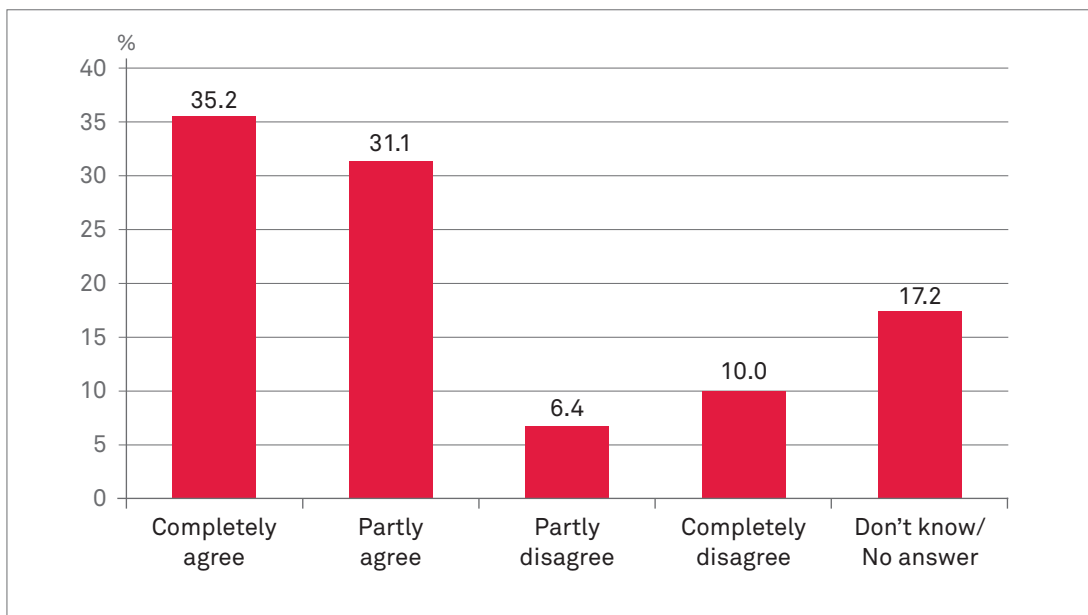
Graph 5. Agreement with the statement: “Public procurement contracts are awarded to bidders with the most competitive bid.” (N=2500)



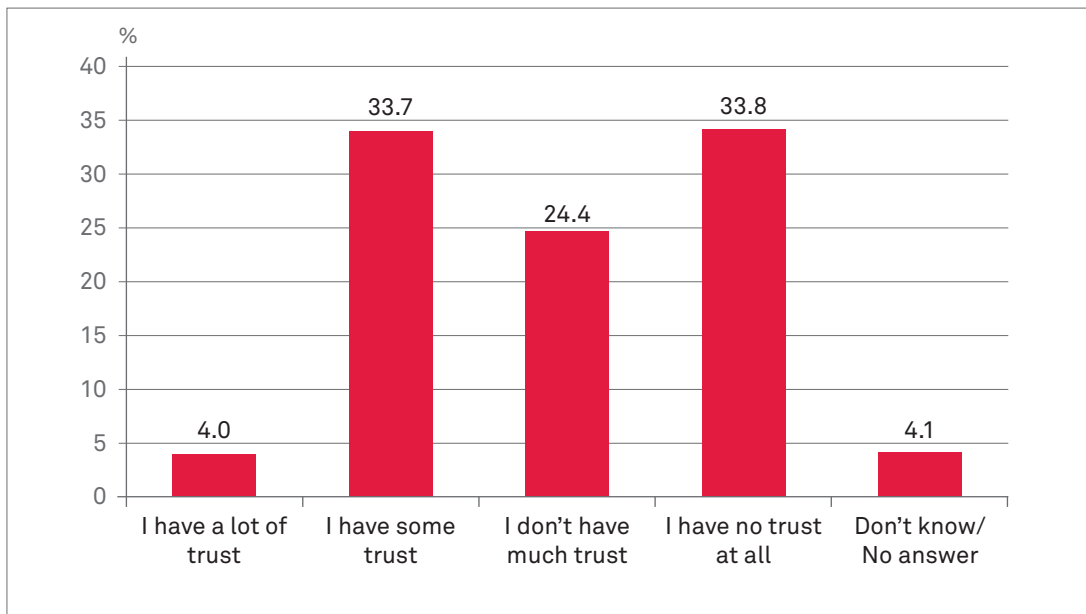
Graph 6. Agreement with the statement: “Public procurement contracts are often acquired through private or political connections.” (N=2500)



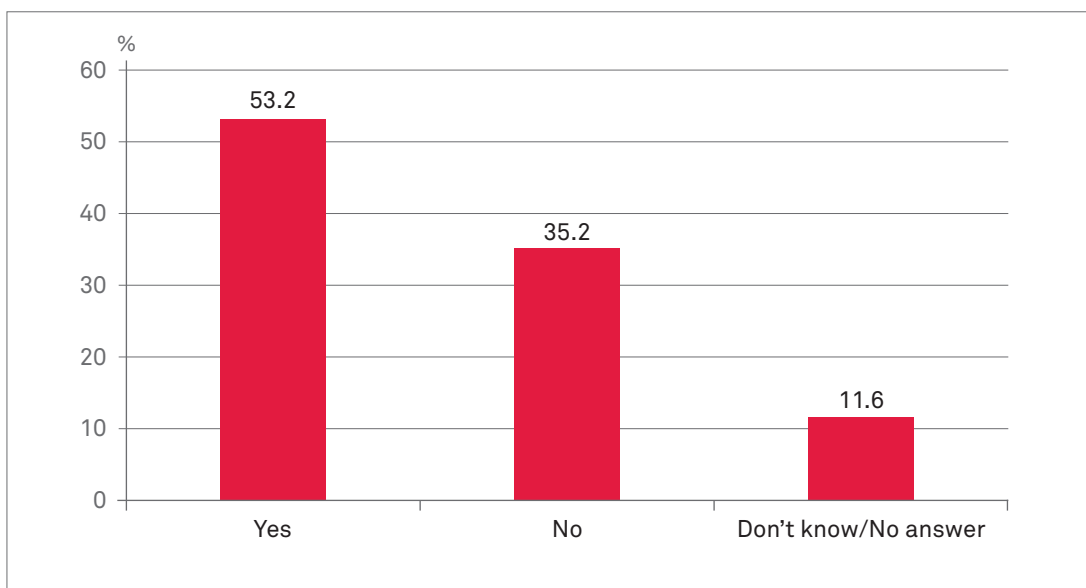
Graph 7. Agreement with the statement: “Public procurement contracts are often difficult to secure without bribing the decision makers.” (N=2500)



Graph 8. Responses to the question: “In general, how much trust do you have in the public procurement system in our country?” (N=2500)



Graph 9. Responses to the question: “Do you believe corruption prevented your company from being awarded a public procurement contract?” (N=1677)



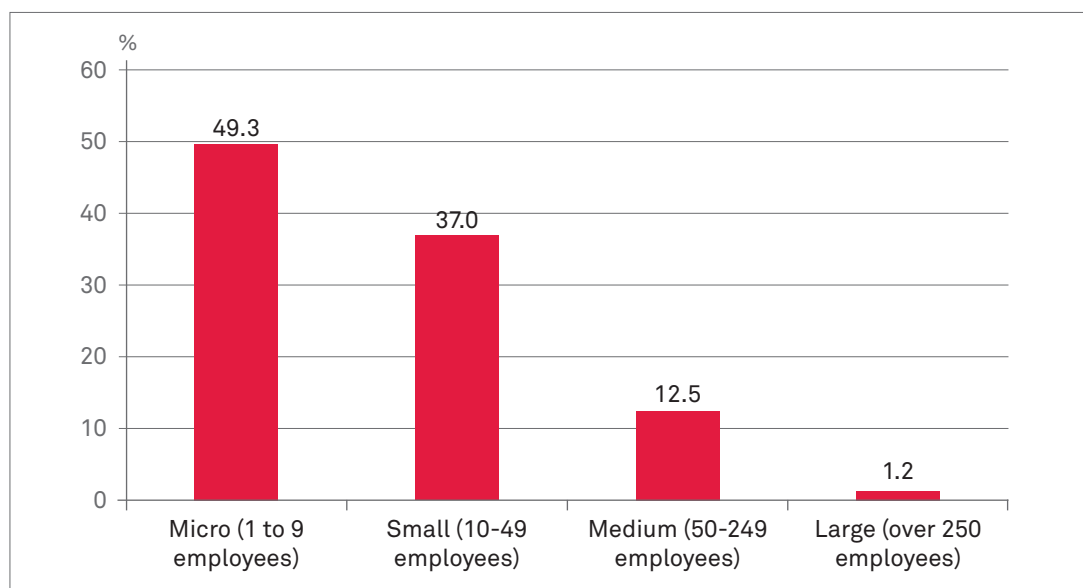
Annex 2.

Results of the Face-to-Face Survey (FtF)¹³¹

Table 1. Number of companies by geographic location (N=511)

Entity	Number	Percentage
FBiH	378	74.0
RS	130	25.4
Brčko District	3	0.6
Total	511	100.0

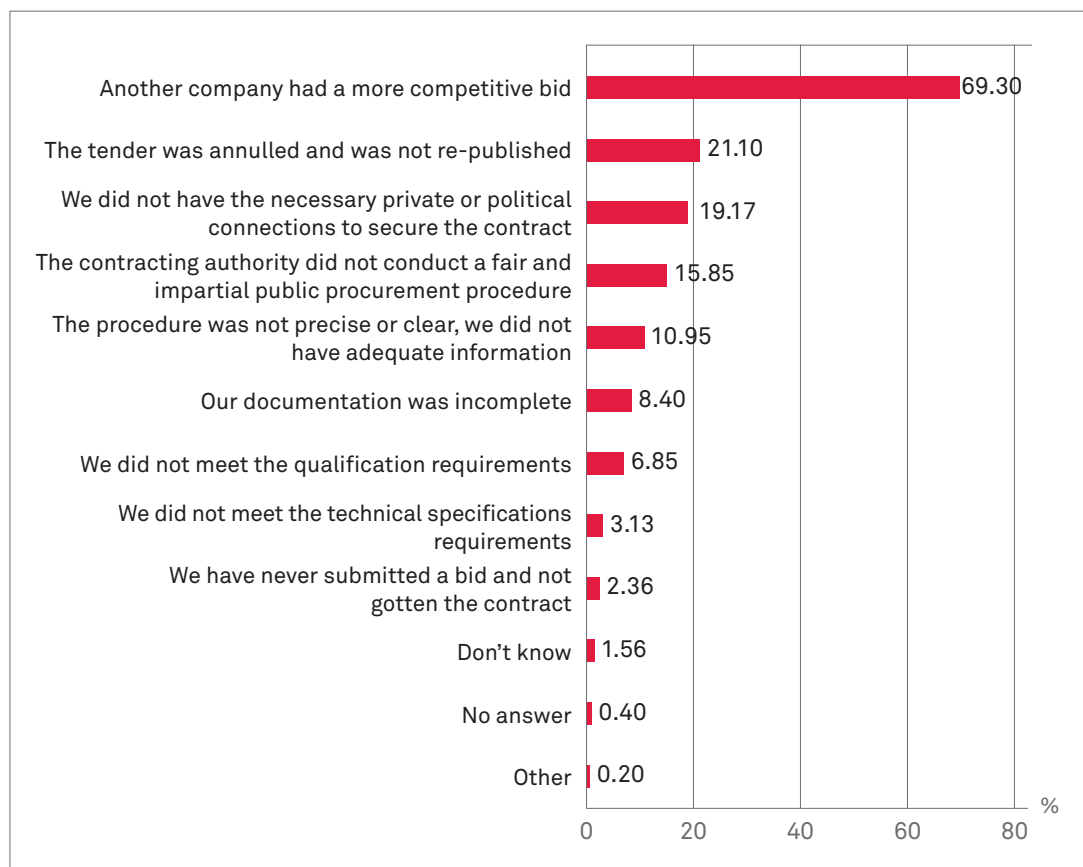
Graph 1. Size of company based on number of employees (N=511)



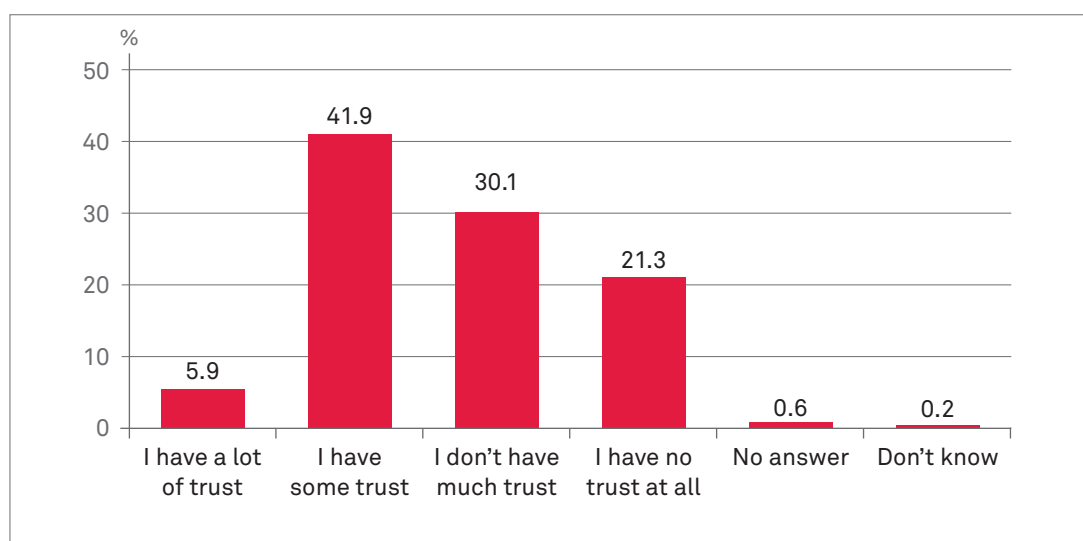
¹³¹ This Annex does not contain the graphs included in the main text of the Report.

Graph 2. Main/major registered activity of company (N=511)

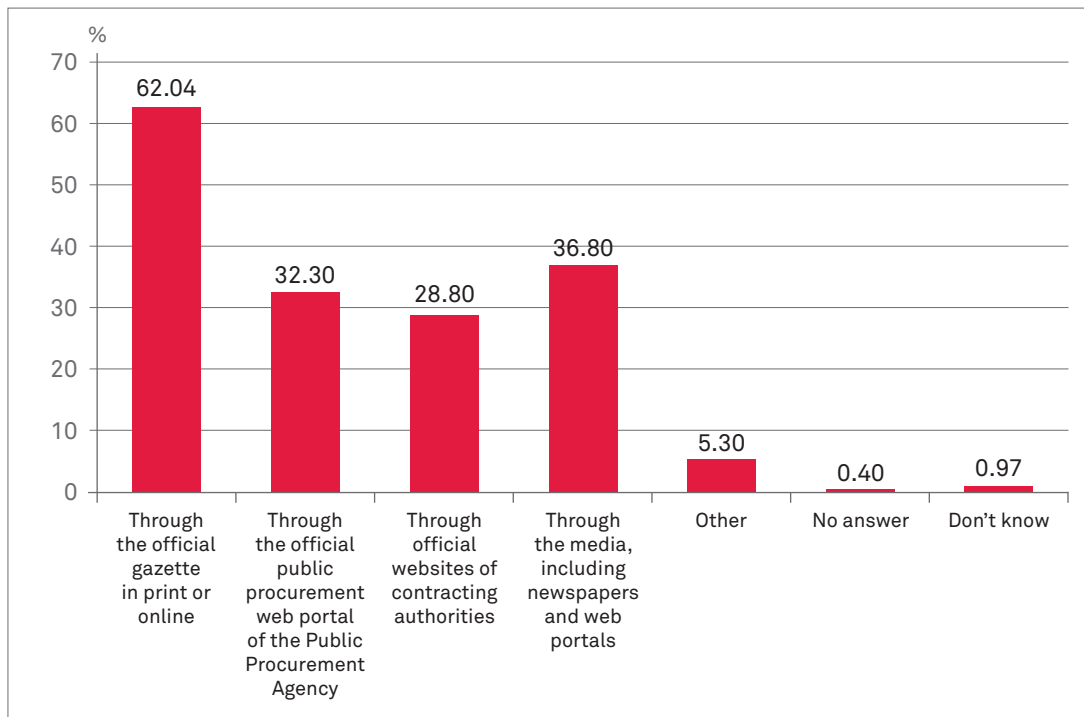
Graph 3. Responses to the question: “If your company submitted a tender, but was not awarded the public procurement contract, what do you think are the most common reasons why you did not get the contract?” (Possibility to select multiple answers, N=511)



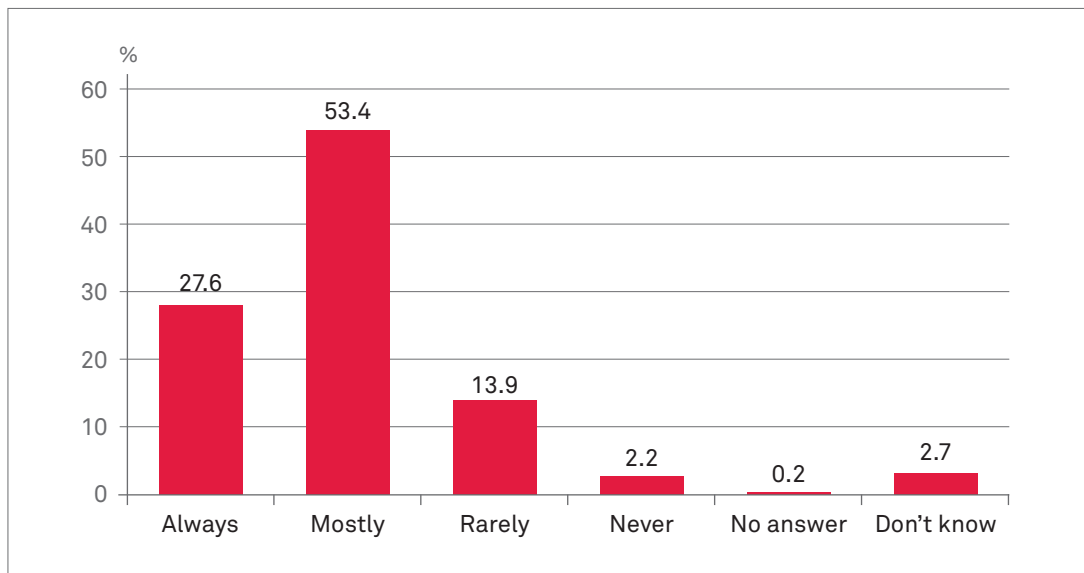
Graph 4. Responses to the question: “In general, how much trust do you have in the public procurement system in our country?” (N=511)



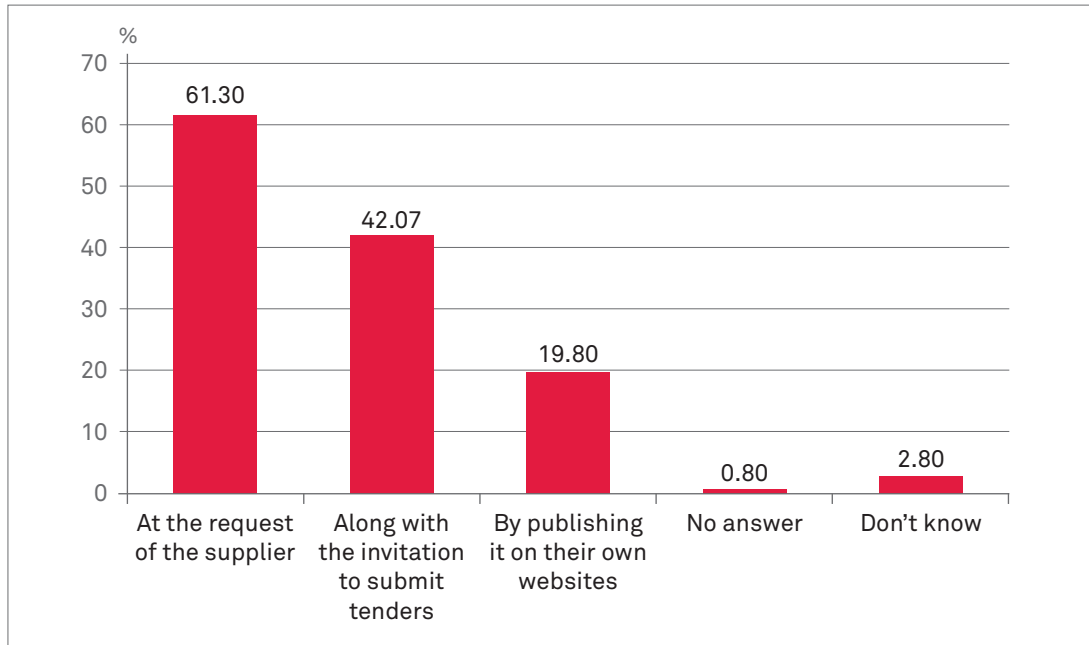
Graph 5. Responses to the question: “How do you keep informed about public procurement notices?” (Possibility to select multiple answers, N=511)



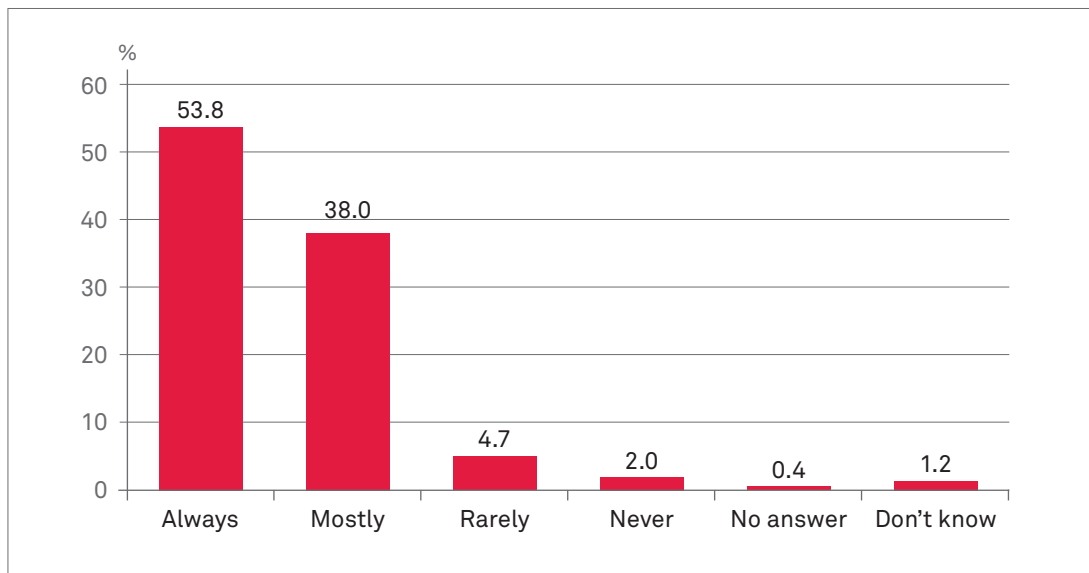
Graph 6. Responses to the question: “In your experience, do contracting authorities really give companies 28 days to submit tenders?” (N=511)



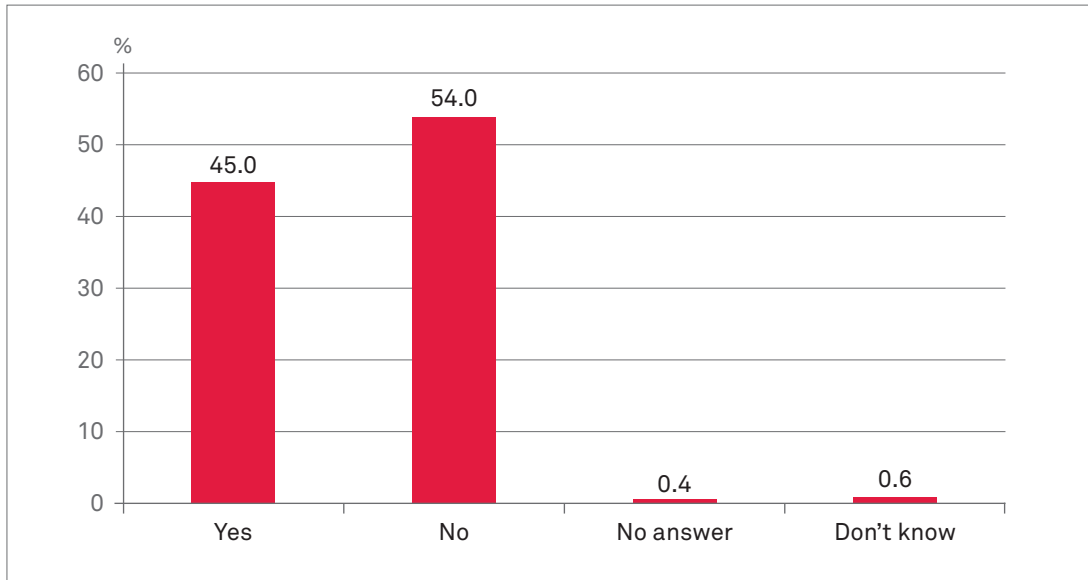
Graph 7. Responses to the question: “In which of the following ways do contracting authorities make tender documentation available to suppliers in public procurement procedures?” (Possibility to select multiple answers, N=511)



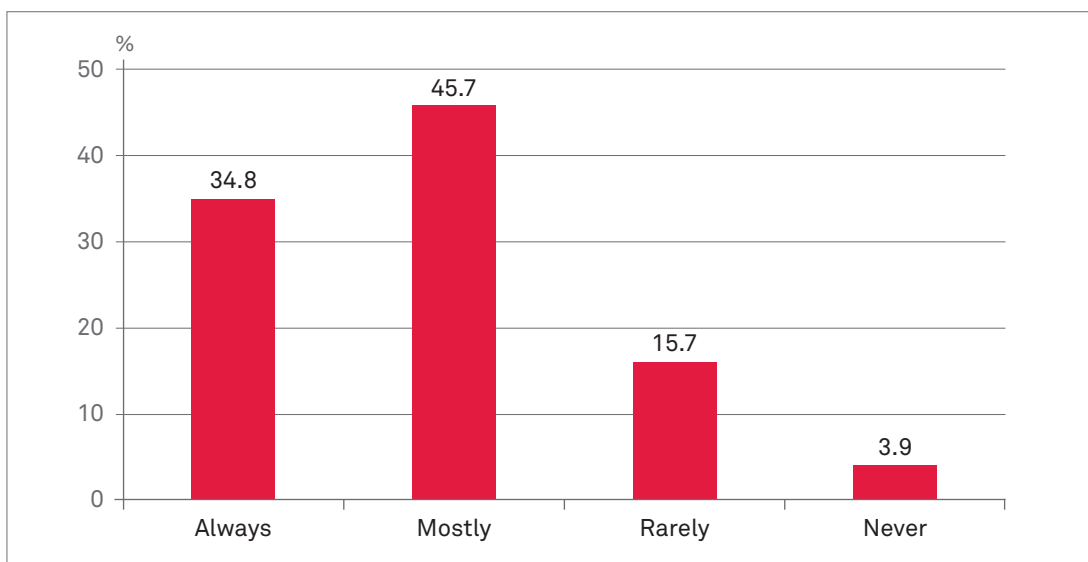
Graph 8. Responses to the question: “If your company requested tender documentation and paid any applicable fees, was the delivery of the tender documentation timely?” (N=511)



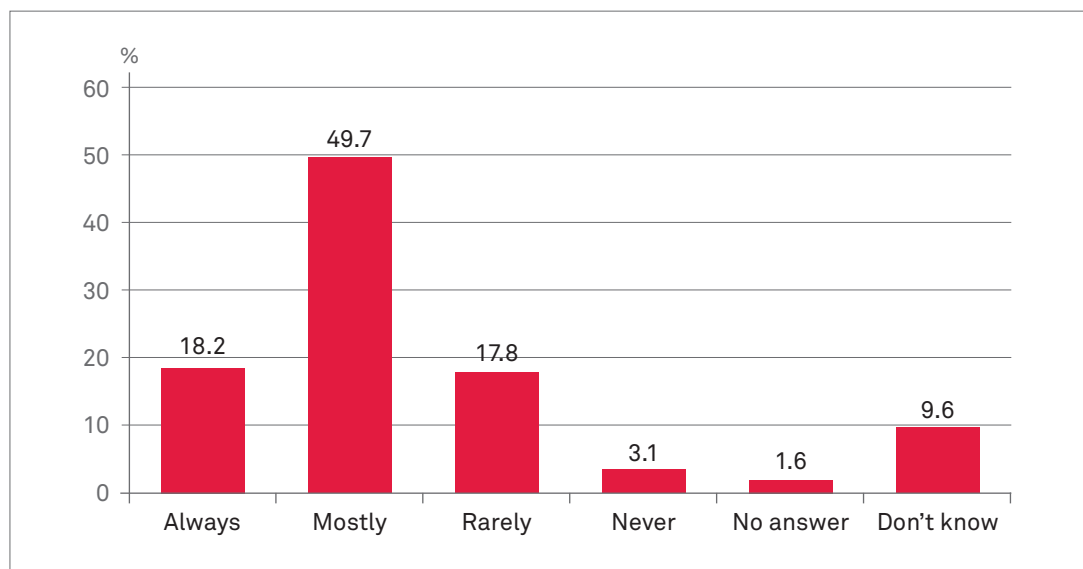
Graph 9. Responses to the question: “Have you ever requested clarification of provisions from tender documentation from the relevant contracting authority?” (N=511)



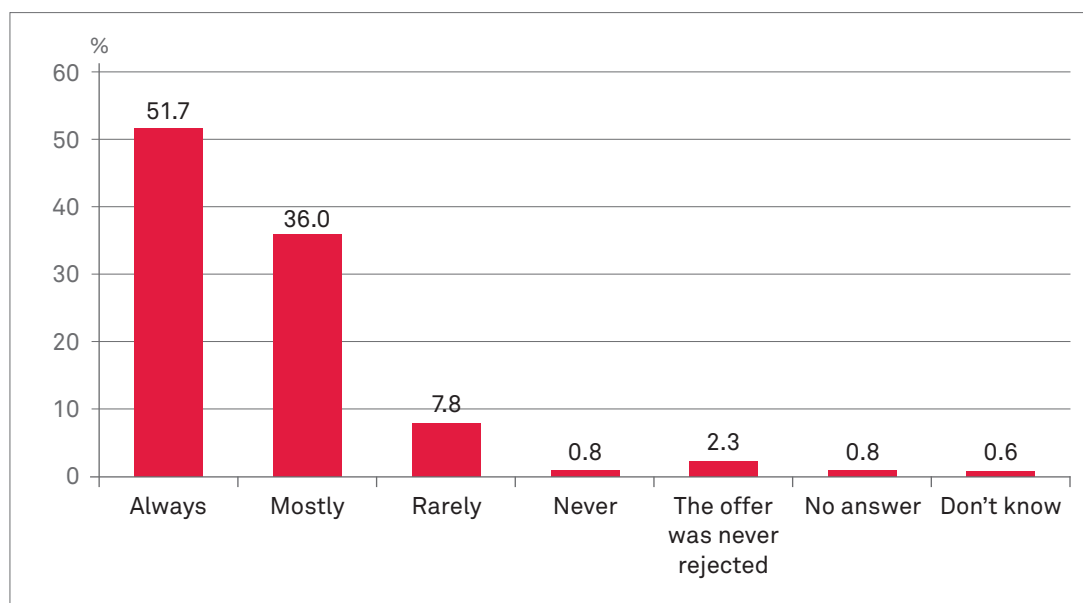
Graph 10. Responses to the question: “If you requested clarification, did the contracting authority provide clear and precise information in response to your query?” (N=230)



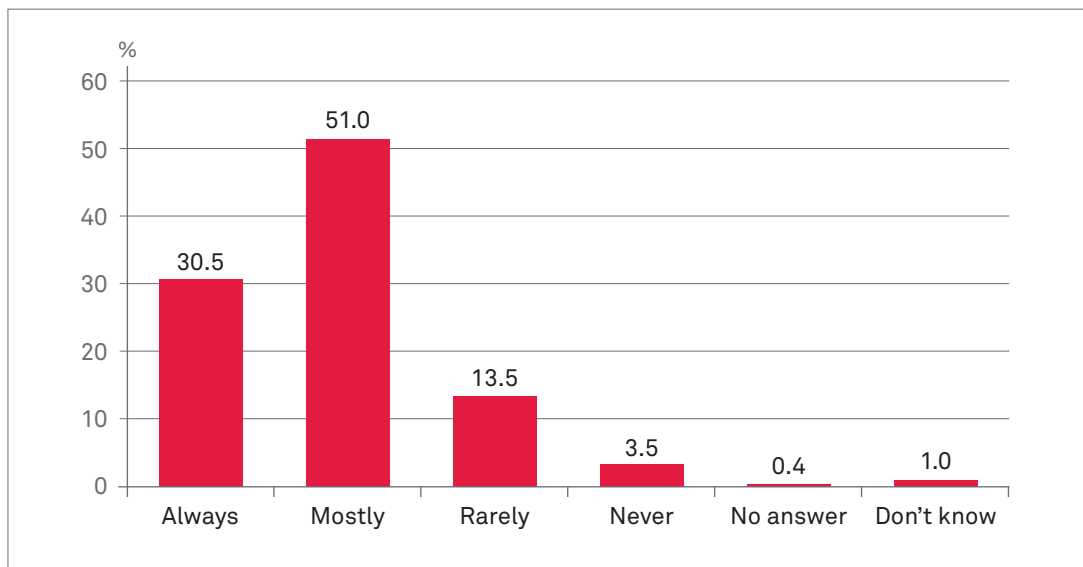
Graph 11. Responses to the question: “Do you believe that in the public procurement procedures where your company participated, the contracting authority conformed to the principles of confidentiality and did not unlawfully disclose information from your tender to third parties?” (N=511)



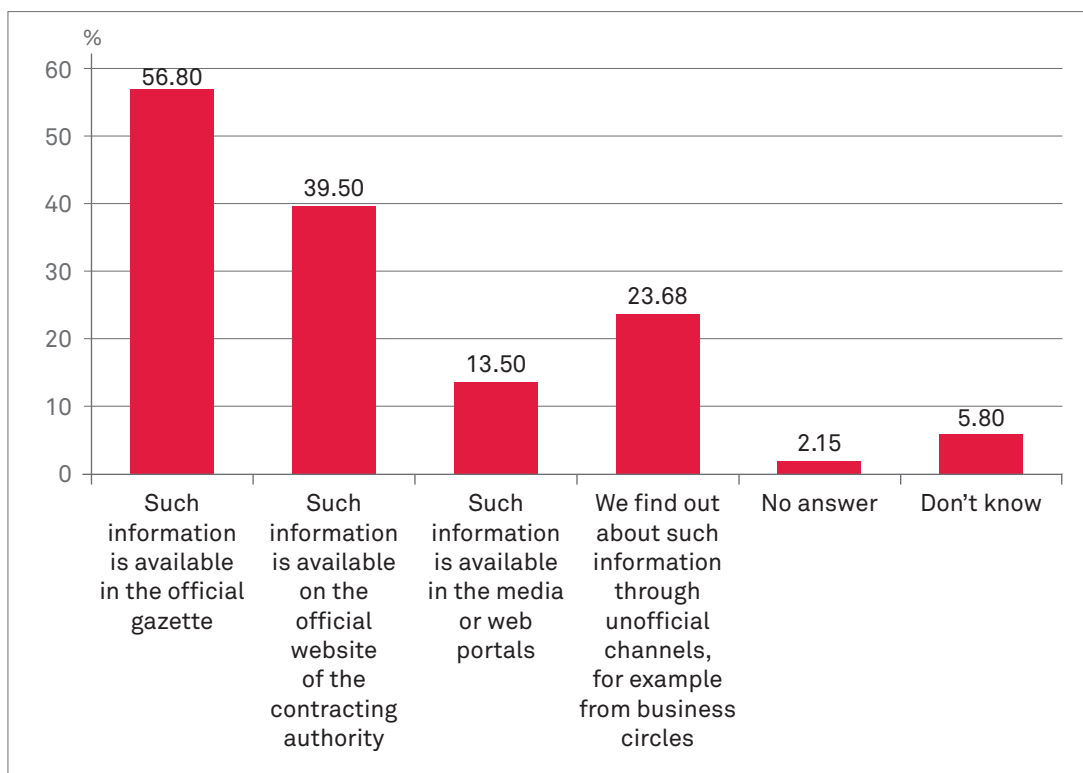
Graph 12. Responses to the question: “If your company’s tender was rejected, were you notified of this?” (N=511)



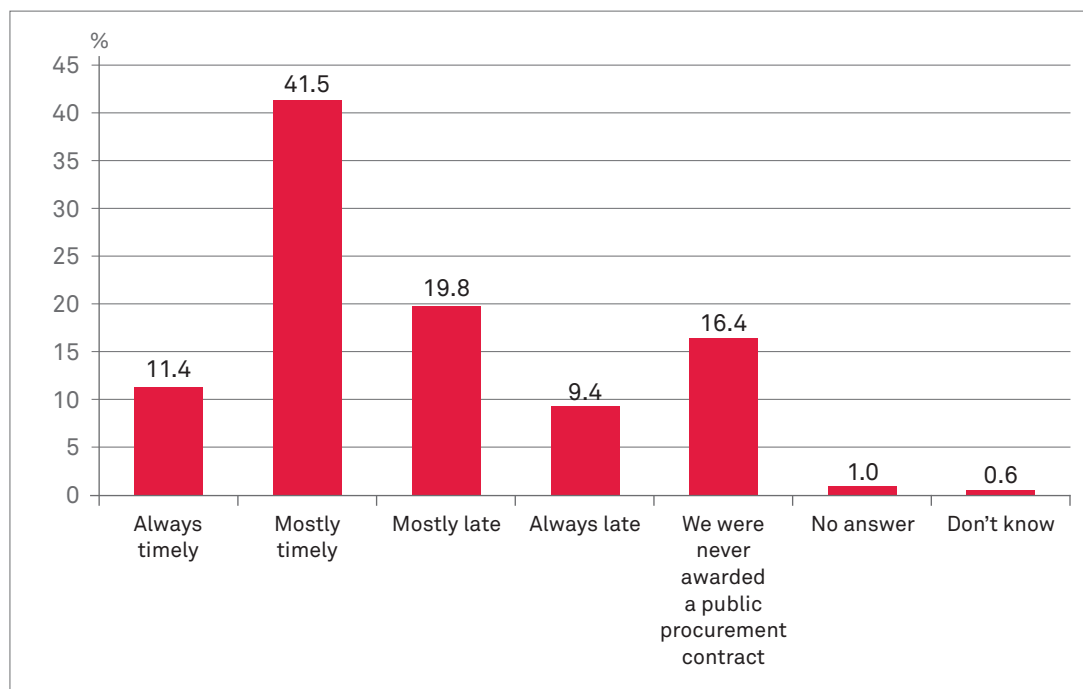
Graph 13. Responses to the question: “If you received notice that your company’s tender was rejected, did it contain the reasons why the contract was awarded to another supplier, including an assessment in line with the contract awarding criteria from the tender documentation?” (N=488)



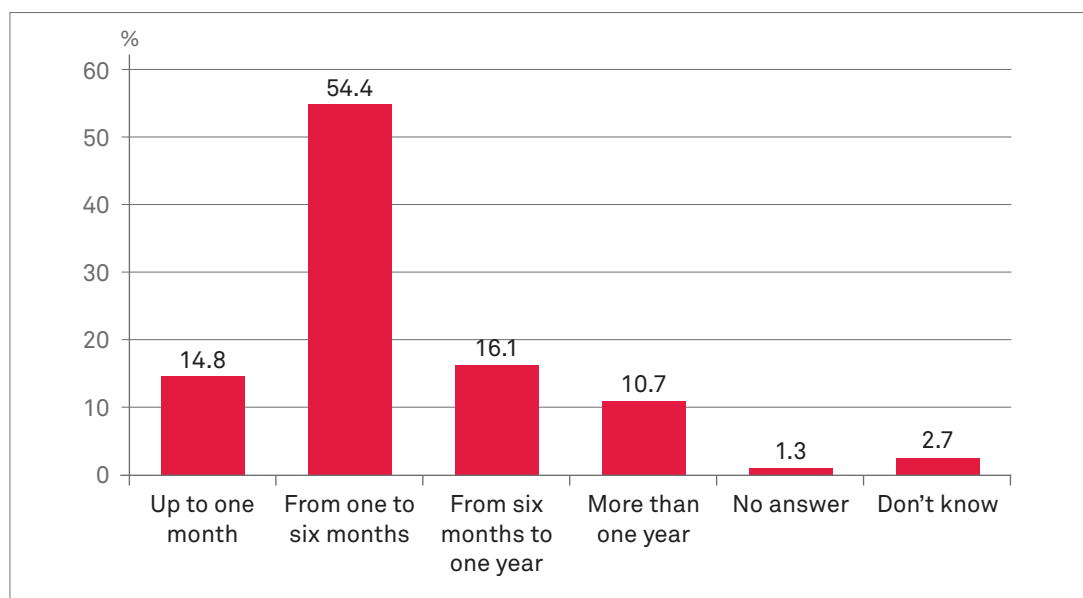
Graph 14. Responses to the question: “In which of the following ways is information on who was awarded the public procurement contract made available?” (Possibility to select multiple answers, N=511)



Graph 15. Responses to the question: "If you were ever awarded a public procurement contract, were the payments made by contracting authorities timely?" (N=511)



Graph 16. Responses to the question: If you responded that payments were mostly or always late, how late were they on average? (N=149)



Graph 17. Responses to the question: “If you requested to see the tenders after the contracting authority had made its decision on the public procurement, were you given access to the tenders?” (N=511)

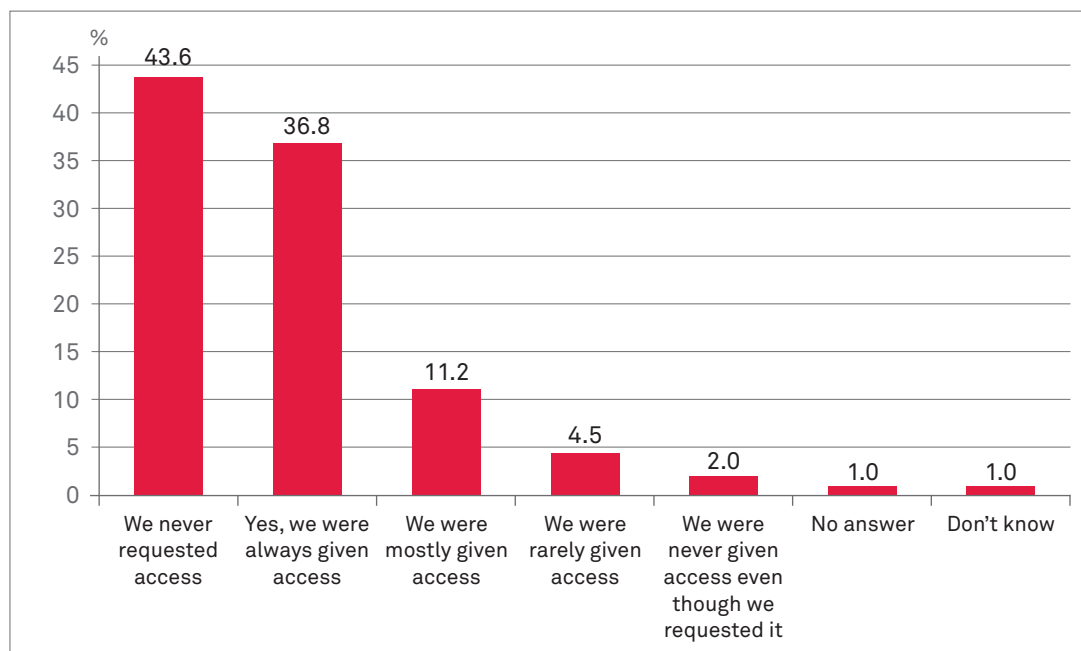
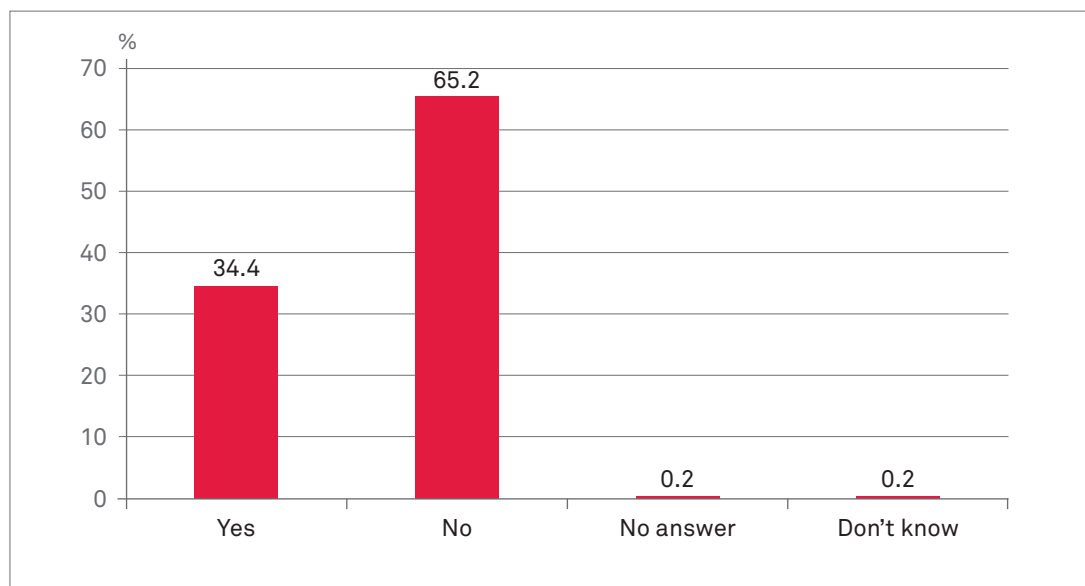


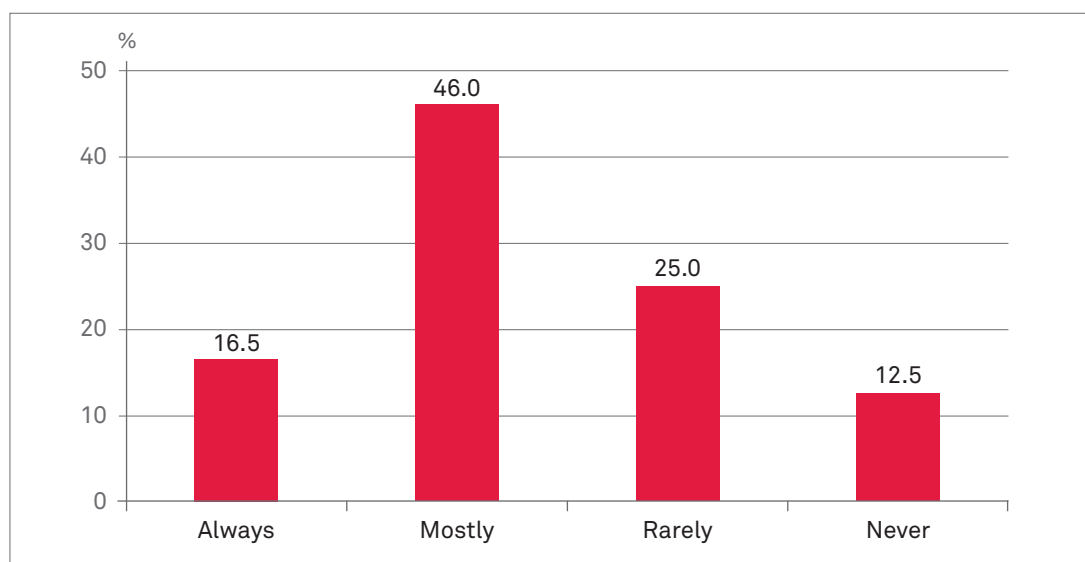
Table 2. Responses to the question: “If you were not given access, what were the reasons?” (N=90)

If you were not given access, what were the reasons?						
	Always	Mostly	Rarely	Never	N/A	Don't Know
The contracting authority did not respond to our request.	6.7	32.2	37.8	12.2	2.2	8.9
The contracting authority rejected our request for access in the interest of confidentiality.	11.1	21.1	34.4	22.2	1.1	10
The contracting authority rejected our request for access in the interest of protection of personal data.	8.9	17.8	35.6	23.3	2.2	12.2
The contracting authority used administrative and other excuses to avoid giving us access, but never formally rejected our request.	11.1	34.4	27.8	15.6	2.2	8.9
The contracting authority rejected our request on some other grounds.	7.8	33.3	28.9	17.8	3.3	8.9

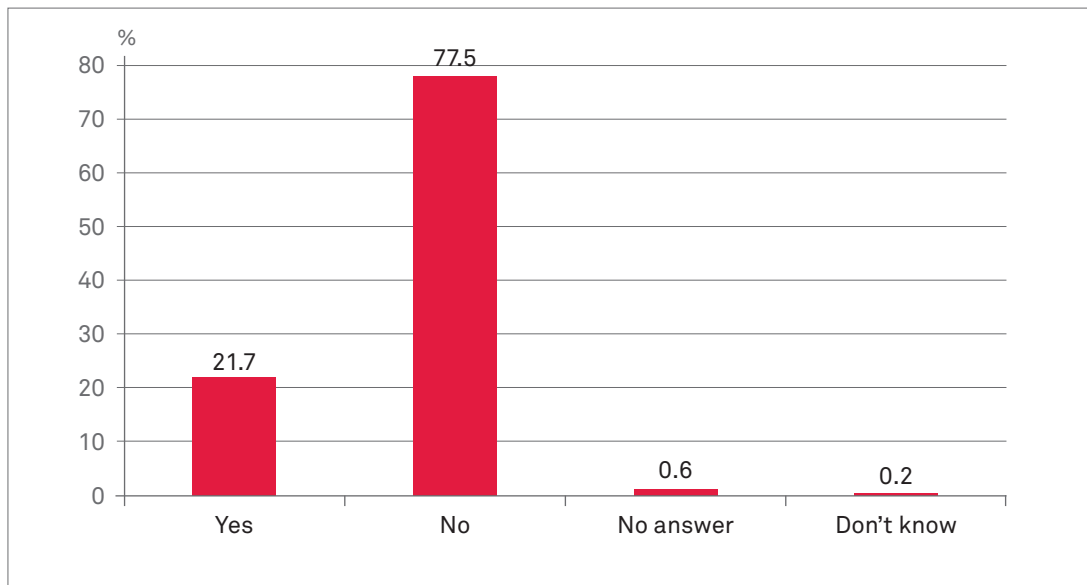
Graph 18. Responses to the question: “Have you ever filed a complaint with the contracting authority against a public procurement decision within a procedure where your company participated?” (N=511)



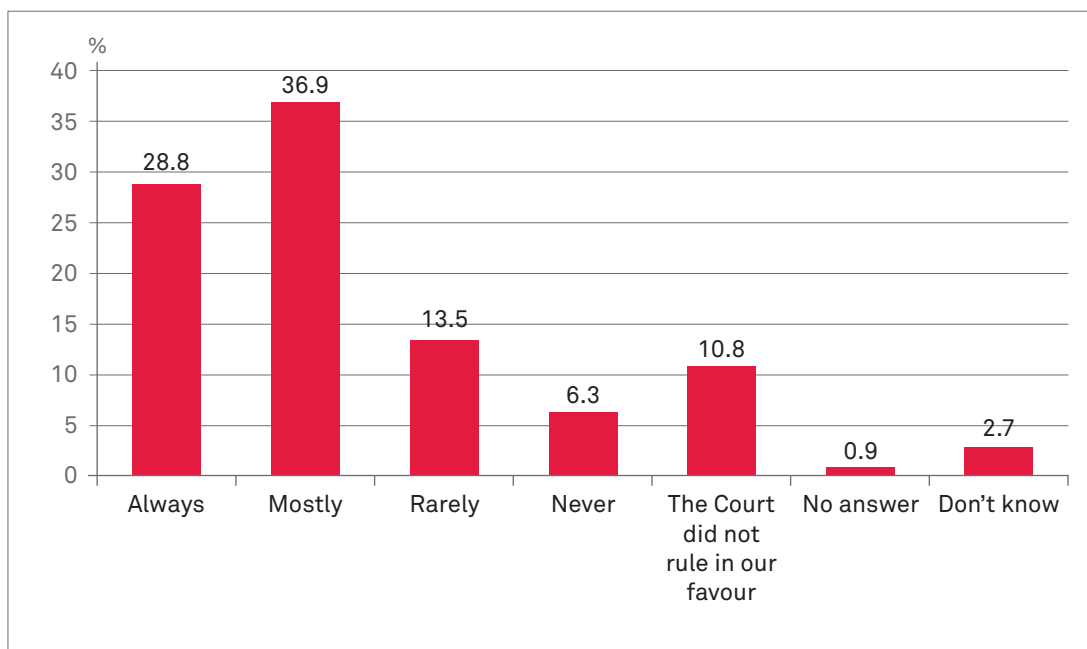
Graph 19. Responses to the question: “If you filed a complaint with the contracting authority about a public procurement decision within a procedure where your company participated, do you believe the contracting authority acted on your complaint in line with stipulated rules and procedures?” (N=176)



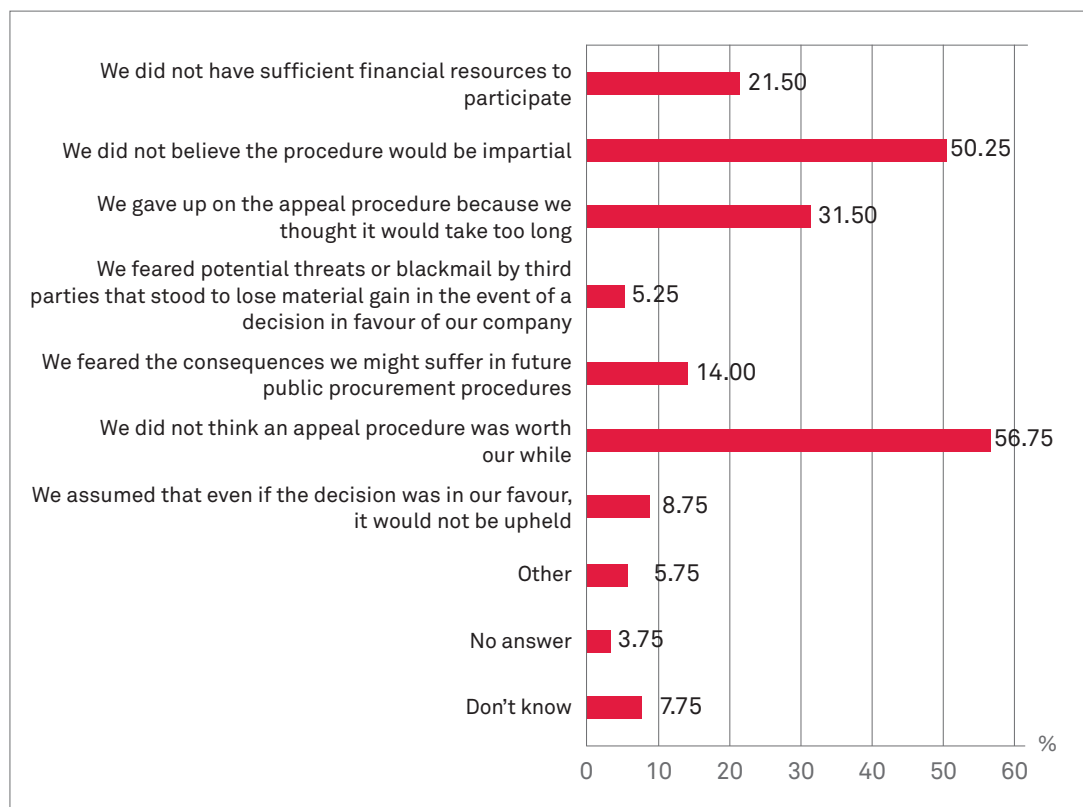
Graph 20. Responses to the question: “Have you ever submitted written complaints to the Procurement Review Body?” (N=511)



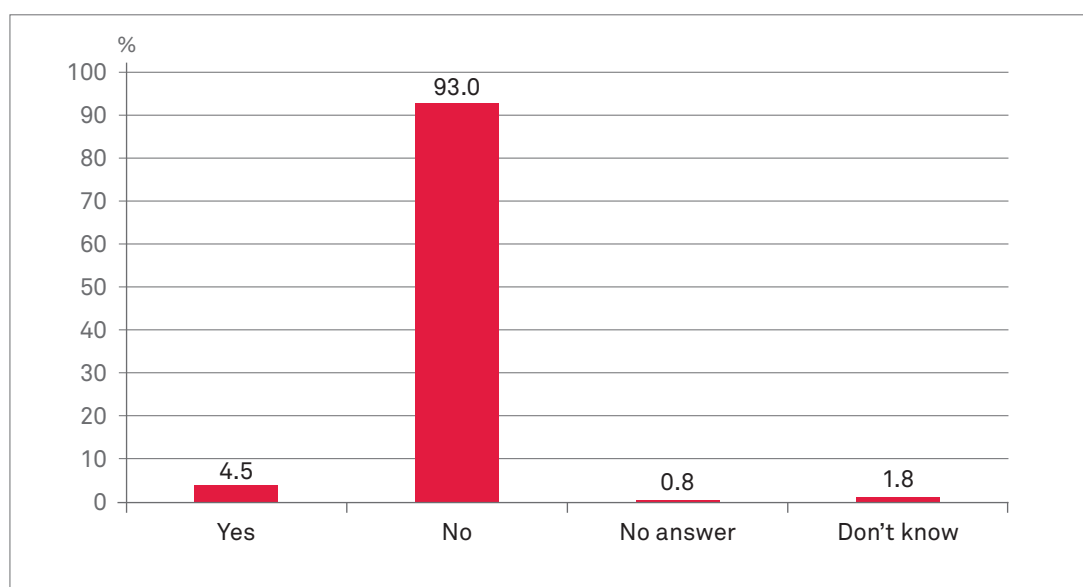
Graph 21. Responses to the question: “If the Procurement Review Body passed a final administrative decision on your complaint in favour of your company, did the contracting authority abide by that decision?” (N=111)



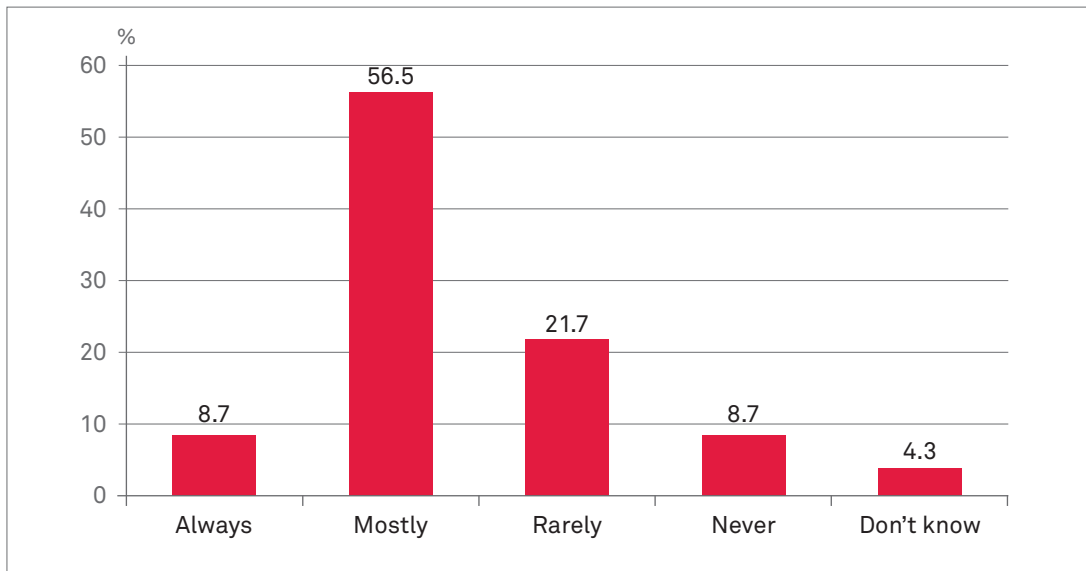
Graph 22. Responses to the question: “If your company ever had grounds to initiate appeal proceedings, but did not do so, why did it not do so?” (Possibility to select multiple answers, N=400)



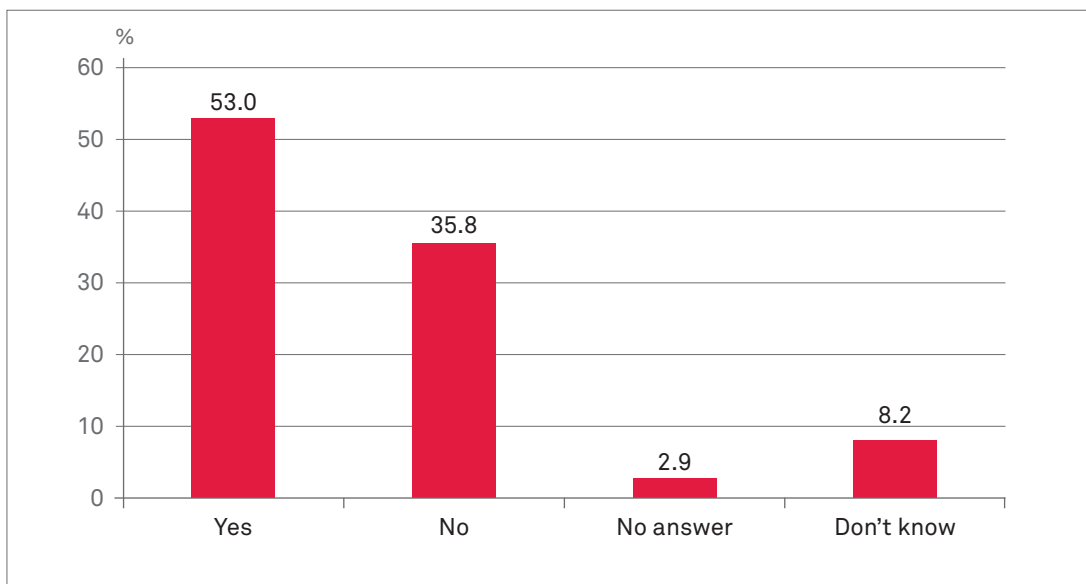
Graph 23. Responses to the question: “Have you ever initiated administrative proceedings at the Court of BiH against a decision of the Procurement Review Body?” (N=511)



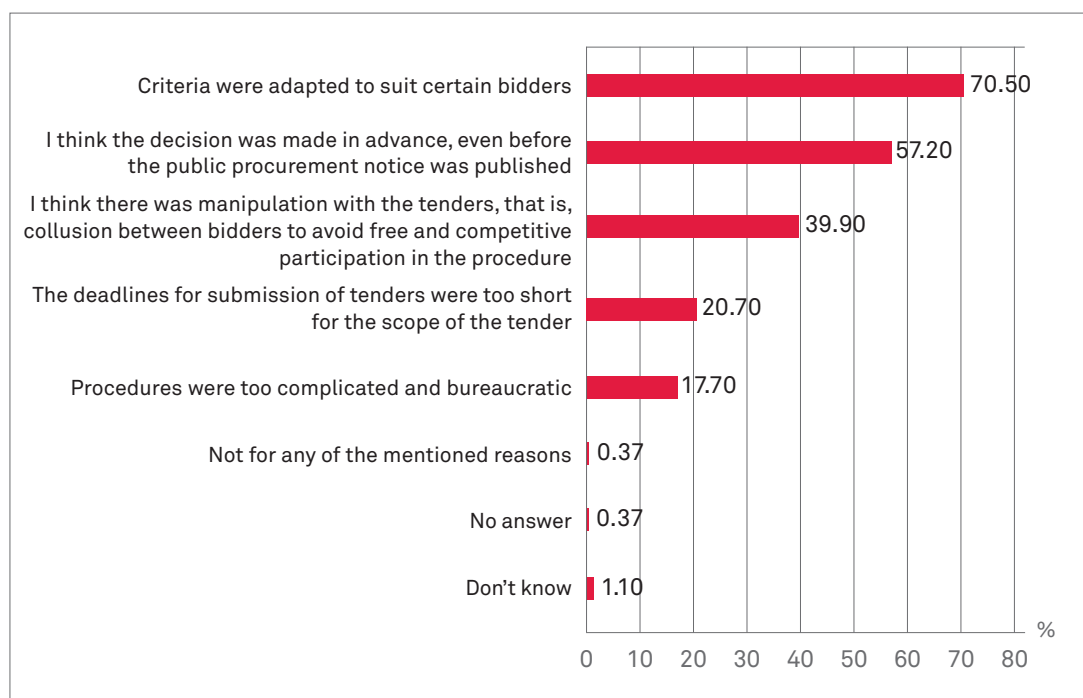
Graph 24. Responses to the question: “If you initiated administrative proceedings at the Court of BiH against a decision of the Procurement Review Body, was the Court’s decision in the lawsuit timely?” (N=23)



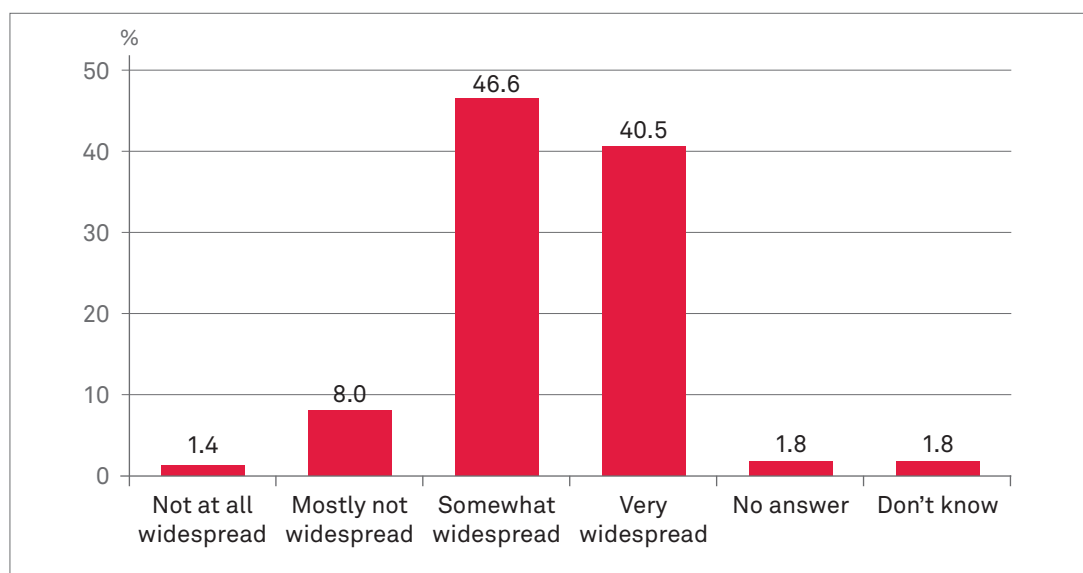
Graph 25. Responses to the question: “Do you believe corruption prevented your company from being awarded a public procurement contract in the past three years?” (N=511)



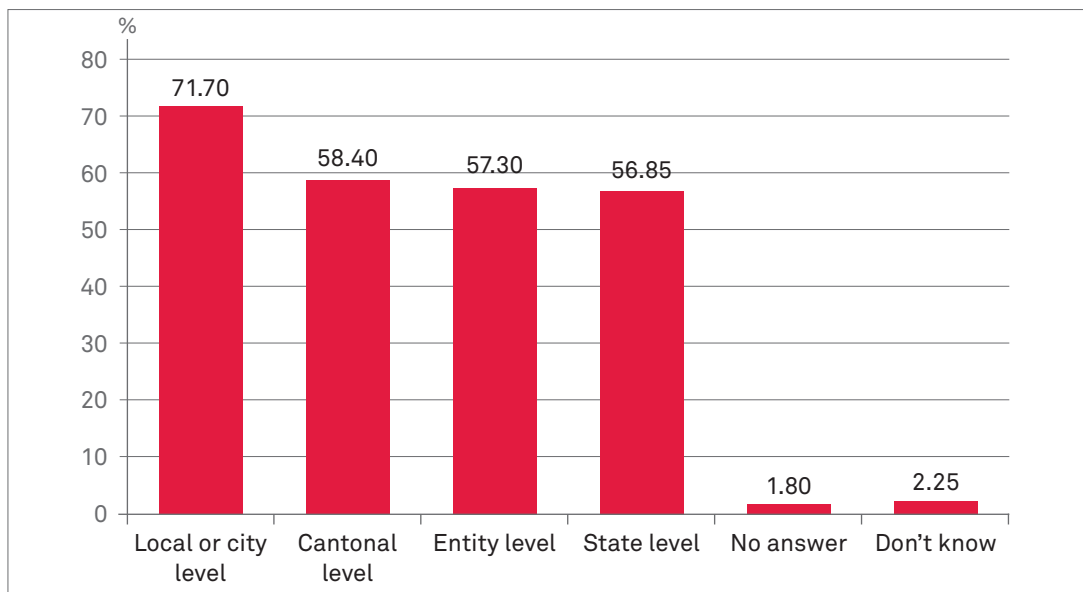
Graph 26. Responses to the question: “Do you believe this was for any of the following reasons?” (Possibility to select multiple answers, N=271)



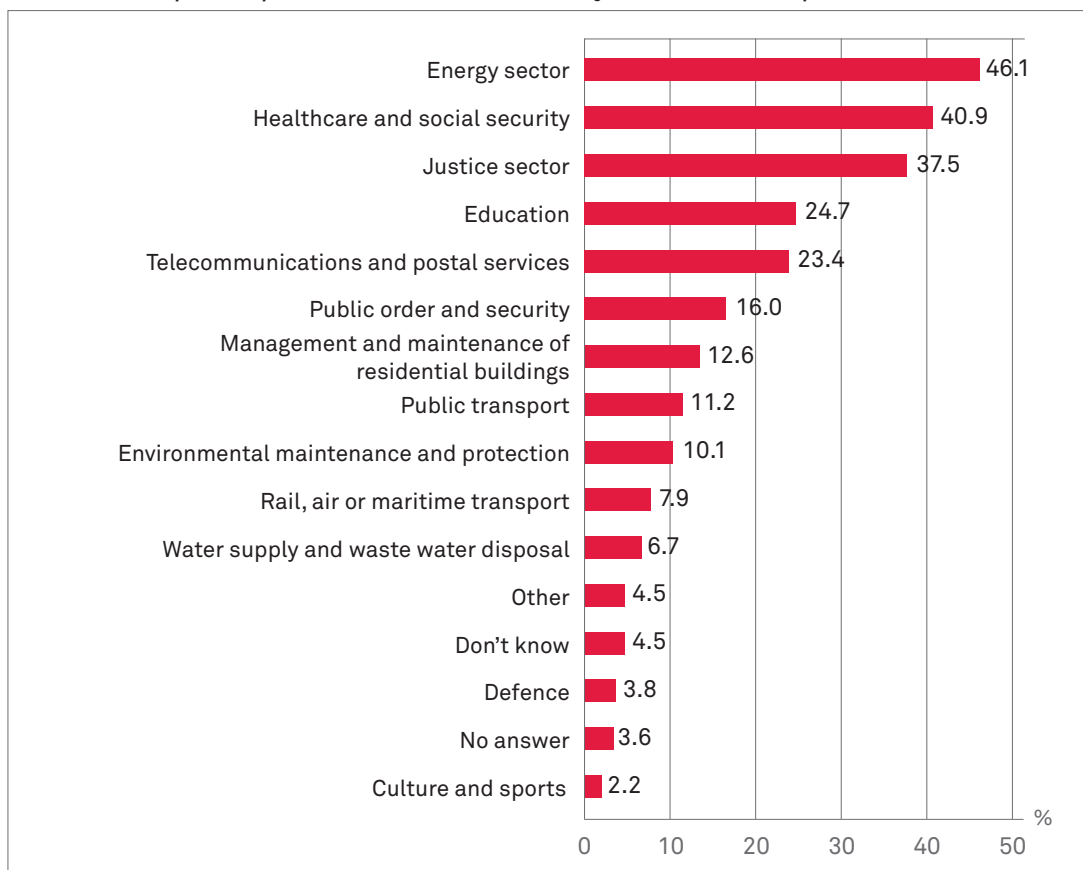
Graph 27. Responses to the question: “How widespread do you believe corruption to be in public procurement procedures?” (N=511)



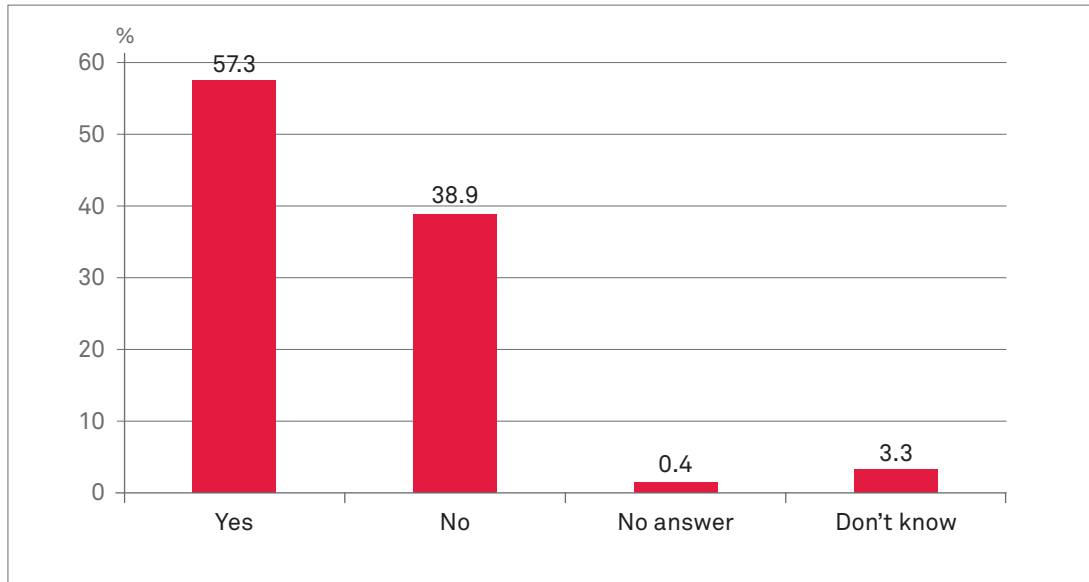
Graph 28. Responses to the question: “If you believe corruption is somewhat or very widespread, at which administrative level do you believe it to be most widespread in terms of public procurement?” (Possibility to select multiple answers, N=445)



Graph 29. Responses to the question: “If you believe corruption is somewhat or very widespread, in which THREE public sectors do you believe it to be most widespread in terms of public procurement?” (Possibility to select multiple answers, N=445)



Graph 30. Responses to the question: “Do you know who to contact and how you can report irresponsible public spending and corruption in public procurement procedures?” (N=511)





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