

## TRANSPARENT PUBLIC PROCUREMENT IN BOSNIA AND HERZEGOVINA: NEW SOLUTIONS FOR AN OLD PROBLEM<sup>1</sup>

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Although the adoption of the Law on Public Procurement for Bosnia and Herzegovina in 2014 introduced a series of new provisions aimed at improving transparency in the public procurement process, there are still significant limitations in this domain that can have significant negative implications in practice. Among other things, the legal framework has not ensured adequate availability of information on planned public procurement, given that public procurement plans are not published on the public procurement portal. The published procurement plans do not include procedures for lower value contracts, and decisions on these contracts are not published. There is a manifest lack of provisions that would contribute to publishing the contracts signed between the public sector and the suppliers. In addition, there are no guidelines developed for the application of tender evaluation criteria, especially criteria for the economically most favourable tender. It is, therefore, crucial to improve legal regulations to remove the identified shortcomings and ensure a significantly higher level of transparency in public procurement in Bosnia and Herzegovina.

### SUMMARY

### 1. INTRODUCTION

Regulations on public procurement aim to regulate the way public bodies (parliaments, ministries, agencies, hospitals, schools, libraries, utility enterprises, etc.) procure various types of goods, services and works needed for their daily operation and for discharging their public functions. The regulations define the rules and procedures for public procurement, as well as the rights and obligations of all participants in the process. Regulation of the public procurement system is based on a number of key principles, such as: the principle of transparency, best value for money, non-discrimination and competition, which serve as a common frame of reference for all public

bodies implementing procurement in line with the public interest.

This *policy brief* deals with transparency as one of the main principles in public procurement and seeks to provide recommendations to improve the legal framework where it pertains to the transparency of the public procurement process. The principle of transparency requires that relevant information on public procurement is made available to as many suppliers, stakeholders (such as relevant public institutions, the media and civil society organisations) as possible and to the public in general. It is important to ensure transparency in the public procurement process for a number of reasons:



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- First of all, access to necessary information enables potential tenderers to be familiar with the rules and procedures applied in the public procurement process, and with the criteria for evaluating their tenders, which is crucial for ensuring competition in public procurement.<sup>2</sup>
- Apart from that, ensuring transparency can improve the efficiency of the public procurement procedure, and can lead to savings in public spending. Accordingly, when conducting public procurement, the contracting authority is required to ensure that as many potential tenderers are made aware of the business opportunities being offered in order to collect the maximum number of quality tenders, so that ultimately, the contracting authority can get the best product or service for the lowest price.<sup>3</sup>
- Transparency of public procurement also serves as a tool to check whether contracting authorities have treated all tenderers equally and without discrimination.
- Finally, transparent procedures and rules for public procurement can significantly reduce corruption, given that decisions are made in line with objective, pre-defined and publicly available rules, thus limiting the possibility for abuse within the process.<sup>4</sup>

Starting from the aspects of transparency in public procurement described above, this *policy brief* gives an overview of relevant international standards, followed by an analysis of key limitations in the current Bosnian-Herzegovinian legislative framework. The concluding remarks are followed by a series of recommendations to improve overall transparency of the public procurement system in Bosnia and Herzegovina (hereinafter: BiH).

## 2. INTERNATIONAL STANDARDS

International standards for transparency in public procurement are defined, *inter alia*, in a number of documents, such as: The UNCITRAL<sup>5</sup> model law on public procurement, the Government Procurement Agreement of the World Trade Organisation,<sup>6</sup> European Union legislation and interpretations of the European Court of Justice, principles for ensuring integrity in public procurement developed by the OECD, etc. Good practices from countries all over the world have also contributed to establishing standards in public procurement by making significant steps forward in publishing information relevant to the overall cycle of public procurement, from planning to the implementation of public procurement contracts.

<sup>2</sup> Sue Arrowsmith, ed., *Public Procurement Regulation: An Introduction* (Nottingham: The University of Nottingham, 2010).

<sup>3</sup> Christopher H. Bovis, *EU Public Procurement Law* (Cheltenham: Edward Elgar, 2007), p. 67.

<sup>4</sup> United Nations Office on Drugs and Crime (UNODC), *Guidebook on anti-corruption in public procurement and the management of public finances: Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption* (New York: United Nations, 2013), p. 9.

<sup>5</sup> UNCITRAL stands for the Commission for International Trade Law established in 1966 at the level of the United Nations and tasked with modernising and harmonising rules for international business. Among other things, in 1994, this Commission developed a model law on public procurement that has served as a basis for the drafting of public procurement laws in many countries. The model law was updated in 2011 in order to reflect new public procurement practices, especially those related to the use of electronic communication in public procurement, as well as experiences in reforming public procurement systems. United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Model Law on Public Procurement (2011)* (Vienna: UNCITRAL, 2011), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2011Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html) (Accessed on August 10, 2015).

<sup>6</sup> The aim of this document is to create conditions for competition among companies and to open the public procurement market in member states of the World Trade Organisation. World Trade Organization, "Agreement on Government Procurement," [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (Accessed on August 1, 2015).

Table 2.1. Overview of EU standards on transparency of public procurement

Type of notice	Type of information	Aim of regulation
Periodic indicative notice (procurement plan)	Type of goods, services and works the public body plans to procure in the forthcoming year, including estimated value of procurement and period when the procurement will be implemented.	The contracting authority plans procurement beforehand, thereby achieving efficiency and giving suppliers enough time to plan their activities in order to better respond to future public procurement notices.
Public procurement notice <sup>7</sup>	Object of procurement, time limits for submitting tenders, conditions and criteria for the evaluation of tenderers and their tenders.	The contracting authority formulates the conditions and criteria for submitting tenders in order to implement the procurement that best corresponds to its requirements and needs. Based on the notice, the suppliers assess whether they have an interest in the procurement and prepare tenders accordingly.
Contract award notices	Information on the tenderer assessed as most favourable, including the offered price and the reasons why the tender was selected.	Information on the supplier and terms of the public procurement contract are available to the public. Unsuccessful tenderers may compare their tenders with the one assessed as most favourable to see their shortcomings and improve future practices for participating in public procurement.

Source: Christopher H. Bovis, *EU Public Procurement Law* (Cheltenham: Edward Elgar, 2007), p. 65.

EU directives are of particular importance, given the official reform commitment and process of approximation of BiH to membership in the European Union in the forthcoming years. The directives are a legal instrument stipulating the minimum common rules that enable the achievement of the basic principles from the Treaty establishing the European Economic Community, and these are: prohibition of discrimination on the basis of nationality and the free exchange of goods, services, the

workforce and capital.<sup>8</sup> The two currently valid EU directives for public procurement from 2004<sup>9</sup> promote the principle of transparency, which is achieved by publishing various types of notices as shown in the table below.

Apart from the types of information contained in the table above, publishing information on contracting implementation is increasingly becoming a standard in public procurement. This phase was not previously



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<sup>7</sup> Additional information, such as a detailed description of what is being procured, i.e. the technical specifications, are given in the tender documentation.

<sup>8</sup> Representatives of Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands, Treaty establishing the European Economic Community (Rome: March 25, 1957).

<sup>9</sup> “Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors,” *Official Journal of the European Union* L134, April 30, 2004; and “Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts,” *Official Journal of the European Union* L134, April 30, 2004.

considered part of public procurement, but primarily part of the internal governance process along with the administration and the selected tenderer.<sup>10</sup> However, newer standards and advanced practices in countries in the world indicate an increasingly prominent trend of publishing information on contract implementation in order to ensure that the contract is implemented in line with the terms and requirements set out in the public procurement notice. In this way, the interested public is given insight into public procurement contract implementation and public spending, as well as control over the quality of delivered goods and services. For example, the Croatian Law on Public Procurement obliges contracting authorities to publish a register of public procurement contracts and framework agreements on their websites,<sup>11</sup> including, inter alia, the amount paid by the contracting entity for each public procurement contract and justification if that amount exceeds what was stipulated in the contract. Publishing any deviations from the contract, especially in terms of prices and deadlines, is also practised in other European countries such as Belgium, Slovakia, and Italy.<sup>12</sup>

In order to uphold the transparency principle, it is also important that decisions are made on the basis of clear rules, and that there is a mechanism in place for checking whether the proper procedures have been applied.<sup>13</sup> This standard, within the wider

concept of transparency in public procurement, was also promoted by the European Court of Justice, which in a number of its decisions<sup>14</sup> confirmed that without transparency, it is impossible to ascertain that the contracting authority ensured equal and fair treatment of all tenderers.

### 3. TRANSPARENCY OF PUBLIC PROCUREMENT IN BOSNIA AND HERZEGOVINA: KEY CHALLENGES

In April 2014, Bosnia and Herzegovina adopted a new Law on Public Procurement of BiH (hereinafter: LPPBiH), which came into force in November of the same year.<sup>15</sup> The aim of the new Law was to reduce bureaucratisation and possible abuse in public procurement procedures, and to improve adherence to the basic principles of public procurement, such as transparency, best value for money, non-discrimination and competition.<sup>16</sup> A number of new provisions were adopted for this purpose, which, inter alia, stipulate the obligation of contracting authorities to improve transparency in all phases of the public procurement cycle, including preparation and planning of public procurement, carrying out the procedure, as well as contract implementation.

However, in certain important segments, the LPPBiH still lacks provisions on transparency

<sup>10</sup> Organisation for Economic Cooperation and Development (OECD), *OECD Principles for Integrity in Public Procurement* (Paris: OECD, 2009).

<sup>11</sup> See the website of the Public Procurement System Administration, Public Procurement Portal, <http://www.javnabava.hr/default.aspx?id=3939> (Accessed on August 10, 2015).

<sup>12</sup> Organisation for Economic Cooperation and Development (OECD), "Transparency in public procurement," in *Government at a Glance 2011* (Paris: OECD Publishing, 2011).

<sup>13</sup> Arrowsmith, *Public Procurement Regulation*, p. 21.

<sup>14</sup> See for example: Court (First Chamber), *Unitron Scandinavia A/S and 3-S A/S, Judgement Danske Svineproducenters Serviceselskab vs. Ministeriet for Fødevarer, Landbrug og Fiskeri*, November 18, 1999, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=44849&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=45960> (Accessed on August 10, 2015); and the judgement in the case of Court of the European Union, *Case C-324/98, Telaustria Verlags GmbH and Telefonadress GmbH vs. Telecom Austria*, December 7, 2000, [http://www.dkom.hr/UserDocsImages/C324\\_98\\_Telaustria.pdf](http://www.dkom.hr/UserDocsImages/C324_98_Telaustria.pdf) (Accessed on August 10, 2015).

<sup>15</sup> "Zakon o javnim nabavkama BiH" [Law on Public Procurement of BiH], *Official Gazette of BiH* 39/14.

<sup>16</sup> Public Procurement Agency of BiH, *Explanation of Draft Law on Public Procurement* (Sarajevo: Public Procurement Agency of BiH), p. 2.

that would be completely in line with the basic principles, international standards and good practices in public procurement transparency, so it is necessary to undertake steps to improve this area. The analysis presented below indicates these specific key problems with transparency in relation to the basic phases of the public procurement process.

### 3.1. Public Procurement Plans

According to the new LPPBiH, contracting authorities are obliged to develop public procurement plans setting out the types of goods, services and works to be procured during the budget year. Procurement plans are then published on the websites of contracting authorities within two months from the date of adoption of the budget or financial plan. Previously, unplanned and *ad hoc* public procurement was characterised as one of the weakest points of the public procurement system in BiH,<sup>17</sup> so the obligation to develop annual procurement plans represents significant progress in terms of transparency<sup>18</sup>. According to the new legislative solution, a contracting authority may not begin the procedure for awarding a contract if the specific procurement is not foreseen in the procurement plan. If a certain procurement is not foreseen in the plan, contracting authorities must augment the procurement plan by a special decision on initiating the procedure at stake.<sup>19</sup>

However, even though the obligation to develop public procurement plans was a

significant step forward in terms of transparency, certain shortcomings still remain. Namely, only those contracting authorities that have their own websites must publish procurement plans online, while procurement plans of contracting authorities without their own websites remain non-transparent. At the same time, there is no legal requirement to publish procurement plans on the public procurement portal,<sup>20</sup> which makes it more difficult for potential tenderers and the public to search through the procurement plans of more than 2000 contracting authorities subject to the Law on Public Procurement<sup>21</sup>. Examples from other countries, such as Croatia where contracting authorities without a website are required to submit their procurement plans to the Public Procurement System Administration for the purposes of publication on the public procurement portal, indicate possible practical solutions to this problem.

In addition, contracting authorities in BiH are not required to publish an integral procurement plan, or more precisely, before publishing the procurement plan, they have the option to remove procurement procedures for lower values subject to competitive request and direct agreement. This is an unjustified limitation of availability of information, especially if we bear in mind that these procedures are applied for the majority of public procurement contracts. According to the Public Procurement Agency, in 2013 contracting authorities implemented 66,775 direct agreement procedures and 14,213 competitive request procedures,

<sup>17</sup> Audit Office of the Institutions of BiH, Audit Report on the Budget Execution Report of Institutions of Bosnia and Herzegovina for 2012 (Sarajevo: Audit Office of the Institutions of BiH, 2013); 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), p. 23.

<sup>18</sup> "Law on Public Procurement," Article 17, para. 2.

<sup>19</sup> "Law on Public Procurement," Article 17, para. 1. This does not apply to emergency procurement that could not be planned.

<sup>20</sup> See the website of the Public Procurement Agency of BiH, Public Procurement Portal of BiH, <https://www.ejn.gov.ba/> (Accessed on August 10, 2015).

<sup>21</sup> The Public Procurement Agency of BiH estimates that there are some 2000 contracting authorities in BiH. Public Procurement Agency of BiH, Annual Report on Public Procurement Contracts for 2013 (Mostar: Public Procurement Agency of BiH, 2014), p. 5.

which is significantly more than the number of open procedures, which was 3,856.<sup>22</sup> Excluding these procedures from publication makes insight into the public procurement plans of contracting authorities incomplete. Excluding procedures for so-called lower value contracts from published procurement plans is problematic also because of the relatively high monetary threshold for competitive request procedures, because these include the procurement of goods and services up to 50,000 BAM and procurement of works up to 80,000 BAM, which when taken in total, and given the number of such procedures, accounts for a significant share of the overall spending in public procurement in BiH.<sup>23</sup>

### 3.2. Public Procurement Notices

Public procurement notices are published for the open and restricted procedure, for negotiated procedure with publication of notice, for the design contest and the competitive dialogue procedure.<sup>24</sup> The 2014 LPPBiH introduced an important innovation in this area by requiring that contracting authorities publish competitive request procedures on the public procurement portal.<sup>25</sup> This has increased the transparency of procedures for so-called lower value contracts, because the previous law had allowed for this type of procedure to be conducted by sending competitive requests for quotations to at least three addresses

without the obligation to publish a public notice. In order to achieve efficiency in implementing public procurement, contracting authorities in BiH are not required to publish notices for the direct agreement procedure, which is applied to procurement up to 6,000 BAM.<sup>26</sup>

All public procurement notices are available at a single location – the public procurement portal – which has been operational since 27 November 2014.<sup>27</sup> Setting up the portal reduced expenses for contracting authorities in BiH because they no longer have to publish the full text of public procurement notices in the *Official Gazette of BiH*, but only their summaries. This is in keeping with global trends where central portals with key public procurement information are increasingly widespread. A number of European countries, such as Portugal, the UK, Finland and Slovakia, stand out as leaders in this area, given that they have developed advanced *online* platforms for various types of public procurement notices.<sup>28</sup> For example, in the UK, all notices on planned and currently open calls for tenders are published on the Contract Finder portal, while in Portugal, the BASE portal publishes procurement notices, exemption decisions, all public procurement contracts issuing from open, restricted and negotiated procedures and competitive dialogue, as well as contract modifications that change more than 15 percent of the original contract.

<sup>22</sup> Ibid., p. 8.

<sup>23</sup> According to the records of the BiH Public Procurement Agency, the total value of competitive request procedures in 2013 was 341,371,369.47 BAM, which accounts for 12.48 percent of the total value of all procedures. The total value of direct agreement procedures in 2013 was 72,678,803.43 BAM, or 2.66 percent of the total value of all procedures. Ibid., p. 19.

<sup>24</sup> “Law on Public Procurement,” Article 35.

<sup>25</sup> Ibid.

<sup>26</sup> European Union directives also recognise differences in the application of rules for procurement below and above a value threshold determined at the EU level every two years. Support for Improvement in Governance and Management (SIGMA), *Understanding the EU Financial Thresholds* (Paris: SIGMA, 2011). A similar principle stipulated in national laws of individual states enables the awarding of lower value contracts without prior publication of a notice. Organisation for Economic Cooperation and Development (OECD), *Integrity in Public Procurement: Good Practices from A to Z* (Paris: OECD, 2007), p. 32.

<sup>27</sup> Since 2011, public procurement notices have been published through an *online* system called GO-Procure, which was innovated in late 2014 and turned into a public procurement portal.

<sup>28</sup> For example, the central public procurement portal in Portugal.

A significant novelty in the LPPBiH is the exemption of *in-house* procurement from the application of the law,<sup>29</sup> which is a further harmonisation with EU standards for public procurement.<sup>30</sup> It is assumed that this change will have significant implications for the value of negotiated procedures within overall procurement. Namely, in the past few years, there has been a high percentage share of negotiated procedures within the overall value of public procurement in BiH.<sup>31</sup> The BiH Public Procurement Agency has explained that the high value of contracts based on this type of procedure resulted from procurement among bundled enterprises such as power companies that procure coal to generate electricity from coal mines that are part of the same business group. Also, 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. The BiH Public Procurement Agency presumes that exempting *in-house* procurement from the application of the law will result in a decreased share of negotiated procedures within overall public procurement in BiH.

The Law has also introduced new provisions to increase transparency of the negotiated

procedure without publication of notice.<sup>32</sup> The contracting authority, after it has selected a tender, may voluntarily publish an *ex ante* notice on transparency in which it will explain how the conditions that justify the application of this procedure were met and make public its intent to award the contract to the most successful tenderer.<sup>33</sup> The enactment of the new LPPBiH means that when applying this procedure contracting authorities must keep minutes of negotiations with each tenderer. From the perspective of international standards and good practice, keeping written records of public procurement procedures is crucial in ensuring accurate and reliable information on public procurement, as well as subsequent checking of the regularity of the implemented procedure by auditing services.

### 3.3. Tender Documentation

The New Law on Public Procurement of BiH foresees the possibility of publishing tender documentation on the public procurement portal,<sup>34</sup> which has been implemented in practice through a special instruction of the BiH Public Procurement Agency issued in June 2015<sup>35</sup>. Based on this bylaw, contracting authorities are able to publish tender documentation on the public procurement

<sup>29</sup> Public Procurement Agency of BiH, "Uputstvo o uslovima i načinu na koji sektorski ugovorni organ dodjeljuje ugovore povezanom preduzeću, poslovnom partnerstvu ili sektorskom ugovornom organu koji je sastavni dio poslovnog partnerstva" [Instruction on the conditions and way that the sector contracting authority awards contracts to a bundled enterprise, business partnership or sector contracting authority within the business partnership], *Official Gazette of BiH* 97/14.

<sup>30</sup> Sue Arrowsmith, ed., *EU Public Procurement Law: An Introduction* (Nottingham: University of Nottingham, 2010), p. 86.

<sup>31</sup> Of the total value of public procurement for 2012, contracts based on negotiated procedure without publication of notice accounted for 55.78 percent.

<sup>32</sup> The negotiated procedure without publication of notice is specific in that it allows the contracting authority to negotiate the financial, technical, administrative or any other aspect of a tender, and its application is permissible only in specific circumstances stipulated by the Law, for example in emergencies caused by events that the contracting authority did not bring about and could not have foreseen.

<sup>33</sup> "Law on Public Procurement," Article 28.

<sup>34</sup> According to the Law on Public Procurement of BiH, tender documentation may be obtained in one of the following ways: in person, upon written request and for a fee, together with the invitation to submit tenders, and by publication on the public procurement portal. "Law on Public Procurement," Article 55, para. 1.

<sup>35</sup> Public Procurement Agency of BiH, Uputstvo o dopuni Uputstva o uslovima i načinu objavljivanja obavještenja i dostavljanja izvještaja u postupcima javnih nabavki u informacionom sistemu "E-nabavke" [Instruction on amendment to the Instruction on the conditions and manner of publication of notices and submission of reports in public procurement procedures in the "e-Procurement" information system], (Sarajevo: Public Procurement Agency of BiH, 2015), [http://www.javnenabavke.ba/legislativa/podzakonskaakta/upustva/Uputstvo\\_dopuna\\_eNabavke\\_bs.pdf](http://www.javnenabavke.ba/legislativa/podzakonskaakta/upustva/Uputstvo_dopuna_eNabavke_bs.pdf) (Accessed on August 10, 2015), Article 1.

portal along with the procurement notice. The bylaw further foresees that contracting authorities shall be required to publish tender documentation on the public procurement portal for at least 30 percent of the procedures advertised on the portal during 2016, and 60 percent during 2017. As of 1 January 2018, *online* publication of tender documentation for all public procurement procedures subject to publication of notice on the public procurement portal shall be mandatory.<sup>36</sup> This has significantly facilitated the exchange of information between contracting authorities and tenderers, and has decreased the possibility for charging high fees for the delivery of documentation, a pronounced problem for public procurement in BiH in the past years.<sup>37</sup> This has also harmonised the Bosnian-Herzegovinian legal framework and practices with relevant EU directives and good practices in other states. Namely, electronic information and document exchange is stipulated by the 2014 European Union Directive on Public Procurement.<sup>38</sup> At the same time, certain countries, such as Estonia, Croatia and Slovenia, have been publishing tender documentation on their public procurement portals in the past few years.

### 3.4. Information on Awarded Contracts

The LPPBiH has stipulated that public procurement notices are to be published on the public procurement portal for the open, restricted and negotiated procedure with or without publication of notice, design

contest and competitive dialogue,<sup>39</sup> as also stipulated by relevant international standards, primarily the EU directives (see Table 2.1.).

However, contracting authorities are not required to publish information on which tenderer was awarded the contract based on the competitive request and direct agreement procedures, which could have negative implications for transparency in public procurement. Namely, the majority of public procurement contracts in BiH are awarded through competitive request and direct agreement procedures. During 2013, the number of contracts awarded through direct agreement was 66,775, and 14,213 competitive requests were implemented in the same year.<sup>40</sup> Without information on these procedures, it is impossible to have a clear picture of the total number and type of contracts the public sector has with various tenderers. Given that contracting authorities are required to report to the Public Procurement Agency on competitive request and direct agreement procedures, ensuring transparency would not entail creating new information, but rather publishing already existing information without any additional administrative burden for the contracting authority.

Apart from the publication requirement, the Law also defines the criteria for evaluating tenders and selecting the most favourable tenderer. Depending on the type of procurement, the evaluation of tenders as per the LPPBiH is conducted on the basis of

<sup>36</sup> Ibid., Article 9.

<sup>37</sup> Public Procurement Agency of BiH, Public Procurement Procedure Monitoring Report for BiH (Sarajevo: Public Procurement Agency of 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, 2013).

<sup>38</sup> "Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC," *Official Journal of the European Union* L94, March 28, 2014, <http://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:32014L0024&from=HR> (Accessed on August 10, 2015).

<sup>39</sup> "Law on Public Procurement," Article 74, para. 1.

<sup>40</sup> Public Procurement Agency of BiH, Annual Report on Public Procurement Contracts for 2013, p. 8.



one of two criteria: lowest price or economically most favourable tender.<sup>41</sup> When the criterion of the economically most favourable tender is applied, the Law requires that, depending on the nature of what is being procured, a methodology for evaluating tenders against selected sub-criteria be defined and elaborated in detail.<sup>42</sup> Given that in order to ensure transparency, it is important to establish clear rules for decision-making, a significant shortcoming in this domain is the lack of regulations or practical instructions that would serve as guidelines for contracting authorities on how to develop an evaluation methodology, i.e. how to determine the criteria for evaluating tenders.<sup>43</sup> This pertains in particular to the criterion of the economically most favourable tender, which facilitates best value for money, but which is used considerably less in public procurement procedures in BiH precisely because of its complexity.<sup>44</sup>

Defining clear rules for evaluating tenders also reduces the possibility of arbitrary application of criteria and subjective evaluation of tenders, and promotes the application of clear rules for making important decisions, a key precondition for achieving the principle of transparency. With this in mind, certain countries in the region, such as Croatia and Montenegro, developed relevant documents that serve as instructions

for contracting authorities on how to apply criteria for evaluation of tenders, especially the criterion of the economically most favourable tender.<sup>45</sup>

### 3.5. Information on Complaints Procedure

The adoption of the new legislative framework and the development of the public procurement portal have significantly improved the transparency of the Procurement Review Body. Since the beginning of 2015, decisions of the Procurement Review Body and the Court of BiH on complaints by tenderers are published on the public procurement portal. However, the LPPBiH foresees the obligation of notifying the selected tenderer that a complaint has been filed, but does not stipulate the obligation to inform other parties in the procedure (companies with a legal interest in the public procurement procedure at stake) about a complaint filed so that they may participate in the procedure and present their views.<sup>46</sup> In that respect, the LPPBiH does not provide the conditions for the application of the adversarial principle, which is a significant shortcoming in view of the EU Directive and the judgement of the European Court requiring that each person whose rights and interests will be affected by a decision, action or procedure should be afforded a hearing.<sup>47</sup>

<sup>41</sup> In the other case, the price is just one of the sub-criteria, which also include: quality of what is being procured, technical capacity, functional and environmental characteristics, operative costs, cost-effectiveness, customer service and technical support, delivery or implementation deadline, etc. "Law on Public Procurement," Article 64.

<sup>42</sup> "Law on Public Procurement," Article 64, para. 2.

<sup>43</sup> Transparency International BiH, *National Integrity System Assessment* (Banja Luka: Transparency International BiH, 2013), p. 105.

<sup>44</sup> Support for Improvement in Governance and Management (SIGMA), *Bosnia and Herzegovina: Public Procurement Assessment in Bosnia and Herzegovina* (Paris: SIGMA, 2012), p. 4; Comments by participants in professional discussion on transparency of public procurement in BiH, Brčko, June 17, 2015.

<sup>45</sup> Croatian Ministry of Economy - Public Procurement System Administration, Smjernice br. 1: Kriteriji za odabir ponude [Guidelines No. 1: Criteria for Selection of Tender], (Zagreb: Public Procurement System Administration, 2011); Ministry of Finance of Montenegro, "Pravilnik o metodologiji iskazivanja podkriterijuma u odgovorajući broj bodova, načinu ocjene u upoređivanju ponuda" [Rulebook on the methodology for expressing sub-criteria as points, evaluation and comparison of tenders], *Official Gazette of Montenegro* 42/11.

<sup>46</sup> Stanka Pejaković, *Analiza pravne zaštite u postupcima javne nabave u Bosni i Hercegovini* [Analysis of Legal Protection in Public Procurement Procedures in Bosnia and Herzegovina], (Sarajevo: Analitika - Center for Social Research, 2015).

<sup>47</sup> Ibid.

### 3.6. Information on Contract Implementation

In contrast to the old law, where the implementation phase was completely neglected, according to the new LPPBiH, contracting authorities are required to publish the basic elements of all public procurement contracts on their websites, as well as any changes to contracts that arise during implementation.<sup>48</sup> Specifically, contracting authorities are required to provide key data on a contract (type of procedure, selected tenderer, basic elements of the contract) in a single document, as well as data on any changes and the implementation of the contract (date of modification, remainder of contract value after modification, date of signing, date of contract implementation and total funds spent).<sup>49</sup> In this way, the public should have access to information not only about how a contract was awarded, but also on how it was implemented, which is in line with public procurement standards promoted by international organisations such as the OECD and Transparency International.<sup>50</sup>

The form for monitoring contract implementation is published on the website of the contracting authority, but the publication of reports on implemented contracts has not been provided for in the LPPBiH. Consequently, information on implemented contracts is not published on the public procurement portal. Also, there are no regulations on the obligation of contracting authorities to publish integral contracts with suppliers, which is a necessary precondition for ensuring complete transparency in public procurement procedures, as well as being a universally accepted practice in other countries. Thus, for example, certain countries, such as Portugal and Slovakia, publish all public procurement con-

tracts since these are documents of wider social interest and key for ensuring accountability in public spending through public procurement.

## 4. CONCLUDING REMARKS

As the analysis has shown, even though the adoption of the Law on Public Procurement in BiH has resulted in significant improvements for transparency in public procurement, in some important aspects, the current provisions are still not up to par, i.e. they do not correspond to the basic principles, standards and good practice in this area:

- The LPPBiH has not stipulated mandatory publication of all public procurement plans on the public procurement portal, including plans of contracting authorities that do not have their own websites.
- The type of information included in public procurement plans is also limited. Namely, public procurement plans that are published do not need to include procedures for so-called lower value contracts, i.e. competitive request and direct agreement procedures.
- Contracting authorities are also not required to publish notices on the award of contracts based on competitive request and direct agreement procedures. Given that the majority of contracts are awarded on the basis of these types of procedure, public insight into the public procurement process is significantly limited.
- Apart from that, contracting authorities lack guidelines for the application of tender evaluation criteria, particularly criteria for the economically most favourable tender.

<sup>48</sup> "Law on Public Procurement," Article 75.

<sup>49</sup> Public Procurement Agency of BiH, *Obrazac praćenja realizacije ugovora/okvirnog sporazuma* [Form for monitoring contract/framework agreement implementation], (Sarajevo: Public Procurement Agency of BiH, 2014).

<sup>50</sup> OECD, *Integrity in Public procurement*; Susanne Kühn and Laura B. Sherman, *Curbing Corruption in Public Procurement: A Practical Guide* (Berlin: Transparency International, 2014).

- When it comes to the complaints procedure, the Law does not stipulate the obligation to inform all parties with a legal interest in the specific procedure, and not just the selected tenderer, about the filing of a complaint.
- Finally, overview reports on contract implementation are not published on the public procurement portal, and the Law has not created the preconditions for publishing contracts entered into by contracting authorities with selected tenderers, even though this would significantly improve the availability of this type of information of public interest.
- The published procurement plans should include procurement through competitive request and direct agreement procedures.
- It is necessary to stipulate the obligation of contracting authorities to publish information on the results of competitive request and direct agreement procedures, including information on the selected tenderer, prices and deadlines.
- The BiH Public Procurement Agency should develop general guidelines for the application of tender evaluation criteria, especially the criteria for the economically most favourable offer.

## 5. RECOMMENDATIONS

Based on the findings of the analysis, the following recommendations for improving transparency in the public procurement system of BiH have been formulated:

- It is necessary to enable the publication of all public procurement plans on the public procurement portal, including plans of contracting authorities that do not have their own websites.
- The law should stipulate the obligation to inform all parties in the procedure, including business entities with a legal interest in the public procurement procedure at stake, when a complaint is filed.
- It should be possible to publish all records on implemented contracts on the public procurement portal.
- A policy for *online* publication of integral public procurement contracts should be developed.

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