

Transparency of Public Procurement in Bosnia and Herzegovina

Between Theory and Practice



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Nermina Voloder



Sarajevo, 2015

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1.

Introduction

Transparency is often singled out as one of the key indicators of a just and functional public procurement system,¹ and it refers to the availability of all relevant information that enables stakeholders to become familiar with the rules and procedures applied in the public procurement process.² If a public authority fails to ensure a sufficient level of transparency, it is impossible to ascertain whether the public procurement procedure was conducted impartially and in line with the rules. In that context, transparency in the implementation of public procurement contributes to increasing the accountability of public authorities and more efficient control of public spending.

Contracting authorities in Bosnia and Herzegovina (BiH) are under the obligation to transparently conduct public procurement procedures and ensure fair and equal treatment of all tenderers in order to achieve the best value for public money.³ These principles are stipulated in the Law on Public Procurement in Bosnia and Herzegovina (hereinafter: LPPBiH) adopted in April 2014 as part of the public procurement system reforms and harmonisation of domestic legislation with European Union *acquis*. The new, modernised legal framework was established in BiH ten years after the adoption of the first Law on Public Procurement in 2004, which had shown numerous shortcomings in practice, including some to do with transparency.⁴

Although the new law introduced better norms for the aspect of transparency in public procurement, shortcomings that may have significant implications in practice are still evident. One of the aims of this analysis is to assess the extent to which the legal framework ensures an adequate level of transparency in public procurement in BiH, and how transparency could be improved. The analysis offers insight into the main obstacles to transparency in public procurement, especially in light of international standards and comparative practices, focusing primarily on existing legal and institutional solutions in this domain. It should be noted that the new Law on Public Procurement of BiH has been in force only since November 2014, and that certain bylaws relevant to transparency have not yet

¹ Christopher H. Bovis, *EU Public Procurement Law* (Cheltenham: Edward Elgar, 2007), p. 65.

² Steven L. Schooner, "Desiderata: Objectives for a System of Government Contract Law," *Public Procurement Law Review* 11, no. 2 (2002), p. 6.

³ "Law on Public Procurement," *Official Gazette of BiH* 39/14, Article 3.

⁴ Public Procurement Agency of BiH, *Obrazloženja Nacrta Zakona o javnim nabavama* [Explanation of Draft Law on Public Procurement], (Sarajevo: Public Procurement Agency of BiH), p. 2.

been adopted. That is why at this stage of research, insight into the practice of public procurement is still limited.

This report focuses on the obligations of public institutions stipulated under the Law on Public Procurement of BiH to independently publish key information on public procurement that will enable the public procurement procedure and provide public insight into the process for awarding contracts. Access to all public information in the possession of any institution in BiH, including specific information on public procurement, may also be requested in line with the laws on free access to information adopted at the state and entity level,⁵ but this aspect of transparency is not the subject of the present analysis.

This report takes into account the main conceptual discussions of transparency in public procurement processes. It then gives an overview of international standards in this area, focusing on European Directives for conducting public procurement procedures, and on decisions of the European Court of Justice. It also presents comparative practices in transparent public procurement in European Union countries with innovative approaches to improving the public procurement system, such as Slovakia and Portugal. The legal frameworks and practices of Western Balkan countries that have in the past few years made innovations to their legal and institutional frameworks for public procurement as part of the European Union approximation process are subject to a separate analysis. This primarily pertains to the experiences of Croatia, Serbia and Slovenia. Past reports on these issues, as well as the old and new legislative and institutional framework are also analysed. Finally, interviews were conducted with representatives of key institutions, including the Public Procurement Agency (hereinafter: PPA) and the Procurement Review Body (hereinafter: PRB), as well as with representatives of the business community in BiH.

⁵ “Zakon o slobodi pristupa informacijama u Bosni i Hercegovini” [Law on Free Access to Information in Bosnia and Herzegovina], *Official Gazette of BiH* 28/00, 45/06, 102/09, 62/11 and 100/13; “Zakon o slobodi pristupa informacijama u Federaciji Bosne i Hercegovine” [Law on Free Access to Information in the Federation of Bosnia and Herzegovina], *Official Gazette of the Federation of BiH* 32/01 and 48/11; “Zakon o slobodi pristupa informacijama u Republici Srpskoj” [Law on Free Access to Information in Republika Srpska], *Official Gazette of Republika Srpska* 20/01.

2.

Conceptual Framework

Public procurement accounts for a significant portion of budget spending and thus has a direct effect on the economy. Public authorities allocate large sums of money each year for various types of procurement necessary for their operation and the execution of their public duties. According to the most recent data from 2011, public procurement in OECD countries account for an average of 29 percent of public spending, which is 13 percent of gross domestic product.⁶ In this way, the state takes on the role of consumer and generates economic development, ensuring revenue for private companies and encouraging innovation.

Public procurement includes procuring various goods, services and works, ranging from the procurement of hospital beds, school textbooks and street lighting to the procurement of military equipment and the construction of hydropower plants, airports and highways. However, public procurement rules primarily aim to regulate not what the contracting authority shall procure, but the way in which this is to be done. In that sense, regulations on conducting public procurement procedures oblige contracting authorities to ensure active competition between companies, equal opportunities for participation, and appropriate and rational public spending.

One of the main tasks in this process is establishing and consistently applying transparent public procurement procedures so that tenderers are aware of all the requirements and criteria used for their evaluation, and the procedures that lead to the awarding and implementation of public contracts.⁷ In public procurement, as in other areas of public governance, transparency is not achieved merely by publishing information – information must not only be available, but also reliable, relevant, complete, timely and understandable.⁸ The principle of transparency is often cited as one of the main aims of public procurement regulations, however, leading authors in this area point out that transparency in public procurement has

⁶ Organisation for Economic Cooperation and Development (OECD), “Public procurement spending,” in *Government at a Glance 2013* (Paris: OECD Publishing, 2013), p. 130.

⁷ Wayne A. Wittig, “Linking Islands of Integrity to Promote Good Governance in Public Procurement: Issues for Consideration,” in *Fighting corruption and promoting integrity in public procurement* (Paris: OECD Publishing, 2005), p. 111.

⁸ Kofi Osei-Afoakwa, “How Relevant is the Principle of Transparency in Public Procurement?,” *Developing Country Studies* 4, no. 6 (2014), pp. 140-146.

a primarily instrumental value.⁹ In other words, transparency is not an objective in itself, but a means to achieve other objectives, such as, in the case of public procurement, economic efficiency, non-discrimination, and competition among businesses.

In order to understand the importance and purpose of the transparency principle in public procurement, we should first keep in mind that the government is not a customer like any other. In the public procurement process, the government, made up of politicians, and the bureaucracy stand in an agency relationship.¹⁰ At the heart of agency theory is the presumption that the interests of the agent (in this case the officer administering the public procurement process) and the principal (leader, political representative) are often divergent. In the public procurement process, the agent is paid for his job according to a predetermined fee and his compensation is the same irrespective of the result, efficiency and potential savings achieved in the public procurement process. Consequently, the agent sees no direct benefit from savings achieved when the procurement is conducted in the economically most favourable way, procuring the best product for the lowest price. The agent may seek to increase his own benefit in the form of, for instance, bribes, better working conditions or job prospects, which is in direct conflict with achieving the economic and social benefit desired by the principal.¹¹

The agent and principal also have different positions in relation to the procurement process. The position of the agency usually entails insight into all the details of public procurement, from the planning phase to the contract award and implementation phase. The agency relationship creates an informational asymmetry between agent and principal: the agent possesses all the information on the public procurement process, which is usually not available to the principal, and may use it for personal gain against the interests of his superiors.¹² Within the procurement process, information asymmetry is also created between agent and supplier, given that suppliers are better informed about the market, products and pricing mechanisms.

One of the measures the principal may use to efficiently control the agent and ensure that the agent works in line with public interest is transparency. This measure obliges the agent to make information on his work available in order to reduce the possibility for abuse and achievement of personal interests. Transparency thus becomes a form of administrative control used by the

⁹ Peter Trepte, *Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Procurement: Possibilities and Limitations* (Paris: OECD, 2005); Anoeska Buijze, "The Six Faces of Transparency," *Utrecht Law Review* 9, no. 3 (2013), pp. 3–25; Sue Arrowsmith, ed., *Public Procurement Regulation: An Introduction* (Nottingham: The University of Nottingham, 2010).

¹⁰ Trepte, *Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Procurement*, p. 6.

¹¹ *Ibid.*, p. 6.

¹² *Ibid.*, p. 8.

principal to ensure proper public procurement procedures.¹³ On the other hand, transparency is also a method for market research. By publishing a public procurement notice and collecting tenders, the agent receives information about the market that helps him make the contract award decision.

Transparency may significantly contribute to reducing corruption in public procurement.¹⁴ The considerable funds spent through public procurement make this area exceptionally susceptible to corruption, and transparency acts as a barrier to the emergency of corruption. Given that in a transparent public procurement system decisions must be made on the basis of objective, predefined and publicly available rules, this leaves less room for favouring certain tenderers that pay or would be prepared to pay a bribe.¹⁵ This can help significantly limit the harmful effects of corruption in public procurement, such as, among others, high costs of poor quality procurement, procurement of goods, services and works that are not economically justified or based on real needs, and delivery of products that entail security and other risks for the population.¹⁶

Transparency directly impacts competition, equal treatment of tenderers, and savings in the public sector. If information on public procurement is widely available and suppliers are familiar with participation opportunities, it is assumed that this will lead to more quality tenders, enabling contracting authorities to procure a better product or service for less money.¹⁷ On the other hand, if information on public procurement is not available, it is impossible to ascertain whether public authorities have treated all potential suppliers equally or whether discrimination on any grounds was perpetrated.

Even though transparency plays an important part in public procurement procedures, there are certain legitimate restrictions of this principle. Apart from having the duty to ensure transparency in public procurement, public authorities are also bound to protect confidential information of tenderers. Confidentiality primarily pertains to protecting proprietary rights, i.e. business secrets of the tenderer, as well as technical solutions cited in the tender and marked by the

¹³ Ibid, p. 15.

¹⁴ Susanne Kühn and Laura B. Sherman, *Curbing Corruption in Public Procurement: A Practical Guide* (Berlin: Transparency International, 2014); 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); Organisation for Economic Cooperation and Development (OECD), *Fighting corruption and promoting integrity in public procurement* (Paris: OECD Publishing, 2005).

¹⁵ UNODC, *Guidebook on anti-corruption in public procurement and the management of public finances*, p. 9.

¹⁶ Kühn and Sherman, *Curbing Corruption in Public Procurement*, p. 9.

¹⁷ Bovis, *EU Public Procurement Law*, p. 67.

tenderer as confidential, meaning those whose publication would damage the commercial interests of the tenderer.¹⁸

Confidentiality of information is particularly important when collecting and evaluating tenders. As a rule, all bids submitted as part of a tender are confidential until the competent committee decides on the best tenderer. Otherwise, revealing the names of tenderers before the final deadline for submission of tenders may incite other companies to try to broker a secret deal with a disclosed tenderer and eschew the rules of free competition.¹⁹ Cartels, which considerably undermine the public procurement system, are manifested in various ways: tenderers may submit fictitious tenders or withdraw from the public procurement procedure so as to favour the selection of a tenderer from the cartel, or tenderers may collude to section the market, restricting their tendering to only one geographic area or only one set of suppliers.²⁰

Apart from confidentiality, there is also the question of how to ensure complete transparency without imposing cumbersome administrative burdens. Namely, the public authority is obliged to ensure that the public procurement procedure is not only transparent, but also efficient. Schooner defines the principle of efficiency as “spend[ing] the least amount of resources in the process of purchasing what is needed [...] [and] employ[ing] the fewest possible people to do the required purchasing.”²¹ On the other hand, we should bear in mind that one of the basic principles of transparency in public procurement is to stimulate competition, i.e. to create conditions under which the greatest possible number of potential tenderers will be informed about tenders so that, as a result of competition between companies, the public authority receives the greatest possible number of viable tenders. The collection and careful evaluation of a large number of tenders is a task that requires considerable administrative resources. If, despite the invested resources and administrative costs incurred on account of processing tenders, this process does not lead to better quality tenders, this brings into question the long-term cost-effectiveness of the transparency principle.²²

¹⁸ Organisation for Economic Cooperation and Development (OECD), *OECD Principles for Integrity in Public Procurement* (Paris: OECD, 2009), p. 24.

¹⁹ Organisation for Economic Cooperation and Development (OECD), *Enhancing Integrity in Public Procurement: A Checklist* (Paris: OECD, 2008), p. 13.

²⁰ Organisation for Economic Cooperation and Development (OECD), *Detecting Bid-rigging in Public Procurement* (Paris: OECD), p. 5.

²¹ Steven L. Schooner, “Ciljevi državnog zakona o ugovorima” [Objectives of Government Contract Law], in *Pravo i politika javnih nabavki EU* [EU Public Procurement Law and Policy], ed. Martin Trybus (Sarajevo: Program podrške sistemu javnih nabavki u Bosni i Hercegovini, 2006), p. 21.

²² Bovis, *EU Public Procurement Law*, p. 68.

Many countries have resolved the issue of balancing transparency and efficiency by taking into account the type and value of the contract. This system of proportionality imposes the obligation of publishing information on contracts above a certain value threshold, while lower value contracts may be awarded without publishing an invitation for tenders.²³ Ensuring transparency comes at a cost, but this is negligible if we bear in mind the numerous advantages of transparency, such as limiting corruption, increasing competition, accountability in public spending, and public trust in the public procurement system.

²³ For example, in France, a system has been in place since 2006 whereby public procurement procedures above 90,000 EUR must be published in the *Official Journal of the European Union* (OJEU), as well as in the procurement publications part of the official gazette of the French Republic (Bulletin officiel des annonces des marchés publics, BOAMP). Invitations for contracts below 90,000 EUR are published either in the official gazette, regional or national bulletins, specialised journals or daily newspapers, at the discretion of the public procurement officer. Contracts below 4,000 EUR are exempt from mandatory publication, but in these cases adequate control mechanisms have been ensured in order to prevent abuse. Organisation for Economic Cooperation and Development (OECD), *Integrity in Public Procurement: Good Practices from A to Z* (Paris: OECD, 2007), p. 32.

3.

International Standards and Comparative Practices

Public procurement standards are defined, inter alia, by European Union regulations binding for all Member States. The main objective of these standards is to create a single European Union market characterised by the free movement of people, goods, services and capital. The primary legal act regulating public procurement is the Treaty establishing the European Economic Community of 1957, which stipulates the basic principles, such as prohibition of discrimination and free trade in goods, services, labour and capital, that apply to all laws in the European Union, including those that regulate the public procurement system in EU Member States.²⁴

3.1. European Union Directives and Other Standards in Public Procurement

The legal instruments employed by the European Union to regulate public procurement in more detail are directives with the main objective of establishing joint rules that will protect the main principles from primary regulations. Directives impose on states certain results to be achieved through public procurement procedures, but each state chooses how to achieve the stipulated results.²⁵ In that sense, the directives form a framework to regulate the public procurement system, and states may adopt additional regulations within their legislation to account for local context in ensuring fair public procurement procedure. Since the first public procurement directive was adopted in 1966,²⁶ the European Union has changed and improved regulations in the past few decades so as to adapt public procurement to social and economic development.

When it comes to implementing public procurement procedure, two EU Directives adopted in 2004 are currently in force. They regulate awarding contracts in the so-called classic sector that includes administrative authorities at all levels

²⁴ Representatives of Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands, Treaty establishing the European Economic Community (Rome: March 25, 1957).

²⁵ Treaty on the Functioning of the European Union (consolidated version), 2010, Article 288.

²⁶ Bovis, *EU Public Procurement Law*, p. 17.

of government and in the utilities sector, i.e. in water supply, traffic, energy and postal services.²⁷ The division into the classic and utilities sectors resulted from the specific market position occupied by utility companies. Namely, in various states, utility services have been entrusted to public or private enterprises that – on account of their exclusive rights and monopoly position – must abide by public procurement rules applicable to “traditional” public authorities. However, utility enterprises also function under liberalised market conditions that allow for competition. It was precisely out of the need to balance the monopoly position and market pressures that the European Union adopted a separate directive for the utilities sector, which foresees more flexible procedures and rules for public procurement, such as, for instance, greater freedom to opt for the negotiated procedure and qualification system, shorter deadlines, etc.²⁸ Legal safeguards in public procurement are regulated by a separate directive adopted in 2007.²⁹ The most recent modernisation of public procurement regulations took place in 2014 when the European Union adopted two new directives for public procurement in the classic and utilities sectors.³⁰ Member States must harmonise their laws with these directives by April 2016.

As a general principle, the current directives oblige contracting authorities to “act transparently.”³¹ Analysing the provisions of these directives, Bovis notes that transparency in public procurement is achieved by publishing three types of public procurement notices in the *Official Journal of the EU*:³²

²⁷ “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; “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.

²⁸ Adrian Brown, “Propisi javnih nabavki Evropske zajednice primjenjeni na komunalni sektor” [The Extension of the Community Public Procurement Rules to Utilities], in *Pravo i politika javnih nabavki EU* [EU Public Procurement Law and Policy], ed. Martin Trybus (Sarajevo: Program podrške sistemu javnih nabavki u Bosni i Hercegovini, 2006), pp. 15–25.

²⁹ “Directive 2007/66/EC of the European Parliament and of the Council of 11 November 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts,” *Official Journal of the European Union* L335, December 20, 2007.

³⁰ “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; “Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC,” *Official Journal of the European Union* L94, March 28, 2014.

³¹ “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,” Article 2; “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,” Article 18.

³² Bovis, *EU Public Procurement Law*, p. 65.

1. **Periodic indicative notice** (procurement plan) is a notice by which the contracting authority announces the types of goods, services and works the public authority intends to procure in the forthcoming 12 months, including the estimated total value of the contracts and the period when the procurement will be implemented. This type of notice provides suppliers with enough time to plan their activities in order to better respond to future public procurement invitations.³³ Publishing information on an annual public procurement programme at the EU level was stipulated as a standard already in 1988.³⁴
2. **Invitation to tender**, where the contracting authority states the conditions and criteria for evaluating tenderers and submitted tenders, is the most important type of notice in public procurement. The key to this notice is that criteria must be formulated so that all potential tenderers can interpret them in the same way. Information given in the invitation, such as qualification and selection criteria, as well as deadlines for submitting tenders, must be predetermined and must not be changed during the implementation of the procedure. If criteria are not published in the public procurement notice, they must be included in the tender documentation, which should be easily accessible to all tenderers. However, on the other hand, contracting authorities may provide tender documentation and additional documents at the request of interested parties, and may charge a fee.³⁵ The Directive does not stipulate the fee that may be asked of the candidates, but it indicates that the fee must be proportional to the real costs of copying and delivering the documentation.³⁶ Public invitations must be not only clearly

³³ Pursuant to the Directive from 2004 that regulates awarding contracts in the classic sector, the contracting authority must publish a prior information notice only for procurement procedures below a certain value that will be implemented under shortened time limits. “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,” Article 35.

³⁴ Directive 88/295 also detailed new rules that introduced a standard to improve transparency in public procurement: an open procedure was stipulated as a rule, while negotiated procedure was permitted only in extraordinary situations, and exemptions from the application of public procurement rules were specified in more detail. Bovis, *EU Public Procurement Law*.

³⁵ “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,” Annex VII, p. 215.

³⁶ Anoeska Buijze, *The Principle of Transparency in EU Law* (Hertogenboša: Uitgeverij BOXPress, 2013), p. 165.

formulated but also delivered in a timely manner so that potential tenderers can process the relevant information and prepare tenders.³⁷

The new EU Directive adopted in April 2014 also brings a fundamental step forward in this area by foreseeing electronic means of information and exchange of information as standard forms of communication.³⁸ The Directive obliges states to ensure fully electronic communication, meaning “communication by electronic means at all stages of the procedure, including the transmission of requests for participation and, in particular, the transmission of the tenders.”³⁹ These regulations aim to simplify transmission of procurement notices and to increase efficiency and transparency in public procurement procedures.

3. **An information notice on the contract award** is published after the public procurement procedure and contains information on the selected tenderer and price, as well as the reasons for selecting that tender. This notice is sent to all tenderers who participated in the procedure and is then made public. In this way, the contracting authority explains how tenders were evaluated and why the selected tender was found to be most suitable, which can have numerous positive effects in the implementation of public procurement procedures. On the one hand, companies can see where they went wrong, improve practices and thus increase their chances for success the next time round. On the other, contracting authorities can encourage better tenders in the future and set up a reputation of openness and ethical conduct in doing business.⁴⁰

³⁷ The Directive stipulates that when fixing the time limits for the receipt of tenders and requests to participate, contracting entities shall “take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimal time limits. In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent. In restricted procedures and in negotiated procedures with a prior call for competition set out under Article 30 and in competitive dialogue, the following arrangements shall apply: (a) the time limit for the receipt of requests to participate shall be fixed at no less than 37 days from the date on which the notice or invitation was sent; (b) in restricted procedure, the time limit for receipt of tenders shall be no less than 40 days from the date on which the notice or invitation was sent. If the contracting entity has published a prior information notice, the minimum time limit for the receipt of tenders in open and restricted procedures may be shortened to 36 days, but shall in no case be less than 22 days.” “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,” Article 45; “Directive 2004/17/EZ 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,” Article 45.

³⁸ “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.”

³⁹ Ibid.

⁴⁰ OECD, *Integrity in Public Procurement: Good Practices from A to Z*, p. 40.

These types of notices, whose publication is stipulated by EU Directives, are key segments of transparent public procurement procedure, but Arrowsmith believes that in order to ensure a transparent public procurement system, contracting authorities must be obliged to make decisions based on rules and to enable reviews of their procedure.⁴¹ Specifically, rules must be clearly defined so that the manner in which the procurement officer makes various decisions is known; for example, in which cases is the open procedure applied, and when is another type of procedure applied, why was the lowest price criterion chosen to determine the contract award and not the criterion of most favourable price, etc. In order to enable checking whether procedures and rules were adhered to, contracting authorities must also keep written records of all their decisions in the public procurement process.⁴² Thus, Arrowsmith adds a new dimension to the principle of transparency in public procurement, pointing out that it is not enough to publish information, it must also be clear and subject to review.

The Organisation for Economic Co-operation and Development (OECD) has also contributed to establishing standards in transparent public procurement by focusing on transparency and controls in the contract implementation phase.⁴³ Subsequent changes to a signed contract are directly linked to respect for the principle of transparency, because they imply that at the very beginning of the procedure, contracting entities were not transparent about the specific requirements and conditions for the awarding of the public procurement contract.⁴⁴ Also, controls and transparency in contract implementation are particularly important if we bear in mind the various forms of abuse that may arise in that process. For example, derogation from contract terms may occur when the supplier is allowed longer time limits for delivery or an increase in prices during contract implementation. During implementation, products may be replaced by those of poorer quality, or sub-standard services or works may be substituted, or the specifications contained in the tender documentation may not be followed.

The EU Directives from 2004 do not specify the conditions under which changes to the contract terms are permissible, but instead stipulate a general principle that each new procurement requires a new procedure.⁴⁵ It was only in 2014, with the adoption of the new Directives, that conditions under which contracts may be modified were defined. According to the directives, modifications, irrespective of their monetary value, are permissible if they “have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which

⁴¹ Arrowsmith, *Public Procurement Regulation*, p. 21.

⁴² Ibid.

⁴³ OECD, *Integrity in Public Procurement: Good Practices from A to Z*.

⁴⁴ Buijze, *The Principle of Transparency in EU Law*, p. 166.

⁴⁵ “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,” Article 31.

may include price revision clauses, or options.”⁴⁶ Contract modifications may include additional works, services or goods in cases where a change of supplier is not possible for technical reasons, e.g. due to interoperability requirements, or in cases when a change of supplier would cause “significant inconvenience or substantial duplication of costs for the contracting authority.”⁴⁷ Changes to contract conditions are additionally defined through decisions of the European Court of Justice presented below.

3.2. Caselaw

The European Court of Justice has played a significant role in reinforcing the principle of transparency in public procurement. Until the adoption of the new Directive in 2004, the principle of transparency was not explicitly stated in the directives. The Court’s findings on concrete obligations of contracting authorities, issuing from the directives, contributed to including the principle of transparency among the basic principles of public procurement in EU directives.⁴⁸ The European Court of Justice directly links transparency to achieving the principle of equal treatment. The caselaw indicates that without transparent conduct it is impossible to check whether the contracting authority has treated all tenderers equally, i.e. whether all tenderers were given fair conditions for competition. Therefore, the principle of non-discrimination and equal treatment includes the obligation of transparency in order to enable checking whether the principle was upheld. This was confirmed in a number of judgements.

In the 1999 case of *Unitron Scandinavia*, the European Court of Justice issued a decision whereby prohibition of discrimination necessarily includes the obligation of transparency. The case concerned the selection of a supplier to provide livestock farmers with eartags designating the origin of the livestock in Denmark. The procedure was conducted by the private company *Danske Slagterier* endowed by competent authorities with exclusive rights to implement this type of veterinary control.⁴⁹ One of the dissatisfied tenderers, the *Unitron*

⁴⁶ The Directive specifies that the above clauses must contain the scope and nature of possible modifications, as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or framework agreement. “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,” Article 72; “Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC,” Article 89.

⁴⁷ *Ibid.*

⁴⁸ Dariusz Piasta, *Evropski sud pravde o javnim nabavkama: Izvod iz prakse* [The European Court of Justice on Public Procurement: Extracts from Case-law], (Sarajevo: EUPPP, 2006), p. 27.

⁴⁹ 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.

company, appealed the public procurement procedure for the eartags, claiming, inter alia, that preferential treatment for domestic companies should not have been applied with the contract notice published only in the territory of Denmark and not at the EU level. At the same time, representatives of Danske Slagterier and the competent state veterinary department claimed that they were not under obligation to adhere to EU provisions, because the company did not purchase the eartags directly, but administered and coordinated purchases between supplier and customer.⁵⁰ The Court confirmed that the contracting entity had not been under the obligation to adhere to the Directive, but to the national law on public procurement in Denmark,⁵¹ but that it was under the obligation to uphold the principle of non-discrimination on the basis of nationality. As the judgement states, the principle of non-discrimination cannot be interpreted restrictively. It implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that it has been complied with.⁵²

In the case of *Telaustria and Telefonadress v Telekom Austria* from 2000, the European Court of Justice ruled that the principle of transparency in public procurement must be upheld even when the procurement at stake is beyond the scope of EU regulation. In the concrete case, Telekom Austria, as a public enterprise, decided to enter into a contract with a private company to produce and publish telephone directories for all its subscribers. The notice was published in the official gazette of Austria, but not in the *Official Journal of the European Union*. Not publishing the public procurement notice was justified by the fact that this was not a contract for financial gain, but a concession of a public service, which did not come under the scope of the then valid Directives 92/50 and 93/38, given that Telekom Austria was not directly remunerating another company for the service of processing telephone subscriber data, but instead conceding the rights to commercial exploitation of said services.⁵³ At the objection of the *Telaustria and Telefonadress* companies, the Federal Procurement Review Commission filed a request with the European Court of Justice for interpretation of the directives. The Court ruled that the contracting entities, notwithstanding

⁵⁰ Opinion of Advocate General Alber of July 8, 1999. *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab vs. Ministeriet for Fødevarer, Landbrug og Fiskeri*.

⁵¹ European Union directives are applied to contracts above a certain value threshold determined at the EU level every two years. Procurement below the EU value threshold is subject to national laws of Member States. Accordingly, procurement above the EU value threshold must be published in the *Official Journal of the European Union*, website of the Official Journal of the EU, <http://www.ojec.com/> (Accessed on July 23, 2015), while procurement procedures below this threshold are published in national gazettes. Support for Improvement in Governance and Management (SIGMA), *Understanding the EU Financial Thresholds* (Paris: SIGMA, 2011).

⁵² Judgment of the Court (First Chamber), *Unitron Scandinavia A/S and 3-S A/S, Presuda Danske Svineproducenters Serviceselskab vs. Ministeriet for Fødevarer, Landbrug og Fiskeri*, November 18, 1999.

⁵³ Court of the European Union, Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH vs. Telecom Austria*, December 7, 2000.

the fact that they are not bound by the provisions of the EU Directive, “are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, that principle implying, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.”⁵⁴ The Court further specified that the “obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.”⁵⁵

The European Court of Justice has also passed a number of decisions supporting the obligation of transparency during contract implementation. Based on the caselaw, it can be concluded that amendments to the provisions of a public contract during its term constitute a new contract award where the amendments are materially different in character from the original contract.⁵⁶ The Court also set out the circumstances where an amendment could be regarded as being material, as when it “introduces conditions that, had they been part of the initial award procedure, would have allowed the admission of tenderers other than those initially admitted or the acceptance of a tender other than the one initially accepted.”⁵⁷ A material amendment also “extends the scope of the contract considerably to encompass services that were not originally covered; or changes the economic balance in favour of the contractor in a manner that was not provided for in the terms of the initial contract.”⁵⁸ As a result of the Court’s judgements,⁵⁹ the new Public Sector Directive from 2014 provides detailed provisions on contract modification during its term (for more details see subsection 3.1).

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Support for Improvement in Governance and Management (SIGMA), *Odabrane presude Suda pravde Evropske unije u oblasti javnih nabavki (2006–2014)* [Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006–2014)], (Paris: OECD, 2014), p. 134.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ See, for example, the judgements: Court of Justice of the European Communities, Case No. C-454/06, *Pressetext Nachrichtenagentur GmbH vs. Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung*, June 19, 2008; Court of Justice of the European Communities, Case No. C-160/08, *European Commission vs. Federal Republic of Germany*, February 11, 2010; and Court of Justice of the European Communities, Case No. C-91/08, *Wall AG vs. La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH*, April 13, 2010.

3.3. Comparative practices

Many countries in the world have reformed their public procurement systems by, among other things, improving practices related to publishing key information needed to achieve competition in public procurement and public control over public spending. The innovations have mostly included more online publishing of information about the whole public procurement cycle, including public procurement plans, tender documentation, information on contract implementation with deadlines and disbursed amounts.

In the past few years, there has been a visible trend of establishing central portals for public procurement, which have improved transparency by providing tenderers and interested members of the public with a single point of access to all the important information on public procurement procedures in the country. One of the most successful examples of an *online* platform for public procurement in the world is the central portal KONEPS established in South Korea.⁶⁰ This system, often used as a model by other countries reforming their public procurement systems, covers all the phases of public procurement, from the design and publication of notices to contract awards and payment of contractors, and provides the business community, civil society organisations and the public with insight into public spending. In Europe, Portugal was one of the first countries to make significant innovation in this area. Since 2009, public procurement in Portugal is conducted through a central public procurement portal called BASE.⁶¹ The portal publishes all the public notices, decisions on exemptions, all public procurement contracts concluded after open, restricted and negotiated procedures, as well as competitive dialogue,⁶² and amendments to contracts that modify more than 15 percent of the original contract.⁶³ Contracts concluded based on direct agreement come into force only once they are published on the portal. One of the subpages

⁶⁰ See the website of Korea ON-line E-Procurement System (KONEPS), <http://www.pps.go.kr/eng/jsp/koneps/overview.eng> (Accessed on July 23, 2015).

⁶¹ Before the portal was established, in 2008, a new law was adopted, which foresaw the introduction of innovative measures, including electronic communication to replace previous information exchange by way of printed documents, greater transparency and efficiency, simpler procedures and increased competition. Ana Sofia Pais and Pedro Ministro, *Public Procurement in Portugal 2011* (Lisbon: Observatório das Obras Públicas, 2012).

⁶² Competitive dialogue is a procedure employed by the contracting authority when, in the absence of technical knowledge or for other reasons, it is unable to define the legal or financial dimension of procurement, or the object of procurement that would fulfil its needs. During this procedure, contracting authorities conduct a dialogue with potential suppliers in order to develop one or more suitable solutions capable of meeting their requirements, and on the basis of which the candidates chosen are invited to tender. “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,” Article 1, para. 11, point c.

⁶³ See website of Base: Contratos Públicos Online, <http://www.base.gov.pt/Base/pt/Homepage> (Accessed on July 23, 2015).

of the central portal is the Public Works Observatory, which provides insight into the implementation of public procurement contracts.⁶⁴

Advanced central public procurement portals have also been established in other European countries, such as Finland, where the central portal HILMA was launched in 2007,⁶⁵ the UK with the *online* system called Contract Finder, and Slovakia, which has a successfully functioning public procurement portal called EVO that was created as part of a thorough public procurement system reform in the country⁶⁶.

Looking to the immediate neighbourhood of BiH, in Croatia, public invitations to tender and contract award notices have been published on the Electronic Bulletin of Public Procurement of Croatia since 2008, while in Serbia, the Public Procurement Portal, which publishes tender notices, has been operating since 2013.

Establishing public procurement portals in individual countries has had numerous benefits both for the public sector and for the suppliers participating in the procedures. According to a European Union report, thanks to the electronic procurement system, hospitals in Portugal have managed to reduce contract prices by 18 percent, while total savings in the first year after transitioning to electronic procurement are estimated at 650 million Euros. Savings ranging from 6 to 12 percent of total spending in public procurement are possible.⁶⁷ The launch of the central portal Contract Finder in the UK in 2011 has significantly benefited small and medium enterprises, which in the first year of the portal's functioning received almost a third of the total number of contracts awarded in the public procurement process.⁶⁸ The latest data shows that in 2013 and 2014, small and medium enterprises received public procurement contracts in the total amount of 11.4 billion pounds, which makes up 26.1 percent of budget spending in the UK.⁶⁹

⁶⁴ The portal enables comparisons of the contract price with that paid upon contract completion, as well as the deadline foreseen in the contract with the actual date of completion. Pais and Ministro, *Public Procurement in Portugal 2011*.

⁶⁵ See HILMA website, <http://www.hankintailmoitukset.fi/fi/> (Accessed on July 23, 2015).

⁶⁶ One of the reasons to enact reforms and publish almost all information on public procurement in Slovakia was a series of scandals related to abuse of public procurement procedure. One of the indicative examples of this type of abuse is that of the Slovak Ministry of Development, which in 2007 published an invitation for construction works in the amount of 119.5 million Euros on a small noticeboard in the hallway inside the ministry building inaccessible to the public. The contract was awarded to a company with close ties to the president of the ruling party in Slovakia. The case became known a year later, and the contract was annulled by the Slovak Public Procurement Office. Alexander Furnas, "Transparency Case Study: Public Procurement in the Slovak Republic," Sunlight Foundation, August 12, 2013. <http://sunlightfoundation.com/blog/2013/08/12/case-study-public-procurement-in-the-slovak-republic/> (Accessed on July 23, 2015).

⁶⁷ European Commission, *Strategy for e-procurement*, COM (2012) 179 (Brussels: European Commission, 2012).

⁶⁸ HM Government, *Open Data White Paper: Unleashing the Potential* (HM Government, 2012), p. 18.

⁶⁹ "Government spends £11.4 billion with SMEs," Gov.uk, February 25, 2015, <https://www.gov.uk/government/news/government-spends-114-billion-with-smes> (Accessed on July 23, 2015).

In terms of the types of information, countries have increasingly decided to publish information not just on current procurement processes, but also on annual plans of institutions for the procurement of various goods, services and works. Thus, in Croatia, contracting authorities are obliged to publish procurement plans on their websites, and there are links on the public procurement portal leading to these documents.⁷⁰ In Serbia, special attention was devoted to procurement plans so that contracting authorities in that country must state detailed information, such as, among other things, the reason and justification for individual procurement, method for determining estimated value, i.e. method and manner in which the contracting entity investigated the market and defined the estimated value.⁷¹ Contracting authorities in Montenegro must draw up a procurement plan by 31 January and submit it for publication on the public procurement portal.⁷² Publishing procurement plans is common practice in countries of the European Union as well, such as Austria, Italy, Estonia, Poland, etc.⁷³

Numerous countries, including those in the region, have stipulated the obligation for public authorities to make tender documentation available on their official websites, which reduces costs of participation for potential tenderers. For example, the Croatian Law on Public Procurement stipulates that after publishing the procurement notice, the contracting entity must submit all documentation for publication in the Electronic Public Procurement Classifieds of the Republic of Croatia, which can be accessed free of charge.⁷⁴ The legislative framework for public procurement in Slovenia also foresees that tender documentation must be available through the public procurement portal, while access to and search of documents on the public procurement portal, as well as their downloading, should be free of charge.⁷⁵ Public procurement laws in Croatia and Slovenia also stipulate that the contracting authority must provide tender documentation or parts of such documentation⁷⁶ at the request of a tenderer if for technical reasons the documentation cannot be published. The central portal Contract Finder in the

⁷⁰ “Zakon o javnoj nabavi” [Law on Public Procurement], *Official Gazette of the Republic of Croatia* 90/11, 83/13, 143/13 and 13/14.

⁷¹ “Zakon o javnim nabavkama Republike Srbije” [Law on Public Procurement of the Republic of Serbia], *Official Gazette of the Republic of Serbia* 124/12; “Pravilnik o formi i sadržini plana nabavki i izveštaja o izvršenju plana nabavki” [Rulebook on the form and content of procurement plans and procurement implementation reports], *Official Gazette of the Republic of Serbia* 29/2013.

⁷² “Zakon o izmjenama i dopunama Zakona o javnim nabavkama Crne Gore” [Law on Changes and Amendments to the Law on Public Procurement of Montenegro], *Official Gazette of Montenegro* 57/14 and 28/15, Article 38.

⁷³ Organisation for Economic Cooperation and Development (OECD), “Transparency in public procurement,” in *Government at a Glance 2011* (Paris: OECD Publishing, 2011).

⁷⁴ “Law on Public Procurement,” Article 31, para. 2.

⁷⁵ “Public Procurement Act Slovenia,” *Official Gazette of the Republic of Slovenia* 128/06, 16/08, 19/10 and 18/11, Article 72.

⁷⁶ *Ibid.*; “Law on Public Procurement,” Article 31, para. 2.

UK is also used to publish tender documentation,⁷⁷ and the same is true of the public procurement portal in Estonia⁷⁸.

Contract implementation is usually the least regulated by law, which increases the need to ensure transparency in this phase of public procurement. Thus, 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,⁷⁹ 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 contract⁸⁰. If the contracting entity is unable to publish the register on its own website, it must submit it to the central state administration body responsible for the public procurement system, which will then publish it on its own website.⁸¹ The Law on Public Procurement in Serbia obliges contracting authorities to publish any changes in prices and other important contract elements, which are permissible only if they are clearly and precisely determined in the tender documentation and contract, on the public procurement portal within three days from the date of the decision to modify the contract.⁸² Publishing any deviations from the contract, especially in terms of prices and deadlines, is also practised in other European countries such as Belgium, Slovakia, Italy, etc.⁸³

3.4. Public Procurement and Proactive Transparency

The publishing of all information on public procurement of significance for the public is increasingly prescribed by laws on free access to information. Numerous countries have modernised their information laws to oblige public authorities to

⁷⁷ UK Cabinet Office - The Efficiency and Reform Group. Publication of Tender Documentation. Guidance Note (London: UK Cabinet Office, 2012).

⁷⁸ See website of E-riigihangete keskkond, <https://riigihanked.riik.ee/lr1/web/guest/e-keskkonnakasutamine> (Accessed on July 23, 2015).

⁷⁹ A framework agreement is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period. "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," Article 1, para. 5.

⁸⁰ "Law on Public Procurement," Article 21, para. 3.

⁸¹ Ibid., Article 21, para. 6.

⁸² "Law on Public Procurement of Serbia," Article 115.

⁸³ The study gives an overview of information published on central government websites. OECD, "Transparency in public procurement."

publish information important for the public proactively, without waiting for a request.⁸⁴

The best example of this is Slovakia, which in 2011 adopted changes to its Law on Free Access to Information stipulating that all public procurement contracts shall enter into force only once they are published *online*.⁸⁵ What is more, contracts that are not published three months after signing become null and void.⁸⁶ These changes were part of radical reforms aimed at increasing the openness and accountability of institutions in a country which was at the time among the group of countries perceived as the most corrupt.⁸⁷ In the period from 2011 to 2014, over 780 contracts were published on the Central Contracts Registry (CRS), and it is estimated that local communities published over a million contracts on their websites within the same period.⁸⁸ The publishing of contracts yielded many results – the share of procedures with a single tenderer dropped from one half to one third, and the media carried stories on public procurement about 25 percent more frequently than before. The average number of tenderers per procedure in 2010 was 1.6 tenderers, but four years after mandatory publication of contracts was introduced, the average number of tenderers per procedure rose to 3.7.⁸⁹ The obligation to publish includes amendments to contracts, which ensures full transparency in this domain.

It is expressly information on public procurement that is increasingly becoming part of mandatory proactive publication of information. Specifically, proactive transparency in public procurement means publishing information on public procurement including detailed information on public procurement procedures, criteria, outcomes, copies of contracts, reports on contract completion.⁹⁰ In that context, a transparent public procurement system was reinforced by legislation on free access to information that guarantees the right of citizens to access all information of public interest.

⁸⁴ For more information, see: Helen Darbishire, *Proactive Transparency: The Future of the Right to Information? A Review of Standards, Challenges, and Opportunities* (Washington: World Bank Institute, 2011); Alen Rajko, *Proaktivna transparentnost u Bosni i Hercegovini: Stanje i perspektive u svjetlu međunarodnih standarda i komparativnih rješenja* [Proactive Transparency in Bosnia and Herzegovina: Status and Perspectives in Light of International Standards and Comparative Solutions], (Sarajevo: Analitika – Center for Social Research, 2014).

⁸⁵ Gabriel Sípos, Samuel Spác and Martin Kollárik, *Not in Force until Published Online. What the Radical Transparency Regime of Public Contracts Achieved in Slovakia* (Bratislava: Transparency International Slovakia, 2015).

⁸⁶ *Ibid.*, p. 5.

⁸⁷ *Ibid.*, p. 4.

⁸⁸ *Ibid.*, p. 8.

⁸⁹ *Ibid.*, p. 13.

⁹⁰ Darbishire, *Proactive Transparency*, p. 20.

4.

Public Procurement System in Bosnia and Herzegovina: Legal and Institutional Framework

A significant portion of budget funds in Bosnia and Herzegovina is allocated to public procurement. According to the latest data from 2013, the value of public procurement contracts in BiH was 2.7 billion BAM, which accounts for 9.68 percent of the total gross domestic product.⁹¹ This type of public spending is regulated by a unique legal framework applicable to all public authorities at all levels of government, irrespective of whether they are procuring goods, services or works. The public procurement system is also regulated by a series of bylaws, such as rulebooks, rules of procedure, decisions, instructions and standard document models that regulate in more detail the obligations stemming from the law.

Rules on public procurement procedure in BiH were first defined in 2004 when the Parliamentary Assembly of BiH adopted the Law on Public Procurement of BiH.⁹² The Law established a decentralised public procurement system where each contracting authority implements public procurement procedures independently. The LPP also created a unique public procurement market given that the provisions of this Law are applicable throughout the territory of the country. In line with EU standards, the LPP stipulated that public procurement in BiH shall be conducted in keeping with the principles of efficient public spending, fair and active competition among potential tenderers, transparency, and equal treatment and non-discrimination between tenderers.⁹³

⁹¹ Still, it should be noted that annual reports on public procurement contracts for 2013, as well as those from previous years, do not include the total public funds used by authorities, public enterprises and public entities at all levels of government in Bosnia and Herzegovina to procure goods, services and works. The annual report is compiled on the basis of submitted reports on implemented public procurement procedures from 1431 contracting authorities registered in the WisPPA system – information system for *online* reporting on awarded public procurement contracts. The Public Procurement Agency of BiH estimates that there are 2000 contracting authorities in BiH. Public Procurement Agency of BiH, *Godišnji izvještaj o zaključenim ugovorima u postupcima javnih nabavki u 2013. godini* [Annual Report on Public Procurement Contracts for 2013], (Mostar: Public Procurement Agency of BiH, 2014), p. 15.

⁹² “Zakon o javnim nabavkama Bosne i Hercegovine” [Law on Public Procurement of Bosnia and Herzegovina], *Official Gazette of BiH* 49/04.

⁹³ *Ibid.*, Article 2.

The public procurement system in Bosnia and Herzegovina was reformed in 2014 with the adoption of the Law on Public Procurement of BiH, which repealed the previous law from 2004. Given that the process of accession to the European Union requires that BiH adopt a host of regulations (*acquis communautaire*), the adoption of the new Law on Public Procurement was a measure to harmonise BiH legislation with EU standards.⁹⁴ In line with the EU Directives from 2004, contracting authorities were divided into two groups: the so-called classic public authorities, including administrative authorities at all levels of government, and sector authorities operating in energy, transport, postal services, water supply, as well as companies with exclusive rights to perform one or more services of public interest.⁹⁵

Institutions responsible for monitoring the application of the Law on Public Procurement of BiH and its bylaws are the Public Procurement Agency of BiH and the Procurement Review Body.⁹⁶ The Public Procurement Agency of BiH is responsible for drafting laws and amendments, as well as bylaws and model documentation, compiling annual reports on public procurement, providing advisory and technical support to the stakeholders in the public procurement process, and organising training.⁹⁷ The Agency is also responsible for monitoring public procurement procedures for all contracting authorities, gathering, analysing and publishing information on public procurement procedures, and developing electronic information systems for public procurement in BiH.⁹⁸ The Procurement Review Body is a separate, independent institution whose members are appointed by the Parliament of BiH and whose task it is to decide on complaints by tenderers in public procurement procedures.⁹⁹

Depending on the type of procurement and the circumstances, the Law on Public Procurement of BiH enables contracting authorities to apply different types of procedure:

⁹⁴ Specifically, the new law on public procurement was harmonised with the EU Directive on awarding public procurement contracts in the classic and utilities sectors and the EU Directive on legal safeguards in public procurement, which had not been in force when the first LPP BiH was adopted in 2004. “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”; “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”; “Directive 2007/66/EC of the European Parliament and of the Council of 11 November 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.”

⁹⁵ “Law on Public Procurement of BiH,” Articles 4 and 5.

⁹⁶ See the website of the Public Procurement Agency and the Procurement Review Body of BiH, <http://www.javnenabavke.ba/index.php?id=01&jezik=bs> (Accessed on July 23, 2015).

⁹⁷ “Law on Public Procurement,” Article 92, para. 3.

⁹⁸ Ibid.

⁹⁹ Ibid., Article 93.

- Open procedure, where all interested suppliers are invited to tender by a public notice, is the basic type of procedure.
- When it comes to more complex projects, contracting authorities may opt for the restricted procedure, where in the pre-qualification phase interested suppliers submit a request for participation and the contracting authority then invites only qualified candidates to submit tenders.¹⁰⁰
- A design contest is used for procurement in specific areas such as architecture, civil engineering and spatial planning.
- In exceptional situations, such as for example emergencies and circumstances where due to technical restrictions or exclusive rights the contract can be awarded only to a specific supplier, the contracting authority may apply the negotiated procedure with or without publishing a procurement notice. This type of procedure enables contracting authorities to negotiate the financial, technical, administrative and any other aspect of the tender with the tenderer.
- Lower value contracts may be concluded on the basis of competitive requests where at least three suppliers are invited to submit their tenders, and then the optimal tender is selected, or through a direct agreement where the contracting authority solicits a price proposal or quotation from a single supplier.
- Finally, the new law foresees a new type of procedure, the competitive dialogue, which enables contracting authorities to enter into dialogue with interested suppliers on developing one or more suitable solutions that meet their requirements and on the basis of which the selected suppliers are invited to tender.¹⁰¹

The new legal framework was adopted with a view to better prevent abuse of public procurement procedure, precisely define the responsibilities of the contracting entity and remove bureaucratic burdens, and to improve the efficiency of public procurement procedures.¹⁰² At the same time, reforms in this area aimed to remove problems encountered in the application of the previous Law on Public Procurement, one of which was the lack of transparency.

¹⁰⁰ Ibid., Article 6.

¹⁰¹ Ibid., Article 2, para. 3, point j.

¹⁰² Public Procurement Agency of BiH, Explanation of Draft Law on Public Procurement, p. 2.

5.

Transparency of Public Procurement in Bosnia and Herzegovina: Key Challenges

The current Law on Public Procurement of BiH foresees a host of new solutions with the aim of improving the transparency of public procurement in BiH. What follows is a more detailed analysis of the legal framework regulating the aspect of transparency of public procurement in BiH in order to assess the degree to which the Law creates preconditions for transparent public procurement. Standards established by the European Union and the European Court of Justice, as well as advanced practices in the EU and countries of the region, described in previous sections, serve as a framework for assessing the transparency of the public procurement system, taking into account all the phases of the public procurement cycle, including planning, implementation of the public procurement procedure and contract implementation.

5.1. Public Procurement Planning

The Law on Public Procurement of BiH (hereinafter: LPPBiH) obliges contracting authorities to develop a public procurement plan showing the types of services, goods and works the contracting authority plans to procure in the upcoming year, at the latest two months from the date of adoption of the budget or financial plan.¹⁰³ According to the LPPBiH, the procurement plan is a precondition for initiating public procurement procedure, so the contracting authority may not even start the contract award procedure if the procurement is not foreseen in the procurement plan,¹⁰⁴ with the exception of emergency procurement that is unplanned¹⁰⁵. When a public procurement is not foreseen in the plan, the LPPBiH obliges contracting authorities to adopt a special decision on initiating the procedure, thereby modifying the procurement plan.¹⁰⁶ This decision is mostly reserved for procedures that could not be foreseen at the time the plan was being

¹⁰³ “Law on Public Procurement of BiH,” Article 17, para. 2.

¹⁰⁴ Ibid., Article 17, para. 1.

¹⁰⁵ Ibid., Article 21, point d.

¹⁰⁶ “Law on Public Procurement of BiH,” Article 17.

drafted, such as procurement for the benefit of the everyday functioning of the contracting authority.

Pursuant to the bylaw, procurement plans in BiH must contain the following information: object of procurement, estimated value and type of procedure, approximate date of start and end of procedure, and source of financing.¹⁰⁷ Based on this information, suppliers can plan their future activities, and the public can have an insight into how the contracting authority allocates public funds within public procurement.

The obligation to develop procurement plans is a significant step forward given that public procurement planning to date has mainly been evaluated as inadequate and non-transparent.¹⁰⁸ Namely, up until the adoption of the new Law on Public Procurement of BiH, public authorities in BiH were not bound by law to develop annual public procurement plans. Notwithstanding that fact, auditing services had recommended in their reports that public institutions should conduct regular analyses of implemented public procurement contracts and use them to make plans that would enable timely and efficient public procurement procedures.¹⁰⁹ EU directives have stipulated the development of procurement plans since 1988, and as a result, many countries of the EU and the region have transposed this standard into their legislation. The new Law on Public Procurement of BiH from 2014 introduced the obligation for public authorities in BiH to publish information on the planning phase.

However, the publication of procurement plans in BiH does not fully correspond to good practice in other countries or the needs of the public procurement system in BiH. Procurement plans are published on the websites of contracting authorities, but the law does not provide for a solution to publishing procurement plans of those contracting authorities that do not have their own websites. In addition, procurement plans are not published on the public procurement portal, which serves as a central information point for public procurement. This makes it significantly more difficult for potential tenderers to search through all procurement plans published on the websites of over 2000 contracting authorities. For the sake of comparison, according to the Croatian Law on Public Procurement, contracting authorities must publish their procurement plans on their websites, but also submit a link to the plan to the Public Procurement

¹⁰⁷ Public Procurement Agency of BiH, Sample Procurement Plan, http://www.javnabavke.ba/legislativa/upripremi/Primjer_plan_nabavki_bs.pdf (Accessed on July 23, 2015).

¹⁰⁸ Audit Office of the Institutions of BiH, *Izveštaj 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); 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.

¹⁰⁹ Audit Office of the Institutions of BiH, *Audit Report on the Budget Execution Report of Institutions of Bosnia and Herzegovina for 2012*, p. 79.

System Administration, which will then publish all the links on its own website.¹¹⁰ Contracting authorities that do not have their own websites must also submit their procurement plans, as well as any changes to the plans, to the Administration, which then makes sure that these plans are available to the public through its website.¹¹¹ In this way, contracting authorities that do not have their own website are not exempt from the obligation of transparent planning and implementation of public procurement.

According to the LPPBiH, procurement plans published on the website need not include lower value procurement conducted through competitive requests and direct agreements.¹¹² Procedures implemented by way of competitive requests apply to procurement of goods and services up to 50,000 BAM and procurement of works up to 80,000 BAM, while direct agreements are applied to contracts up to 6,000 BAM. Not publishing these procedures is a significant shortcoming in terms of transparency, given that a large number of public procurement contracts in BiH are awarded precisely on the basis of competitive requests and direct agreements. According to the data of the BiH Public Procurement Agency for 2013,¹¹³ the number of contracts based on direct agreement exceeds the number of contracts based on open, restricted and negotiated procedures combined. A large share of the total number of public procurement contracts are also contracts based on competitive requests, as can be seen in the table below.

¹¹⁰ “Law on Public Procurement,” Article 20, para. 7.

¹¹¹ See the website of the Public Procurement System Administration of BiH, Public Procurement Portal, <http://www.javnanabava.hr/default.aspx?id=3939> (Accessed on July 23, 2015).

¹¹² “Law on Public Procurement of BiH,” Article 87.

¹¹³ Public Procurement Agency of BiH, *Godišnji izvještaj o zaključenim ugovorima u postupcima javnih nabavki u 2012. godini* [Annual Report on Public Procurement Contracts for 2012], (Banja Luka: Public Procurement Agency of BiH, 2013), p. 8.

Table 1.5. Overview of number of public procurement contracts for each quarter of 2013

Type of procedure	1st quarter (1 Jan – 31 Mar)	2nd quarter (1 Apr – 30 Jun)	3rd quarter (1 Jul – 30 Sep)	4th quarter (1 Oct – 31 Dec)	Total per type of procedure
Open procedure	1,087	853	922	994	3,856
Restricted procedure	14	3	9	30	56
Negotiated procedure with notice	11	15	10	9	45
Negotiated procedure without notice	1,475	901	848	889	4,113
Competitive request	3,943	3,342	3,146	3,782	14,213
Direct agreement	16,669	16,014	14,318	19,774	66,775
Total number of procedures	23,199	21,128	19,253	25,478	

Source: Public Procurement Agency of BiH, Annual report on public procurement contracts for 2013 (Mostar: Public Procurement Agency of BiH, 2014), p. 8.

Analysing the relevant legal provisions,¹¹⁴ we can conclude that contracting authorities must also include in their procurement plans those procedures based on competitive requests and direct agreements¹¹⁵ (because it is impossible to implement a public procurement procedure not foreseen in the plan),¹¹⁶ but they are not obliged to publish a comprehensive public procurement plan on their websites. Contracting authorities are thus given the possibility to remove competitive requests and direct agreements from their procurement plans and publish only these reduced plans on their websites. In other words, contracting authorities have information about the lower value procurement they plan to implement, but they are not obliged to publish this information. This also means

¹¹⁴ “Law on Public Procurement,” Article 17.

¹¹⁵ The Rulebook on Direct Agreement Procedure stipulates that direct agreements may be concluded only if such procurement is foreseen in the procurement plan, or when the contracting authority issues a special decision to initiate the direct agreement procedure. Public Procurement Agency of BiH, “Pravilnik o postupku direktnog sporazuma” [Rulebook on Direct Agreement Procedure], *Official Gazette of BiH* 53/6, Article 2.

¹¹⁶ If the contracting authority implements procurement that was not initially foreseen in the procurement plan, it shall adopt a special decision on initiating the public procurement procedure, thereby making that procurement part of the procurement plan. This means that the special decision modifies the procurement plan, and the public procurement procedure is initiated only after the plan has been modified.

that including competitive requests and direct agreements in the published procurement plan does not entail any additional administrative burden in the sense of creating new information, but merely necessitates making information already in the possession of the contracting authority publicly available. It should be noted that some contracting authorities already publish integral procurement plans that include both competitive requests and direct agreements.¹¹⁷

Apart from that, the monetary value and character of so-called small-scale procurement is an additional reason to include this type of procedure in the initial or modified procurement plan. As noted above, procurement based on competitive requests includes procurement of goods and services up to 50,000 BAM and procurement of works up to 80,000 BAM, which is a relatively high monetary threshold. On the other hand, lower value procedures do not have the character of emergency procurement implemented when the contracting authority could not have foreseen or planned the procurement need, so there is no reason to leave this type of procedure out of procurement plans. In contrast to Bosnian-Herzegovinian legislation, laws on public procurement in, for instance, Serbia and Croatia¹¹⁸ do not contain this type of restriction, and procurement plans, including all the procedures, are published integrally.

5.2. Public Procurement Notices

The new law foresees that all notices on procurement, awarding of contracts, annulment of procedures, voluntary *ex-ante* notices on transparency and prior information notices, as well as summaries of notices in English, are to be published on the Public Procurement Portal,¹¹⁹ administered by the BiH Public Procurement Agency¹²⁰. According to the previous law, notices on procurement, annulment of procedures and contract awards were to be published in the *Official Gazette of BiH*. The new law requires that summaries of notices published on the public procurement portal are also published in the *Official Gazette*. Given that the mandatory publication in the *Official Gazette of BiH* entails brief information about the public procurement procedure, this has significantly

¹¹⁷ Such authorities include: Motorways of the Federation of BiH, Clinical Centre of the University of Sarajevo, Municipalities of Travnik, Stari Grad Sarajevo, Bosanska Krupa, Government of the Brčko District. This is not an exhaustive list, but merely serves as an example of practices adopted by certain contracting authorities, which may be applied by other authorities as well. Further research in this sector is needed to determine whether they fulfil their obligation of publishing plans and in what form.

¹¹⁸ “Law on Public Procurement,” Article 20; “Law on Public Procurement of Serbia,” Article 5.

¹¹⁹ See Public Procurement Agency of BiH, Public Procurement Portal of Bosnia and Herzegovina, <https://www.ejn.gov.ba/> (Accessed on July 23, 2015).

¹²⁰ “Law on Public Procurement,” Article 36.

reduced publication costs, which used to mean a considerable financial burden for contracting authorities.¹²¹

The system for *online* publication of public procurement notices was established in 2011 when contracting authorities were enabled to publish notices on public procurement procedures on the Internet.¹²² This system was innovated to become the public procurement portal, which became operational on 27 November 2014 to coincide with the start of application of the new LPPBiH.¹²³ In the upcoming phases of development of the portal, there are plans to develop two new modules: e-tendering and e-auction.¹²⁴ The public procurement portal has significantly improved the public procurement system, providing all potential tenderers with a single place to get information on opportunities to participate in public procurement procedures. The establishment of the portal in BiH is in line with the general trend of initiating central electronic systems for public procurement, which have been established in almost all European countries, including countries in the region, and which are used to publish public procurement notices. Public procurement notices in BiH are published for the open and restricted procedure, the negotiated procedure with publication of notice, and for the design context, competitive dialogue and competitive request procedures.¹²⁵

A novelty in the LPPBiH of 2014 is the improved transparency of competitive requests. Namely, contracting authorities are now obliged to publish competitive requests on the public procurement portal, form a procurement committee and ensure public opening of tenders received through the competitive request procedure.¹²⁶ This has also created the preconditions for improving competition in procedures for lower value contracts, given that the contracting authority need not be limited to sending competitive requests to at least three addresses, but can receive many more offers thanks to publicly available notices. Publishing competitive requests thus contributes to easier identification of the prohibited splitting of procurement into smaller parts in order to avoid having to apply the open procedure, which had been recorded as a significant problem in previous practice. Namely, according to research conducted by Analitika in mid 2014 on a sample of 511 representatives of private companies with experience in public procurement, 65.6 percent of them stated they believed splitting procurement

¹²¹ SIGMA, *Bosnia and Herzegovina: Public Procurement Assessment* (Paris: SIGMA, 2012), p. 4.

¹²² Public Procurement Agency of BiH, Annual report on Public Procurement Contracts for 2012, p. 41.

¹²³ See Public Procurement Portal in Bosnia and Herzegovina, <https://www.ejn.gov.ba/> (Accessed on July 23, 2015).

¹²⁴ Public Procurement Agency of BiH, "Pušten u rad novi informacioni sistem e-Nabavke" [New information system for e-Procurement launched], November 26, 2015.

¹²⁵ "Law on Public Procurement," Article 35.

¹²⁶ *Ibid.*, Article 88, para. 1 and 4.

into smaller parts in order to avoid applying the appropriate procedure was very or somewhat widespread in public procurement in BiH.¹²⁷

According to the new LPPBiH, apart from procurement notices, contracting authorities may also publish *prior information notices* on the procurement of goods, services and works, which contains the estimated value and important characteristics of the contract the contracting authority plans to award in the next 12 months.¹²⁸ While the *periodic indicative notice* (procurement plan) contains framework data on all planned procurement, publication of the prior information notice is reserved for cases where the contracting authority wishes to shorten the time limits of the procedure.¹²⁹

In order to ensure a balance between transparency and efficiency, public notices are not published for the direct agreement procedure, i.e. for procurement below 6,000 BAM. Public notices are also not published for the purposes of the *negotiated procedure without publication of notice*, which is used in exceptional circumstances as defined by law. Instead, in line with the new LPPBiH, public authorities must publish information on their website on a *negotiated procedure without publication of notice* which they plan to implement so that the tender documentation is made available to all interested tenderers.¹³⁰ The new LPPBiH also provides for the possibility of the contracting authority, after it has selected a tender, to 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.¹³¹ This legislative solution is in compliance with the provisions of the EU directives obliging contracting authorities to “provide reasons why there are no reasonable alternatives or substitutes”¹³² in the case of a negotiated procedure without publication of notice, i.e. to clarify the validity of reasons justifying the application of this procedure.

The new law regulates in more detail the general and special conditions for the application of the *negotiated procedure without publication of notice*. As provided

¹²⁷ The research was conducted while the Law on Public Procurement of BiH from 2004 was in force. Nermina Voloder, *Mapiranje ključnih prepreka za ravnopravno učešće privrednih subjekata u javnim nabavkama u Bosni i Hercegovini* [Mapping of Key Obstacles to Equal Participation of Private Companies in Public Procurement in Bosnia and Herzegovina], (Sarajevo: Analitika – Centre for Social Research, 2015), p. 28.

¹²⁸ “Law on Public Procurement of BiH,” Article 27.

¹²⁹ “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.”

¹³⁰ “Law on Public Procurement,” Article 28, para. 2.

¹³¹ *Ibid.*, Article 28.

¹³² “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,” para. 50.

for by the current European Union directives,¹³³ the Law on Public Procedure stipulates that the negotiated procedure may be applied only in extraordinary circumstances which are clearly defined, for example, when no tenders or no acceptable tenders are received in an open procedure, when due to objective limitations the contract can only be awarded to a specific supplier, or in cases of emergency and due to events unforeseeable by the contracting authority¹³⁴. In this way, the decision to opt for the negotiated procedure must be based on clear rules, which is necessary to achieve the principle of transparency in public procurement. At the same time, prescribing conditions for the implementation of the negotiated procedure significantly limits possible abuse of this type of procedure.

In addition, the Public Procurement Agency of BiH, through monitoring contract award notices, may request a detailed report on the implemented *negotiated procedure without publication of notice* if information from the notice indicates that conditions for applying this type of public procurement procedure were not met. In the event of irregularities, the Agency may file charges.¹³⁵ Finally, another novelty in the LPPBiH of 2014 is the obligation of contracting authorities to take minutes of negotiations with each supplier during the negotiated procedure. Keeping written records when making important decisions is one of the preconditions for securing accurate and reliable information on public procurement. At the same time, this is a way to enable checking whether procedures were properly implemented.

New provisions pertaining to the *negotiated procedure without publication of notice* are a significant step towards ensuring greater transparency in public procurement, especially if we bear in mind that the frequent application of negotiated procedure without publication of notice had been identified as a key problem in public procurement in BiH.¹³⁶ According to research conducted by Analitika, 81.6 percent of the total of 511 surveyed business representatives believed that the abuse of negotiated procedure is very or somewhat widespread in public procurement in BiH.¹³⁷ A significant number of respondents (71 percent) also stated they believed

¹³³ “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,” Article 31; “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”; “Directive 2007/66/EC of the European Parliament and of the Council of 11 November 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts,” Article 40.

¹³⁴ “Law on Public Procurement,” Article 20.

¹³⁵ Ibid., Article 116, para. 2, point d.

¹³⁶ See reports: Open Society Fund, *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); Transparency International BiH, *Monitoring of the Implementation of the Law on Public Procurement of BiH*.

¹³⁷ Voloder, *Mapping of Key Obstacles to Equal Participation of Companies in Public Procurement in Bosnia and Herzegovina*, p. 26.

abuse of extraordinary circumstances to justify using emergency or non-competitive procedures was widespread in public procurement in BiH.

According to data from 2012, the value of contracts awarded on the basis of negotiated procedure as a share of the total value of all contracts accounted for 49 percent of all procedures.¹³⁸ The Public Procurement Agency interpreted the rise in the share of negotiated procedures without publication of notice as a result of procurement between unbundled enterprises, for example power utilities that procure coal from mines, which are in turn members of the same business group. The rise in value of negotiated procedures within the total records on implemented procedures occurred when authorities that implemented *in house* procurement started submitting reports on these procedures, because they had previously believed such procurement to be exempt from the LPPBiH.¹³⁹ Apart from that, it is important to note that all procedures implemented by natural and legal monopolies are entered into the WisPPA system as *negotiated procedures without publication of notice*. According to relevant EU standards,¹⁴⁰ the implementation of *in house* procurement does not necessitate the application of provisions of the law on public procurement. Consequently, the new LPPBiH exempted *in house* procurement from the application of the law,¹⁴¹ which should ultimately lead to a reduction of the value share of negotiated procedures within total procurement.

5.3. Tender Documentation

According to the LPPBiH, contracting authorities are obliged to make tender documentation available to tenderers in one of the following ways: to be collected in person, upon the tenderer's written request, and by publishing it on the public procurement portal.¹⁴² The Law also provides for the possibility that contracting authorities may determine a monetary fee for the tender documentation, which must be equal for all tenderers. It further stipulates that the monetary fee may include only "the actual costs of paper, printing, copying, data holder, as well as the compensation of possible postal costs."¹⁴³

¹³⁸ Public Procurement Agency of BiH, Annual Report on Public Procurement Contracts for 2012, p. 6.

¹³⁹ Ibid.

¹⁴⁰ Sue Arrowsmith, ed., *EU Public Procurement Law: An Introduction* (Nottingham: University of Nottingham, 2010), p. 86.

¹⁴¹ 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 an unbundled enterprise, business partnership or sector contracting authority within the business partnership], *Official Gazette of BiH* 97/14.

¹⁴² "Law on Public Procurement of BiH," Article 55, para. 1.

¹⁴³ Ibid., Article 55, para. 4.

Earlier, contracting authorities would often violate the LPPBiH by fixing a high price for tender documentation.¹⁴⁴ Thus, for example, according to the report of the Public Procurement Agency, the price of tender documentation in one instance was an astounding 5,000 BAM. Research conducted in 2014 among representatives of private companies with public procurement experience also showed that 25 percent of respondents believed the fees for tender documentation were inappropriately high, 33.3 percent stated that the fees were higher than they should be, while 36.8 percent of respondents believed the fees were fair and reflected the costs of copying.¹⁴⁵ The high price of tender documentation may have a negative effect on competition and equal treatment of tenderers by hampering the participation of small companies unable to pay the price of tender documentation. On the other hand, the practice whereby the contracting authority charges a fee for tender documentation so as to cover the costs of preparing and implementing the procedure or to make a profit off of tenderers is in direct violation of public procurement regulations.¹⁴⁶

The new Law on Public Procurement in BiH, much like the old law from 2004, does not stipulate that the tender documentation must primarily be made available through the public procurement portal. However, the bylaw adopted by the Public Procurement Agency in June 2014 defined that publishing and clarifying tender documentation shall be possible on the public procurement portal as of 1 July.¹⁴⁷ According to this bylaw, during 2016, contracting authorities are to publish tender documentation on the public procurement portal for at least 30 percent of the procedures advertised on the portal, and for 60 percent of procurement in 2017. *Online* publication of tender documentation for all public procurement procedures subject to publication of notice on the public procurement portal shall be mandatory as of 1 January 2018.¹⁴⁸ This has significantly improved transparency in public procurement procedures, especially in view of the fact that tender documentation contains critical and comprehensive information potential tenderers need to prepare their tenders, and that it is of paramount importance that this information

¹⁴⁴ Public Procurement Agency of BiH, *Izveštaj o monitoringu postupaka javnih nabavki u 2012. godini* [Public Procurement Monitoring Report for 2012], (Sarajevo: Public Procurement Agency of BiH, 2013); Open Society Fund BiH, *Corruption Risk Assessment in Public Procurement*.

¹⁴⁵ Voloder, *Mapping of Key Obstacles to Equal Participation of Companies in Public Procurement in Bosnia and Herzegovina*.

¹⁴⁶ Public Procurement Agency of BiH, *Izveštaj o monitoringu postupaka javnih nabavki u 2013. godini* [Public Procurement Procedure Monitoring Report for 2013], (Sarajevo: Public Procurement Agency of BiH, 2014).

¹⁴⁷ 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), Article 1.

¹⁴⁸ *Ibid.*, Article 9.

be made available to all tenderers. The publication of tender documentation has become established practice in countries such as Croatia, Slovakia and the UK.

5.4. Information on Awarded Contracts

According to the LPP, contracting authorities are obliged to publish a notice following the public procurement procedure about which tender was evaluated and selected as the most successful and about the terms and conditions of the awarded contract. Notices on awarded contracts are published on the public procurement portal for the open, restricted and negotiated procedure, with or without publication of notice, the design contest and the competitive dialogue procedure.¹⁴⁹ However, contracting authorities are not obliged to publish the results of the competitive request and direct agreement procedures.

It is evident that the reason for leaving this obligation out is to create a balance between transparency, i.e. the obligation of public authorities to make all important information available to the public, and the principle of efficiency, which allows for information on lower value public procurement procedures to be exempt from mandatory publication. However, in support of publishing information even on lower value public procurement procedures is the fact that according to the LPPBiH,¹⁵⁰ contracting authorities are obliged to submit reports to the Public Procurement Agency on all implemented procedures, including procedures for lower value contracts. Therefore, publishing information on contracts awarded through lower value procurement would not constitute an additional administrative burden, because it would entail publishing information that must be prepared in any case. Apart from that, the fact that value thresholds for lower value contracts in BiH are relatively high – up to 50,000 BAM for goods and services and up to 80,000 BAM for works – and that a large number of these procedures are implemented annually indicates the need for contracting authorities to ensure the same level of transparency applied to higher value contracts. Finally, public procurement contracts between institutions and private companies constitute information of interest for the wider public, whatever the value of such contracts.

The current LPPBiH also stipulates the criteria for evaluation of tenders. In line with the EU directives and similar to the previous law, it stipulates that the choice of supplier must be based on one of two criteria: lowest price or economically most favourable tender, where the price is only one of the criteria and other criteria such as quality, technical capacity, functional and environmental characteristics, operative costs, cost-effectiveness, customer service and technical support, delivery or

¹⁴⁹ “Law on Public Procurement,” Article 74, para. 1.

¹⁵⁰ Ibid., Article 75, para. 1.

completion deadline, etc. are also taken into account.¹⁵¹ 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.¹⁵²

Defining sub-criteria for evaluating the economically most favourable tender is very important for ensuring transparency, given that it aims to establish clear rules and procedures for awarding contracts, which are to be applied consistently and without discrimination throughout the procurement procedure. The evaluation method based on the preset criteria must be published in advance in order to allow potential tenderers to prepare their tenders accordingly, and the criteria must not be altered during the procedure.

In that context, establishing tender evaluation criteria is a considerable challenge for contracting authorities, given that the lack of clear and precise methodology may lead to irregularities in the contract award process. According to reports by Transparency International BiH, a frequent problem with awarding contracts is the lack of detailed regulations or practical instructions that would help contracting authorities develop an evaluation methodology, i.e. determine the criteria for the evaluation of the most favourable tender, which in turn leads to a lack of transparency.¹⁵³ This results in numerous irregularities in practice, such as: establishing criteria that are not proportional to the type and size of the procurement, evaluating tenderers on the basis of their qualification and not their tender, and awarding points to tenders on the basis of subjective assessment.¹⁵⁴

In other countries, attempts to prevent these issues include developing manuals for the application of tender evaluation criteria. Competent institutions in countries of the region, for instance in Croatia and Montenegro, have also developed relevant documents to serve as instructions for contracting authorities on how to apply tender evaluation criteria, and especially the criteria for the economically most favourable tender.¹⁵⁵ This is a way to promote the establishment of clear rules for important decision making, which is an important precondition for achieving the principle of transparency.

¹⁵¹ Ibid., Article 64.

¹⁵² Ibid., Article 64, para. 2.

¹⁵³ Transparency International BiH, *National Integrity System Assessment Bosnia and Herzegovina 2013* (Sarajevo: Transparency International BiH, 2013), p. 105; 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], p. 9.

¹⁵⁴ Ibid.

¹⁵⁵ 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 odgovorajućim brojevima 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.

5.5. Information on Complaints Procedure

Non-transparency in complaint procedures has often been the subject of public criticism. Up until 2015, the Procurement Review Body, despite the fact that it had a website¹⁵⁶ and all the preconditions for making its work public, mostly did not publish its decisions on complaints by dissatisfied tenderers. An exception was the period from December 2010 to April 2011 when the PRB published its decisions on its website, but this practice was discontinued with the explanation that the PRB lacked the financial resources to publish its decisions.¹⁵⁷ However, not publishing decisions on complaints raised suspicion among tenderers that rules were not being applied consistently. Thanks to the new legal framework prescribing mandatory publication of decisions, and the development of the electronic public procurement system in BiH, since the beginning of 2015, decisions of the Procurement Review Body and the Court of BiH on complaints filed by tenderers are publicly available on the public procurement portal.

However, the LPPBiH has not fully ensured that the work of the Procurement Review Body is public, given that it 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 following participation in the procedure.¹⁵⁸

5.6. Information on Contract Implementation

Reporting on the implementation of public procurement contracts in BiH is a significant step forward, especially if we bear in mind that the transparency of contract implementation had previously been assessed as problematic.¹⁵⁹ The

¹⁵⁶ The Public Procurement Agency and the Procurement Review Body of BiH have a joint website, www.javnenabavke.ba (Accessed on July 23, 2015).

¹⁵⁷ Transparency International BiH, *Monitoring of the Implementation of the Law on Public Procurement of BiH*.

¹⁵⁸ For more on issues of transparency of the complaint procedure, see: 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).

¹⁵⁹ Audit Office of the Institutions of BiH, *Izveštaj 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, *Audit Report on the Budget Execution Report of Institutions of Bosnia and Herzegovina for 2012*, p. 79; Audit Office of the Institutions of BiH, *Izveštaj 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 2013], (Sarajevo: Audit Office of the Institutions of BiH, 2014), p. 94.

previous Law on Public Procurement did not regulate the issue of accessibility of information on the implementation of public procurement contracts, so the public did not have access to information about how contracts were implemented in practice. As a result of a lack of control in this phase, auditing services indicated practices of signing annexes to existing contracts, which in some cases resulted in significant additional expenses for the public authority.¹⁶⁰ Given the frequency of additional and unplanned works, the auditors saw the causes for this phenomenon in poor planning of public procurement or in the creation of conditions favouring a privileged supplier.¹⁶¹ According to European Union standards based on directives and on decisions of the European Court of Justice, material modification of contracts is contrary to the principle of transparency because it indicates that the contracting authority, at the time of publication of the notice, was not being transparent about the type of services, goods or works being procured, their quantities and the terms of procurement.¹⁶² This rule does not pertain to additional works when they are necessary for justified and objective reasons to fulfil the terms of the initial contract.

The adoption of the new LPPBiH significantly improved transparency of public procurement in the contract implementation phase. It was stipulated that all contract modifications must be recorded and made available to the public. Contracting authorities are now obliged to publish on their websites the main elements of all their public procurement contracts, as well as any modifications to these contracts that arise during contract implementation.¹⁶³ This obligation is more precisely defined by a bylaw obliging the contracting authority to ensure monitoring of the implementation of the contract or framework agreement by recording information about the contract in a standardised form (type of procedure, selected supplier, main elements of the contract, date of contract), as well as a description of any changes, date of implementation of the contract and total expenditure.¹⁶⁴ Through this table overview, contracting authorities inform the public about how contracts were implemented and provide key information about their implementation – the time period within which the contract was implemented, any modifications to the contract, and the amount of money paid under the contract.

However, the new LPP does not stipulate how these forms are to be made available to the public if the contracting authority does not have its own website.

¹⁶⁰ Buijze, *The Principle of Transparency in EU Law*, p. 166.

¹⁶¹ Audit Office of the Institutions of BiH, *Audit Report on the Budget Execution Report of Institutions of Bosnia and Herzegovina for 2012*.

¹⁶² Buijze, *The Principle of Transparency in EU Law*, p. 166.

¹⁶³ “Law on Public Procurement of BiH,” Article 75.

¹⁶⁴ 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).

As a rule, procurement plans of contracting authorities that do not have the possibility of publishing them on their own website are available upon request. The request is filed pursuant to the law on free access to information on the state and entity level. However, this mode of achieving transparency in public procurement is very restrictive, because information is accessible only to individuals who file requests. Given these limitations, some countries have introduced the practice of providing access to information on contract implementation through the central public procurement portal. Thus, for example, the Law on Public Procurement of Croatia obliges contracting authorities without websites to submit their contract implementation forms to the Public Procurement Administration, which then publishes them on the public procurement portal.¹⁶⁵ Apart from that, contracting authorities that publish contract implementation information on their own official websites are also obliged to forward links to that information to the Public Procurement Administration so that they may be published on the public procurement portal.¹⁶⁶ In this way, all key information about contract implementation from all contracting authorities is available in a single place. As opposed to the practice adopted in Croatia, contracting authorities in BiH are not under the obligation to submit records on implemented contracts to the Public Procurement Agency, and the publication of this information on the public procurement portal is not foreseen.

Also, there is currently no legal basis that would oblige contracting authorities to publish integral contracts with suppliers, which has been shown as good practice in other countries such as Portugal¹⁶⁷ and Slovakia¹⁶⁸. Public procurement contracts constitute information of interest for the public,¹⁶⁹ and their publication would increase the degree of control and accountability in public spending and provision of public services.

¹⁶⁵ “Law on Public Procurement,” Article 21, para. 6; Public Procurement Administration of Croatia, Public Procurement Portal, <http://www.javnanabava.hr/default.aspx?id=3940> (Accessed on July 23, 2015).

¹⁶⁶ Public Procurement Administration of Croatia, Poveznice na registre ugovora o javnoj nabavi i okvirnih sporazuma naručitelja za 2012./2013./2014./2015 [Links to registers of public procurement contracts and framework agreements of contracting entities for 2012/2013/2014/2015], (Public Procurement Administration of Croatia, 2015).

¹⁶⁷ Pais and Ministro, *Public procurement in Portugal 2011*.

¹⁶⁸ Sípos, Spác and Kollárik, *Not in Force until Published Online*.

¹⁶⁹ The publication of contracts would have to ensure the protection of confidential information, such as business secrets or technical solutions in order to protect the interests of private companies.

6.

Conclusion

The aim of this report was to analyse the degree to which the public procurement system in Bosnia and Herzegovina ensures transparency throughout the public procurement process, from the planning phase to the contract implementation phase. Given that regulating public procurement plays an important role in the process of BiH's accession to the European Union, the assessment was conducted in view of international standards, primarily the directives of the European Union and the caselaw of the European Court of Justice, which serve as good practice examples in countries of the EU and of the region. Due to the fact that the application of the new legal framework began only recently, at this stage it is not possible to analyse public procurement practices in detail, which is why the report focuses on analysing solutions provided for in the new LPP from 2014.

The principle of transparency plays an important role in public procurement and entails strengthening accountability in the operation of public authorities, limiting corruption and other types of abuse, creating conditions for fair and equal competition and for savings in the public sector. Standards relevant to this issue stipulate that the principle of transparency is achieved through the obligation to publish certain categories of information, such as procurement plans, procurement notices and contract award notices, which are to be made available to the public. In addition, there is an increasingly prominent need to ensure information on contract implementation, which is a phase of public procurement particularly vulnerable to abuse. Establishing mechanisms to ensure that decisions in the public procurement process are made in line with predetermined and publicly available rules is also of great importance for transparency in public procurement.

The new legal framework for public procurement in BiH, which has been in force since November 2014, enables the achievement of the transparency principle to a considerable degree, and given its instrumental value, it also supports the achievement of other principles, such as non-discrimination of suppliers, competition and efficient public spending. Based on the analysis of the public procurement system, we can conclude that the current level of transparency is in compliance with the requirements set by international standards: (1) public procurement plans provide potential tenderers with information on future procurement so that they may plan their tenders; (2) public procurement notices, which are published for all types of procedure apart from the direct agreement procedure, are published on the public procurement portal, which is accessible

to all and free of charge, and it is also possible to publish tender documentation on the public procurement portal; (3) information on awarded contracts is sent to unsuccessful tenderers who participated in the procedure and is also made available on the public procurement portal; (4) contracting authorities are obliged to publish information on how contracts are implemented; (5) the criteria for awarding contracts must ensure objective decision making based on clear and objective parameters.

Despite evident progress, transparency in public procurement in BiH is still not at the level it could and should be. Weaknesses are primarily discernible in the planning of public procurement. Namely, the law obliges contracting authorities to develop procurement plans, and a bylaw stipulates the information to be contained in these plans. However, the law does not provide for the publication of plans by contracting authorities that do not have their own website, and procurement plans are not published on the central public procurement portal. Transparency in the planning phase is also reduced by the fact that contracting authorities must develop a procurement plan for all procedures, but are not under the obligation to publish notices for lower value contracts, i.e. for the competitive request and direct agreement procedures. Given that according to official data on implemented public procurement in BiH, a large number of contracts are awarded precisely on the basis of these procedures, transparency in this domain is important in order to provide an insight into public spending through public procurement.

Information on awarded contracts is available through the public procurement portal, but does not include competitive request and direct agreement procedures. This shortcoming significantly decreases transparency in public procurement, because it is precisely these procedures that are used to award the greatest number of contracts. Also, defining precise criteria for the evaluation of tenders is still a challenge for contracting authorities, since there are no instructions with clear guidelines on how to develop an evaluation methodology, especially when it comes to procurement that has to take into account a number of different criteria. Lack of clarity in these situations can significantly undermine public procurement because unclear criteria leave room for contracting authorities to make decisions not on the basis of clear and predetermined rules, but on the basis of subjective appraisal.

The LPP does not fully provide for the public nature of the work of the Procurement Review Body, because in the event of a complaint, it does not stipulate that contracting authorities must inform all parties with a legal interest in the procedure, but only the selected tenderer.

When it comes to contract implementation, contracting authorities must keep records of modifications to contracts and must publish information on such modifications on their websites. Publishing this information on the public procurement portal is not foreseen, and information on contracts implemented by contracting authorities that do not have their own websites is also unavailable. The current law has not created the preconditions for mandatory publication of

public procurement contracts, although in other countries this practice has been shown to diminish corruption.

The present analysis indicates that further improvements to the transparency of public procurement in BiH are necessary. The needed improvements would contribute to strengthening the trust of business sector representatives and the public in the public procurement system, they would reduce information asymmetry between the public sector, which implements public procurement, and the citizens, who use and pay for the procurement, and would significantly reduce room for abuse. The following section contains a number of recommendations to improve the overall level of transparency of the public procurement system in BiH.

7.

Recommendations

Based on research findings, this section provides recommendations to improve transparency in the various phases and aspects of public procurement. The recommendations are primarily intended for the body responsible for improving legislation in this domain – the BiH Public Procurement Agency – but may also be relevant for other institutions, such as the Procurement Review Body, auditing institutions and the BiH Parliament, as well as for contracting authorities at various levels of government. These recommendations pertain to improving various phases of the public procurement process.

Public Procurement Planning

- The publication of all public procurement plans on the public procurement portal should be made mandatory, including plans of contracting authorities that do not have their own websites and therefore have no possibility of publication. This would significantly facilitate the availability and overview of public procurement plans of all contracting authorities.
- Published public procurement plans should also contain procurement to be implemented through the competitive request and direct agreement procedures, which would significantly improve the transparency of public procurement given the large number of contracts awarded through these procedures. This obligation would entail the publication of information the contracting authority must already prepare as a precondition for initiating public procurement procedure, and would therefore not impose additional administrative or other burdens on the contracting authority.

Awarded Contracts

- Contracting authorities should be obliged to publish information on awarded lower value contracts. Given that contracting authorities are obliged to submit reports on competitive request and direct agreement procedures as well as tenderers who are awarded contracts in these procedures, this type of information should also be published on the public procurement portal so that the public may have a complete overview of all public procurement procedures and a significant portion of public spending.
- In order to improve the evaluation of tenders on the basis of objective criteria, and thus improve public procurement transparency, the Public

Procurement Agency should create instructions or a manual that would contain general guidelines for contracting authorities on the application of evaluation criteria, especially the criteria to determine the economically most favourable tender, which would contribute to developing clear criteria for evaluating tenders and would provide tenderers with better information on how their tenders will be evaluated.

Complaint Procedure

- 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.

Contract Implementation

- It should be possible to publish all records on implemented contracts on the public procurement portal. It should be ensured that the obligation to publish reports on implemented contracts is carried out through a unique form applicable to all contracting authorities, and the public procurement portal, where all the records would be pooled, would enable uniform practice in this area.
- A policy for *online* publication of integral public procurement contracts should be developed. Since the LPPBiH significantly improved the transparency of contract implementation by way of mandatory reporting, the next logical step would be to create regulations to enable the publication of the contracts themselves, provided that confidential information is protected, while information of public interest is published.

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2. Court of Justice of the European Communities. Case No. C-454/06. *Presstext Nachrichtenagentur GmbH vs. Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung*, June 19, 2008.
3. Court of Justice of the European Communities. Case No. C-91/08. *Wall AG vs. La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH*, April 13, 2010.
4. Court of Justice of the European Union. Case C-324/98. *Telaustria Verlags GmbH i Telefonadress GmbH vs. Telecom Austria*. December 7, 2000. http://www.dkom.hr/UserDocsImages/C324_98_Telaustria.pdf (Accessed on July 23, 2015)
5. Judgment of the Court (First Chamber). *Unitron Scandinavia A/S and 3-SA/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 July 23, 2015)
6. Opinion of Advocate General Alber of July 8, 1999. *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab vs. Ministeriet for Fødevarer, Landbrug og Fiskeri*. <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30dd53402d63dc884e3bb015f7f319005ed1.e34KaxiLc3qMb40Rch0SaxuQahj0?text=&docid=44301&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=25611> (Accessed on July 23, 2015)

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.



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