

Towards a More Transparent Public Procurement System in Bosnia and Herzegovina via Publishing of Contracts

A Legal Framework Analysis



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1.

Introduction

Public procurement contracts result from the need to use budget funds efficiently and to bolster free market competition. They are an instrument of the realisation of public procurement. Concluding a public procurement contract marks the beginning of a new stage of public procurement realisation (post-tender stage), in which abuses that adversely affect the efficiency of the public procurement system may appear, like in any other stage. That is to say, adverse economic impacts, such as corruption, nepotism or favouritism, are not necessarily connected with the pre-contract stage, they can also appear in the post-tender stage. Such abuses should be prevented by appropriate legal norms.

In Bosnia and Herzegovina (BiH), public procurement contracting is regulated by the Law on Public Procurement (hereinafter: LPP),¹ which regulates public procurement implementation procedures. However, it does not regulate public procurement contracts fully, thus many issues related to the conclusion and execution of contracts remain out of regulatory reach. For this reason, relevant provisions of the Law on Obligations² are applied to public procurement contracts as subsidiary law. As a result, we see the problem of application of the disposition principle, as one of the fundamental principles of civil law,³ that is, the autonomy of the will of the parties in concluding and executing the public procurement contract,⁴ the application of which principle in public procurement processes should be limited by imperative legal provisions.⁵

The publishing of public procurement contracts is one of the questions which should not be left to the discretion of the parties but rather regulated by imperative provisions of the LPP. Although provisions on the publishing of the public procurement contract have been included in the LPP, these provisions

¹ “Zakon o javnim nabavama” [Law on Public Procurement], *Official Gazette of Bosnia and Herzegovina* 39/14.

² “Zakon o obligacionim odnosima” [Law on Obligations], *Official Gazette of the Socialist Federative Republic of Yugoslavia* 29/78, 39/85, 45/89 and 57/89; *Official Gazette of the Republic of Bosnia and Herzegovina* 2/92, 13/93 and 13/94, *Official Gazette of the Republika Srpska* 17/93 and 3/96.

³ In civil law, the disposition principle means the freedom to arrange the form and content of the contractual relation, and the sole red line the subjects of the contractual relation must not cross is the possible and permissible content under imperative regulations.

⁴ The disposition principle is contained in Article 10 of the LO under the heading “Freedom to Arrange Obligations” as well as Article 11 of the LO under the heading “Independence of Will”.

⁵ Imperative regulations are strict, compulsory regulations which must be observed.

are neither sufficiently clear and precise, nor sufficiently harmonised with the existing European standards. Such regulation brings into question the proper implementation of the transparency principle, as one of the basic principles of public procurement. Previous research in this field also indicates that the transparency of public procurement contracts is a sore spot in the public procurement system in Bosnia and Herzegovina.⁶ Using the facts outlined above as a point of departure, this study sets out to analyse thoroughly the question of the publishing of public procurement contracts with a view to strengthening the transparency principle, which does not figure very significantly in the valid legislation in BiH.

The study is primarily based on the analysis of primary and secondary legislation which regulates the publishing of concluded public procurement contracts, as well as the publishing of changes to such contracts. At the same time it examines the issue of limiting the transparency principle by invoking the principle of trade secret protection. It analyses the provisions of the LPP which are regulated by imperative norms on account of their specific nature, but also the relation of these norms to the civil law norms grounded in the general regulation, i.e. the LO. Despite the tendency to see public procurement contracts through the lens of civil law contracts,⁷ the nature of the specific contractual relations inherent in the public procurement contract dictates a somewhat different approach to the execution of the public procurement contract,⁸ and a completely different approach to the publishing of the public procurement contract.⁹ Relevant European Union (EU) legal standards are also discussed herein, as well as examples of best practices from member states.

The study goes on to give an overview of the main debates in the field, focusing on the wider significance of ensuring transparency of public procurement contracts, keeping in mind at all times the instrumental nature of this principle.¹⁰

⁶ For attitudes and perceptions, as well as direct experiences of entrepreneurs in BiH related to the changes to the contracts and the control over such changes, cf. 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 – Centar za društvena istraživanja, 2015), pp. 43-45.

⁷ Public procurement was proclaimed an economic activity by the European Court of Justice: European Court of Justice (ECJ), *Gemeente Arnhem and another vs. BFI Holding BV*, November 10, 1998, Paragraph 63 of the ruling.

⁸ For instance, on the possibility of amending a public procurement contract.

⁹ “Law on Public Procurement”, Article 74.

¹⁰ The instrumental character of the transparency principle is reflected in the fact that its proper realisation in public procurement processes, including in the post-tender stage, helps parties to the contract to procure goods, works and services of a higher quality for a lower price. The result of this is the more efficient spending of taxpayers’ money, faster economic development, greater competition among economic operators in the market, as well as the realisation of other public procurement goals, such as the prevention of corruption, nepotism, fraud and getting rich at the expense of the government.

In the part devoted to the publishing of public procurement contracts, it overviews international standards focusing on relevant EU regulations, as well as on a comparison of experiences of member states which stand out as examples of good practices, especially countries from the region (Croatia and Slovenia) which have joined the EU. The study analyses the legal framework which regulates the publishing of public procurement contracts and the changes to such contracts in BiH, with a view to highlighting the key aspects – the positive sides of these contracts and their lack of transparency. It also discusses possible restrictions to the application of the transparency principle to the protection of confidential information of entrepreneurs – economic operators engaged in public procurement processes.¹¹ The conclusion sums up the results of the analysis, and goes on to offer suggestions for the improvement of the existing normative framework to the publishing of the public procurement contract and the changes to it in the course of its execution.

¹¹ For the legal definition of an economic operator cf. “Law on Public Procurement”, Article 2, Paragraph 1(c).

2.

Publishing Public Procurement Contracts: Standards and Comparative Practices

Generally, the significance of publishing in public procurement processes, including the publishing of the concluded public procurement contract itself, lies in the facilitation of access to information on public procurement, not only for economic operators engaged in public procurement processes, but also for all those interested in protecting the fairness and equity of public procurement, such as the media, civil society organisations, non-governmental organisations and the public at large. Transparency (publicness, publicity)¹² in public procurement directly contributes to an increase of public trust in the work of contracting bodies, as well as to increased competition and reduction of prices. At the same time, transparency is a tool which may be used to support other goals of the procurement system,¹³ that is, it may contribute to the realisation of other public procurement principles, above all the principle of equal treatment¹⁴ and non-discrimination.¹⁵ Publishing relevant information on public procurement processes facilitates more efficient monitoring of the use of public funds, which can lead to a reduction in corruption levels.¹⁶ Openness, transparency and the publishing of documents are crucial for an efficient anti-corruption policy.¹⁷

¹² In legal texts, transparency refers to speaking out in public, providing information, and the right of access to documents. Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 2008), p. 562.

¹³ Sue Arrowsmith, *The Law of Public and Utilities Procurement: The Regulation in the EU and UK* (London: Sweet & Maxwell, 2014), p. 1337.

¹⁴ EU Court of Justice does not treat transparency as a separate principle. Instead, it connects it with the equal treatment principle and stresses that equal treatment strengthens transparency – *Commission of the European Communities vs. Kingdom of Belgium*, April 25, 1996, (54-56).

¹⁵ According to the ruling in *Telaustria Verlags GmbH and Telefonadress GmbH vs. Telekom Austria AG*, December 7, 2000 (61-62), the obligation of transparency 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 processes to be reviewed.

¹⁶ Christopher Bovis, “The Effects of the Principles of Transparency and Accountability on Public Procurement and Public-Private Partnerships Regulation”, *European Public Private Partnership Law Review* 3, no. 1 (2009), pp. 7-25.

¹⁷ European Commission, EU Anti-corruption Report, COM (2014) 38 final (Brussels: European Commission, February 3, 2014), p. 20.

Transparency in public procurement includes four different aspects: transparency of the rules of every process, transparency of action and decision rules, the possibility of control and execution of decisions in the process, and also contract transparency.¹⁸ The obligation to publish information may apply to public procurement processes, as well as the content and the execution of concluded contracts, that is, both before and after the conclusion of the contract.¹⁹ A transparent publication of a public procurement contract, including framework agreements,²⁰ means that every economic operator, as well as the public at large, may have information regarding a concluded contract or a framework agreement. This improves effective control of the use of public funds, and the entrepreneurial climate in general. Improved transparency of public procurement contracts and framework agreements limits corruption and helps ensure quality spending of taxpayers' money, which is a precondition for economic growth and development.

2.1. International Standards

European standards related to public procurement transparency, and therefore public procurement contracts, are contained in the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU),²¹ and especially in the relevant directives on public procurement. These are the Directive 2014/24/EU on public procurement²² and the Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.²³ The two directives took effect on 17 April 2014, and member states were to incorporate them into their national legislation by 18 April 2016, while e-procurement must be fully established, without exceptions, by 18 October 2018.²⁴ The directives should serve as coordinates for shaping national regulations in the public procurement process, as well as for transparent publication of public procurement contracts.

¹⁸ Arrowsmith, *The Law of Public and Utilities Procurement*, p. 622.

¹⁹ *Ibid.*, p. 1337.

²⁰ A framework agreement is not a public procurement contract, and it does not have legal effect without an individual contract. It is an agreement “*between one or several contracting authorities and several suppliers, concluded in writing, that defines the conditions under which contracts may be awarded in a determined time period, in accordance with the foreseen price, and where possible, in foreseen quantities*”, “Law on Public Procurement”, Article 2 (n).

²¹ The Treaty on European Union (consolidated version) and the Treaty on the Functioning of the European Union (consolidated version), *Official Journal of the EU* C 326, October 26, 2012.

²² “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 EU* L 94/65, March 18, 2014.

²³ “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 EU* L 94/243, March 28, 2014.

²⁴ “Directive 2014/24/EU”, Article 90; “Directive 2014/25/EU”, Article 106.

They include provisions on publishing award notices for EU-level contracts,²⁵ and foresee standard forms for award notices, for the sake of simplifying their publication for contracting bodies.²⁶ They also include rules on publishing award notices for national-level contracts.²⁷ Although the provisions of the directives are interpreted loosely or are adjusted so as to allow contracting bodies to take secondary policies into consideration, the provisions on advertising should be precisely determined and strictly applied.²⁸

One important source of law in this field is the case law of the EU Court of Justice, which has made a substantial contribution to the development of the public procurement system as a whole, and as regards the publishing of public procurement contracts. Case law of the EU Court of Justice is an important source of law,²⁹ and all state bodies, including national courts, are obligated to observe and implement the Court's rulings.³⁰ The EU Court of Justice case law continuously deals with the question of transparency in public procurement. The first case in which the EU Court of Justice examined the transparency principle in public procurement processes was the Walloon Buses case,³¹ in which the court stressed that a minimal level of transparency had to be ensured in all stages of the public procurement process, that is, the pre-tender, tender and post-tender stages. In its rulings, the court expressed opinions regarding the amending of public procurement contracts, which were subsequently included in the text of the public procurement directives. The new public procurement directives include rules resulting from the adoption of the opinions expressed in the rulings by the EU Court of Justice, particularly in the cases *Presstext*³² and *Wall AG*,³³ pertaining to the changing of public procurement contracts during their execution. These cases, among other things, define the conditions under which it is possible to amend contracts and framework agreements without launching a new public procurement process.³⁴

²⁵ "Directive 2014/24/EU", Article 50; "Directive 2014/25/EU", Article 70.

²⁶ "Directive 2014/24/EU", Article 51; "Directive 2014/25/EU", Article 71.

²⁷ "Directive 2014/24/EU", Article 51; "Directive 2014/25/EU", Article 72.

²⁸ Joël Arnould, "Secondary Policies in Public Procurement: The Innovations of the New Directives", in: *Pravo i politika javnih nabavki* [Public Procurement Law and Policy], ed. Martin Trybus (Sarajevo: Program podrške sistemu javnih nabavki u Bosni i Hercegovini, 2006), pp. 185-198.

²⁹ On the EU Court of Justice case law as a source of law cf. Tamara Čapeta and Siniša Rodin, *Osnove prava Europske unije* [Basics of the EU Law] (Zagreb: Narodne novine, 2011), pp. 15-17.

³⁰ European Court of Justice (ECJ), *Sabine von Colson and Elizabeth Kamann vs. Land Nordrhein-Westfalen*, April 10, 1984.

³¹ ECJ, *Commission of the European Communities vs. Kingdom of Belgium*.

³² European Court of Justice (ECJ), *Presstext Nachrichtenagentur GmbH vs. Republik Österreich (Bund)*, June 19, 2008.

³³ European Court of Justice (ECJ), *Wall AG vs. Stadt Frankfurt am Main*, April 13, 2010.

³⁴ In the said cases, the EU Court of Justice established clear conditions which apply to modification of contract clauses and change of supplier. The cases examined contract changes which warrant the launching of a new public procurement procedure (substantial changes).

One of the most important international anti-corruption documents, the United Nations Convention Against Corruption,³⁵ requires the introduction of a public procurement system which includes the publishing of public procurement contracts.³⁶ Relevant standards for the publishing of public procurement contracts are also contained in the World Trade Organization's³⁷ Agreement on Government Procurement (GPA), whose basic principles are transparency and discrimination prevention. Pursuant to Article XVI Paragraph 2 of the GPA, transparency is ensured by publishing information on concluded contracts subject to the rules of the Agreement. Even UNCITRAL's Model Law³⁸ obliges contracting bodies to publish information on concluded contracts and framework agreements, unless their value is below the threshold set by public procurement regulations, while it refers to public procurement regulations for determining the manner of publication. The Organisation for Economic Cooperation and Development (OECD)³⁹ also deals with the question of transparency, focusing primarily on the challenges and opportunities of transparency as regards exercising the right of access to information, and making specific recommendations for improving integrity in the field of public procurement.⁴⁰

Several documents related to public procurement standards⁴¹ have so far been published under the auspices of the SIGMA (Support for Improvement in Governance and Management) programme. Of significance is also a document which treats the question of concluding public procurement contracts whose value is below the EU thresholds.⁴² Public procurement below the EU thresholds is of great importance and makes up a substantial part of every state's total procurement. Thus quality drafting of national rules on procurement below the EU and national value thresholds, along with adequate norms of publishing of information on below-threshold contracts, is crucial for achieving an effective public procurement system.

³⁵ United Nations, Convention Against Corruption (New York: United Nations, 2004). The convention was adopted by resolution A/RES/58/4 at the 58th session of the General Assembly of the United Nations held on 31 October 2003; it was ratified by BiH on 23 July 2006.

³⁶ United Nations, Convention Against Corruption, Article 9, Paragraph 1(a).

³⁷ The World Trade Organization (WTO), Agreement on Government Procurement – GPA (Marrakesh: WTO, April 15, 1994).

³⁸ United Nations Commission on International Trade Law (UNCITRAL), Model Law on Public Procurement (Vienna: UNCITRAL, July 1, 2011), Article 23.

³⁹ Organisation for Economic Cooperation and Development (OECD), "Transparency in Public Procurement", in *Government at a Glance* (Paris: OECD Publishing, 2011).

⁴⁰ Organisation for Economic Cooperation and Development (OECD), *Principles for Integrity in Public Procurement* (Paris: OECD Publishing, 2009).

⁴¹ Organisation for Economic Cooperation and Development (OECD), *Public Procurement Review and Remedies Systems in the European Union, SIGMA Paper No. 41* (Paris: OECD Publishing, 2007).

⁴² Organisation for Economic Cooperation and Development (OECD), *Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives, SIGMA Paper No. 45* (Paris: OECD Publishing, 2010).

Transparency International, a global organisation focusing on tackling corruption and its consequences, is also devoted to fostering transparency, integrity and accountability in public procurement. In co-operation with the European Commission, Transparency International has developed the Integrity Pact (IP), a project which aims to achieve higher levels of transparency in public procurement.⁴³ The IP does not replace valid national legislation, but is rather included in the very legal framework which obliges contracting parties to act in a specific manner. Parties to the IP are obliged to publish all information relevant for public procurement, and facilitate its publication and accessibility. Parties to the IP are also obliged to use the information for its proper purpose, and to respect the confidentiality of protected information.

In that particular context, the application of the transparency principle in public procurement is restricted by the principle of trade secret protection which protects economic operators' confidential information. The concept of trade secret cannot be unambiguously defined, it varies from country to country, and has no harmonised legal protection in EU law.⁴⁴ A trade secret could generally be defined as information which possesses economic value, whose confidentiality is to be protected.

In public procurement processes, the question of the relation between the transparency principle and data confidentiality often arises. At first glance, these principles have nothing in common and are mutually exclusive. Yet, occasionally these two concepts (principles) appear along with each other, raising the question as to which of them should be favoured in public procurement processes, i.e. should we insist on the transparency principle or ensure secrecy of certain data. The EU Court of Justice has expressed the opinion in its rulings that trade secret protection is a general principle, that parties are not entitled to absolute and unlimited access to all information related to the public procurement process in question, and that the right of access to information has to be balanced against the right of other economic operators to have their confidential information and trade secrets protected.⁴⁵

Certain limitations to publishing are stipulated by the general provisions of the public procurement directives. The publishing of information is also limited by the provision of the European Convention on Human Rights (ECHR).⁴⁶ These documents protect, among other things, business information as confidential information of economic operators. Consequently, certain information related to the conclusion of a public procurement contract or framework agreement

⁴³ Transparency International, *The Integrity Pact (IP)* (Berlin: Transparency International, 2014).

⁴⁴ Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against Their Unlawful Acquisition, Use and Disclosure, *Official Journal of the European Union* C 226/48, July 16, 2014. Item 1.3.

⁴⁵ European Court of Justice (ECJ), *Varec SA vs. Belgium*, February 14, 2008.

⁴⁶ Article 8 of the ECHR includes personal and business information.

cannot be published if the publication of such information would interfere with law enforcement or otherwise run counter to the public interest, compromise legitimate market interests of a publicly or privately owned economic operator, or prejudice fair market competition between them.⁴⁷ Contracting bodies are not to disclose any information forwarded to them by economic operators and designated as confidential, including technical or trade secrets and confidential aspects of bids.⁴⁸

2.2. Comparative Practices

The purpose of this overview of systems of public procurement contract publishing in other countries is primarily to make possible a comparative analysis which helps detect problems, and perhaps to facilitate the transposition of some legal concepts into Bosnian-Herzegovinian legislation in order to improve transparency in publishing information on concluded contracts. The goal of the general analysis of the system of public procurement contract publishing in BiH and the analysis of EU member states is to show the sensitive spots and propose adequate solutions which have proved successful in practice. Although the goal of EU-level public procurement regulations is not unification (harmonisation) of public procurement rules in member states, this is a field which has been thoroughly regulated by public procurement directives, and European law does not leave much room for national legislators to intervene. The directives contain rules on publishing on both the EU and member state level, while standard publishing forms also limit the discretion of national legislators.⁴⁹ The use of standard forms could reduce problems in the accurate writing of notices. This would make it easier for participants to access the data input system which can prevent fraud or errors and ensure quality of statistical data, as well as data access for economic operators and the public at large. For this reason, the issue of publishing public procurement contracts has been regulated in a similar manner across member states, which is a consequence of the standardisation of national systems via EU rules.

⁴⁷ “Directive 2014/24/EU”, Article 50, Paragraph 4; Model Law on Public Procurement, Article 25; GPA, Article XVIII, Paragraph 4.

⁴⁸ “Directive 2014/24/EU”, Article 21 Paragraph 1; confidentiality provisions are also found in Article 39 Paragraph 1 of “Directive 2014/25/EU”.

⁴⁹ Although the directives do not explicitly foresee the obligation to use standard forms for national-level publishing the way they do for publishing on the EU level. The obligation to harmonise national-level forms with EU-level forms is based in the provisions of the directives which stipulate that the notices published on the national level contain only the information from the notices sent to the EU Publications Office (“Directive 2014/24/EU”, Article 52, Paragraph 2; “Directive 2014/25/EU”, Article 72, Paragraph 2).

Common to all member states is the fact that they have incorporated, along the lines of the public procurement directives, the transparency principle – as the fundamental principle of public procurement – into their legal texts which regulate public procurement processes.⁵⁰ For instance, the transparency principle is prominent in Croatian public procurement legislation.⁵¹ In Croatia, notices of concluded contracts sent for publication via electronic means on the standard form also fall into the category of public procurement notices. The form and content of the standard forms as well as the manner and conditions of their publication have been laid down by the Government of the Republic of Croatia via the Ordinance on Public Procurement Notices,⁵² with the standard form containing information as stipulated by the public procurement directives. All notices whose estimated value is equal to or higher than the national threshold⁵³ are published in an electronic public procurement gazette, while contracts whose estimated value is below the threshold are not announced in the electronic gazette. Such contracts, together with high-value contracts, are published in a register of public procurement contracts and framework agreements which the orderer (contracting body) is obliged to keep.⁵⁴

In the legislative acts of some member states, the principle of publicness/transparency is defined descriptively, along with an explicit proclamation. Thus the Slovenian Public Procurement Act states that public procurement processes are public, which is ensured by running free public procurement notices on the public procurement portal run by a public company, and on the public procurement portal in the Official Journal of the EU.⁵⁵ The Slovenian Public Procurement Act foresees the publication of contracts and framework agreements using the standard form laid down by the public procurement directives, that is, the publication has to contain all the information required by the directives, while low-value contracts are published using a form prescribed by the Government of

⁵⁰ Pursuant to the public procurement directives, the fundamental principles of public procurement are free movement of goods, freedom of establishment and freedom to render services, as well as the derived principles such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency (Item 1 of the preamble of the “Directive 2014/24/EU”; Item 2 of the preamble of the “Directive 2014/25/EU”).

⁵¹ Croatian “Zakon o javnoj nabavi” [Public Procurement Act], *Official Gazette of the Republic of Croatia* 90/11, 83/13, 143/13 and 13/14, Article 3, Paragraph 1 lists the transparency principle as one of the fundamental principles of public procurement processes.

⁵² Croatian “Public Procurement Act”, Article 55.

⁵³ The value of or in excess of 200,000.00 HRK for goods and services, or of or in excess of 500,000.00 HRK (Croatian “Public Procurement Act”, Article 18, Paragraph 3).

⁵⁴ Croatian “Public Procurement Act”, Article 21.

⁵⁵ Slovenian “Zakon o javnem naročanju” [Public Procurement Act], *Official Gazette of the Republic of Slovenia* 91/15, Article 6, Paragraph 2.

the Republic of Slovenia.⁵⁶ Just like in Croatia, national level public procurement contracts are published on the national portal by sending a filled in standard form for the publication of notices whose content is in line with the requirements of the public procurement directives.⁵⁷

In order to ensure uniform conditions for the implementation of the directives, most member states use the same standard forms for EU-level publishing,⁵⁸ as prescribed by the directives, while national-level publishing forms do not differ from those for publishing on the level of the EU. Thus in the United Kingdom, where there is a high degree of respect for public procurement regulations and public procurement contracts are regulated by a special Regulation,⁵⁹ national-level publishing consists of filling in and sending the standard form for different kinds of notices, whose content is identical to the content of notices as prescribed by the public procurement directives.⁶⁰ Some states (The Czech Republic, Estonia, Latvia) use the standard forms for publishing information on concluded contracts both above and below the European value thresholds.⁶¹

In order to reduce the risk of corruption, some member states have introduced the obligation to publish public procurement contracts integrally. Thus Slovakia, where corruption has been a problem over many years, has introduced the obligation to publish public procurement contracts integrally in the Central Register of Contracts⁶² which contains the list of contracts concluded by public bodies as of 1 January 2011. All public procurement contracts have to be published in the Register as they only take effect one day after their publication in the Register.⁶³ There are still abuses, in spite of greater transparency, which is why Slovakia is undertaking further reforms of the public procurement system.⁶⁴ Yet, publishing integral public procurement contracts has reduced the risk of corruption, as it has made it easier for the public at large to access information on public procurement, and it has facilitated detection of acts of corruption.

⁵⁶ The publishing of public procurement contracts and framework agreements is regulated by the Slovenian “Public Procurement Act” Article 58 as related to Article 52, Paragraph 1, Item 5.

⁵⁷ Information contained in standard forms is contained in Annex V Part D of the Directive 2014/24/EU, and Annex XII of the Directive 2014/25/EU.

⁵⁸ “Directive 2014/24/EU”, Article 52, Paragraph 2; “Directive 2014/25/EU”, Article 72, Paragraph 2.

⁵⁹ “Public Contract Regulation”, 2015 - No. 102.

⁶⁰ *Ibid.*, Article 50, Paragraph 2.

⁶¹ OECD, *Public Procurement in EU Member States*, p. 15.

⁶² The Central Register is available at <http://www.crz.gov.sk/> (Accessed on May 19, 2016).

⁶³ European Commission, EU Anti-corruption Report, ANNEX 25, (Brussels: European Commission, 3 February, 2014), pp. 9-10.

⁶⁴ *Ibid.*, p. 10.

3.

The Publishing of Contracts in BiH: Analysis of Legislation in Force

Sources of European law are becoming more and more relevant in BiH as the country nears EU membership. BiH has the status of a potential candidate for EU membership, and with the signing of the Stabilisation and Association Agreement (SAA)⁶⁵ between European Communities and their member states on one side, and Bosnia and Herzegovina on the other, the country accepted the obligation gradually to harmonise its existing as well as future legislation with the EU legislation, and the obligation to enforce and implement the existing and future legislation.⁶⁶ Hence the duty of BiH properly to transpose its obligations, contained in relevant European legal acts (more specifically, the public procurement directives), into its own legislation, with an adequate degree of clarity and certainty in order to achieve effective functioning of the system. BiH has lately been undertaking systematic activities to improve public procurement as a whole, including strengthening of transparent publishing of concluded public procurement contracts.

However, although BiH has adopted a new Law on Public Procurement, which has been in effect since November 2014⁶⁷ and which contains solutions that facilitate the realisation of the transparency principle in BiH, this principle has still not been realised to a satisfactory extent in public procurement contracts publishing. The existing level of transparency does not go beyond the obligation to publish the information of concluded public procurement contracts and changes to such contracts, and important questions such as the manner of publishing, conditions for amending the contract, and the publishing of such changes are being neglected. The transposition of solutions from the public procurement directives would significantly reduce the possibility of abuse and

⁶⁵ “Sporazum o stabilizaciji i pridruživanju između evropskih zajednica i njihovih država članica, s jedne strane i Bosne i Hercegovine, s druge strane” [Stabilisation and Association Agreement between Bosnia and Herzegovina, of the one part, and the European Communities and their Member States, of the Other Part], Article 74. Text available from the website of the Directorate of European Integration of the Council of Ministers of BiH: http://www.dei.gov.ba/dei/bih_eu/sporazum/default.aspx?id=9812&langTag=bs-BA (Accessed on 19 May, 2016).

⁶⁶ Ibid., Article 70.

⁶⁷ Pursuant to the “Law on Public Procurement”, Article 125 Paragraph 1, the Law entered into force eight days from the day of its publication in the Official Gazette of BiH, i.e. on 29 April 2014, with a 6-month deferment from the day of entry into force.

improve transparency, while any issues not resolved by the directives can be resolved by tried and tested solutions from member states. This does not mean that there is a universal pattern for solving certain problems. Rather, it means that certain countries have certain normative solutions which have proved efficient in the realisation of transparent contract publication. An example of such a normative solution is the standard forms for the publication of concluded public procurement contracts. They are foreseen by the directives, accepted by member states, and their purpose is to improve and automatize the publication process. They can reduce problems related to accurate drafting of formal notices.

In order to achieve transparency of the public procurement process as a whole, the transparency principle was included in the text of the LPP, which stipulates that contracting bodies should act in a transparent manner.⁶⁸ The legislative body did not make use of the descriptive method and did not include the content of this principle in the text of the Law by specifying, as the legislative body in Slovenia did,⁶⁹ that transparency is ensured via free publication of public procurement notices on the public procurement portal. The Law does not expressly proclaim the transparency principle in the post-tender stage, though the principle appears in individual, unsystematically proclaimed provisions which regulate the publishing of information on concluded contracts.⁷⁰ Pursuant to the provisions of the LPP, the transparency of a contract should also be ensured by publishing changes to it. Key elements and decisions in individual procurement processes should also be documented in the procurement report. In addition to its purpose of contract control, the report is an important means of ensuring contract transparency. Public procurement contracts are also made transparent by keeping and publishing a register of public procurement contracts, and introducing the obligation to keep copies of concluded contracts. Contracting bodies should keep copies of concluded high-value contracts, and provide interested parties access to these documents, in line with applicable rules of document access.

3.1. The Publishing of Information on Concluded Public Procurement Contracts

3.1.1. Notice of Contract Awards

The publication of public procurement contracts is one of the steps to be taken by the contracting bodies in the post-tender stage. Its purpose is to announce, in line with regulations, the conclusion of a contract and disclose

⁶⁸ “Law on Public Procurement”, Article 3, Paragraph 1.

⁶⁹ Slovenian “Public Procurement Act”, Article 6, Paragraph 1.

⁷⁰ “Law on Public Procurement”, Article 74, as relates to Article 36.

its content, in order to keep the general public informed. The LPP binds the contracting bodies to publish contract award notices no later than 30 days from the day of the conclusion of the contract or framework agreement,⁷¹ which is in line with the public procurement directives.⁷² If the contracts in question are subject to special conditions or contracts concluded on the basis of framework agreements, they are published annually, no later than 30 days from the end of the calendar year.

However, although the LPP stipulates that framework agreements be published 30 days from their conclusion, the same paragraph⁷³ of the same article⁷⁴ stipulates that when a framework agreement is concluded, the contracting body is to publish a notice of award no later than 30 days from the end of the calendar year. The directives lay down the same timeframe and manner of publishing both public procurement contracts and framework agreements, but they also stipulate that contracting bodies are not bound to send notice of the results of the public procurement process for each (individual) contract based on that particular agreement.⁷⁵ Member states may decide that contracting bodies should send quarterly notices of results for contracts based on the framework agreement. In that case, batch notices are to be sent no later than 30 days from the end of each quarter.

It is assumed that the BiH legislative body considered these requirements of the directives, but it worded the provision on sending notices for contracts based on a framework agreement vaguely.⁷⁶ Properly worded, the provision would read that the contracting body should publish award notices for individual contracts concluded on the basis of a framework agreement. The term “contract” in this part of the LPP is used to mean an individual contract concluded on the basis of a framework agreement, while the same term (“contract”) is also used for public procurement contracts in general.⁷⁷ Using the same term for different concepts creates ambiguities and difficulties in interpretation and application. Using adequate terminology would help eliminate the difficulties which arise due to different interpretations of the same term. Furthermore, the LPP was supposed to shorten the deadline for the publication of individual contracts concluded on the basis of a framework agreement in line with the requirements of the directives, so that the deadline should not be “30 days from the end of the calendar year”, but 30 days from the end of each quarter.

⁷¹ On award notices cf. “Law on Public Procurement”, Article 74.

⁷² “Directive 2014/24/EU”, Article 50, Paragraph 1; “Directive 2014/25/EU”, Article 70, Paragraph 1.

⁷³ “Law on Public Procurement”, Article 74, Paragraph 1.

⁷⁴ *Ibid.*, Paragraph 2.

⁷⁵ “Directive 2014/24/EU”, Article 50, Paragraph 3; “Directive 2014/25/EU”, Article 70, Paragraph 3.

⁷⁶ “Law on Public Procurement”, Article 74, Paragraph 2.

⁷⁷ Cf. heading of Article 72 of the Law on Public Procurement.

In BiH, there is no obligation to publish public procurement contracts concluded after a competitive request for quotations or on the basis of a direct agreement, because these are low-value contracts (competitive request),⁷⁸ or petty purchases (direct agreement).⁷⁹ The obligation to publish such contracts exists only if the contracting body is running an open, restricted or negotiated procedure (with or without publication of notice, a design contest, or competitive dialogue.⁸⁰ Such contracts (low value) do not require publication in the Croatian Public Procurement Act,⁸¹ but the Act binds the placer of the order (the contracting body) to keep and publish a register of public procurement contracts and framework agreements, regardless of their value.⁸² The Croatian legislative body has thus ensured the publication of concluded contracts of low value. The Slovenian Public Procurement Act allows for the publication of low-value contracts,⁸³ which the contracting bodies are not legally bound to publish.⁸⁴

It should be pointed out that many countries have the same rules for publishing low- and high-value contracts.⁸⁵ In Poland, for instance, contracting bodies are required to publish all award notices on their websites, for contracts below and above the national value thresholds.⁸⁶ Transposition of the obligation to publish all public procurement contracts regardless of their value and the type of procedure, although not compulsory by European standards, would help improve the level of transparency of public procurement contracts, and therefore the transparency of the public procurement system in BiH as a whole.⁸⁷

⁷⁸ The estimated value of goods and services procured being below the threshold of BAM 50,000.00, and the estimated value of works being below the threshold of BAM 80,000.00 (“Law on Public Procurement”, Article 87, Paragraph 2).

⁷⁹ The estimated value of which amounting to or below the threshold of 6,000.00 (“Law on Public Procurement”, Article 87, Paragraph 3).

⁸⁰ “Law on Public Procurement”, Article 87, Paragraph 4, as relates Article 74, Paragraph 1.

⁸¹ Low-value procurement is exempt from the provisions of the Public Procurement Act in Croatia. Contracting bodies regulate this issue with their internal acts (Croatian “Public Procurement Act”, Article 18, Paragraph 3).

⁸² The manner of keeping and publishing the register of contracts, as well as the information which should be entered into it, is regulated by the provisions of Article 21 of the Croatian “Public Procurement Act”.

⁸³ Article 21 of the Slovenian Public Procurement Act defines the thresholds above which the law applies.

⁸⁴ Slovenian “Public Procurement Act”, Article 52, Paragraph 5.

⁸⁵ OECD, *Public Procurement in EU Member States*, p. 18.

⁸⁶ *Ibid.*

⁸⁷ Nermina Voloder, *Transparentnost javnih nabavki u Bosni i Hercegovini: između teorije i prakse* [Transparent Public Procurement in BiH: Between Theory and Practice] (Sarajevo: Analitika – Centar za društvena istraživanja, 2015), p. 42.

Public procurement contract award notices are published on the public procurement portal, and their abstracts in the Official Gazette of Bosnia and Herzegovina, whereby the LPP stipulates that notices be prepared and sent for publication electronically, in the manner and within the timeframe laid down in a statutory instrument enacted by the Public Procurement Agency (hereinafter: the Agency).⁸⁸ However, the enactment of statutory instruments of this kind should not be left to the Agency, because the Agency does not have the authority to enact them, although it plays a significant role in the preparation and drafting of statutory instruments.⁸⁹ The enactment of such statutory instruments is within the competency of the Council of Ministers of BiH,⁹⁰ which should have been given the authority under the LPP to lay down the details and conditions, that is, the manner of publishing public procurement contracts and the content of the publication by a separate act for the implementation of the LPP.⁹¹ There is no reason for acts of the same type, such as the statutory instrument for the implementation of the Law as pertains the content of the award notices⁹² and the one which regulates the publication of the basic elements of contracts and changes thereto on the contracting bodies' websites,⁹³ to be enacted by different bodies. Besides, these are implementing acts of equal legal force and significance (LPP implementation acts), with the same purpose (monitoring), yet the LPP does not give the Agency the authority to enact acts of this kind.⁹⁴

The LPP regulates the issue of notices in two places, first stipulating that award notices and other notices in the public procurement process be sent for publication electronically, in the manner and within the timeframe laid down by the Agency,⁹⁵ then by stipulating that award notices contain information determined in the statutory instrument enacted by the Agency.⁹⁶ In practice, a statutory instrument has been adopted which should regulate award notices and which should be, based on its title, the "Instruction on the Publication of Basic

⁸⁸ "Law on Public Procurement", Article 36, Paragraph 2.

⁸⁹ Article 92 of the Law on Public Procurement contains the competencies of the Agency, among them the authority to prepare and draft statutory instruments (Paragraph 3(a)).

⁹⁰ The Council of Ministers forms part of the executive of Bosnia and Herzegovina. ("Zakon o Vijeću ministara Bosne i Hercegovine" [Law on the Council of Ministers of Bosnia and Herzegovina], *Official Gazette of BiH* 30/03, 42/03, 81/06, 76/07, 81/07, 94/07 and 24/08, Article 2).

⁹¹ It should also be noted that such statutory instruments in Croatia and Slovenia are enacted by the governments of these countries (see Article 55, Paragraph 5 of the Croatian "Public Procurement Act", and Article 52, Paragraph 3 of the Slovenian "Public Procurement Act").

⁹² Statutory instrument to be enacted by the Public Procurement Agency ("Law on Public Procurement", Article 74, Paragraph 3).

⁹³ Statutory instrument to be enacted by the Council of Ministers ("Law on Public Procurement", Article 75, Paragraph 2).

⁹⁴ On the competencies of the Agency, cf. "Law on Public Procurement", Article 92, Paragraph 3.

⁹⁵ "Law on Public Procurement", Article 36, Paragraph 2.

⁹⁶ *Ibid.*, Article 74, Paragraph 3.

Elements of Contracts and Changes Thereto”.⁹⁷ However, this instrument was enacted on the basis of the authority from the Article of the LPP which regulates reporting in public procurement processes,⁹⁸ not on the basis of the authority from the article regulating award notices.⁹⁹ In other words, the “Instruction on the Publication of Basic Elements of Contracts and Changes Thereto” should have been enacted on the basis of the authority from the LPP provision under the heading Notice on (sic!) Contract Award,¹⁰⁰ not on the basis of the LPP provision under the heading Report on Public Procurement Procedure.¹⁰¹ Likewise, the “Instruction on the Conditions and Manner of Publication of Notices and Delivery of Reports to the IT System of E-Procurement”¹⁰² was not enacted on the basis of the provisions of the article which regulates award notice publication.¹⁰³ Therefore, one can only conclude that the statutory instrument enacted on the basis of the authority from the provision of the article regulating award notices, has in fact not been enacted.

On the other hand, the Instruction on the Publication of Basic Elements of Contracts and Changes Thereto was enacted based on the authority contained in the provisions of the LPP which regulate the publishing of basic elements of contracts on the website,¹⁰⁴ from which it follows that it refers to the keeping and publishing of a register of contracts and framework agreements. Contract award notices, public procurement reports and the register of public procurement reports must necessarily be differentiated from one another, which was disregarded when the statutory instruments were enacted.

3.1.2. The Publishing of Information on Concluded Contracts Labelled as Trade Secret

Data protection is exempt from the transparency principle in public procurement procedures, and as such should be interpreted narrowly. The provisions regulating confidential information protection should in no way preclude the publication of the parts of the contract which are not confidential

⁹⁷ “Naputak o objavi osnovnih elemenata ugovora i izmjena ugovora” [Instruction on the Publication of Basic Elements of Contracts and Changes Thereto], *Official Gazette of BiH* 156/15.

⁹⁸ “Law on Public Procurement”, Article 75.

⁹⁹ *Ibid.*, Article 74.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, Article 75.

¹⁰² “Naputak o uvjetima i načinu objave obavijesti i dostavljanja izvješća u postupcima javnih nabava u informacijski sustav ‘e-Nabave’” [Instruction on the Conditions and Manner of Publication of Notices and Delivery of Reports to the IT System of E-Procurement], *Official Gazette of BiH* 90/14.

¹⁰³ “Law on Public Procurement”, Article 74, Paragraph 3.

¹⁰⁴ *Ibid.*, Article 75, Paragraph 2.

in nature, including any subsequent changes to the contract.¹⁰⁵ It is important to point out that only certain information may be labelled as confidential, while the publishing of information on concluded public procurement contracts is a rule.¹⁰⁶ If there are no exceptions, the publication is compulsory.¹⁰⁷ At any rate, seeing that data access in public procurement procedures is a rule, exceptions made to protect trade secrets should be interpreted narrowly and should not be used to cover up deals that are detrimental to the public interest and paid for by the taxpayer. However, some member states tend to interpret data confidentiality broadly. Thus, for instance, confidentiality clauses have been widely used in Romania over the last 20 years, some cases of which have had a high profile, and some have even been tried.¹⁰⁸

Therefore, it would have been beneficial if the BiH legislating body had proclaimed this principle in the post-tender stage of public procurement and specified which information cannot be labelled trade secret and exempt from publishing. Although the LPP contains provisions on confidentiality,¹⁰⁹ they are worded broadly and do not include the confidentiality of data from the public procurement contract. Yet, by interpreting the data confidentiality provisions one may realise which information contained in a public procurement contract could not or should not be considered trade secret. For instance, information on the parties to the contract could not be considered trade secret, which makes sense, as this information was made public long ago at the public opening of bids.¹¹⁰ For this reason the same applies to the information on the total and individual prices in a bid. Information on prices cannot be labelled as confidential in a bid submitted by an economic operator.¹¹¹

Information requested in tender documents should not be considered confidential. If it is possible to qualify requested information as terms and requirements of the tender documents, such information cannot be considered trade secret. In addition, such information should not be labelled as trade secret in a bid submitted by an economic operator,¹¹² especially considering the obligation

¹⁰⁵ “Directive 2014/24/EU”, Item 51 of the preamble; “Directive 2014/25/EU”, Item 62 of the preamble.

¹⁰⁶ [T]he provisions concerning protection of confidential information do not in any way prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes. “Directive 2014/24/EU”, Item 51 of the preamble.

¹⁰⁷ Arrowsmith, *The Law of Public and Utilities Procurement*, p. 1343.

¹⁰⁸ Partnerstvo za društveni razvoj [Partnership for Social Development] and Expert Forum, *Mjere protiv prijevara u javnoj nabavi na jedinstvenom tržištu EU: Zakonska, institucionalna i tehnička rješenja* [Anti-Fraud Measures in Public Procurement on the Single Market: Legal, Institutional and Technical Solutions] (Zagreb: Partnerstvo za društveni razvoj, 2014).

¹⁰⁹ “Law on Public Procurement”, Article 11.

¹¹⁰ On public opening of bids cf. Article 63 of the “Law on Public Procurement”.

¹¹¹ “Law on Public Procurement”, Article 11, Paragraph 1(a).

¹¹² *Ibid.*, Article 11, Paragraph 1(c).

on the part of the contracting body to make tender documents available, that is, to provide access to them to interested candidates¹¹³/tenderers.¹¹⁴ Seeing that tender documents include a draft contract or basic elements of contract,¹¹⁵ these basic elements, previously included in tender documents, should not be labelled trade secret in the contract publishing procedure.

3.2. The Publishing of Information on Modifications of Public Procurement Contracts

3.2.1. Modifications to Public Procurement Contracts

Once the award decision is made, before, but also after the conclusion of the contract, the need may arise to change the content of the contract if it is no longer appropriate or if external circumstances have suddenly changed. The need to change the contract may arise after a contracting party (supplier) has been chosen but the contract has not been concluded, or after the contract has been concluded. In the former case, the changes to the contract may be the result of a mutual agreement of both parties or the initiative of one party (for instance, when the contracting body changes the project in the process of contract conclusion). In the latter case, the contract may be changed under the conditions listed in the contract itself, or if the contracting parties reach an agreement.¹¹⁶ In both cases, the changes should be available to the general public. In the former case the changes are published together with the concluded contract, in the latter, the changes themselves are published.

The possibility to change contracts itself is not in question, especially with long-term or open-end contracts, but it should be kept in mind that this possibility opens the door to abuse. For instance, a contracting body may strike a deal with a favoured economic operator whereby the economic operator makes an exceedingly attractive offer, but after the contract is concluded the price is raised, deadlines for the discharge of obligations extended or the discharge of obligations is generally made easier. After the conclusion of the contract, the contracting body and the supplier may agree that the supplier should deliver a lesser quantity of goods, whereby the price may be raised, which puts the

¹¹³ For the legal definition of a candidate, cf. “Law on Public Procurement”, Article 2, Paragraph c, Item 2.

¹¹⁴ “Law on Public Procurement”, Article 55.

¹¹⁵ *Ibid.*, Article 53, Paragraph 3(r). A draft contract has to be included in the tender documents, so that all tenderers may compete on equal footing.

¹¹⁶ Arrowsmith, *The Law of Public and Utilities Procurement*, pp. 578–579.

supplier at an advantage in relation to other economic operators which offer their goods, services or works in the market.

There are risks to concluding a contract for additional works or services when proper conditions have not been met. Under the LPP, in such situations the application of the disposition principle is not restricted, but it should be, seeing that the LPP provides for changes to the contract.¹¹⁷ In order to ensure a minimum of transparency in such situations, it is necessary to distinguish between substantial and less substantial changes under the LPP, and then apply European standards, i.e., include in the text of the Law the conditions under which changes to the contract are permissible without launching a new public procurement process (less substantial changes), and the conditions under which a new public procurement process has to be launched (substantial changes).

3.2.1.1. Less Substantial Changes to the Public Procurement Contract

The LPP does not regulate which changes to the contract are to be considered less substantial, which is a serious failure on the part of the legislative body, seeing that this is a fundamental requirement for the improvement of the public procurement system in the execution stage aimed to ensure transparency of the conclusion and execution procedure and equal treatment of all economic operators. The EU Court of Justice provided instructions on how to rate changes as less substantial first in the *Presstext* case,¹¹⁸ then in the *Wall AG* case.¹¹⁹ In these two cases, the Court stressed, by way of introduction, that changes to a contract made in the execution phase are possible and permissible in principle, unless they affect an important aspect of the contract. This opinion of the Court is included in the text of the new public procurement directives which provide for changes to public procurement contracts.¹²⁰ Contracts and framework agreements can be changed without a new public procurement process, in line with the directives' requirements, if the changes are provided for in the tender documents, if the changes do not alter the nature of the contract or framework agreement, if the changes refer to additional deliveries, if a change of supplier is not possible for technical or economic reasons or would cause a substantial increase in costs for the contracting body or if the changes are due to unforeseen circumstances and amount to half the value of the original contract. The value caps for changes to the original contract are included in the provisions of the public procurement directives.¹²¹

¹¹⁷ "Law on Public Procurement", Article 75, Paragraph 2.

¹¹⁸ ECJ, *Presstext Nachrichtenagentur GmbH vs. Republik Österreich (Bund)*.

¹¹⁹ ECJ, *Wall AG vs. Stadt Frankfurt am Main*.

¹²⁰ "Directive 2014/24/EU", Article 72; "Directive 2014/25/EU", Article 89.

¹²¹ The conditions for less substantial modifications are contained in "Directive 2014/24/EU", Article 72, Paragraph 1-3; and "Directive 2014/25/EU", Article 89, Paragraph 1-3.

In order to ensure transparency, the LPP currently in force stipulates that contracting bodies are to publish all modifications made during the realisation of a contract in the manner and in the form to be regulated by the Council of Ministers of BiH in a statutory instrument.¹²² Pursuant to the LPP, the said changes are to be published on the website of the contracting body, which makes the publication optional as it is contingent on whether or not said contracting body has a website. If it does not have one, it is not obliged to publish the changes.¹²³ In the light of European standards as well as the practice of member states, the legislating body should have set out the conditions for potential modifications of public procurement contracts and framework agreements, and created the obligation to publish said modifications in the manner and the time frame prescribed for the publishing of public procurement contracts, on a form especially created for the publishing of changes to contracts. As it is, contracting bodies still have the option to change the conditions of contracts at their discretion, without restrictions. Besides, the enacted Instruction on the Publication of Basic Elements of Contracts and Changes Thereto¹²⁴ is titled as a statutory instrument regulating contract publication,¹²⁵ but the legal basis for its enactment¹²⁶ as well as its content reveals that it regulates the keeping of a register of public procurement contracts, not contract publication.

If the modifications are less substantial, they should be published in the same way as the original contract, and the content of such publication should have also been defined in the LPP. The public procurement directives set out the content of

¹²² “Law on Public Procurement”, Article 75, Paragraph 2.

¹²³ Ibid.

¹²⁴ “Instruction on the Publication of Basic Elements of Contracts and Changes Thereto”.

¹²⁵ “Law on Public Procurement”, Article 74.

¹²⁶ The Instruction was enacted on the basis of the authority from Article 75 Paragraph 2 of the Law on Public Procurement.

the notice of modifications of a contract during its term.¹²⁷ The Slovenian Public Procurement Act provides for publication of modifications of public procurement contracts on the public procurement portal, while the reasons for modifying the contract or framework agreement, as well as the justification of the modification, must be documented by the contracting body regardless of whether it is possible to publish notices of contract modification.¹²⁸

With the importance of contract modifications in mind, the directives bind contracting bodies to publish notices of contract modifications. It should be stressed that only less substantial modifications are published. In case of substantial modifications, the contracting body has the obligation to start a new public procurement process. However, in that case the legislative body should consider the foreseen obligation to terminate the contract.

3.2.1.2. Substantial Contract Modifications

Substantial modifications of a public procurement contract during its term are considered a new contract, for which the contracting body is bound to conduct a new public procurement procedure. A modification is considered substantial if it causes a change of nature of the original contract, if terms are introduced which were not contained in the tender documents, if the modification changes the economic balance of the contract in a manner not provided for in the original contract, or if the scope of the original contract or framework agreement is

¹²⁷ Annex V Part G of Directive 2014/24/EU; and Annex XVI of Directive 2014/25/EU. Pursuant to said Annexes, the information contained in the notices are: name, identification number (if provided for in national legislation), address including NUTS code, telephone number, fax number, e-mail address and web address of the contracting body and, if necessary, e-mail and web address of the service which provides additional information; CPV codes; NUTS code for the main site of works in the case of a works contract or NUTS code for the main site of delivery or performance in the case of a goods or services contract; The description of the procurement before and after contract modification; the nature and scope of works, nature and quantity or value of goods, nature and scope of services; if applicable, price increase caused by the modification; description of the circumstances which made the modification necessary; date of award decision; if applicable, address, including NUTS code, telephone number, fax number, e-mail and web address of the new economic operator or operators; addendum explaining whether or not the contract is connected to a project or programme financed from EU funds; name and address of the monitoring body and the body in charge of legal protection procedures and, if necessary, mediation procedures; detailed information on deadlines for legal protection procedures or, if necessary, name, address, telephone number, fax number and e-mail address of the service which may provide this information; date or dates and reference or references to previous publications in the Official Journal of the EU of importance for the contract or contracts the notice refers to; date of despatch, telephone number, fax number and e-mail address of the service which may provide this information; date or dates and reference or references to previous publications in the Official Journal of the EU of importance for the contract or contracts the notice refers to; date of despatch; any other relevant information.

¹²⁸ Slovenian "Public Procurement Act" Article 95, Paragraph 5 related to Paragraph 3 of the same Article.

increased in the case of a change of supplier, the increase of which is not the result of the restructuring of the original contract or framework agreement.¹²⁹

In order to launch a new procedure, the contracting body should undertake certain actions to sever the contract. Seeing that the interests and the will of the parties to a public procurement contract are in a way subordinate to the public interest, this fact alone warrants the possibility of severance to be regulated differently in relation to the general principles of civil law. This is why the public procurement directives provide for the possibility, or lay down the terms, of contract severance, and leave it to the legislating bodies of each individual member state to transpose termination into their relevant acts in line with the requirements of the directives. A contract may be severed when the need arises to modify it substantially, and in other cases provided for in European law.¹³⁰ In order to guarantee alignment with that requirement, the LPP should have ensured that contracting bodies have the possibility to sever a contract during its term.¹³¹ What is more, in order to ensure the fulfilment of the obligations to European law in the field of public procurement, the LPP should set out the terms of severance. This was done by the Slovenian legislative body,¹³² while the Croatian Public Procurement Act still does not contain provisions regulating contract severance. This is because the Croatian Public Procurement Act has not as yet been aligned with the requirements of the new public procurement directives.

Only a valid contract which has not yet been fulfilled can be severed.¹³³ By providing for contract termination in cases when European law requires it, the legislative body would introduce severance by virtue of law. The Directive requires an expression of will as a prerequisite for severance, which means a contract cannot be severed as a matter of law (*ex lege*), but only as a result of a

¹²⁹ Situations in which modifications of a public procurement contract are considered substantial are listed in Article 72 Paragraph 4 of Directive 2014/24/EU and Article 89 Paragraph 4 of Directive 2014/25/EU.

¹³⁰ Pursuant to Article 73 of Directive 2014/24/EU, member states have the obligation to ensure that contracting bodies may sever a public contract during its term, at least under the following circumstances and conditions set out under applicable national laws: if the contract is substantially modified, which would warrant a new public procurement procedure if at the time of award the legal basis existed to exclude an economic operator pursuant to Article 57 Paragraph 1 of the Directive, and said economic operator should therefore have been excluded from the public procurement process, and if the contract should not have been awarded to the supplier on account of a serious infringement of the obligations under the Treaties and this Directive which has been declared by the Court of Justice of the EU in a procedure pursuant to Article 258 of TFEU.

¹³¹ The Directive uses the wording *termination of contract*, which means limiting the term of contract, or cessation of validity of contract. This is a general formulation which may cover different ways for a contract to cease to be valid (fulfilment, impossibility of fulfilment, severance, debt write-off, cancellation), but the content points to severance as one of the possible ways for a contract to cease under civil law.

¹³² Slovenian "Public Procurement Act", Article 96.

¹³³ Petar Klarić and Mladen Vedriš, *Građansko pravo* [Civil Law] (Zagreb: Narodne novine, 2014), p. 477.

decision made by the contracting body, but under certain conditions. Therefore, if termination provisions were to be introduced into the LPP, any termination under LPP would be considered severance by unilateral expression of will by the contracting body. Considering that public procurement contracts are in writing, they can be terminated by informal agreement as well, unless the LPP regulates otherwise.¹³⁴ However, a public procurement contract should be terminated in writing, seeing that this is required under the principle because of which the written form was prescribed. Contracts have to be put in writing, amongst other things, in order to ensure transparency, thus the declaration of termination should also be put in writing and published. This is something that should be considered in BiH, too, although the directives do not require the declaration of termination to be in writing, but leave that question to the legislature of each individual member state.¹³⁵

Published information on terminated contracts could be of importance for economic operators as it could help them make quality preparations for submitting their bids, and also introduce them to the risk of loss of contract after conclusion and the question of profitability of participating in a certain public procurement procedure. This would also make it possible for the general public to have control over the execution of public procurement contracts, and would bolster legal certainty and trust in the rule of law. An additional layer of transparency in the public procurement system would ensure responsible spending of public funds and reduce the risk of corruption.

3.3. Register of Public Procurement Contracts and Framework Agreements

In addition to the obligation of sending award notices and reports to the Agency, contracting bodies should also have the obligation to keep a register of public procurement contracts. Contracting bodies would be in charge of keeping such a register and they should publish it on their website. The LPP foresees this obligation, albeit in an insufficiently systematic manner, and the obligation is contingent on the existence of a website.¹³⁶ However, this is a vague disposition,

¹³⁴ Article 68 of the Law on Contractual Relations: “Formal contracts may be severed by informal agreement, unless regulated otherwise in certain cases, or unless the purpose of prescribing a certain form for the conclusion of a contract requires that the same form be used for the termination thereof.”

¹³⁵ Seeing that member states enjoy a degree of liberty in transposing directives while respecting the particularity and the existing standards of a specific branch of law. Another reason to mention this, pursuant to Article 239 Paragraph 3 of the TFEU, a directive is “binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

¹³⁶ “Law on Public Procurement”, Article 75, Paragraph 2.

which leaves the contracting body the possibility to violate it. For dispositions which use a legal norm (the obligation to keep a register) it is important that there exist only one type of behaviour which fully conforms to the disposition, whilst any other behaviour should represent a violation. Therefore, keeping a register should be an unconditional obligation of contracting bodies, and the failure to apply this disposition (failure to keep a register) should warrant the application of a sanction. However, the LPP does not foresee a sanction for this, but rather leaves the option to break the disposition. Such a disposition is merely a rule of behaviour set by the legislative body, and its character is normative rather than legal. It would become a legal norm only with the addition of a sanction. There is no sanction as yet, for if the contracting body does not have a website, it is under no obligation to keep a register.

The problem of contracting bodies that do not have websites should have been solved by legally binding contracting bodies to submit (twice a year, for instance) updated registers of public procurement contracts and framework agreements to the Agency, and the Agency would then publish them on its own website. Such a solution exists in the Croatian Public Procurement Act.¹³⁷ This would ensure the searchability of the information on concluded contracts by contracting body, and would at the same time enable the Agency to analyse all concluded contracts in the country, as well as control and statistically process the contracts.

As for the publishing of contracts on the websites of contracting bodies, the LPP does not even contain possible solutions which proved to be good practice in achieving a higher level of transparency in some member states, namely the publishing of contracts and framework agreements integrally on the websites of contracting bodies, and making this a precondition for validity of contracts (as is the case in, for instance, Slovakia).¹³⁸ In practice, this would mean that the integral text of the contract would have to be published within a deadline (three months, for instance), or would become invalid.

3.4. The Archiving of Public Procurement Contracts

One of the ways to ensure transparency of public procurement contracts is archiving (keeping). Contracting bodies should keep copies of concluded high-value contracts in order to enable all interested parties to access these documents in line with the applicable rules on document access.¹³⁹ The directives foresee,

¹³⁷ Croatian “Public Procurement Act”, Article 21.

¹³⁸ See Heading 2.2. of this study.

¹³⁹ “Directive 2014/24/EU”, Item 126 of the preamble; “Directive 2014/25/EU”, Item 132 of the Preamble.

in their normative parts, too, the obligation of contracting bodies to keep copies of all concluded contracts at least during their terms.¹⁴⁰ The directives require of contracting bodies to document the course of all procurement procedures, regardless of whether this is conducted electronically. To that end contracting bodies are obligated to keep sufficient documentation to back any decision made in all stages of procurement, such as documentation on communication with economic operators, documentation on internal exchanges of opinions, on the preparation of procurement documents, dialogue and negotiations (if any) and selection and award. The documentation is kept for at least three years from the date of award.¹⁴¹

The LPP does not lay down an exact duration of contract keeping, but stipulates instead that contracts and other documentation shall be kept in line with the laws regulating archiving.¹⁴² Both Croatian and Slovenian legislatures explicitly stipulate how long contracts or tender documentation are to be kept. In Croatia, this is at least four years from the end of the public procurement procedure, except for bids and participation requests by economic operators in the case of cancellation of the procurement process,¹⁴³ while in Slovenia documents are kept for five years from the date of the award, or at least two years after the expiry of the contract.¹⁴⁴

¹⁴⁰ For a value amounting to or exceeding 1,000,000 € in the case of a goods or public services contract, and 10,000,000 € in the case of public works; cf. “Directive 2014/24/EU”, Article 83, Paragraph 6 and “Directive 2014/25/EU”, Article 99, Paragraph 6.

¹⁴¹ “Directive 2014/24/EU”, Article 84, Paragraph 2, and “Directive 2014/25/EU”, Article 100, Paragraph 2.

¹⁴² “Law on Public Procurement”, Article 76.

¹⁴³ Croatian “Public Procurement Act”, Article 104, Paragraph 1.

¹⁴⁴ Slovenian “Public Procurement Act”, Article 105, Paragraph 3.

4.

Conclusion

This analysis of the publishing of public procurement contracts shows that in BiH this issue is partly aligned with the requirements of the public procurement directives, but there are still some normative shortcomings, especially when it comes to completeness and functionality, which unambiguously indicates the need for thorough legislative reform. In the reform process, the requirements of the new public procurement directives should be taken into account, as should the experience of individual member states. This study has detected some controversial legislative solutions. Had they been adequately and completely formulated, they would have helped increase the transparency and efficiency of the public procurement system in BiH.

The LPP does not meet the requirements of clarity, quality and quantity of style as general principles of legal drafting. It uses undefined terms, which is not desirable, considering the sensitivity of the field it regulates. Namely, it does not establish clear distinctions between the publishing of public procurement contracts, the delivery of public procurement reports, and the keeping of a register of public procurement contracts, whose existence derives from a number of unsystematically formulated provisions. This normative confusion has caused omissions related to the passing and the content of statutory instruments. The LPP also does not contain provisions for possible modifications of public procurement contracts, nor does it contain provisions regulating the manner of publication of such modifications, or provisions regulating possible termination of contract due to substantial modifications.

The law does not lay down the obligation to publish public procurement contracts which are concluded after the completion of a competitive request for quotations, nor does it require the publication of direct agreements. In addition, the legislative body does not list the information which cannot be labelled trade secret when publishing a public procurement contract.

5. Recommendations

The subject of analysis in this study is the provision of the LPP regulating the publishing of public procurement contracts. Problems with the transparency principle have been detected. At the same time, the study offers specific suggestions, based on the EU directives as well as comparative experiences tested in practice, aimed at improving individual solutions.

The results of the research point to the conclusion that the text of the LPP should be amended with a number of provisions regulating some unsolved (conditions for modifying a public procurement contract) or inadequately solved issues (insufficient differentiation and incomplete regulation of types of notices). It is important to take certain normative steps as soon as possible with a view to revising the existing provisions regulating the publishing of public procurement contracts. To improve the existing normative situation, it is above all necessary to amend the text of the LPP with adequate imperative provisions, in line with the recommendations given in this study.

The recommendations from this study may be of use to contracting bodies and economic operators, which could benefit from an introduction to European standards although Bosnian-Herzegovinian legislation is not entirely harmonised with those standards. Furthermore, the study could be useful to the relevant institutions (Public Procurement Agency, Procurement Review Body) on account of the indirect (interpretative) impact of the directives,¹⁴⁵ seeing that these bodies have the obligation to interpret domestic law through the lens of EU law, and considering that BiH is still waiting to become an EU member state. The recommendations made in this study could also benefit the BiH legislature, which should take them into account the next time it sets out to amend the existing public procurement legislation or pass new laws.

Transparency Principle

- In order to call attention to the importance of the principle of transparency of public procurement contracts, it would be beneficial to introduce the content and meaning of this principle into the LPP alongside the existing proclamation¹⁴⁶ by making all public procurement procedures public and ensuring publicness by running free public procurement notices on a public procurement portal.

¹⁴⁵ The existence of said impact was ascertained by the EU Court of Justice in the case *Sabine von Colson and Elizabeth Kamann vs. Land Nordrhein-Westfalen*.

¹⁴⁶ "Law on Public Procurement", Article 3.

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- It would be good to introduce compulsory publication of public procurement contracts on one portal, while the existing solution which provides for optional publishing in other publications or on other websites can be retained.
- There needs to be a clear distinction between the publishing of a public procurement contract, the delivery of a public procurement report and the keeping of a register of public procurement contracts.
- It would be good clearly to bind contracting bodies to prepare and publish a register of public procurement contracts and framework agreements of all values, and to update the information in said register on a regular basis. The register would have to be published on the contracting body's website. At the same time, information related to registers and subsequent modifications should be centralised and published on the website of the Public Procurement Agency in the form of a list of links. In order to ensure a higher level of transparency, it would be good also to publish integral public procurement contracts in the register, regardless of their value.

Economic Operator Data Confidentiality Protection

- In order to improve transparency, the LPP should explicitly state that certain information on contract award or framework agreement conclusion does not have to be published if the publication of such information would interfere with law enforcement or otherwise run counter to the public interest, compromise legitimate market interests of a publicly or privately owned economic operator, or prejudice fair market competition between them.
- It would be good to stipulate that the provisions regulating the protection of confidential information should in no way preclude the publishing of the parts of the contract which are not confidential in nature, including any subsequent changes.

Modification of Contracts

- Following the example of the EU Court of Justice case law and the material directives on public procurement, the LPP should distinguish between substantial and less substantial modifications.
- It is necessary to stipulate that, in principle, modifications of a contract during its term should be possible and permissible if they do not affect an important feature of the contract, and define other conditions for permissible modifications of public procurement contracts.
- It is necessary to stipulate that all modifications of a public procurement contract made during its term should be published.

- Furthermore, the LPP should stipulate that substantial modifications to a public procurement contract made during its term should be considered a new contract, for which the contracting body should be bound to launch a new public procurement procedure.
- The LPP should stipulate that contracting bodies should have the option unilaterally to sever a public procurement contract during its term in case of substantial changes to the contract under the public procurement directives.
- Furthermore, although the issue is at the discretion of national legislatures, it is recommended, for the sake of ensuring transparency, to stipulate that the statement of contract termination should be put in writing and the information regarding the termination of the contract should be published.

Archiving of Contracts

- Along with the existing provision which regulates archiving, the LPP should define an exact deadline for contract archiving.

6.

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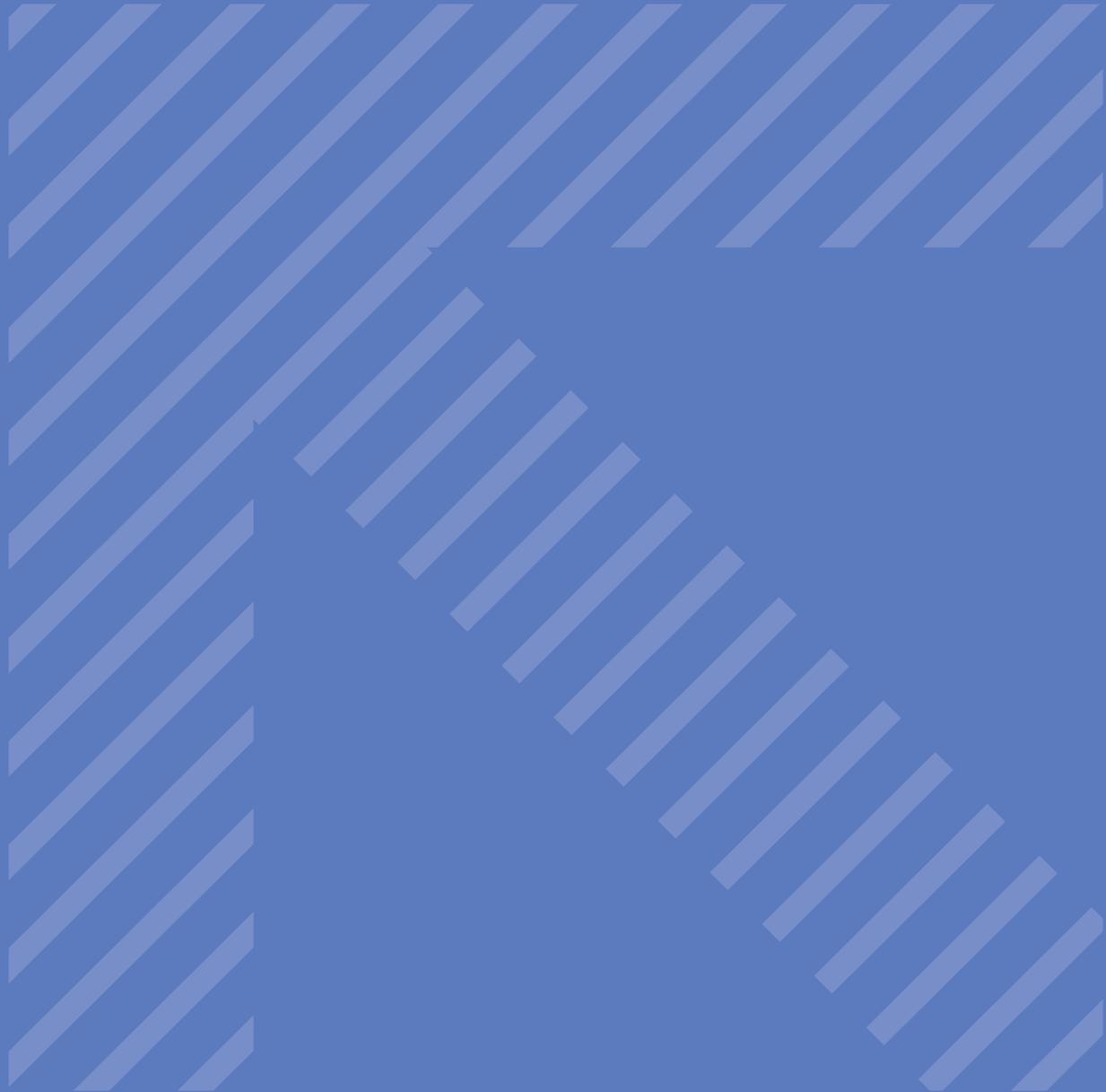
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