

## TOWARDS GREATER TRANSPARENCY OF PUBLIC PROCUREMENT CONTRACTS IN BOSNIA AND HERZEGOVINA<sup>1</sup>

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The question of publishing public procurement contracts in BiH 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. This brief analyses the provisions of the Law on Public Procurement which regulate the publishing of public procurement contracts in BiH, and detects problems which undercut the principle of transparency. The main findings unambiguously indicate that thorough legislative reform is needed, and to that end the brief offers specific suggestions aimed at improving some of the legal solutions.

**SUMMARY**

### 1. INTRODUCTION

As the rules of public procurement procedure were codified, a new type of contract was introduced into the legal system of Bosnia and Herzegovina – the public procurement contract. This is a specific kind of contract, concluded after a public procurement procedure has been conducted. The procedure of concluding a public procurement contract, as well as its content, to an extent, is regulated by a fundamental public procurement legal act – The Law on Public Procurement of Bosnia and Herzegovina (hereinafter: LPP).<sup>2</sup> However, some questions related to public procurement contracts are regulated by general principles of civil law. For this

reason, another source of law regarding public procurement contracts is the Law of Contracts and Obligations (LCO).<sup>3</sup> However, in order to ensure better realisation of the transparency principle in the publishing of contracts, the LPP contains regulations which restrict the freedom of the parties in the conclusion and execution of public procurement contracts. Yet the text of the LPP does not contain clear and precise provisions regulating other issues (for instance, the possibility of changing a contract during its term), which would restrict the application of the disposition principle as the fundamental principle of the LCO, that is, the autonomy of the will of the parties to the contract in the execution of a public procurement contract.



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<sup>2</sup> “Law on Public Procurement”, *Official Gazette of BiH* 39/14.

<sup>3</sup> “Law on Obligations”, *Official Gazette of the SFRY* 29/78, 39/85, 45/89 and 57/89; *Official Gazette of RBiH* 2/92, 13/93 and 13/94; *Official Gazette of RS* 17/93 and 3/96.

In this regard, it is important to point out that European standards, too, demand additional provisions aimed at ensuring the principle of contract transparency in the process of contract execution. Although BiH is not an EU member state, European law is beyond any doubt relevant for its legal system, seeing that the obligations under the Stabilisation and Association Agreement (SAA)<sup>4</sup> dictate, among other things, the harmonisation of standards in the publishing of public procurement contracts. With international standards in this field as its point of departure, especially the EU directives and best practices from member states, this policy brief offers a detailed analysis of the existing legislation in BiH which regulates the publishing of public procurement contracts, with a view to bolstering the transparency principle. Based on the main findings, the brief offers recommendations to improve the existing BiH normative framework regulating the publishing of public procurement contracts as well as the publishing of modifications to public procurement contracts during their execution.

## 2. INTERNATIONAL STANDARDS AND THE RELEVANCE OF TRANSPARENCY OF PUBLIC PROCUREMENT CONTRACTS

Transparency in the post-tender stage of public procurement is ensured by publishing information on concluded contracts, which facilitates more efficient monitoring of the use of public funds.<sup>5</sup> Transparency (publicness, publicity)<sup>6</sup> in public procurement directly contributes to the increase of public trust in the work of contracting bodies, as well as to the increase of 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,<sup>7</sup> that is, it may contribute to the realisation of other public procurement principles, above all the principle of equal treatment<sup>8</sup> and non-discrimination.<sup>9</sup>

Numerous international acts lay down appropriate requirements in order to ensure transparent publishing of public procurement contracts. European standards in this field derive from the Treaty

<sup>4</sup> Stabilisation and Association Agreement, Article 74. Text available on 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](http://www.dei.gov.ba/dei/bih_eu/sporazum/default.aspx?id=9812&langTag=bs-BA) (Accessed on May 19, 2016).

<sup>5</sup> 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), p. 7-25.

<sup>6</sup> In legal literature, transparency refers to making public statements, providing information, and the right to access documents. Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 2008), p. 562.

<sup>7</sup> Sue Arrowsmith, *The Law of Public and Utilities Procurement: The Regulation in the EU and UK* (London: Sweet & Maxwell, 2014), p. 1337

<sup>8</sup> 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*, C-87/94, April 25, 1996, (54-56).

<sup>9</sup> According to the ruling in *Telaustria Verlags GmbH and Telefonadress GmbH vs. Telekom Austria AG*, C-324/98, 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.

on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU),<sup>10</sup> and especially in the relevant directives on public procurement. These are the Directive 2014/24/EU on public procurement<sup>11</sup> and the Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.<sup>12</sup> 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. The United Nations Convention against Corruption<sup>13</sup> also requires the introduction of a public procurement system which includes the publishing of public procurement contracts. International organisations such as the Organisation for Economic Cooperation and Development (OECD) and Transparency International stress the need to publish public procurement contracts.

Said standards stipulate that transparency of a public procurement contract is ensured through publication, whereby it is necessary correctly to prescribe the form and content of the publication. In addition, it is necessary to publish any modifications to contracts, whereby a distinction has to be made between substantial modifications, which require a new public procurement procedure and less substantial modifications, which do not require a new procedure. Publicness of public procurement

contracts is also ensured by keeping and publishing a register of public procurement contracts, as well as through compulsory keeping of copies of concluded contracts. At the same time, the application of the transparency principles in public procurement procedures is restricted by the application of the principle of trade secret protection, which protects confidential information of economic operators, including technical or trade secrets and confidential aspects of bids.

### 3. THE PUBLISHING OF CONTRACTS IN BIH: AN ANALYSIS OF THE EXISTING LEGISLATION

Although public procurement was proclaimed an economic activity by the European Court of Justice,<sup>14</sup> and although the procedures were shaped to create a market-like space, some restrictions do apply, in order to protect the public interest; these restrictions should be built into imperative provisions of the LPP. They should, among other things, apply to the autonomy of the will of the parties to contract in the publishing of public procurement contracts, by stipulating, clearly and precisely, that contracts must be published. The LPP does not meet this requirement fully and adequately, thus there are still normative shortcomings which significantly limit the realisation of the principle of transparency of public procurement contracts.



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<sup>10</sup> "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.

<sup>11</sup> "Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC", *Official Journal of the European Union* EU L 94/65, March 18, 2014.

<sup>12</sup> "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.

<sup>13</sup> 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 October 31, 2003; it was ratified by BiH on July 23, 2006.

<sup>14</sup> European Court of Justice (ECJ), *Gemeente Arnhem and another v BFI Holding BV*, C-360/96, November 10, 1998.

### 3.1. The Publishing of Contracts

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,<sup>15</sup> which is in line with the public procurement directives.<sup>16</sup> However, individual contracts, concluded on the basis of a framework agreement, are to be published no later than 30 days from the end of the calendar year.<sup>17</sup> The EU directives also stipulate that contracting bodies are not bound to send notice of results of public procurement process for each (individual) contract based on that particular agreement.<sup>18</sup> In that case, notices of results of public procurement procedures for contracts based on the agreement are to be sent in batches, no later than 30 days from the end of each quarter. Therefore, the LPP should have shortened 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 is not, “30 days from the end of the calendar year”, but 30 days from the end of each quarter.

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 agree-

ment, because these are low-value contracts (competitive request),<sup>19</sup> or petty purchases (direct agreement).<sup>20</sup> It should be pointed out that many countries have the same rules for publishing low- and high-value contracts,<sup>21</sup> although this is not stipulated by the directives. The compulsory publication of all public procurement contracts regardless of their value and the type of procedure, although not compulsory by European standards, is good practice which would greatly improve the level of transparency of public procurement contracts, and therefore the transparency of the public procurement system in BiH as a whole.<sup>22</sup>

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 are prepared and sent for publication electronically, in the manner and within a timeframe laid down in a statutory instrument enacted by the Public Procurement Agency (hereinafter: the Agency).<sup>23</sup> 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.<sup>24</sup> The

<sup>15</sup> On award notices cf. “Law on Public Procurement”, Article 74.

<sup>16</sup> “Directive 2014/24/EU”, Article 50, Paragraph 1; “Directive 2014/25/EU”, Article 70, Paragraph 1.

<sup>17</sup> “Law on Public Procurement”, Article 74, Paragraph 1.

<sup>18</sup> “Directive 2014/24/EU”, Article 50, Paragraph 3; “Directive 2014/25/EU”, Article 70, Paragraph 3.

<sup>19</sup> 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.)

<sup>20</sup> The estimated value of which amounting to or below the threshold of 6,000.00 (“Law on Public Procurement”, Article 87, Paragraph 3.)

<sup>21</sup> 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), p. 18.

<sup>22</sup> Nermina Voloder, *Transparency of Public Procurement in Bosnia and Herzegovina* (Sarajevo: Analitika – Center for Social Research, 2015), p. 42.

<sup>23</sup> “Law on Public Procurement”, Article 36, Paragraph 2.

<sup>24</sup> 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)).

enactment of such statutory instruments is within the competency of the Council of Ministers of BiH,<sup>25</sup> 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.<sup>26</sup> At the same time, the LPP does not even contain possible solutions which have 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).<sup>27</sup>

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

Although the LPP provides for the publishing of modifications to public procurement contracts,<sup>28</sup> further elaboration of such modifications is missing from the text of the law, which leaves space for abuse. The Law does not distinguish between substantial and less substantial modifications of public procurement contracts during their term, nor does it take cues from the EU Court of Justice case

law,<sup>29</sup> the public procurement directives,<sup>30</sup> and comparative practices of member states in defining the conditions for differentiating between these two types of modifications. Less substantial modifications do not require a new public procurement procedure to be launched; instead, an annex can be signed and added to the contract, and it has to be published in the same way as the contract itself. The LPP does not stipulate which modifications are to be considered less substantial, which is a serious omission, seeing that this requirement is crucial for ensuring transparent execution of contracts and equal treatment of all economic operators. At the same time, the LPP does not contain provisions regulating the manner of publicizing modifications once they have been made, which is another significant flaw. On the other hand, substantial modifications of a public procurement contract made during its term should be considered a new contract, for which the contracting body should have the obligation to launch a new public procurement procedure. In order to conduct a new procedure, it is necessary to take certain steps to terminate the contract. In that regard, the LPP does not define substantial contract modifications, or the conditions under which it is possible to terminate the contract.<sup>31</sup> The Law does not

<sup>25</sup> The Council of Ministers forms part of the executive of Bosnia and Herzegovina. ("Law on the Council of Ministers of Bosnia and Herzegovina", *Official Gazette BiH* 30/03, 42/03, 81/06, 76/07, 81/07, 94/07 and 24/08, Article 2).

<sup>26</sup> It should also be noted that such statutory instruments in Croatia and Slovenia are enacted by the governments of these countries (see Croatian "Public Procurement Act", *Official Gazette of the Republic of Croatia*, 90/11, 83/13, 143/13 and 13/14, Article 55, Paragraph 5 and Slovenian "Public Procurement Act", *Official Gazette of the Republic of Slovenia* 91/15, Article 52, Paragraph 3).

<sup>27</sup> European Commission, EU Anti-corruption Report, ANNEX 25, COM(2014) 38 final. (Brussels: European Commission, February 3, 2014), p. 9-10.

<sup>28</sup> "Law on Public Procurement", Article 75, Paragraph 2.

<sup>29</sup> European Court of Justice (ECJ), *Presstext Nachrichtenagentur GmbH. v. Republik Österreich (Bund)*, C-454/06, June 19, 2008.

<sup>30</sup> "Directive 2014/24/EU", Article 72; "Directive 2014/25/EU", Article 89.

<sup>31</sup> 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.

stipulate that notices of contract termination have to be published, although this could be of use to economic operators and help them make quality preparations for bidding, as well as introduce them to the risk of loss of contract after conclusion. 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.

### 3.3. Register of Public Procurement Contracts and Framework Agreements

One of the obligations of contracting bodies is the obligation to keep a register of public procurement contracts on their websites. The LPP foresees this obligation, albeit in an insufficiently systematic manner, and the obligation is contingent on the existence of a website.<sup>32</sup> 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.<sup>33</sup> 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.

### 3.4. Archiving of Contracts

Transparency is also ensured by introducing the obligation of keeping copies of concluded contracts. The directives require of contracting bodies to document the course of all procurement procedures, regardless of whether they are conducted electronically or not. 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. Pursuant to the EU directives, the documentation is kept for at least three years from the date of award.<sup>34</sup>

However, 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 the archiving.<sup>35</sup> Considering the requirement of the EU Directive and the comparative practice,<sup>36</sup> 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.

<sup>32</sup> "Law on Public Procurement", Article 75, Paragraph 2.

<sup>33</sup> Croatian "Public Procurement Act", Article 21.

<sup>34</sup> "Directive 2014/24/EU", Article 84, Paragraph 2, and "Directive 2014/25/EU", Article 100, Paragraph 2.

<sup>35</sup> "Law on Public Procurement", Article 76.

<sup>36</sup> Both the 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 bids and participation requests by economic operators in the case of cancellation of the procurement process, 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. Croatian "Public Procurement Act", Article 104, Paragraph 1; Slovenian "Public Procurement Act", Article 105, Paragraph 3.

### 3.5. Trade Secret Protection

Data protection is exempt from the transparency principle, and should be interpreted narrowly, like all exceptions. Only certain information may be labelled as confidential, and as such it should in no way preclude the publication of the parts of the contract which are not confidential in nature. If data were to be designated trade secret in order to cover up business transactions paid by the tax payer which are detrimental to the public interest, such designation should be disregarded. In order to improve the transparency of public procurement contracts, 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.

## 4. CONCLUDING REMARKS

Analysis shows that although the public procurement system in BiH is partly aligned with the transparency requirements of the public procurement directives, there are still some normative shortcomings, especially when it comes to completeness and functionality, which unambiguously indicates the need for thorough legislative reform. The shortcomings of the LPP are, above all, the fact that it does not systematically regulate the question of publishing information on all concluded contracts, including low-value contracts, nor does it regulate the timely publication of contracts concluded on the basis of a framework agreement. Furthermore, it does not provide for possible modifications of public procurement contracts, provisions regulating the manner of publishing of said modifications, or provisions on possible contract termination due to modifications. Also, the LPP does not provide for the publication of registers of public

procurement contracts in cases when the contracting body does not have a website, nor does it specify, in line with the EU directives, how long contracting bodies have to keep public procurement contracts. Improvements in the field of transparency cannot be achieved without solving these normative omissions and ambiguities.

## 5. RECOMMENDATIONS

The analysis of the question of publishing of public procurement contracts indicates the need for thorough legislative intervention, whereby the following recommendations should be taken into consideration:

It is necessary to make it compulsory for contracting bodies to publish information and award notices for contracts concluded on the basis of competitive requests for bids and direct agreements.

It is necessary 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 this information is published 30 days from the end of each quarter, not 30 days from the end of the calendar year, as the Law currently requires.

It is necessary explicitly to define the conditions under which certain information on contract award or framework agreement conclusion does not have to be published (trade secret protection); at the same time, the provisions regulating the protection of confidential information should in no way preclude the publication of the parts of the contract which are not confidential in nature, including any subsequent modification.

The LPP should make it compulsory for contracting bodies to publish a register

of public procurement contracts and framework agreements on the Public Procurement Agency website, which is especially important in cases where the contracting body does not have a website of its own.

The LPP should differentiate between substantial and less substantial contract modifications, and stipulate that substantial modifications of a contract during its term are to be considered a new contract, for which the contracting body, having severed the existing contract, has

to launch a new public procurement procedure.

The Law should stipulate that any less substantial modifications of public procurement contracts during their terms have to be published. It should also stipulate that statements of contract termination by contracting bodies should be published as well.

The Law should define, precisely and explicitly, how long copies of contracts should be kept.

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