

Policy memo

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Recommendations for the Improvement of Legal Protection in Public Procurement Procedures in Bosnia and Herzegovina

Legal protection in public procurement procedures implies a set of legal norms that regulate the mechanisms available to participants in public procurement procedures in Bosnia and Herzegovina (BiH) if participants consider that the decision brought by a contracting authority violates their rights and legal interests. An appropriate normative framework also ensures the realization of fundamental objectives of legal protection in public procurement procedures such as inspiring competition and preventing discrimination, cronyism and corruption. On the basis of such a normative framework, provision of goods and services at the best value for money is ensured, as well as cost-effective spending of public funds, faster economic growth and harmonization with the fundamental principles and other standards of European law.

The basic legal act which regulates legal protection in public procurement procedures in BiH is the Law on Public Procurement (LPP).¹ Legal protection procedure – both administrative and judicial – is incorporated in the provisions of the LPP. In addition to the LPP, as a unique and basic act which regulates legal protection in public procurement procedures, the Law on Administrative Procedure (LAP) is applied in a subsidiary manner.² The institutional framework of legal protection in public procurement procedures consists in the Agency for Public Procurement (APP) and the Procurement Review Body (PRB). The APP has mainly an advisory role while the authority of the PRB is to review appeals in public procurement procedures.

¹ “Zakon o javnim nabavama” [Law on Public Procurement], *Official Gazette of BiH* 39/14. The Law on Public Procurement came into effect on May 19, 2014.

² “Zakon o upravnom postupku BiH” [Law on Administrative Procedure of BiH], *Official Gazette of BiH* 29/02, 12/04, 88/07, 93/09 and 41/13. Subsidiary application of the provisions of the LAP in an appeal stage of the public procurement procedure against the procedure of the authority that implements legal protection is explicitly envisaged in the “Law on Public Procurement,” Article 117.



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With regard to the available legal protection mechanisms, a dissatisfied participant in the public procurement procedure in BiH can resort to appeal in an administrative procedure or a lawsuit in an administrative dispute. Nevertheless, some normative decrees regarding the possibility of resorting to those mechanisms and procedures show a deviation from European law since they fail to sufficiently ensure legality, legal safety, predictability and transparency, and consequently they do not provide the necessary guarantees in respect of availability and efficiency and effectiveness of legal protection. In addition, there is also a problem regarding the implementation of particular provisions of the relevant legislation on public procurement.

Based primarily on the findings of the study on legal protection in public procurement procedures commissioned by Analitika – the Center for Social Research,³ this *policy memo* aims to point to some key deficiencies in the legal framework which regulates legal protection in public procurement procedures in BiH and offer recommendations with regard to overcoming the observed deficiencies. The recommendations are based on international standards and comparative solutions proven in practice, and as such, they should contribute to a definition of legal decrees that will lead to more efficient legal protection in practice.

Subsidiary Application of the Law on Administrative Procedure

The legally envisaged subsidiary application of the Law on Administrative Procedure (LAP) in the appeal stage of the public procurement procedure does not conform in entirety to the requirements of this procedure. Therefore it would be useful for the legislator to define the procedure conducted in accordance with the provisions of the LPP as an administrative procedure, or the legislator should at least envisage that the provisions of the LAP in public procurement procedures are applied in an *appropriate* manner. Thus, at least in principle, the specific nature of legal protection in public procurement procedures would be noted.

Status of the APP

The authority of the APP is defined neither in a sufficiently broad manner nor precisely enough by the LPP. Thus the provision of advisory opinions is restricted exclusively to the contracting authorities and bidders, although the circle of potentially authorized subjects for submitting requests to give opinions should include a wider public, in addition to economic operators.⁴

³ Stanka Pejaković, *Analiza pravne zaštite u postupcima javne nabave u Bosni i Hercegovini* [Analysis of Legal Protection in Public Procurement Procedures in Bosnia and Herzegovina], (Sarajevo: Analitika – Center for Social Research, 2015).

⁴ An economic operator can be a participant in a public procurement procedure as a bidder, candidate, member of a group of candidates/bidders and as a supplier (“Law on Public Procurement,” Article 2, Item c).

Within the legally envisaged competency of this entity the competency which implies the execution of supervision of the application of the LPP and procedural provisions of the LPP is missing. In essence, the execution of administrative procedure is inherent to state administration entities, and the Agency for Public Procurement (APP) has such a status. In addition, the LPP does not include within the APP's competency the right to file infringement reports, while in another article the LPP states that the APP files infringement reports in cases when there was no procedure against an appeal.⁵ The content of the abovementioned provision of the LPP is problematic in the context of its application since the Law does not determine what kinds of misdemeanor are within the competency of the APP which, in turn, leaves a possibility of arbitrary and willful conduct on the part of the APP. As a result, the LPP should also include a provision stipulating whereby that the APP is authorized to submit infringement reports for all kinds of misdemeanor. The precondition for this is to authorize the APP to execute the work of administrative supervision.

Status of the PRB

Deficiencies and vague wording of the LPP are evident regarding the status of the PRB. Above all, taking into consideration that this entity decides on appeals, and due to the importance of this work, it would be preferable to define the status of this entity by a special law,⁶ which would, inter alia, regulate the question of the PRB personnel, namely, appointment and duration of mandate of the PRB's members, prerequisites for nomination and remuneration of members. Such a solution would be advisable, especially since the PRB should be a quasi-judicial entity rather than an administrative entity, which is its current status. With regard to the key function of this entity (consideration of appeals in public procurement procedures), the PRB has both administrative and judicial characteristics, and consequently it cannot be classified, without reserve, either as an administrative or a judicial entity. In this sense, regarding the organizational structure of the PRB, measures have already been taken for this entity to assume the status of a court or tribunal in the sense of Article 267 of the TFEU and the relevant judgments of the European Court.⁷

The Law should define the time limit for issuing internal acts of the PRB. Although the legal regulation of the PRB is significantly incorporated in the provisions of the LPP, it must be highlighted that its internal organization should be regulated by the Rulebook on Internal Organization and by new Rules on Procedure of the PRB - documents that have not been issued; nor has the time limit for their issue been determined by the LPP.

⁵ Ibid., Article 116, para. 1.

⁶ As is the case with the State Commission for Supervision of Public Procurement Procedures in Croatia established by the "Zakon o Državnoj komisiji za kontrolu postupaka javne nabave" [Law on the State Commission for Supervision of Public Procurement Procedures], *Official Gazette of the Republic of Croatia* 18/03, 127/13 and 74/14.

⁷ The concept of the court or tribunal is a Union concept and it does not depend on the status of authority, according to the national legislation, but it implies the possibility that this authority, by the expected admission of BiH into full membership of the EU, asks for preliminary rulings from the European court.

Neither is the decentralization of competences a good solution, i.e. transfer of responsibilities to the branch offices – located in Banja Luka and Mostar⁸ – which are competent to issue a decision upon appeals for procurement values up to 800,000.00 KM.⁹ Centralization of the PRB's work would certainly be a better solution, because this would ensure higher quality of work, unified proceedings, reduction in costs and full responsibility for business performance.¹⁰

Finally, the realization of the requirement of European legislation is questionable in the part of the LPP relating to the adversarial procedure before the PRB, which is certainly necessary to ensure, with the objective of the equal legal position of parties in the appeal stage of the public procurement procedure. Specifically, the LPP does not envisage the possibility that the parties of the review procedure state their allegations in an oral debate. Hence it would be necessary to introduce provisions on holding an oral debate before the PRB.

Legal Capacity of Public Authorities

The LPP has not completely resolved the question of legal capacity of the state authorities that watch over legality and which are competent to maintain the public interest. Namely, the legal protection procedure, pursuant to the current LPP, depends only on the initiative of the economic operator, while public authorities do not have legal capacity in the legal protection procedure. Yet, public procurement procedures, as well as private ones, have implications for the public interest, and it is necessary that access to the legal remedies in this domain be provided to those public authorities that guarantee the implementation of the law and protect the public interest. Above all, the PPA, The Prosecutor's Office of Bosnia and Herzegovina and the Council of Competition could have the right to appeal in this regard.¹¹

⁸ "Law on Public Procurement", Article 93, para. 4.

⁹ Ibid., Article 93, para. 7.

¹⁰ Legal protection in public procurement procedures is also centralized in complex member states of the EU (e.g. Belgium, Austria). See "Public Procurement Review and Remedies Systems in the European Union", *SIGMA Papers*, no. 41 (2007), pp. 39 and 42.

¹¹ For instance, according to the Croatian legislation, the right to appeal in public procurement procedures is given to the authority of the state administration responsible for the public procurement system and to the competent state Attorney's Office ("Zakon o javnoj nabavi" [The Public Procurement Act], *Official Gazette of the Republic of Croatia* 110/07 and 125/08, Article 141, para. 2). The Slovenian legislation gives such competences to the Ministry of Finance, the Court of Audit, the authority competent for the protection of competition and the body competent to prevent corruption ("Zakon o pravnem varstvu v postopkih javnega naročanja" [Law on the Legal Protection in Public Procurement Procedures], *Official Gazette of the Republic of Slovenia* 43/11, 60/11, 63/13 and 90/14, Article 6).

Competences of the Contracting Authority upon Appeal

Competences of the contracting authority upon appeal are set too widely in the LPP. Thus, in the first place, the same operator who conducted a public procurement procedure decides upon appeal, and therefore in the procedure itself objectivity and impartiality are not ensured. The contracting authority should not be left the legal possibility to reject an appeal as inadmissible, untimely or filed by an unauthorized person, because the preconditions for the appeal will in any case be estimated by the PRB.¹² Concerning the competence of the contracting authority to decide on the merits of appeal, it would be necessary to envisage that an appeal against a new decision cannot be re-filed to the contracting authority, but the new appeal should be submitted by the contracting authority directly to the PRB. Another possible solution is that the appeal is filed to the PRB, and in this case it should be envisaged that a copy of the appeal is submitted to the contracting authority itself.

Communication between the Contracting Authority and the PRB

The LPP does not resolve the issue of communication between the contracting authority and the PRB, because it does not envisage the obligation that the PRB be acquainted with the filing of an appeal, i.e. that it gets to know about the existence and conduct of the review procedure. Thus the LPP makes control over the conduct of the contracting authority more difficult on the part of the PRB. Hence, in the situation where the appeal is filed to the contracting authority, which is now the case, a decree should be legalized according to which a copy of the appeal should be submitted to the PRB.

Conduct of the Contracting Authority

The legislator in BiH failed to regulate the issue of conduct of the contracting authority with regard to the suspense effect of appeal. Namely, immediately upon receipt of an appeal on bidding documentation, the contracting authority should necessarily announce the information that the appeal has been filed and the public procurement procedure interrupted. Also, it would be necessary to prescribe the further conduct of the contracting authority depending on the decision of the PRB.

Standardization of the Procedure of the PRB upon Appeal

The LPP does not contain precise provisions on reimbursement of the costs of the review procedure. Namely, among the competences of the PRB, a decision on the costs of the review procedure must be included. In addition, it should envisage the provision under which the PRB decides on the reimbursement of these costs depending on the outcome of the review procedure, i.e. on the success in the procedure upon appeal.

¹² “Law on Public Procurement”, Article 111, para. 1, Item b.

The LPP does not contain special provisions that would, with the competence of the contracting authority to continue the procedure,¹³ enable the appellant to file a request for postponing the procedure. Hence, the LPP should certainly enable the appellant to require postponement of the procedure until the issuing of the decision upon appeal (temporary measures). It would be necessary to specify the criteria for estimate of the balance of the interests involved (both public and private) so that the PRB would have legal grounds for its decision. The LPP should also regulate the question of the burden of proving the circumstances upon which the submitters base their requests; in this case the burden of proof would be on the one who requires the temporary measures. As possible criteria for the estimate of the balance of interests, the LPP could envisage the possible occurrence of damage which is disproportionately larger than the value of the subject of procurement, protection of the public interest, and the possibility of endangering people's lives and health or other serious dangers or possible damage.

Standardization of the Legal Procedure

Regarding the standardization of the legal protection procedure, one can notice deficiencies in the provisions of the LPP which additionally burden the procedure, but also prevent realization of the right to legal protection in an administrative dispute. The issue is, in the first place, about the decision upon the operator of the dispute, i.e. the one initiating the dispute (legal capacity),¹⁴ for it is not clear which contracting authorities and participants of which procedure can file a lawsuit. Therefore, the circle of persons competent for initiating an administrative dispute should be determined more precisely, and this question should be left completely to the Law on Administrative Disputes,¹⁵ which precisely standardizes the issue of legal capacity in administrative disputes.¹⁶

The possibility to continue the procedure is not correctly resolved by the LPP either, for there remains the question of the protection of concrete interests (the prominent public and the suppressed private as well).¹⁷ Specifically, the LPP puts before the Court of BiH¹⁸

¹³ Namely, pursuant to the "Directive 89/665/EEC from December 21, 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contract," *Official Journal of the European Union* L395, December 30, 1989, Article 2, para. 4, "review procedures need not necessarily have an automatic suspense effect on the contract award procedures to which they relate." Also "Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors," *Official Journal of the European Union* L76, March 23, 1992, Article 2, para. 3a.

¹⁴ "Law on Public Procurement," Article 115, para. 1, states: "Contracting authority and parties to the procedure may initiate an administrative dispute before the Court of Bosnia and Herzegovina (hereinafter: the Court of BiH) against a PRB decision within 30 days from the day of the receipt of the decision."

¹⁵ "Law on Administrative Disputes," *Official Gazette of BiH* 19/02, 88/07, 83/08 and 74/10.

¹⁶ *Ibid.*, Article 2.

¹⁷ This is in regard to the provision of the "Law on Public Procurement," Article 115, para. 4: "Respecting public interest and taking into account the damages that may be caused by postponing the final PRB decision."

¹⁸ "Law on the Court of Bosnia and Herzegovina," *Official Gazette of BiH* 49/09, 74/09 and 97/09.

the difficult task of weighing insufficiently determined interests, without a defined criterion that could serve the Court in this estimate. Additionally, postponement of the execution of the decision of the PRB is not correctly set nor is it implementable, since postponement does not imply postponement of the final decision of the contracting authority (not the PRB's final decision, as wrongly determined by the LPP), and even if it did mean so, the postponement would always come too late. Therefore, along with the existing provision that the administrative dispute is conducted according to the emergency procedure, it would be preferable to precisely determine the time limit within which the legal procedure is to be ended. Even if the existing decision were kept, that the Court of BiH decides upon the proposal for postponing the individual decision of the PRB, it would be good to explicitly and precisely prescribe the criteria for the estimate of the balance of the involved interests (both public and private). In this case it would be necessary to enable the adverse party to plead upon postponement, but, above all, to correctly formulate the institute of postponement, since we can refer to postponement of the execution of the final administrative act, i.e. the decision of the contracting authority, and not about postponement of the final decision of the PRB.

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