



## Public Procurement Corruption in Bosnia and Herzegovina

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### Abstract

*Public procurement system, which is being implemented in Bosnia and Herzegovina, is an integrated system that includes a large number of actors. This system is described, including the identified competencies and responsibilities of all participants, by law and bylaws. And, corruption is one of the social phenomena whose definitions change in time and space. Many behaviors that are considered corruption today have been an integral part of regular behavior in the past.*

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*Although it has always existed, in the modern society it becomes a danger because it harms the performance of social affairs, lowers the required level of morality in political decision-making, blocks public administration, makes the judiciary ineffective and lowers economic efficiency. This study explores the problem of corruption in public acquisitions of goods and services, corruption vulnerability in public procurement processes and identifies the possibility for applying corruptive activities and techniques.*

## **1. Introduction**

Corruption (lat. corruptio) is an ambiguous term while its meaning is not easy to determine. This term is often used to describe various social phenomena: organized and economic crime, bad government and its consequences, human capriciousness and the arrogance of government. In the legal sense, corruption means seeking or receiving some monetary value or other privilege, such as a gift, favor, promise or favor, in exchange for an act or omission in the performance of a duty. Conventionally, this term means giving and receiving bribes, illegal mediation, abuse of office, abuse of position and authority, concluding a harmful contract, disclosing an official secret and issuing and obtaining unauthorized business secrets. In research on the etiology of corruption, equal importance is given to various social and institutional factors. Social factors include tradition, the absence of a democratic political culture, the uncontrolled pursuit of wealth, consumerism. Institutional explanations highlight the shortcomings of regulation and respect for the rule of law, the incorporation of corruption into the functioning of institutions and the lack of appropriate elements of social sanction (Enciklopedija.hr, 2022).

In any case corruption is a criminally prohibited activity that represents a serious obstacle to social development and progress. It is a systemic weakness - it is connected to other elements of the social, economic and political system, which is particularly evident in the example of transition countries (new democracies). Corruption as such, has negative consequences on all aspects of society.

Corruption measurements are based on public opinion polls and risk assessment. According to the CPI Transparency International (Transparency.org, 2022), Bosnia and Herzegovina is rated with 35 on a scale from 0 to 100, where 0 represents the highest level of perceived corruption,

while 100 represents the lowest level of perception of corruption. It is ranked on 110th position, out of 180 countries included in the survey. Corruption is particularly pronounced in the field of public procurement, where combating corruption risks in public procurement presents a very important issue.

On the road to the European Union, Bosnia and Herzegovina is being late with the adoption of complete European regulations in the field of combating corruption in public procurement field and is faced with devastating consequences.

It is important to stress that through a fair public procurement procedure, all providers of goods and services have an equal chance to win a job and to conclude contract. However, it depends on the legality of conducting public procurement procedures and on the honesty and degree of incorruptibility of employees who work on the procurement of goods and services. Those are individuals who work in such sensitive jobs that can use estimates when applying the prescribed procedures, which implies a higher risk of abusing their position in order to gain a certain benefit. On the other hand, any insider information, or the combination of individual employees with potential suppliers, in order to provide an illegal competitive advantage in public procurement procedures, allows the assignment of jobs to individual market participants on a pathological basis.

This paper links corruption and public procurement, relying on the practical issues related to irregularities and detected offense of its rules and regulations.

## **2. Legal and institutional framework of the public procurement system**

Public procurement system in Bosnia and Herzegovina is regulated by a single legal framework but also through a series of bylaws (rules, regulations, decisions, instructions and models of standard documents). First Law on Public Procurement in Bosnia and Herzegovina was adopted in 2004, establishing a decentralized public procurement system. In accordance with this system, it was determined that each contracting authority independently conducts public procurement procedures. Since it was applied throughout the whole country, a single market for public procurement has been established. In accordance with EU standards, the Law on Public Procurement stipulates that public procurement in Bosnia and Herzegovina has been implemented according to the principles of efficient use of public funds, fair and active competition among

potential bidders, transparency, and equal treatment and non-discrimination of bidders (Zakon o javnim nabavkama BiH, Sl. glasnik BiH 49/04, p. 5074).

Over time, and due to the changes in theory and practice at the domestic and international level, there was a need for a comprehensive reform of public procurement. Thus, after ten years, a new Law on Public Procurement was adopted (entered into force at the end of 2014). The adoption of the new law sought to meet B&H's obligation harmonizing domestic regulations with EU standards. Institutions responsible for monitoring the implementation of public procurement laws and bylaws are Public Procurement Agency in Bosnia and Herzegovina and Complaints Review Office.

Procedures whose application is enabled by the contracting authorities, depending on the type of procurement and the conditions in which procurement is carried out, consists of: open procedure, restricted procedure, development of the conceptual design, negotiating procedure, competitive application, competitive dialogue and the procedure for awarding service contracts from Annex II, Part B of the Law, which is regulated by special Rulebook (Pravilnik o postupku dodjele ugovora o uslugama iz aneksa II. Dio B zakona o javnim nabavkama, Sl. glasnik BiH 66/16).

The reform of public procurement in Bosnia and Herzegovina has sought to eliminate many problems that accompanied the implementation of the previous Law. The new Legal Framework was adopted with the intention of better prevention of abuse in the public procurement procedure, specifying the responsibilities of procuring entities and removal bureaucratic burdens and improving the efficiency of public procurement procedures. Although, there was intention for improving public procurement procedures, the new Law also left room for controversial action. According to the OECD Monitoring Report-Executive Summary related to the Principles of Public Administration from November 2021 and after comparison to the 2017 SIGMA assessment, limited progress is noted in this area and several serious deficiencies which have been identified previously, remain unresolved. Even if there is some progress in the legislative framework, the implementation is usually weak and fails to achieve the main objectives of the reforms.

### **3. Concept, significance and essence of public procurement**

Public procurement is the acquisition of goods and services or the assignment of public works by a state body, organization, institution or other legal entity that is considered a contracting authority in terms of the Law on Public Procurement, in the manner and under the conditions prescribed by law. It is essentially a "process by which the government or public sector institutions procure goods and services from third parties."

Additionally, it represents a significant part of budget spending and therefore has a direct impact on the economy. Public authorities allocate huge sums of money every year for various types of procurement, about 9.5 trillion US dollars in public contracts each year. This fact means that, on average, public procurement represents about 12-20% of the country's GDP (12% in OECD member countries and in the European Union, 18-20% in some developing countries, where this share may be higher). In this way, the state in the role of consumer generates economic development, providing income to private companies, and encourages innovation. Therefore, strengthening the public procurement system is the basis to achieve concrete and sustainable results and to build efficient institutions.

Rules on public procurement are primarily aimed at regulating what the contracting authority procures, but the way it has been procured. In this context, the rules of procedure public procurement oblige contracting authorities to ensure active competition among companies, equal opportunities for participation and purposeful and rational spending public funds. Due to the significant impact that this segment of public expenditures can have on the entire financial sector of the state, modern market economies regulate this area legally, especially due to the possibility of corrupt behavior.

The main goal of corrupt actions in the public procurement sector is to "direct or award contracts to a privileged bidder while avoiding the detection of such actions." In order to alleviate these social anomalies, the legislative environment in the field of public procurement must be based on the principles that holders of public authority should respect when disposing of public funds.

Who should apply the Law on public procurement in Bosnia and Herzegovina? It is applied by:

- 1) any government institution in Bosnia and Herzegovina, entities, Brčko District of Bosnia and Herzegovina, at the level of cantons, cities or municipalities,
- 2) legal entities established for a specific purpose in order to meet the needs of general interest and which do not have an industrial or commercial character and meet at least one of the following conditions:
  - is financed mostly from public funds or
  - management supervision is performed by a contracting authority defined in Law or
  - more than half of the members of the Assembly, Management or Supervisory Board are appointed or elected representatives of the contracting authorities specified in the Law
- 3) An association formed by one or more institutions authorities or legal entities defined in point a) and b) of this paragraph (Zakon o javnim nabavkama BiH, Sl. glasnik BiH 39/14, p. 3).

These economic entities, state bodies and institutions of Bosnia and Herzegovina are financed from the budget with taxpayers' money. So, they are obliged to act transparently, to treat equal and non-discriminatory candidates in the public procurement procedure and to ensure fair and active competition with the aim of the most efficient use of public funds related to the subject of public procurement and its purpose.

#### **4. Corruption vulnerability in public procurement processes**

As a specific economic activity, public procurement characterized the realization of large amounts, a significant number of concluded contracts and participants, whose roles are quite complex. According to the latest available data for 2021 in The Annual Report on Contracts Awarded in Public Procurement Procedures in 2021 year - draft, the total number of the awarded contracts within public procedures in Bosnia and Herzegovina for 2021 is 182.669. It should be noted that the total number of awarded contracts is always higher than the number of proceedings, because the proceedings can be divided into lots, and then consequently contracts are concluded by lots. According to the submitted reports on public procurement procedures in the information system "E-Procurement", around 80% of the received yearly bids have been accepted during 2018-2021 periods (more precisely: 83.61 % in 2018, 86.90 % in 2019, 65.28 % in 2020 - less indicated due to the pandemic and late adoption of the Budget regulation and 79,90 % in 2021. The total

value of those awarded contracts is 2,803,956,860.08 BAM (VAT excluded). The highest total value of awarded contracts in public procurement procedures was detected in 2018, 3,080,202,646.22 BAM (VAT excluded). Over the last few years it has been on a downward trend of the total value of the awarded contracts, which is understandable having on mind that at the end of 2019, there was a significant market disruption caused by COVID-19 pandemic. Since Bosnia and Herzegovina is a small open country, all changes taking place in the world market and the region's market are relatively quickly reflected in our economy. Due to these significant and unusual world events during pandemic, space for various events in the field of public procurement has been inevitably opened up. The public procurement system required continuous monitoring of the activities that have been carried out, especially because the numbers of them had to be realized in urgent procedures in order to act in a timely manner and for need to preserve human health and their lives.

According to The Annual Report on Contracts Awarded in Public Procurement Procedures in 2021 year – draft, share of public procurement in the total nominal GDP for 2021 (37,578 billion BAM, estimated values) is 7.51%, which is decreased compared to 2020 when the share was 8.05%. The high share of public spending on public procurement implies that it is specific area, but also a significant market full of imperfections, monopolies, asymmetries of information. The state, as the Contracting Authority, should act as an economic entity in public procurement procedures subject and be guided by the principles of market business. However, in practice this is not the case, due to frequent conflicts between public and private interests. Both the state and the citizens have a public interest. Citizens as taxpayers, who allocate part of their income through taxes, expect more rational spending of budget funds (Budak, 2016). Private interest in public procurement is a source for corruption. Employees employed by the contracting authority manage procurement procedures, often without a created sense of rationality in spending budget funds. Is there going to be a corrupt activity or no, depends on their (ir)rationality and (in)efficiency. For the area of public procurement it is important to see it employed in the public sector as someone who has discretionary power, but also the power to abuse the assigned public authority for private gain. According to the World Bank Annual report form 1997 any abuse of public authority for private gain is considered corruption.

To prevent opportunities for corruption and limit influence of private interests, the state as the legislator, prescribes public procurement procedures. It determines the conduct of civil servants, control and audit as well. Measures are *preventive* (strengthening the capacity of public administration through training, selection of professional and verified personnel, etc.), but also *corrective* by introducing sanctions that include dismissal and career break (Budak, 2016, p. 311.)

Corruption works in a way that represents an additional tax, makes public procurement more expensive and provides additional income to participants. The costs of corruption in public procurement are high due to the risk included in the public procurement price like a risks of not getting the job done, risks from disclosure, sanctioning, etc.). Risks are foreseen by the participants but also in advance agreed. The higher the risk, the more complex the corrupt activities and the higher the costs are. In the process intermediaries are involved, new legal entities are established, transaction accounts are opened, double documentation is kept, directly affecting the cost of public procurement. During decision making, participants assess the significance of engaging in the corrupt activities, determining what such an action can bring them (additional income, other benefits), as well as the risks they can be exposed to (to be detected and punished).

## **5. Identification of the possibility for corruptive techniques applying in the public procurement processes**

### **5.1. Monitoring of the public procurement procedures**

Monitoring the public procurement procedures has an important role. According to SIGMA, it is any systematic observation of the public procurement system, which is conducted in a coherent way in order to assess how the system works and how it develops over a time, to determine whether the desired (target) hour has been achieved defined by policy makers (SIGMA, 2017). It makes one of the indicators for appropriate functioning of the entire system, not only from the aspect of application of public procurement procedures, but of the entire system, which depends on a number of other regulations and directly or indirectly affects the public procurement system in Bosnia and Herzegovina.

Public procurement, as a highly decentralized system, has "delegated" responsibility to contracting authorities who are obliged to apply public procurement regulations. It is this high



degree of decentralization of the system that indicates the complexity of monitoring it, especially from the aspect of the impact of other regulations on the public procurement system. The main goal of monitoring the public procurement system is to find out the problems that system has, bad practice in the application of regulations, as well as abuses that occur in the system, and which should be corrected, i.e. initiate policy development, and to define goals that will fully respect the basic principle of "value for money".

Monitoring of all notifications by Agency is carried out continuously on a daily basis through the Public Procurement Portal, and the monitoring procedure includes only notifications that violate the Law or bylaws, and requires a statement from the contracting authority. Specific aspects of monitoring are the monitoring criteria, which are focused on the severity of the irregularity, the procurement of high value and the stage at which the irregularity is detected. From the middle of 2020, the adoption of amendments to this Rulebook is in the process, and the reason for amending it is the fact that the 2014 Directives include the monitoring process. So it is about harmonization with EU Directives, as well as the real need identified through monitoring of previous years. Amendments to the Rulebook on Monitoring Public Procurement Procedures (*Pravilnik o praćenju postupaka javnih nabavki, Sl. glasnik BiH 72/16*) are focused on the sources of monitoring, greater powers of the Agency in the part that affects the submission of requests for the initiation of misdemeanor proceedings, and especially in the part of obtaining evidence "ex officio".

In case of non-action of the contracting authority in pointing out the omission or violation that was noticed through the monitoring system, the Agency has the authority to file a misdemeanor report. Therefore, in addition to monitoring the system aiming to detect deviations, as well as to create practices that are in line to the principles of public procurement, it has the possibility of repressive action (*Zakon o javnim nabavkama BiH, Sl. glasnik BiH 39/14, p. 28*). Article 116, paragraph (1) of the Law also determines the competence of the Agency to initiate misdemeanor proceedings before the competent courts when no appeal has been filed in the procurement proceedings, and conditions have been met for processing cases based on monitoring individual public procurement procedures.

As a result of the monitoring process provided by Agency on a yearly basis through its annual reports on monitoring public procurement procedure, irregularities detected in the procurement procedures are as follows:

- conducted a negotiated procedure without publication of a contract notice (not in accordance to articles 21, 22, 23, 24 and 28 of the Law),
- the tender documentation has not been made available to all economic entities (e.g. changes made to the TD after the deadline for change, where no bidder could take over the published amendment to this TD),
- no procurement plan has been adopted and has not been published on the institution website (not in accordance to article 18 of the Law),
- procured services without conducting an appropriate public procurement procedure,
- the valid technical standards have not been complied with, the prescribed standards in the description of the technical specification,
- the decision on the selection of the most favorable bidder was not submitted (not in accordance to article 71 of the Law), etc.

Also, the numbers of misdemeanor notifications indicated are: in 2017, 0 public procurement procedures were filled in the conditions for a misdemeanor (for 2017 Agency has not filled any misdemeanor notifications because it has no enough organizational and financial capacity), in 2018 4 misdemeanor notifications were realized, in 2019 there were 27 of them (6 requests were processed, of which 4 decisions are final and 2 are invalid, which indicates the slowness of the courts in processing requests, where legal basis for it processing was as follows: the appropriate type of procedure in accordance with the Law has not been applied, no public procurement plan published, negotiated procedure was conducted without publication of a notice, although the conditions for the application of this type of public procurement procedure were not met, division of the subject of procurement in order to avoid the application of the appropriate type of public procurement procedure and no report was submitted in accordance with the Law and bylaws) and in 2020, 26 (submitted requests for initiating misdemeanor proceedings can be find in Annex II of the Report on Monitoring Public Procurement Procedures for 2020 – draft).

Based on the data above, it can be seen that the Agency, monitoring the activities of contracting authorities in public procurement procedures, seeks to eliminate detected weaknesses, primarily

through trainings and by giving the recommendations. However, it is noticed that the preventive and educational activities did not give the desired results, so it intensified the activities of filing misdemeanor charges (starting from 2019).

## **5.2. Indicative corruption techniques**

Bearing in mind the fact that modern theory and practice in the country and the world in the field of public procurement procedures recognizes the phase system of this procedure, corruption mechanisms as such are manifested in three main phases of public procurement: 1) public procurement planning phase; 2) phase of implementation of the public procurement procedure and 3) phase of implementation of the public procurement contract. Each of the above three phases hides the dangers of the manifestation of certain forms of corrupt activities, which will be further processed and analyzed in the following text.

### **5.2.1. Corruption in the public procurement planning phase**

It is important to keep in mind that, in general, the public procurement process is a multi-stage process consisting of a series of related activities from the planning and needs assessment phase, through public procurement, to managing the contract and finally paying suppliers. Public procurement planning itself implies several actions that the contracting authority undertakes in order to prepare the implementation of the public procurement procedure, to make a contract and to implement it. This includes determining procurement needs, anticipating funds by adopting a budget or financial plan, as well as adopting a public procurement plan that contains the dynamics of public procurement, type of procedure, estimated value and other elements.

Corruption in the public procurement planning phase can be manifested through the following four corrupt mechanisms: 1) creating and feigning needs, 2) setting or "tailoring" offers, 3) unjustified public procurement procedures (can be manifested through the following corrupt techniques: frequent and unjustified application of exceptions, frequent and unjustified application of the negotiated procedure with a certain bidder and frequent and unjustified application of the "urgency" procedure) and 4) manipulations in estimating the value of public procurement.

#### **5.2.2. Corruption in the phase of public procurement procedure**

In the process of conducting public procurement, it is possible to manifest various corrupt mechanisms whose indications can be manifested through: 1) manipulation of bids (like manipulation of tender documents, discriminatory conditions for participation, advertising manipulations, discriminatory technical specifications, discriminatory criteria for selecting the most favorable bid, irregularities during the opening and evaluation of the bid, submission of forged documents in the tender documentation, "leakage" of data from the tender documentation) and 2) through links between bidders (like faked bidding, rotation of bids, "choking" offers and market sharing).

#### **5.2.2. Corruption in the phase of realization of public procurement contracts**

In the phase of realization of the public procurement contract, it is possible to manifest the following corrupt techniques: 1) allowing the implementation of the contract differently from what was offered and agreed (illegal annexes to the contract) and 2) non-use of measures to sanction non-compliance with the contractual obligations of the selected bidder.

### **6. Conclusion**

The public procurement is very sensitive and subject to corruption. Corruption distorts competitiveness and increases business uncertainty. Preventing corruption in public procurement must be focused on reducing corruption opportunities and increasing the costs for engaging in corruption activities. From an economic point of view, there have to be measures that should reduce the supply and demand for corruption. This can be achieved by properly organizing the institutional framework. Due to the significant influence of international organizations and integrations, the institutionalization of the public procurement system is required, where the efficiency of public administration will be ensured, mechanisms of controls prescribed and adopted regulations for ensuring free competition in public procurement procedures. The question, however, is to what extent the principles of public procurement (e.g. transparency) contribute to suppression corruption risks in public procurement. The quality of public administration must be improved and accountable, which is an integral part of good governance as well. Promoting transparency and accountability, capable and competent public administration, and the rule of law

must be at the forefront of development policies. Policy planning and decision-making are the key concerns to public administration.

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## Sažetak

*Sistem javnih nabavki, koji se implementira u Bosni i Hercegovini, je integrisani sistem koji uključuje veliki broj aktera. Ovaj sistem je opisan, uključujući identifikovane nadležnosti i odgovornosti svih učesnika, zakonom i podzakonskim aktima. Korupcija je jedan od društvenih fenomena čije se definicije mijenjaju u vremenu i prostoru. Mnoga ponašanja koja se danas smatraju korupcijom bila su sastavni dio redovnog ponašanja u prošlosti. Iako je oduvijek postojala, u savremenom društvu postaje opasnost jer šteti obavljanju društvenih poslova, snižava potreban nivo morala u političkom odlučivanju, blokira javnu upravu, čini pravosuđe nedjelotvornim i smanjuje ekonomsku efikasnost. Ova studija istražuje problem korupcije u javnim nabavkama dobara i usluga, korupcijsku ranjivost u procesima javnih nabavki i identifikuje mogućnost primjene koruptivnih aktivnosti i tehnika.*

**Ključne riječi:** korupcija, sistem javnih nabavki, monitoring, Bosna i Hercegovina