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**GUIDELINES FOR COMBATING CORRUPTION IN THE
PUBLIC PROCUREMENT PROCESS DURING EMERGENCY
CIRCUMSTANCES**

**SMJERNICE ZA SUZBIJANJE KORUPCIJE U PROCESU JAVNE
NABAVKE U VRIJEME VANREDNIH OKOLNOSTI**

Abstract

Corruption, nowadays, is one of the main threats and obstacles to the safe development and prosperity of any society. For many years, corruption was thought of and written about as a spontaneous and sporadic social phenomenon, especially related to non-developed societies and societies in transition. However, modern research shows and proves that corruption scandals, especially political ones, are increasingly appearing in developed democracies, ie. societies with developed democracies. Modern societies face need to seek and identify key guidelines for combating corruption in many aspects of social activities. One of the activities that is particularly vulnerable to corruption scandals is the activity or public procurement processes. This is especially pronounced in the circumstances of disturbed social relations, but also in times of extraordinary circumstances to which modern societies are increasingly exposed. A special problem is how and in what way to determine the position of administrative bodies in times of extraordinary circumstances, and in the context of combating corruption scandals in the field of public procurement. It is necessary, therefore, to identify whether the normative solutions properly treat the suppression of corruption in the public procurement process during emergencies, and whether the normative framework enables public procurement. However, it is necessary to offer scientifically relevant answers to the question of what policies and practices in

Bosnia and Herzegovina are in the prevention and fight against corruption in the public procurement process, and to what extent the legal framework and political decision-making processes affect the effective response to corruption in public procurement. procurement? The main goal of the research is to understand the importance of planning activities that are directly related to combating corruption in the public procurement process during emergencies. Also, the aim is to explain the functioning of the public procurement system, the principles on which public procurement is based, the legislative and institutional framework, the stages in which corruption is possible, as well as anti-corruption rules. By analyzing the existing trends of corruption in the public procurement process, key gaps in times of emergency will be identified. The general hypothesis is that public procurement in times of emergency is determined by a complex system of political decision-making, normative-legal framework, potentials of state and entity law enforcement agencies in response to the fight against corruption. For the purpose of proving the stated hypothesis, a combination of several basic and general scientific methods was applied. For the purpose of obtaining data, the method of document content analysis was used. The general conclusion is that it is necessary to implement urgent measures, which should be taken with a focus on illegal corrupt activities in the public procurement process, and to affirm support to the authorities and inspection bodies in carrying out their tasks. Ultimately all this, contributes to a significant suppression of corruption in public procurement processes in times of emergency.

Keywords: Public procurement, anti-corruption, extraordinary circumstances, risk, Bosnia and Herzegovina

Sažetak

Korupcija, u današnjem vremenu, predstavlja jednu od glavnih prijetnji i prepreka sigurnog razvoja i prosperiteta svakog društva. Dugi niz godina se o korupciji razmišljalo i pisalo kao o spontanoj i sporadičnoj društvenoj pojavi, vezanoj posebno za nerzavijena društva i društva u tranziciji. Međutim, savremena istraživanja pokazuju i dokazuju da se korupcijski skandali, posebno oni politički, sve više pojavljuju i u razvijenim demokratskim državama, tj. društvima s razvijenom demokratijom. Pred modernim društvima nameće se neophodnost traganja i identificiranja ključnih smjernica za suzbijanje korupcije u mnogim aspektima društvenih djelatnosti. Jedna od djelatnosti koja

se posebno nalazi na udaru korupcionih afera jeste djelatnost ili procesi javnih nabavki. Posebno je to izraženo u okolnostima narušenih društvenih odnosa, ali i u vrijeme vanrednih okolnosti kojima su savremena društva sve više izložena. Poseban problem jeste kako i na koji način odrediti položaj organa uprave u vrijeme vanrednih okolnosti, a u kontekstu suzbijanja korupcionih afera u oblasti javnih nabavki. Neophodno je, dakle, identificirati da li normativna rješenja na pravilan način tretiraju suzbijanje korupcije u procesu javnih nabavki u vrijeme vanrednih okolnosti, te da li normativni okvir omogućuje javne nabavke. Posebno je potrebno ponuditi naučno relevantne odgovore na pitanje kakve su politike i prakse u Bosni i Hercegovini u prevenciji i borbi protiv korupcije u procesu javnih nabavki, te u kojoj mjeri normativno-pravni okvir i procesi političkog odlučivanja utiču na efikasan odgovor na korupciju u procesu javnih nabavki? Osnovni cilj istraživanja se odnosi na spoznaju i značaj načina planiranja aktivnosti koje su u direktnoj vezi sa suzbijanjem korupcije u procesu javne nabavke u vrijeme vanrednih okolnosti. Također, cilj je objasniti funkcionisanje sistema javnih nabavki, načela na kojima su javne nabavke osnovane, zakonodavni i institucionalni okvir, faze u kojima je korupcija moguća, kao i antikorupcijska pravila. Analizom postojećih trendova korupcije u procesu javne nabavke, identificirat će se ključni propusti u vrijeme vanrednih okolnosti. Opća hipoteza je da su javne nabavke u vrijeme vanrednih okolnosti determinirane kompleksnim sistemom političkog odlučivanja, normativno-pravnim okvirom, potencijalima državnih i entitetskih agencija za provedbu zakona u odgovoru na suzbijanje korupcije. Za potrebe dokazivanja navedene hipoteze, primijenjena je kombinacija više osnovnih i opšte-naučnih metoda. Za potrebe pribavljanja podataka, korištena je metoda analize sadržaja dokumenata. Opći zaključak je da je neophodno implementirati hitne mjere, koje se trebaju preduzeti s fokusom na nezakonite koruptivne aktinosti u procesu javnih nabavki, te afirmirati podršku organima vlasti i inspekcijским tijelima u izvršavanju njihovih zadataka. Sve to, u konačnici, doprinosi značajnom suzbijanju korupcije u procesima javnih nabavki u vrijeme vanrednih okolnosti.

Ključne riječi: Javne nabavke, suzbijanje korupcije, vanredne okolnosti, rizik, Bosna i Hercegovina

1. INTRODUCTION

Public procurement is the acquisition of goods and services or the assignment of public works by a state body, organization, institution or other legal entities that, in terms of this law, are considered contracting authorities, in the manner and under the conditions prescribed by this law. Corruption is the acquisition in the personal gain on the basis of abuse of public office and position, while in public procurement it can occur at all stages of the implementation of public procurement procedures and procedures. The complex organization of the political system of Bosnia and Herzegovina adversely affects the possibility of effective and systematic action to combat corruption in the public procurement process. The institutional basis for the functioning of authorities as well as inspection institutions must have greater political support. On the other hand, it is important to recognize the preconditions, requirements, ie principles that should be adhered to, which should be developed and fulfilled in order to reduce irregularities and abuses in the public procurement process and to strengthen the public procurement system. It is necessary to define guidelines that enable monitoring and monitoring of progress. The subject of public procurement may be all goods or services prescribed by law. The Law on Public Procurement also provides for the method of procurement: purchase, lease or leasing. The essence of public procurement is that all the above-mentioned bodies and organizations financed from the Budget, ie with taxpayers' money, perform procurement in a way that will prevent abuses, enable procurement under the most favorable conditions, but according to "public procurement principles". The Law on Public Procurement is modeled on the Public Procurement Directives of the European Union and the relevant preconditions of the European Court of Justice. Public procurement in the EU is a significant market. Competitive and transparent procurement procedures help public authorities procure better quality products and services for a lower price. The Rulebook on the Procedure of Contracts in the Field of Defense and Security of Bosnia and Herzegovina was adopted by the Decision of the Council of Ministers of Bosnia and Herzegovina, No. 75/15. Unlike the Directive adopted in 2009 in the field of defense and security by the European Parliament and the Council on the harmonization of procurement procedures for certain works contracts, supply contracts for services concluded by contracting authorities or contracting entities in the field of defense and security are much differs. The research is focused on the elaboration of the public procurement process, especially in times of emergency. In addition, the

paper points out specific guidelines for suppression in the public procurement process. All phases of the public procurement procedure are covered, from taking over the tender documentation, correspondence with representatives of contracting authorities, quality preparation of bids, participation in the E-auction system, insight into bids, filing complaints and lawsuits, and the main guidelines for combating corruption in the process. public habits especially in times of emergency.

2. Public procurement process cycle

Public procurement and process cycle can be defined as a „normatively formalized activity of a public body“, for the procurement of goods, services or works necessary for the performance and activities established by that public body, with or without concluding a contract. Important determinant of the notion of public procurement is “entities that procure goods, procure services, or assign works, which means that public procurement is not considered to be procurement conducted by other entities other than bodies, organizations and other legal entities that are considered by law to the purchasers.” (Kozar, 2010)

The notion of public procurement is “necessary to be distinguished from other related institutes such as private-public partnership and concession. The difference between public procurement and private-public partnership is in the duration of the contract.” (Jukić, Kolar, Marinović, Perković, Raguž, Regvar, Žilić, 2007)

In the Bosnia and Herzegovina, all public procurement is regulated by “a single law and its bylaws. Failure to apply adequate legal solutions contributes to the suspicion of corrupt activities. On the other hand, insufficient control leaves significant room for abuse of the law and corruption. The first Law on Public Apples (LPP) was adopted in 2004 at the level of the state of Bosnia and Herzegovina. It replaced public procurement regulations with four levels of government and regulated the public procurement system in a unique way in accordance with European directives. After several of its amendments, in April 2014, a new Law on Public Procurement was adopted, which applies from 28.11.2014. years.” (“Službeni glasnik Bosne i Hercegovine“ 39/2014.) The identified weaknesses were the subject of new provisions of the adopted legal framework. Thus, the legal regulations of the framework agreement are

regulated, enabling its conclusion with several bidders. The conditions for the application of the negotiated procedure without publication of a notice have been determined, and the competitive dialogue, conditions and procedures have been determined. In addition, special tools have been identified for sectoral contracting authorities and special exemptions for legal and natural monopolies have been envisaged. In the European Union, public procurement is a very important market. It is estimated that the total value of public procurement is around 16% of the Union's gross national product. (<http://eur-lex.europa.eu/en/legis>, access 10.10.2020.) One year after the entry into force of the new Public Procurement Law in 2014, the European Commission notes in its 2015 report that legislation in the field of public-private partnerships and concessions is still not in line with the *acquis*. It is stated that it is necessary to adopt the remaining bylaws, strengthen the supervisory role of the Public Procurement Agency and establish a specialized function related to procurement within the contracting authorities. However, the latest report from the European Commission states that "some progress has been made in the field of public procurement by adopting a new rulebook on conditions for the use of e-auctions, a rulebook on monitoring public procurement procedures, as well as a new strategy and action plan for public procurement in Bosnia and Herzegovina 2016-2020. years. In September 2016, three new ordinances regulating the public procurement process were adopted, including the Ordinance on the conditions and manner of using the e-auction. This is the first major step in e-procurement in Bosnia and Herzegovina, which increases transparency in post-bid procedures.

The Law on Public Procurement of Bosnia and Herzegovina "did not define the obligation to adopt a procurement plan for contracting authorities. It was noticed that the contracting authorities do not plan procurements, which makes their procurement procedures more difficult. Therefore, contracting authorities should adopt procurement plans in a timely manner, in accordance with the budget or financial plan. The procurement plan must contain the subject of procurement, quantity, or scope of procurement, approved funds for the planned procurement, as well as the deadline by which it is necessary to conduct the public procurement procedure. In the case of urgent procurements, which are not foreseen in the procurement plan, it is possible to change the procurement plan, ie. supplement with that newly created procurement." (<http://www.javnenabavke.ba/>, access 11.10.2020.)

At the beginning, it is important to state which cycle of the public procurement process it is. The process includes:

annual procurement plan, identification of needs, procurement planning, market review, specification, performance measurement, terms and conditions, build business case, approval, preparation of procurement notices, preparation of TD, publication of notices, delivery of TD, dealing with issues, receiving bids, supplier qualification, assessment, clarifications, approval of contract award, standstill period, filing of objections, award of contracts, publication of contract award, internal communication, engagement with suppliers, provision of ordering mechanisms, acceptance, urging, quality control, special transport, reception, inspection, storage and control, issuance to interested parties, payment, review of performance, continuous improvement, postponement and termination of contracts. Corruption can be the result of the activities of both parties, both the public servant and the bidder participating in the public procurement procedure.

3. Examples of risks related to the occurrence of corruption in public procurement

Observing the public procurement systems in European countries, it is evident that most of them are based on the same principles of organization, with almost identical procedures and rules. “However, the differences that arise, which have an impact on the possibility of corruption, relate to the practical application, monitoring, institutional framework, and the degree of application of statutory rules and procedures.” (Jovanović, 2001)

Also, “research on corruption in public procurement in the security sector is rare.” (Hadžović, Hamidičević, Kržalić, Hodović, 2017) The four most common forms of corruption in public procurement identified in the EU Public Procurement Corruption Study are: tendering, the contract is “promised” to one bidder, with or without the consent of the public servant conducting the procedure, bribery, conflict of interest and intentional conduct of the procedure. .

„According to the 2016 UNODV report for BiH, which refers to the impact of corruption on private business, corruption, along with other forms of crime, is a major hindrance to private companies and has a negative impact on private investment.“ (UNODC, 2013)

Previous research has not specifically addresses about a specific indicators such as confidential public procurement.

Risks related to corruption in public procurement are: non-transparency in the preparation phase, insufficient or poor needs analysis, favoritism / discrimination of bidders, inadequate choice of procedures, non-transparency in the implementation phase, lack of competition, circumvention of competition, semblance of competition, conflict of interest in evaluation phase (commission), conflict of interest in the phase of approval / award of the contract by the responsible person, non-transparency of the contract implementation, abuse in the execution of the contract and lack of control in the implementation of the contract. Some of the indicators of control over the implementation of the contract are delays in the delivery of procurement items, delays in payments and the lack of a formalized system of internal control and monitoring of the implementation of the contract.

The largest number of guidelines refers to contracting authorities, which undertake and implement actions in the public procurement cycle (during planning, implementation of the procedure, execution of contracts) and represent, along with bidders, the most important and most numerous units of the public procurement system.

For the functioning of the contracting authority in accordance with the guidelines, it is necessary that the system is based on defined rules and principles, which are consistently applied, as well as that institutions within the system act in accordance with their powers and competencies at the level of public procurement system.

- In order to “combat irregularities, it is necessary to ensure and improve at the level of the public procurement system:
- long-term policy framework and implementation of measures and activities in order to achieve the envisaged goals,
- compliance with regulations,
- holding a public debate during the adoption of the law,
- long-term policy framework and implementation of measures and activities in order to achieve the envisaged goals,
- compliance with regulations,
- holding a public debate during the adoption of the law,
- transparency and availability of data,

- appropriate competencies and adequate resources to the competent institutions,
- capacity building,
- mechanisms for monitoring public procurement,
- sanctioning abuses and irregularities
- guidelines at the level of work of institutions in the field of public procurement.” (Rahić, 2020)

Certain institutions are “in direct contact with contracting authorities, such as the Public Procurement Agency for the purpose of giving opinions, preparing various models and instructions, resolving in protection procedures and their work can directly affect the work of contracting authorities, participation of bidders as for example the lengthy conduct of the protection proceedings.

However, considering the other data, and especially the large number of conducted non-transparent procedures, as well as the fact that more complex procedures are rarely used, it can be concluded that the trainings are carried out unplanned, ie. that there is no coordination by the Public Procurement Agency. The duty of the Public Procurement Agency is to ensure that the various modules of the vocational training program are professionally / correctly designed / prepared, while providing and covering thematically targeted rules of procedure, activities, topics / set of issues, or special issues of public procurement and / or problems of special interest to various participants in public procurement, which are relevant to the public procurement practice of Bosnia and Herzegovina.” (Pravilnik o akreditaciji i registraciji predavača javnih nabavki, „Sl. glasnik BiH“, br. 99 od 12 decembra 2006, 59/08)

- Accordingly, and “taking into account that the work on prevention is extremely important for reducing and combating irregularities in the field of public procurement, at the level of work of institutions it is necessary to:
- strengthen the preventive role of institutions,
- prepare and make available practical and useful models, guidelines, instructions for contracting authorities and tenderers,
- provide adequate advisory and operational support in the implementation of the LPP,
- pay attention to achieving the main objectives of public procurement (and in particular to achieving “value for money”) in relation to focusing on

purely formal errors and omissions, especially those that do not affect the outcome of the procurement process;

- ensure an efficient system of protection of rights;
- strengthen the control and supervisory role of institutions;
- develop mechanisms for monitoring public procurement;
- achieve more direct cooperation and coordination between institutions in order to more efficiently exchange data and improve the monitoring of public procurement processes;
- taking adequate measures in case of identified irregularities;
- sanction established abuses and irregularities in public procurement;
- ensure the strengthening of the professional capacities of other bodies acting in connection with public procurement;
- include and ensure communication with contracting authorities and tenderers, other institutions during the preparation of regulations, and
- ensure familiarization and monitoring of the case law of the Court of Justice of the European Union in the field of public procurement.
- Guidelines at the level of the contracting authority include:
 - Guidelines for combating corruption in the public procurement process at the level of the contracting authority can be observed such as:
 - guidelines for risk reduction related to public procurement
 - guidelines through different phases of the public procurement process - the phase of planning, implementation of the procedure and execution of the contract
 - For the successful implementation of the guidelines at the level of the contracting authority, it is necessary that the managers, responsible persons of the contracting authorities understand their purpose, significance and contribute, and ensure their implementation.
 - In order for contracting authorities to reduce risks in the conduct of public procurement and act in accordance with the regulations in this area, it is necessary to:
 - to have adopted procedures in public procurement and to act in accordance with them

- To have adequate public procurement services;
- to have established the functioning of the public procurement system
- to have established internal control of public procurement that functions and conducts internal controls.“ (Rahić, 2020)

When it comes to exemptions from the application of regulations. In the implementation of public procurement procedures, it is important to note that public law bodies are obliged to apply state regulatory rules prescribed by law and bylaws in the field of public procurement during public procurement of goods, services and works.

However, due to certain specific cases, the “regulatory rules” provide for the exclusion of repealed laws and bylaws in procurement procedures. Regardless of the fact that in such situations the procurement is performed according to the provisions of the Law on Public Procurement, public law bodies are obliged to adopt decisions on initiating the procurement procedure in accordance with the Law on Public Procurement. This decision, in addition to the obligatory explanation of the legal basis for exemption from the application of the Law, also contains the basic elements on the subject of public procurement, the estimated value of public procurement and data on the source - method of financing. The Law on Public Procurement did not prescribe the obligation of public law bodies to apply both the basic principles of public procurement and the rules regarding conflicts of interest during exemptions, however, according to the case law of the Court of Justice in conducting procedures exempted from the application of regulatory rules on public procurement. apply other applicable regulations. In fact, in the legal system of Bosnia and Herzegovina there is an obligation to respect the Constitution, specifically Article I / 4 enabling the unimpeded movement of goods, services, capital and persons, then applying the provisions of the Law on Administrative Procedure (communication, proceedings, principles of procedure), then exercising equal rights. and opportunities for all persons in BiH, guaranteed by the Law on Prohibition of Discrimination.” (Lapandić, 2020)

4. Public procurement in times of emergency - purchase of medical equipment

Since the declaration of the coronavirus pandemic on the territory of the state, health care institutions and other institutions in Bosnia and Herzegovina have initiated 19 procurements of respirators.

“F.H. Srebrena malina ”from Srebrenica never published the details of the procurement, it was supposed to publicly deliver 100 respirators to health institutions in BiH.

The Prosecutor’s Office of Bosnia and Herzegovina has taken over the case related to allegations of illegalities and irregularities related to the import of respirators from Naron of the Republic of China to BiH, which cost about 10.5 million KM.

It is still being determined whether the Federal Civil Protection Administration with the company “F.H. Srebrena malina ”legally concluded the contract, and whether that company even had licenses for trade in medical goods at the time of purchasing the respirator.

As it was later announced from the Director of the Public Procurement Agency of BiH, in this case, the Law on Public Procurement was violated.

Article 46 of the Law on Public Procurement stipulates that when initiating the procurement procedure, it is necessary to check two key things, ‘economic and financial capacity of the company, and technical and professional capacity of the supplier company’, which was not respected in this case.

Paragraph 1 states that “the contracting authority may in the tender dossier require candidates / tenderers to prove their registration in the relevant professional or other registers of the country in which they are registered or to provide a special statement or certificate from the competent authority proving their right to perform professional activity, which is related to the subject of procurement ”.

Article 47, paragraph 1, states that “the contracting authority may specify in the tender documents the minimum conditions regarding the economic and financial capacity of the candidate / tenderer, as well as the evidence required, which may be:

- a) an appropriate document issued by a bank or other financial institution, which proves the economic and financial capacity with regard to the

facts that can be proved from the documents issued by the bank or other financial institution in accordance with the positive regulations;

- b) a guarantee to cover liability insurance for the implementation of the contract in question in the field of its registered activity;
- c) business balance sheets or excerpts from business balance sheets, for a period not longer than the last three financial years, or from the date of registration, ie start of business in the subject segment, if the bidder or candidate was registered or started working less than three years ago, if publishing a business balance is a legal obligation in the country where the candidate / bidder is registered; in case there is no legal obligation in the country where the candidate / bidder is registered, he is obliged to submit a statement certified by the competent authority;
- d) a statement on the total turnover of the candidate / tenderer and, where applicable, on the turnover in the business segment which is the subject of the contract, for a period not longer than the last three financial years, or from the date of registration or start of business, if the candidate / tenderer registered, ie started working less than three years ago; the statement attached shall be certified by the competent authority.“

Given the financial indicators of the company „F.H. Silver Raspberry“, it was clear that this company survives on credit indebtedness. These were indicators that „F.H. Silver Raspberry“ could not be chosen as a partner in this business.

5. CONCLUSION

Public procurement in times of emergency is determined by a complex system of political (public) decision-making, normative-legal framework, potentials of state and entity law enforcement agencies in response to the fight against corruption. Public procurement in Bosnia and Herzegovina is not public. Public procurement jobs are not jobs for which persons who have become redundant in other services are determined, nor jobs that are done “by punishment”. On the other hand, these are not jobs that should be obtained “by reward”, unless they are professional staff. This is too sensitive a type of work for a conscientious and responsible manager (responsible person) to leave to the person (persons) without the necessary professional knowledge and integrity. All this can one day create a problem for the same responsible person (in the form of misdemeanor, criminal liability), during the supervision and control

of public procurement procedures, during the audit, if the procurements were not conducted in accordance with the regulations. It should be noted that the subject of supervision and control are not only procurements from the current, previous or previous 2 to 3 years. Procurement from 10 to 15 years ago is also subject to supervision by the police and the prosecution. Pursuant to the Law on Public Procurement and bylaws, contracting authorities are obliged to adopt an internal rulebook on the direct agreement procedure. Other internal regulations were adopted by the contracting authorities on their own initiative. It is necessary to bring better normative regulation in the field of public procurement, in order to reduce the possibility of manipulation and corrupt actions, and especially to keep such actions unsanctioned, because in that way only individuals prone to corruption are encouraged to continue illegal actions to the detriment of public funds. At the same time, it is necessary to insist on the necessity of reducing the number of non-transparent procedures within reasonable limits, because as such they are hidden from the public eye and are very difficult to detect. In such proceedings, it is almost impossible to obtain legal protection. Furthermore, it is necessary to oblige contracting authorities to adopt comprehensive procurement plans, so that procurement is not carried out ad hoc, ie due to lack of time they are not forced to conduct non-transparent procedures, which are prone to corruption and obtain significantly less value for money than transparent procedures. Also, it is necessary to systematically design a training plan for public procurement officers, because the current way of conducting trainings was not useful and officials, although they have undergone many trainings, have not been adequately trained to best conduct public procurement procedures in their contracting authorities. Finally, the analysis of the research indicates that it is necessary to regulate by law the observance of payment deadlines by contracting authorities towards suppliers, in order to avoid manipulations due to payment delays and for public institutions not to be a generator of economic illiquidity. In the research within this paper, claims were made that public procurement has had numerous irregularities in the last period in Bosnia and Herzegovina. An example is the company "F.H. Silver Raspberry" which, considering the indicators, especially the financial ones, could not be selected as a partner in the business of purchasing medical equipment and for that purpose get a contract worth 10 million KM. It is to be expected that the judicial system of Bosnia and Herzegovina will soon answer the question of how "suspicious persons" win tenders for jobs worth millions of marks.

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