

PUBLIC PROCUREMENT

1.33

WHITE BOOK BALANCE SCORE CARD

Recommendations:	Introduced in the WB:	Significant progress	Certain progress	No progress
Active cooperation between the Public Procurement Office, the Ministry of Finance, the Ministry of Economy, the Anti-Corruption Agency, the budget inspectorate, the State Audit Institution and the Government of Serbia in the implementation of the Public Procurement Law and the Memorandum on Cooperation of 15 April 2014.	2015			√
Expansion of the administrative and expert capacities of the Public Procurement Office and State Audit Institution to effectively oversee the planning and execution of public procurements by contracting authorities and combat corruption.	2013		√	
Strengthening the Law in relation to the Public Procurement Office's and the Commissions' authorities in cases of suspected "bid rigging," (the ability to implement special procedures to control the implementation of awarded contracts and submit proposals for the annulment of a public procurement contract).	2014			√

CURRENT SITUATION

On December 23rd 2019, the Serbian Parliament adopted the new Law Public Procurement Law (RS Official Gazette No 91/2019, hereinafter: the New Law). The New Law entered into force on January 1, 2020 and started to be applied as of July 1 2020. The law is to a significant extent harmonized with EU acquis, notably 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 and 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.

REMAINING ISSUES

The public procurement market in the Republic of Serbia in 2021 accounted for 8.93% of GDP, which is significantly higher compared to 2020, when it was 6.88%. The average number of bids per tender remained at a stable 2.5, but that is still lower than 2017 when the average number of offers per procedure was 3. The number of contracts awarded to foreign bidders remained at low level of 2% whereby this percentage is equally distributed between companies coming from the EU and third countries.

When it comes to contracts awarded in the negotiation procedures without prior notice their values accounted for 7.67% which represents a significant increase from 2020, when that percentage was at 2.57%. Open proceedings still have a domi-

nant share with a percentage representation of 91.33%.

The value of public procurement, which is exempt from the implementation of the Law on Public Procurement, amounted to approx. 3.2 billion euros, of which the highest percentage (22.7%) represents international contracts that are exempted from the Law on Public Procurement.

The public procurement portal, which began operations in June 2020, represents a significant step in improving transparency of public procurement procedures.

REMAINING ISSUES

In the previous year, no progress was made in the field of fight against corruption and integrity in the field of public procurement.

Furthermore, intergovernmental agreements with third countries continue to violate the principle of equal treatment of bidders, the prohibition of discrimination, transparency and the protection of competition. The implementation of these agreements is often inconsistent with the adopted solutions in both domestic and EU law.

The monitoring of the execution of contracts awarded in public procurement procedures is completely neglected. The Foreign Investors Council is not aware of any cases where the Commission has exercised the power envisaged in Article 163 of the previous Law, to file a lawsuit for the annulment of the contract on grounds set forth in this article.

A remaining issue is the application of the rules on an “unusually low bid.” Despite FIC’s effort to draw attention of inadequate provisions with regard to “unusually low bid” and proposal to set limits i.e. percentage in the New Law defining what exactly “unusually low bid” and obligation of the contracting authorities to reject “unusually low bids”, FIC proposal was rejected. The point is, that the official position of the Commission is that the contracting authority has the discretionary right to assess whether a bid is unusually low, i.e. whether a bid differs from the comparable market prices and raises doubts as to the ability of the bidder to execute the procurement in accordance with the offered terms. The lack of clear criteria that would oblige the contracting authority to demand a detailed explanation of all the elements of the bid brings uncertainty in public procurement procedures. Bidders who suspect that a contract has been awarded to an unusually low bid have an opportunity to protect their rights before the Commis-

sion, however, the Commission has regularly refused such requests so far.

The mechanisms for the enforcement of the New Law in cases when the public procurement eligibility criteria in a particular procedure are changed with respect to the previous year’s criteria are also at issue. This particularly relates to the amendment of criteria with respect to financial indicators in cases of awarding framework agreements of significant importance for the state. In this particular case, filing a request for the protection of rights due to the criteria set in the tender documentation is not an efficient legal remedy.

The capacities of the Commission for protection of rights in public procurement procedures and Public Procurement Authority remain very weak. Also, the professional capacity of the Administrative Court to decide in complex and numerous cases remains low due to the lack of adequate training.

FIC RECOMMENDATIONS

- Improving the administrative and expert capacity of the Commission for protection of rights in public procurement procedures and the State Audit Institution so that they can effectively monitor the planning and execution of public procurement.
- Establish closer co-operation between, on the one hand, the Public Procurement Authority and the Republic Commission for protection of rights in public procurement procedures and the Administrative Court in order to exchange knowledge and information.
- Contracting exemptions from the implementation of the Law on Public Procurement in international agreements with third countries should be significantly reduced.