MISDEMEANORS IN THE AREA OF PUBLIC PROCUREMENT

manual

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CONTENT

LIST OF ABBREVIATIONS

CPV - Common Procurement Vocabulary

EU - European Union

PPL - Public Procurement Law

LoM - Law on Misdemeanors

CC - Criminal Code

RS - Republic of Serbia

CRS - Constitution of the Republic of Serbia

PART I

INTRODUCTORY CONSIDERATIONS AND THE STATE OF THE LEGISLATION

The legal subject-matter of public procurement is extremely developed and complex, taking into account that the justified aspiration of the state for rational spending of public funds during the acquisition of goods, services and works has necessarily led to detailed standardization of public procurement procedures. Not only have an extremely large number of legal rules been prescribed, but consequently a substantial legal practice of state authorities responsible for controlling the legality of public procurement has been developed. However, although elaborated and specialized, the content of legal regulations and legal practice in the field of public procurement remained vague to the general practitioners, often perceived as complicated and reserved only for the lawyers who deal with it on a daily basis. Therefore, this Manual aims to bring the subject-matter of public procurement closer to its users, sublimating the necessary substantive and procedural issues relevant to the conduct of misdemeanor proceedings, with a focused review of the Public Procurement Law norms, violation of which constitutes the the act of commission of prescribed misdemeanors. The Manual also contains examples from practice.

By passing the new Public Procurement Law *("Official Gazette of the RS", no. 82/19;* hereinafter: PPL/2019) conducting the first-instance misdemeanor proceedings for misdemeanors prescribed by this law was assigned to the misdemeanor courts, contrary to the solution from the previously valid Public Procurement Law (*"Official Gazette of the RS", no. 124/2012, 14/15, 68/15;* hereinafter: PPL/2012), according to which the Republic Commission for the Protection of Rights in Public Procurement Procedures acted as the first-instance body in these proceedings (hereinafter: Republic Commission). In fact, the provision of Article 246 of the PPL/2019 envisages that the provisions of Article 87, paragraph 2, item 1) of the Law on Misdemeanors (LoM) ("Official Gazette of the RS", no. 65/13, 13/16, 98/16 - CC)[1] shall cease to have effect, while other

[1] The above provisions of the LoM provided that, exceptionally, the Republic Commission conducts the first-instance misdemeanor proceedings for misdemeanors in accordance with the law governing public procurement;

provisions of the PPL/2019 have been adapted to ensure that misdemeanor courts act in the first instance.

Adjudicating in the misdemeanor subject-matter of public procurement is challenging, having in mind the number and variety of prescribed misdemeanors, but also the fact that there is a plurality of instruments to protect legality in this legal area. Namely, in addition to misdemeanor legal protection, the norms of the Public Procurement Law provide protection in a special administrative procedure of "protection of rights" before the Republic Commission, in procedures that exercise special powers of the said body (imposition of fines as administrative measures, annulment of public procurement contracts, submission of reports and documentation); in criminal proceedings before the competent public prosecutor's offices and courts (criminal offense of abuse concerning public procurement under Article 223 of the CC), in the procedure of protection of competition before the Commission for Protection of Competition, in the audit procedure before the State Audit Institution, and in the monitoring procedure by the Public Procurement Office. This obvious effort of the legislator to strengthen the obligation to comply with the law in several ways ("hypertrophy of legal protection") may result in the actions of several state authorities for violations of the same/different provisions of the PPL in a single public procurement procedure. It is therefore necessary to consider repercussions of the decisions passed in the stated proceedings in relation to misdemeanor proceedings. In any case, the provision of misdemeanor legal protection is not disputable from the criminal or political aspect. It is also present in comparable legal systems. After many years of ineffective conduct of misdemeanor proceedings for misdemeanors prescribed by the Public Procurement Law, now the misdemeanor courts are expected to efficiently contribute to the suppression of unlawful behavior in the field of public procurement within their jurisdiction.

Review of relevant regulations in the area of public procurement - term and repercussions on the competencies of state authorities in misdemeanor proceedings

In an effort to regulate the legal matter of public procurement in the Republic of Serbia as much as possible and gradually harmonize it with the acquis communautaire contained in special directives[2], the Public Procurement Law and the relevant bylaws are often subject to amendments. Moreover, the reasons for frequent amendments can be found in the need to eliminate practical problems in the direct application of the law (which can cause delays in the functioning of important systems in the Republic of Serbia), to make public procurement procedures as efficient as possible, and to observe international and domestic economic flows and new technologies. For conducting misdemeanor proceedings, it is important to keep in mind the following chronology in adopting regulations, and their features:

PPL/2012 was published in the "Official Gazette of the RS" on 29 December 2012, and entered into force on 1 April 2013. It was amended twice during 2015, and in relation to the previously valid PPL/2008, it contained numerous and significant novelties. PPL/2012 undoubtedly represented a step forward in the legal regulations in the area of public procurement, aimed at improving the work of state authorities authorized to control the legality of public procurement procedures. However, problems and doubts arose in legal practice, inter alia regarding the issues that concerned the conduct of misdemeanor proceedings. Namely, it turned out to be a legally unsustainable and practically unenforceable decision for the Republic Commission to act in the first instance of the misdemeanor procedure, which is why the said body did not make any decision on the merits during the validity of that law, specifically for the following essential reasons: a) there would be a merger and conflict of procedural functions between the prosecution and the court in the misdemeanor subject-matter, since under the PPL/2012, the Republic Commission was simultaneously authorized to instigate proceedings (ex officio) and pass a decision on the misdemeanor subject-matter; b) the entire content of the Law on Misdemeanors is determined and structured according to the courts as first-instance bodies, leaving no possibility for an administrative authority such as the Republic Commission to act in the first-instance, which for example cannot exercise those powers that by their legal nature and according to the Constitution of the Republic of Serbia,

[2] Relevant EU directives are available on the website: https://eur-lex.europa.eu/oj/direct-access.html;

LoM and CPC, are reserved exclusively for courts (e.g. imposition of measures to ensure the presence of defendants, conversion of a fine to imprisonment, decision-making on a concluded plea bargaining, etc.); c) numerous legal and technical problems arising from the inconsistencies between the LoM and PPL/2012, such as the fact that the Republic Commission as an administrative authority cannot pass judgments, but only decisions, while a misdemeanor liability under the provisions of the LoM can be decided only by judgment.

With the adoption of the PPL/2019 this problem has been eliminated, but having in mind the fact that numerous contracting authorities in the Republic of Serbia initiated a large number of public procurement procedures during 2020 under the PPL/2012, misdemeanor courts may expect in their future work also cases on misdemeanors prescribed by this law, within the framework of Articles 169 (misdemeanors of contracting authorities) and 170 (misdemeanors of bidders). When it comes to misdemeanors prescribed by PPL/2012, one group of cases will consist of those taken over from the Republic Commission after the entry into force of PPL/2019 (after the said authority ceases to be competent to conduct first-instance misdemeanor proceedings), while the other group will be represented by the cases formed upon directly submitted motions to instigate misdemeanor proceedings by authorized authorities.

PPL/2019 was published in the "Official Gazette of the RS" on 24 December 2019, and entered into effect on 1 July 2020, except for certain provisions whose application began before the specified date and a number of provisions whose application shall begin on the day of accession of the Republic of Serbia to the EU. In addition to harmonization with EU directives, the goals of its adoption are the implementation of as efficient and transparent public procurement procedures as possible, simplified administrative procedure on the part of both contracting authorities and bidders, and achieving material savings and greater control of contracting authorities in public procurement. PPL/2019 has introduced significant innovations, and in the following text we will summarize those that may be important for the actions of the courts in the first-instance misdemeanor proceedings. Primarily, the PPL/2019 introduced numerous new terms and expressions in public procurement, while some of them from previous regulations ceased to exist. That is why it is always suitable to keep in mind, when assessing whether the actions of defendants have elements of misdemeanors and interpretation of PPL provisions, the terms and meaning of expressions defined by the provision of Article 2 of the said law. New thresholds to which the law does not apply have been established; new types of public

procurement procedures as well as contracting authorities that conduct them; a new way of communication between the parties in the public procurement procedure, which is now exclusively conducted through the Public Procurement Portal[3] - a unique and comprehensive information system which, in addition to communication, also enables the publication of public procurement notices, submission of bids, requests for protection of rights, opening of bids, etc. Also, the novelty of the PPL/2019 is contained in the provisions relating to conflicts of interest, publication and submission of tender documents, grounds for exclusion of economic operators and criteria for qualitative selection of bidders, manner of amending concluded public procurement contracts, monitoring by the Public Procurement Office, etc. Therefore, when acting in misdemeanor proceedings, it is always necessary to keep in mind which PPL applies to a given public procurement procedure, especially because numerous misdemeanors concern violations of norms that are set forth differently in PPL/2019 in relation to PPL/2012. The misdemeanor actions are defined in the PPL/2019 under Articles 236 (misdemeanors of contracting authorities) and 237 (misdemeanors of bidders).

It should be borne in mind that certain actions within the PPL/2012 were envisaged as the basis for the application of a special authorization of the Republic Commission - imposition of fines as administrative measures, and with the entry into force of PPL/2019 they were prescribed as acts of commission of misdemeanors. Thus, the failure of contracting authorities to comply with the decisions of the Republic Commission and to submit its report on the compliance with the decision of the Republic Commission under the provisions of PPL/2012 was a reason for fines in a special procedure before the said authority, and pursuant to the provisions of PPL/2019 the stated actions became misdemeanors (Article 236 paragraph 1 points 17 and 18).

As for the application of regulations, it is important to keep in mind that on 1 July 2020 (when the PPL/2019 became effective) the PPL/2012 ceased to be valid, as did all the bylaws that were adopted on the basis of that law. Also, as of the stated date the provisions of Article 87 paragraph 2, item 1) and Article 100 paragraph 2 of the Law on Misdemeanors ("Official Gazette of the RS", No. 65/13, 13/16 and 98/16 - CC) ceased to be valid, i.e. the provisions prescribing that the Republic Commission shall conduct misdemeanor proceedings for public procurement realted misdemeanors.

[3] For more information see the part of the Manual that refers to the specifics of proving misdemeanors in the area of public procurement;

Beside the above stated laws, the following bylaws adopted by the Government of the Republic of Serbia and the Public Procurement Office may be important for the misdemeanor courts when assessing whether the actions of defendants contain the elements of misdemeanors[4]:

- **Decision on Determining the List of Contracting Authorities referred to in Article 3, paragraph 1, item 1. PPL (***"Offical Gazette of the RS", No. 85/20)***, designating state authorities that fall into the category of public contracting authorities;**

- **Decree on Public Procurement in the Field of Defense and Security** *("Official Gazette of the RS", No. 93/20)***, regulating the types of public procurement procedures in the area of defense and security, conditions and manner of their implementation, and communication in those public procurement procedures;**

- **Decree on the Manner of Performing Centralized Public Procurement Activities at the Republic Level** *("Offical Gazette of the RS", No. 116/20)***, regulating the organization of centralized public procurements at the republic level, determining the Administration for Joint Services of the Republic Bodies as the body conducting centralized public procurement, as well as the list of contracting authorities whose needs are provided through the said body;**

- **Rulebook on the Content of Tender Documentation in Public Procurement Procedures** *("Offical Gazette of the RS", No. 21/21)***, which precisely defines the content of the tender documentation for each type of public procurement procedure, as well as the content of the instructions to bidders on how to prepare a bid;**

- **Rulebook on the Bid Opening Procedure** *("Offical Gazette of the RS", No. 93/20)***, prescribing in more detail the manner of bid opening, the content of the minutes on bid opening and other issues of importance for the bid opening procedure in the public procurement procedure;**

[4] The status of relevant bylaws can be efficiently monitored on the website of the Public Procurement Office: http://www.ujn.gov.rs/propisi/podzakonski-akti/;

- **Rulebook on Monitoring the Application of Public Procurement Regulations** *("Offical Gazette of the RS", No. 93/20)*, **regulating the manner of performing regular, extraordinary, control and supplementary monitoring by the Public Procurement Office, which otherwise represents the legal mandate of the said state body;**

- **Rulebook on Determining the Common Procurement Vocabulary** *(CPV), ("Offical Gazette of the RS", No. 93/20),* **regulating the uniform system of classification of public procurement subject-matter applied in the public procurement procedure, and at the same time ensuring compliance with other existing classifications. This system has unique markings - codes for goods, services and works, all with the aim of harmonizing the description of the procurement subject. CPV codes enable identification of procurements in any EU country, without the need for translation, which can sometimes be insufficiently precise;**

- **Rulebook on Determining the Content of Standard Templates for Publishing Public Procurement Notices through the Public Procurement Portal** *("Official Gazette of the RS", No. 93/20)*, **regulating the standard templates for announcing a public invitation, contract award notice, suspension or annulment of the procedure, periodic indicative notice, notice on the establishment of a qualification system, notice on the profile of the contracting authority, notice of design competition and design competition results, corrections - notices on changes or additional information as well as notices for voluntary ex ante transparency, notice on contract changes, notice for social and other special services, notice for conducting the procedure without publishing a public call, and notice on submitted request for protection of rights;**

- **Instructions on the manner of sending and publishing public procurement notice** *("Official Gazette of the RS", No. 93/20)*, **regulating in detail the conduct of contracting authorities concerning publishing of notices, and determining the obligation to publish public procurement notices on standard templates (according to the Rulebook specified in the previous item), via the Public Procurement Portal;**

- **Instructions for publishing data on public procurements that are exempt from the application of the Law, regulating the actions of contracting authorities with regard to the collective publication of data on the value and type of public procurements referred to in Art. 11 – 21 of the PPL/2019, which are exempted from the application of the said law, and the public procurements referred to in Art. 27 of the PPL/2019, according to which the contracting authorities are obliged to record and publish them in accordance with Art. 181, paragraph 3 and 4 of that Law;**

The purpose of prescribing misdemeanors in the field of public procurements - ratio legis and subject of protection

Misdemeanor protection is provided in the public procurement system starting from the planning phase, through the conduct of the procedure, all the way to the execution phase of the concluded public procurement contract. In principle, the intention of the legislator is to incriminate more severe violations of the rules of procedure as misdemeanors, and it can be said that behind the ratio legis prescribing misdemeanors in the field of public procurement are four basic motives:

- **Strengthening the principle of legality in the public procurement procedure (obligation to comply with the law), bearing in mind the observed tendency of contracting authorities and bidders to jointly create a formal illusion of compliance with laws and bylaws, and essentially take actions aimed at achieving a certain "desired" outcome of the public procurement procedure (unlawful, i.e. one that is not legally possible). Therefore, the substances of certain misdemeanors actually refer to the prevention of undertaking actions that create a formal illusion of lawful conduct, such as the misdemeanor referred to in Article 236, paragraph 1, item 1) of the PPL/2019 – separating a subject-matter of procurement into multiple procurements with the aim to avoid the application of the law or relevant rules of procedure. There is also a tendency to create fictitious conditions for the complete avoidance of the Public Procurement Law, hence prescribing of the misdemeanor under Article 236, paragraph 1, item 2) of the PPL/2019, which incriminates the award of public procurement contracts without previously conducting public procurement procedure;**

- **Realization of public procurement principles prescribed by law**, which have a special practical significance in this legal area. Namely, the provision of Article 5 of the PPL/2019 prescribes the general obligation of all contracting authorities to act in accordance with the defined principles: economy and efficiency (Article 6), ensuring competition and prohibition of discrimination (Article 7), transparency of the public procurement procedure (Article 8), equality of economic operators (Article 9), and proportionality (Article 10). These principles, although generally defined, very often "experience" immediate implementation in the public procurement procedure, especially in legal situations that are not provided by law. Therefore, given their importance, they were provided with misdemeanor protection, and so, for example, the whole range of actions of committing misdemeanors refers to the protection of the principle of transparency: Article 236, paragraph 1, item 5, 7) and 8) of the PPL/2019;

- **Compliance with the most important substantive and procedural obligations of participants in the public procurement procedure**, bearing in mind that it is a very dynamic procedure, with short deadlines for its participants, with the objective for important state entities to procure certain goods, services and works in a timely manner. Therefore, the legislator's idea was to prescribe certain misdemeanors to ensure that on the one hand participants in the public procurement procedure do not abuse their powers and rights, and unnecessarily delay the procedure, while ensuring on the other hand respect for all procedural rights, including the right to appeal of dissatisfied participants in the public procurement procedure. Thus, for example, Article 237, paragraph 1, item 4) of the PPL/2019 incriminates the conduct of a bidder who fails to conclude a public procurement contract upon the request of the Contracting Authority, unless there are justified cases specified by the said law;

- **Prevention of corruption**, as probably the most important function of prescribed misdemeanors. The field of public procurement is indisputably perceived by the lay and professional public as an area with extremely high corruption pressure on participants in the procedure, which is explained by the significant share of public

procurement in total economic activity in the Republic of Serbia, or high material interest of economic operators to conclude legal transactions with the state and deliver to it goods, services and works Thus, for example, the PPL/2019 establishes general rules for the execution of public procurement contracts and at the same time prescribes as a misdemeanor (Article 237, paragraph 1, item 13) of the PPL/2019) failure of the contracting authority to comply with the provision setting these rules, in order to prevent illegal favoring of the bidder to the detriment of the public interest;

General characteristics and legal nature of misdemeanors in the area of public procurement

All misdemeanors prescribed by the PPL/2019 are of a **blanket (referral) character**, and the conduct of the misdemeanants contrary to the precisely determined provision of the said law is incriminated within the framework of the misdemeanor legal norm. However, in certain commission actions, it is not always easy to assess whether the conduct of the misdemeanant is unlawful, given the complexity of the legal rules whose violation constitutes a misdemeanor. In that respect, it seems that the misdemeanors related to the awarding, execution and subsequent modifications to public procurement contracts are the most demanding for evaluation. It is therefore necessary to keep in mind the spirit of the law and the goals for which public procurement contracts are concluded, when interpreting it.[5]

Most of the misdemeanors prescribed by the PPL/2019 are of an **omissive nature**, i.e. they are committed by an act of omission - failure to act. Experience so far shows that defendants mostly act **out of negligence**, and it is typical that small contracting authorities (primary schools, cultural institutions and similar institutions) have limited operational and professional capacities thus failing to take due action, which is basically the result of a mistake and rarely of intentional act.

Pursuant to the provisions of the PPL/2019, both the contracting authority (legal entity to which a fine of 100,000.00 to 1,000,000.00 RSD may be imposed) and the responsible person of the contracting authority (to whom a fine of

[5] For more information see the part of the Manual "Overview of distinctive irregularities in the public procurement procedure which at the same time represent (constitute) the act of committing a misdemeanor", where the substances of the misdemeanors are analyzed individually;

30,000.00 to 80,000.00 RSD may be imposed) will be liable for the misdemeanors of the contracting authority. Also, the mentioned law envisages a special category of persons who may be liable for misdemeanor - **representatives of the contracting authority who participate in the public procurement procedure contrary to the provisions of the law on conflict of interest** (Article 50 of the PPL/2019). Conflicts of interest between the contracting authority and the economic operator include situations in which the representatives of the contracting authorities involved in the procedure or which may influence the outcome of the procedure have a direct or indirect financial, economic or any other private interest that could call into question their impartiality and independence in that procedure. In addition, the said provision stipulates that the contracting authority's representative is obliged to be excluded from the public procurement procedure if at any stage of that procedure s/he becomes aware of the existence of a conflict of interest. This practically means that the contracting authority's representative (who can be any person - e.g. a member of the public procurement commission) can be held liable if not excluded from the public procurement procedure in case of a conflict of interest.

Pursuant to the provisions of the PPL/2019, the bidder, candidate, or subcontractor is liable for the misdemeanors of the bidder, where a legal entity (company), an entrepreneur or a natural person may be in the function of the mentioned entities. Also, the misdemeanor liability of the responsible person of the bidder, candidate or subcontractor is envisaged.

It should be noted that for the misdemeanors referred to in Article 237, paragraph 1, items 2) and 4) of the PPL/2019, it is possible to impose a **special protection measure – prohibition of participation in public procurement procedures**, which may last **up to two years**. The law also establishes the **obligation of the court that imposed this protection measure to notify the Public Procurement Office thereof, within three working days from the day the judgment becomes final**. The notice should contain the full name and registry number of the bidder, candidate or subcontractor, and the date by which that entity is excluded from the public procurement procedure. The Public Procurement Office is obliged to publish the above information on its website. It should be kept in mind with this safeguard measure that it does not affect all economic operators in the same way, since there are bidders and candidates that participate in a large number of public procurement procedures, and those that do so rarely or indirectly.

When it comes to bidders' misdemeanors, it was noted that information on the commission of misdemeanors often initially comes from competitors of registered persons and dissatisfied participants in the public procurement procedure. Therefore, they can often be in the function of unfair competition (e.g. filing false reports to cause a prohibition of participation in the public procurement procedure), which is why cases in this area need to be scrutinized carefully and comprehensively and thus prevent placing of a state authority in the function of illicit competition confrontation.

The statute of limitations for conducting and instigating the procedure occurs three years after the day the misdemeanor was committed, and the absolute statute of limitations occurs after **six years**. The same statute of limitations was provided for in the PPL/2012, therefore in cases assigned by the Republic Commission, and formed under the previously valid law, it is expected that misdemeanor court judges will encounter enforcement actions whose statute of limitations occurs shortly after the taking over of the cases.

PART II

OVERVIEW OF DISTINCTIVE IRREGULARITIES IN THE PUBLIC PROCUREMENT PROCEDURE WHICH AT THE SAME TIME CONSTITUTE THE ACT OF COMMITTING A MISDEMEANOR

Misdemeanors of Contracting Authorities

ARTICLE 236 PARAGRAPH 1 ITEM 1) OF THE PPL *- DIVISION OF THE SUBJECT OF PROCUREMENT INTO SEVERAL PROCUREMENTS IN ORDER TO AVOID THE APPLICATION OF THE PROVISIONS OF THIS LAW OR THE RESPECTIVE RULES OF THE PUBLIC PROCUREMENT PROCEDURE (ART. 29 - 35 OF THE PPL)*

Although this misdemeanor points to the provisions which regulate the manner of determining the estimated value of public procurement (Art. 29 - 35), however, we consider that the provisions of Article 27 of the PPL/2019 are also important for the existence of that misdemeanor. That Article determines the value thresholds for the application of the law by stipulating that the provisions of that law do not apply to:

1) procurement of goods, services and conducting design competitions, with estimated value lower than 1,000,000 RSD, and procurement of works with estimated value lower than 3,000,000 RSD;

2) procurement of goods, services and conducting design competitions, with estimated value lower than 15,000,000 RSD, for the needs of diplomatic missions, diplomatic and consular representative offices and performance of other activities of the Republic of Serbia abroad; as well as procurement of works for those needs, with estimated value lower than 650,000,000 RSD;

3) procurement of social and other special services referred to in Article 75 of this Law, with estimated value lower than 15,000,000 RSD, when the procurement is conducted by a public contracting authority, or lower than 20,000,000 RSD when the procurement is conducted by a sectoral contracting authority.

Therefore, if the value of the public procurement is below the value of these thresholds, the contracting authority is not obliged to apply the public procurement procedures specified in Article 51 of the PPL/2019. The substance of

this misdemeanor is that it is not possible to separate the subject of procurement so that, due to the unauthorized separation, the procurement would be below the value of the thresholds referred in Article 27.

Article 29, paragraphs 1 and 3 of the PPL/2019, stipulate that the estimated public procurement value must be objective, based on the conducted inquiries and market research of the subject of public procurement, that include checking the price, quality, warranty period, maintenance, etc., and must be valid at the time of initiating the procedure. In addition, the contracting authority shall define the subject of public procurement in a way that it represents a technical, technological, functional and other objectively determinable unity.

The value thresholds referred to in Article 27 do not apply to individual procurements, but to all uniform procurements on an annual basis, although this is not so clearly provided for therein. For example, all IT equipment purchased by the contracting authority in one year (laptops and desktops, but also printers and scanners) is an inseparable technical unit and cannot be divided in order to be below the stated limits and that the contracting authority does not apply the provisions of PPL/2019. It is possible that the contracting authority procures in two separate procedures IT equipment that exceeds the annual value threshold referred to in Article 27 (if it is justified from the point of view of its needs), but in both cases it would have to conduct a public procurement procedure or otherwise it would be liable for this misdemeanor. Also, if the contracting authority plans to renovate its business premises, then all works included in that renovation represent a whole and cannot be treated separately or individually in terms of the stated limits (roofing, carpentry, parquet, painting, insulation works, etc.). However, in relation to the previous law (PPL/2012), it can be noticed that the PPL/2019 lacks the regulation of the concepts of uniformity of goods, services and works, which is important for determining the value of public procurement on an annual basis and preventing avoidance of the implementation of the law by the so-called "splitting of procurements". This, of course, does not mean that contracting authorities may divide public procurement into several segments in order to avoid the application of (certain) provisions of the law, primarily taking into account the provision of Article 29, paragraph 2, which stipulates that determining the estimated value of the subject of public procurement cannot be done with an intention of avoiding the application of this Law, nor with the intention of splitting the subject of public procurement into several procurements. Moreover, the mentioned provision of paragraph 3 of that Article stipulates that the contracting authority is to define the subject of public

procurement in a way that it represents a technical, technological, functional and other objectively determinable unity.

With regards to the stated lack of definition of uniformity in the PPL/2019, we must point out that for the application of Article 27 and Articles 29 - 35 it is important that the authorized authority instigates misdemeanor proceedings, as well as the defense counsel of the misdemeanant undertakes the burden of proof so as to prove whether something is or is not identical to the subject of public procurement, and whether, in that sense, the value of that case (procurement) on an annual basis would be below or above the mentioned value thresholds referred to in Article 27.

ARTICLE 236 PARAGRAPH 1 ITEM 2) OF THE PPL *- AWARD OF PUBLIC PROCUREMENT CONTRACTS WITHOUT PREVIOUSLY CONDUCTED PUBLIC PROCUREMENT PROCEDURE, UNLESS ALLOWED HEREBY (ARTICLE 51)*

The public procurement procedure is a procedure in which the contracting authority selects a bidder with whom it will conclude a public procurement contract (to which the contract will be awarded) or a framework agreement, which will be discussed in more detail below.

In short, the stages in the conduct of an open public procurement procedure, as the procedure most often used by contracting authorities, are as follows:

1) **Preparation of the procedure** (market research, needs assessment and public procurement planning - publishing the public procurement plan on the Public Procurement Portal);

2) **Initiation of the procedure** (adopting a decision on the conduct of the procedure and formation of the public procurement commission, and subsequent preparation of the tender documentation by that commission);

3) **Publication** (sending for publication of a public call for submission of bids and publication of tender documentation, on the basis of which bids are submitted, on the Public Procurement Portal)[6];

[6] More about the publication of public procurement notices is stated in the part of this Manual in which the act of committing the misdemeanor referred to in Art. 236, paragraph 1, item 8) of the PPL - Non-publication of notices referred to in Article 105, paragraph 1, item 6), 8) and 11) of the PPL.

4) **Time frame for submission of bids** (potential bidders prepare bids and for that purpose they can ask questions to the contracting authority via the Public Procurement Portal and receive answers in the same way);

5) **Submission of bids** (via the Public Procurement Portal, except for those parts of bids that cannot be submitted electronically, such as: originals of bills of exchange, bank guarantees, samples and models of the subject of procurement);

6) **Opening of bids** (carried out automatically, via the Public Procurement Portal, except for the mentioned parts of bids that cannot be submitted electronically and which are opened before the Public Procurement Commission of the contracting authority):

7) **Expert evaluation of bids** (determining whether bidders meet the criteria for qualitative selection, and then for all the bids meeting the mentioned criteria the contract award criteria are applied, with the purpose to rank bids based on price and, possibly, other criteria);

8) **Contract award decision** (a report on the public procurement procedure is prepared, on the Public Procurement Portal, followed by preparing and publishing the decision on awarding the contract to the bidder whose bid was selected as the most favorable one);

9) **Conclusion of the contract** (with the bidder to whom the contract has been awarded, after the deadline for submitting the request for protection of rights as a legal means by which the decision on awarding the contract can be challenged).

Article 51 of the PPL/2019 determines the **types of public procurement procedures** that are applied in public procurement. Paragraph 1 of that Article prescribes that those are the following procedures:

1) open procedure;

2) restrictive procedure;

3) competitive procedure with negotiations;

4) competitive dialogue;

5) negotiated procedure with publication of a public notice;

6) innovation partnership;

7) negotiated procedure without publishing a public notice.

Regarding the application of these types of procedures, it is important, first of all, to present the difference between a public and a sectoral contracting authority.

Public contracting authorities are defined by Article 3 of the PPL/2019 and they conduct the so-called "classic public procurement" (as opposed to the "sectoral" one which will be described below). Those are the following contracting authorities:

1) Republic of Serbia and the republic authorities, respectively;

2) authorities of the autonomous province;

3) authorities of the local self-government unit;

4) legal entities established for the purpose of meeting the needs of general interest, without industrial or commercial character, provided that any of the following conditions is met:

   (1) they are more than 50% financed from the funds of the public contracting authority;

   (2) supervision of their work is performed by the public contracting authority;

   (3) more than half of the members of their supervisory or management bodies are appointed by the public contracting authority;

5) associations of contracting authorities referred to in item 1) - 4) of that paragraph.

Probably the most doubtful of the mentioned categories of contracting authorities is the fourth one. In order to determine the status of a public contracting authority from that category, it is necessary that several conditions are cumulatively met. The general interest, i.e. the determination of activities of general interest, as well as the answer to the question whether certain legal entity was established in order to meet the needs of the general interest, is primarily based on the provisions of special regulations. Specifically, the Law on Public Enterprises regulates the legal position of public enterprises and other forms of organization that perform activities of general interest.

Once we determine that a particular legal entity was established to meet the needs in general interest, the next step is to determine whether those needs are of industrial or commercial character (if not, then another condition is met to classify that legal entity in this category of contracting authorities).

Paragraph 2 of Article 3 of the PPL/2019 stipulates that needs with an industrial or commercial character are those that are met by a legal entity that operates in regular market conditions, aims to gain a profit and bears the losses arising from its own activities. This essentially means that the business operations, i.e. the performance of activities of that legal entity is based on profit and on a competitive market.

So, public companies, undoubtedly, fall into the fourth category, but in addition to public companies there are many agencies, institutions and other types of organizations established at the national or local level that can be classified under this fourth category of contracting authorities.

Sectoral contracting authorities are defined by Article 4 of the PPL/2019. Sectoral contracting authorities are those contracting authorities that perform sectoral activities prescribed by the Law (Art. 165 - 175), namely: gas, heat and electricity supply, water management, transport services, port and airport activities, postal services, oil and gas extraction, as well as exploration or extraction of coal or other solid fuels. Sectoral contracting authorities are to apply the provisions provided for that type of contracting authorities when the subject of a specific public procurement is intended for the performance of some of the mentioned sectoral activities. With regard to sectoral contracting authorities, paragraph 3 of Article 51 stipulates that, alike public contracting authorities, they can always (for all procurements) apply an open and restrictive procedure, but in addition to these two procedures, they can also always apply a negotiated procedure with publication of a public call or a competitive dialogue, for the implementation of which the PPL/2019 does not have any requirements for this type of contracting authorities. The only procedure that sectoral contracting authorities may not apply is a competitive negotiated procedure that can only be applied by public contracting authorities.

Paragraph 2 of Article 51 stipulates that the public contracting authority, as a rule, awards contracts in an open or restrictive procedure, and may also do so in other public procurement procedures, if the requirements prescribed by this Law are met, except for the negotiated procedure with publication of a public call, which can only be used by the sectoral contracting authority. Therefore, the PPL/2019 (as well as the PPL/2012) does not have any requirements for the application of the open and restrictive procedure, and the public contracting authority may decide whether to use one or the other of these two procedures, for any subject of public procurement. For all other procedures, the prescribed

conditions must be met in order for the public contracting authority to apply them.

The contracting authority is obliged to apply the stated procedures when procuring goods, services or works. However, in certain situations, the contracting authority is not obliged to apply these procedures, even though it procures what is needed for performance of its activities. Thus, the provisions of Art. 11 to 21 of the PPL/2019 provide for exceptions from the application of the Law, which are classified into certain groups, depending on the subject of procurement, the contracting authority, who finances the procurement and some other circumstances, which exceptions allow the contracting authority not to apply procedures referred to in Article 51, but to apply either some special rules (for example, the rules of international organizations financing the procurement), or rules which it solely defined in a special act adopted on the basis of Article 49, paragraph 2 of the PPL/2019. Namely, Article 49, paragraph 2 of the PPL/2019 stipulates that the contracting authority is obliged to regulate by a special enactment (its internal enactment) in more detail, among other things, the manner of planning and conducting procurement to which the law does not apply. The content of the special enactment is no longer regulated by the Public Procurement Office, as done by the Public Procurement Directorate under the provisions of the PPL/2012, which may not be a good solution since in that way the content of that enactment could have been further specified and elaborated by the competent expert body. In that sense, it will be especially important how the contracting authority will regulate the procedures to which this law does not apply (including the procurement of social and special services). It should be emphasized that a special enactment is an enactment that the contracting authority must adopt in order to conduct procurement. Moreover, it is obliged to follow the procedure for adopting such an enactment, which depends on the category of the contracting authority in question. It is, therefore, an official enactment of the contracting authority, which every contracting authority is obliged to adopt. Also, the contracting authority is obliged to publish that special enactment on its website.

It is important to point out that the conditions for the application of exceptions to the application of the Law referred to in Art. 11 to 21 of the PPL/2019 must be interpreted restrictively, in order to prevent their abuse and avoidance of the application of public procurement procedures. Some of the exceptions provided for by those Articles are:

- procurement procedures regulated by an international agreement or by international organizations;
- purchase and lease of land, existing buildings and other real estate, as well as their pertaining rights;
- arbitration and amicable dispute resolution services;
- legal services of representation of the contracting authority by a lawyer in court and other proceedings before courts or other public authorities in the country and abroad or before international courts, tribunals or institutions;
- notarization and certification services provided by public notaries;
- acquisition of loans and credits, whether or not related to the sale, purchase or transfer of securities or other financial instruments;
- contracts concluded in accordance with the provisions of the law governing the rights, obligations and responsibilities arising from the employment relationship, i.e. on the basis of work, other than a service contract;
- central bank services;
- procurement of energy or fuel for energy production by a sectoral contracting authority, etc.

In connection with the above, we should also mention the provisions of Article 24 of the PPL/2019, regulating situations to which different procurement rules apply. Thus, paragraph 1 of that Article stipulates that if the subject of the contract is procurement to which the rules on public procurement procedures prescribed by the PPL/2019 apply and procurement to which the provisions of that law do not apply, and different parts of the contract are objectively separable, then separate contracts in accordance with the rules relating to the separate parts or a single contract can be awarded in which case the rules on public procurement procedures apply, except when the subject of procurement includes procurement in the field of defense and security in which case the contract is awarded in accordance with Article 26 of the PPL/2019. For example, the contracting authority may need a number of legal services, some of which are legal representation services before courts and administrative bodies, and some of which concern provision of legal advice in, say, labor law. The first group of services is an exception from Article 12, paragraph 1, item 4) of the PPL/2019, to which the provisions of that law do not apply, while the second

group is subject to the provisions of that law, but in the part of social and special services referred to in Article 75 of the PPL/2019. Therefore, in that case, these are objectively separable legal services, therefore two separate contracts can be concluded, the first of which will be concluded without prior application of the provisions of the PPL (without conducting a public procurement procedure), and the second with prior application of these provisions (except if they are not below the already mentioned value thresholds referred to in Article 27). Paragraph 2 of Article 24 stipulates that, if the subject of the contract is the procurement of goods, services or works and procurement with elements of concession, the contract is to be awarded in accordance with the provisions of the PPL/2019 if the estimated value of goods, services or works is equal to or higher than the amount referred to in Article 27 of the Law.

Also, the contracting authority is not obliged to apply public procurement procedures in the case when the value of the public procurement is below the value of the thresholds referred to in Article 27 of the PPL/2019, which have already been mentioned, so this also should be borne in mind as an exception to the rule that contracting authorities are obliged to conduct public procurement procedures when procuring goods, services or works.

To remind, the provisions of the law do not apply to:

1) procurement of goods, services and conducting design competitions, with estimated value lower than 1,000,000 RSD, and procurement of works with estimated value lower than 3,000,000 RSD;

2) procurement of goods, services and conducting design competitions, with estimated value lower than 15,000,000 RSD, for the needs of diplomatic missions, diplomatic and consular representative offices and performance of other activities of the Republic of Serbia abroad; as well as procurement of works for those needs, with estimated value lower than 650,000,000 RSD;

3) procurement of social and other special services referred to in Article 75 of this Law, with estimated value lower than 15,000,000 RSD, when the procurement is conducted by a public contracting authority, or lower than 20,000,000 RSD when the procurement is conducted by a sectoral contracting authority.

ARTICLE 236 PARAGRAPH 1 ITEM 3) OF THE PPL - PROCUREMENT OF GOODS, WORKS OR SERVICES BY APPLYING A NEGOTIATED PROCEDURE WITHOUT PUBLICATION OF A PUBLIC CALL, WITHOUT MEETING THE CONDITIONS FOR THE IMPLEMENTATION OF THIS PROCEDURE PRESCRIBED BY LAW

As already stated, Article 51, paragraph 1 of the PPL/2019 defines the types of public procurement procedures. Open and restrictive public procurement procedures are the go-to procedures for selecting the most favorable bid in public procurement, i.e. contracting authorities can always apply them, so their application does not require any special reasons related to the specifics of the type of contracting authority applying them, subject of the procurement or potential bidders. For other procedures referred to in the mentioned provision (there are 7 of them), certain reasons i.e. circumstances are necessary to exist, for the public contracting authority to be able to apply them.

Negotiated procedure without publication of a public call referred to in Article 61 of the PPL/2019 is a procedure in which, in relation to all other procedures, competition is mostly limited and is the least transparent in that the contracting authority invites a certain bidder or several of them to negotiate without publishing a public call.

Article 61 of the PPL/2019 stipulates the reasons for the conduct of this type of procedure, and among them most often applied are those from the first two items of paragraph 1. Namely, these items stipulate that the contracting authority may conduct a negotiated procedure without publishing a public call:

1) when only a certain economic operator can deliver goods, provide services or perform works, for any of the following reasons:
   (1) the purpose of the procurement is to create or purchase a unique work of art or artistic performance;
   (2) lack of competition for technical reasons, or
   (3) for the protection of exclusive rights, including intellectual property rights;
2) to the extent necessary, if due to extreme urgency caused by events which the contracting authority could not have foreseen, it is not possible to act within the deadlines set for open procedure or restrictive

procedure or competitive negotiated procedure or negotiated procedure with publication, provided that the circumstances invoked by the contracting authority to justify extreme urgency must not be caused by its actions.

For the mentioned two items, it is important to point out that Article 62 paragraph 2 and 3 of the PPL/2019 stipulate that the contracting authority shall be obliged to submit an explanation and complete documentation related to the reasons that justify the implementation of this type of procedure to the Public Procurement Office simultaneously with the publication of the notice on the implementation of that procedure on the Public Procurement Portal. The Public Procurement Office is obliged to examine within ten days from the day of receipt of the explanation and documentation the existence of grounds for conducting that negotiated procedure and submit to the contracting authority an opinion on the merits of the application of that type of procedure. Thus, conducting the negotiated procedure, when there are two reasons for its application, is in some way controlled at an early stage, but in this regard it is important to point out that the said opinion of the Public Procurement Office is not binding on contracting authorities, and they can continue the negotiated procedure for these reasons even when they receive a negative opinion from the Office. However, it is necessary to emphasize that the Public Procurement Office performs monitoring ex officio in the case of conducting a negotiated procedure without prior publication referred to in Article 61, paragraph 1, item 1) and 2) of the PPL/2019. So it is expected that in case it submits a negative opinion to the contracting authority on the merits of the application of that type of procedure, and the contracting authority continues with the conduct of that procedure, the Public Procurement Office will submit a request for initiating misdemeanor proceedings for the particular misdemeanor.

In anticipation of adequate examples for this misdemeanor under the PPL/2019, we will present one example that occurred during the period of application of the PPL/2012, which refers to the situation that represents the substance of this misdemeanor. These are cases of unfounded application of two reasons for a specific negotiated procedure, which were provided for in the PPL/2012 and the PPL/2019 (with certain additional clarifications of the provisions governing them). Thus, in the decision of the Republic Commission no. 4-00-810/2018 of 19.09.2018, for the procurement for which the contracting authority claimed that there was only one potential bidder on the market, the following was stated:

"Namely, the Republic Commission points out that from the submitted statement of the producer... it is indisputable that ... d.o.o. is the authorized distributor of consumables for dialysis machines whose manufacturer is ...

However, the fact that… d.o.o. is the only authorized distributor in the territory of the Republic of Serbia for the products of the manufacturer… does not speak in favor of the fact that the appliances owned by the contracting authority and for which it procures consumables can use only original consumables.

Furthermore, it follows from the submitted statements that the consumables do not have an alternative that is validated and standardized for the mentioned dialysis machines, however, it cannot be concluded from the above that they do not exist, especially having in mind the content of the instructions for use of the device for…, which clearly states that if the responsible organization wants to use different consumables and accessories, it is first necessary to check their suitability for use, i.e. that they are suitable for that purpose by, for example, obtaining appropriate information from the manufacturer. Therefore, the manufacturer has left the possibility to use consumables of other manufacturers for the mentioned dialysis machines, subject to previously performed appropriate procedures.

Having in mind the above, the Republic Commission is of the opinion that from the entire documentation it cannot be concluded that only the original consumables of the manufacturer… can be used for dialysis machines whose manufacturer is …, i.e. that it represents a closed system, which for the contracting authority was the basis for conducting the subject public procurement procedure by applying Article 36, paragraph 1, item 2) of the PPL".

The other example of unjustified application of this type of negotiated procedure with the reference of the contracting authority to extreme urgency, is contained in the decision of the Republic Commission no. 4-00-156/2017 of 28.07.2017, stating the following:

"Namely, as follows from the specific circumstances, on 27 January 2017, the contracting authority addressed the Public Procurement Office with a request for an opinion on the existence of grounds for initiating the subject procedure, which was received on 31.01.2017, while the decision to initiate the procedure was adopted on 30.01.2017. Beside citing the provisions of Article 36, paragraph 1, item 3 of the PPL, as a basis, the decision does not contain reasons for urgency, in accordance with the PPL. Although the contracting authority was not obliged to wait for the opinion of the Public Procurement Office in order to adopt the decision in question, pursuant to

the provisions of Article 36, paragraph 6 of the PPL, given the type of procedure, the circumstances of the specific case do not indicate that the conditions for conducting the specific public procurement procedure have been met.

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Especially if we take into account the circumstance that the contracting authority, at the invitation of the Public Procurement Office to supplement the request for an opinion on the merits of initiating a negotiated procedure as a matter of urgency, dated 10 February 2017, answered as late as 06 June 2017, so the time frame in which the contracting authority undertook actions of importance for the negotiated procedure carried out for reasons of urgency, does not result in such a nature of the circumstances that the contracting authority finds as reasons for the specific procedure.

As the contracting authority initiated the negotiated procedure in question on the basis of Article 36, paragraph 1, item 3 of the PPL, by the Decision on initiating the procedure which does not contain reasons for initiation, nor such reasons arise from the circumstances of the case and the actions of the contracting authority, the Republic Commission finds that the contracting authority did not provide certain and justified reasons for initiating negotiated procedure referred to in Article 36, paragraph 1, item 3 of the PPL, which represents the situation that the Republic Commission, based on Article 157, paragraph 2 of the PPL examines ex officio, i.e. whether the legal conditions for the application of a particular public procurement procedure are met. In this particular case it was determined that the said actions of the contracting authority did not comply with the legal requirements for initiating a negotiated procedure under Article 36, paragraph 1, item 3 of the PPL".

ARTICLE 236 PARAGRAPH 1 ITEM 4) OF THE PPL *- NON-DETERMINATION OF DEADLINES FOR SUBMISSION OF BIDS OR APPLICATIONS IN ACCORDANCE WITH THIS LAW (ART. 52-56 AND ART. 58, 60 AND 63)*

The Public Procurement Law sets minimum deadlines for the submission of bids or applications that the contracting authority must apply when conducting public procurement procedures. Applications are submitted in the first stage of two-stage proceedings, such as, a restrictive procedure. Article 53, paragraph 1 of the PPL/2019 stipulates that a restrictive procedure is a procedure that is conducted in two stages in which all interested economic operators can submit an application in the first stage, and only candidates whose qualifications have

been recognized can be invited to submit a bid in the second stage. Hence, the application is not a bid, but it requires the recognition of a qualification in the first stage, so that those who have been recognized a qualification can submit bids in the second stage (with prices, data and evidence of what they offer). In addition to the restrictive procedure, some other procedures are two-stage, such as competitive negotiated procedure, competitive dialogue and innovation partnership.

Articles referring to this misdemeanor (Art. 52 -56 and Art. 58, 60 and 63) are, in fact, articles in which minimum deadlines for submission of bids or applications are defined, with the determination of situations in which it is possible to shorten those deadlines. It should, of course, be taken into account when determining the existence of this misdemeanor, i.e. it should be determined whether there were circumstances for shortening the minimum deadlines (the PPL/2019 prescribes that possibility).

We will present the manner of determining deadlines and, if possible, shortenings by the rules provided in Article 52 of the PPL/2019 for the open procedure. Thus, paragraph 3 of that article determines the minimum deadlines for submission of bids depending on the estimated value of the procurement, as well as the subject of public procurement. Primarily, it should be emphasized that all these deadlines are calculated from the day of sending the public call for publication on the Public Procurement Portal (which will be done electronically by the contracting authority, via the Portal itself), and not from the day of publishing that call on the Portal. Item 1) sets a deadline of at least 35 days for public procurement whose estimated value equals or exceeds the amount of European thresholds, while item 2) provides a minimum deadline of 25 days for public procurement whose estimated value is less than the amount of European thresholds. Items 3) and 4) provide for the possibility of additional shortening of the deadline depending on the combination of the value of the procurement and the type of the subject, so that it is 15 days for the procurement of works whose estimated value is less than 30,000,000 RSD, or 10 days for the procurement goods and services whose estimated value is less than 10,000,000 RSD.

Regarding the sending of a public call for its posting on the Public Procurement Portal (as one of the advertisements published by the contracting authority), from what moment, as stated, the deadline for submission of bids begins, we emphasize that pursuant to Article 105, paragraph 7 of the Public Procurement Law, the Public Procurement Office issued the Instruction on the

manner of sending and publishing public procurement notices ("Official Gazette of the RS", No. 93 of 1 July 2020). All public procurement notices are published via the Public Procurement Portal. The Public Procurement Portal enables contracting authorities to electronically prepare and send for publication public procurement notices on standard templates[7]. Electronic preparation of public procurement notices implies data entry via an application on the Public Procurement Portal. Contracting authorities enter the required data in the standard templates for publishing public procurement notices, in the fields provided for that purpose and which offer a choice between the offered options or require the entry of information. After entering the data required for preparing the notice, the contracting authority via the Public Procurement Portal creates a public procurement notice on a standard template and sends it for publication on the Public Procurement Portal. The public procurement notice shall be published on the Public Procurement Portal on the day following the day of sending the notice. Irrespective of the day of preparing the public procurement notice, the contracting authority may choose the day of sending the notice for publication, which may be the same or the day following the one when the notice was prepared. Thus, the contracting authority, in fact, chooses when the deadline for submitting bids will begin to run. The day of preparing, the day of sending and the day of publishing the public procurement notice can be a working day or a non-working day.

Paragraphs 4, 5 and 6 of Article 52 provide for additional possibilities for shortening the deadlines referred to in the mentioned items 1) and 2) of paragraph 3. It is determined that in the case of prior publication of two notices – prior information notice or periodic indicative notice, the contracting authority may shorten the minimum deadlines referred to in items 1) and 2) to (we emphasize that it is "to" and not "for") 15 days, subject to conditions referred to in Article 107, paragraph 6 and Article 108, paragraph 14 of the Law. The provisions of Articles 107 and 108 state what these two notices must contain, and when they must be published in relation to the date of sending the public call for publication, so that the contracting authority can shorten the stated deadlines to 15 days. Also, the contracting authority can shorten the mentioned two deadlines by (and here we emphasize that it is "by" and not "to") an additional 5 days, when bids can be submitted electronically. Finally, in

[7] More information about the publication of public procurement notices is stated in the part of this Manual in which the act of committing the misdemeanor referred to in Art. 236, paragraph 1, item 8) of the PPL - Non-publication of notices referred to in Article 105, paragraph 1, item 6), 8) and 11) of the PPL.

addition to the stated reasons, another reason for shortening the mentioned deadlines is stated, so it was determined that the contracting authority may set a shorter deadline, but not shorter than 15 days due to justified urgency, for which the contracting authority has valid evidence. The question is what will be considered "justified urgency" in this regard, and what will be accepted as "valid evidence". It is certainly up to the competent authorities to take a stand concerning this provision, especially bearing in mind the possibility of its abuse in the form of unjustified significant shortening of the deadline for submission of bids (from 35 or 25 to 15 days). Therefore, this exception to the statutory minimum deadlines must be interpreted restrictively.

Unlike the stated situations in which it is possible to shorten the deadlines for submitting bids, paragraph 7 of Article 52 stipulates a situation in which the deadlines referred to in paragraph 3 of that Article must be extended. This is the case referred to in Article 45, paragraph 6, which stipulates that if free, unrestricted and unimpeded direct access to the tender documentation cannot be provided by electronic means (on the Public Procurement Portal) due to specific reasons, the contracting authority indicates in the public call the manner in which the tender documentation can be obtained, i.e. the measures required for the purpose of protection of confidential data. In that case the deadlines referred to in paragraph 3 of Article 52 shall be extended by 5 days, except in emergency situations referred to in paragraph 6 of that Article, when that is not possible (due to justified urgency, for which the contracting authority has valid evidence).

ARTICLE 236 PARAGRAPH 1 ITEM 5) OF THE PPL *- NON-PUBLICATION OF THE PUBLIC PROCUREMENT PLAN (ART. 88)*

Article 88 of the PPL/2019 stipulates that the contracting authority is obliged to adopt an annual public procurement plan that contains the following information:

1) subject of public procurement and CPV code;

2) estimated value of public procurement;

3) type of public procurement procedure;

4) approximate time of initiating the procedure;

5) information that the contracting authority conducts the procurement through the centralized public procurement body (if that is the case).

Also, that Article stipulates that the contracting authority publishes the public procurement plan and all its subsequent amendments or supplements on the Public Procurement Portal and on its website within ten days from the date of adoption. In practice, the contracting authority should not conduct a public procurement procedure if the procurement is not provided for in the published public procurement plan or in amendments to that plan. However, in exceptional cases, when the public procurement cannot be planned in advance or due to urgency, the contracting authority may initiate a public procurement procedure even if the procurement is not provided for in the public procurement plan (Article 88, paragraph 7). This exception must be interpreted restrictively.

Therefore, we believe that the act of committing this misdemeanor is not comprised solely of the non-publication of the public procurement plan, but also of the non-publication of all its amendments. Paragraph 4 of Article 88 stipulates what is considered to be an amendment to the public procurement plan, namely: planning of a new public procurement (which was not planned by then), changing the subject of public procurement and increasing the estimated value of public procurement by more than 10%.

On the other hand, we believe that even if the published public procurement plan does not contain all mandatory elements (which have already been mentioned), the misdemeanor is committed by the contracting authority. In that sense, it is important to point out that the contracting authority is not obliged to publish the estimated value of the public procurement, and the data from the public procurement plan constituting a business secret in terms of the law governing the protection of business secrets, or classified information in terms of the law governing the classified information (paragraph 5 of Article 88).

In anticipation of adequate examples for this misdemeanor under the PPL/2019, we will present one example that occurred during the period of application of the PPL/2012, which refers to the situation that represents the substance of this misdemeanor. Thus, the decision of the Republic Commission no. 4-00-1183/2016 of 18.10.2016, states the following:

"Considering the established irregularities committed by the contracting authority in the subject procedure, i.e. that the public procurement in question was not originally foreseen by the Public Procurement Plan of the contracting authority for 2016 within the meaning of Article 51, paragraph 1 of the PPL (which the contracting authority justifies by reasoning that it did not anticipate it because it was not aware that it would have financial resources for implementation), and then

after obtaining the funds it did not amend the Public Procurement Plan for 2016, but by the decision to initiate public procurement procedure number 928 of 20 July 2016 it initiated the procedure in question, and the subject public procurement was not entered in the Public Procurement Plan of the contracting authority for 2016 by way of its amendment, the annulment of the subject procedure as a whole is, in the opinion of this body, the only way to eliminate irregularities."

ARTICLE 236 PARAGRAPH 1 ITEM 6) OF THE PPL *– FAILURE TO ACT IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 90 OF THIS LAW*

This misdemeanor concerns violation of the integrity of the procedure protected by the provisions of Article 90 of the PPL/2019. The provisions stipulate that if the bidder, candidate or an affiliated entity in terms of the law governing the position of economic operators and the law imposing corporate income tax, has been in any way involved in the preparation of the procurement procedure, the contracting authority is to take appropriate measures to ensure that the participation of that bidder or candidate does not distort competition. These measures include communication to other economic operators of relevant information exchanged or incurred in the context of the participation of bidders or candidates in the preparation of the procurement procedure, and the determination of appropriate deadlines for the submission of bids.

Also, Article 90 stipulates that a bidder or candidate may be excluded from the public procurement procedure, if there is no other way to ensure compliance with the obligation to observe the principles of ensuring competition and equality of economic operators, and that before exclusion the contracting authority is obliged to enable the bidder or candidate to prove that their participation in the preparation of the procurement procedure cannot distort competition. In this regard, Article 112, paragraph 1, item 4) of the PPL/2019 stipulates that the contracting authority may provide in the procurement documentation that it will exclude the economic operator from the public procurement procedure at any time if it determines that there is distortion of competition due to previous participation of the economic operator in the preparation of the procurement procedure, within the meaning of Article 90 of the Law, which cannot be remedied by other measures. Therefore, it is an optional ground for exclusion which the contracting authority may or may not apply. In case it will be applied, then it must be provided for in the procurement documentation.

Violation of any of the stated obligations of the contracting authority, prescribed by Article 90, would be an act of this misdemeanor. The obligations are, on the one hand, to take appropriate measures to ensure that the participation of the person involved in the preparation of the public procurement procedure does not distort competition, and on the other hand, for the contracting authority to enable such person, before his/her possible exclusion, to prove that his/her participation in the preparation of the procurement procedure cannot distort competition.

ARTICLE 236 PARAGRAPH 1 ITEM 7) OF THE PPL *- NON-PUBLICATION OF TENDER DOCUMENTATION IN ACCORDANCE WITH THE PROVISIONS OF THIS LAW (ARTICLE 95)*

According to the provisions of Article 2, paragraph 1, item 11) of the PPL/2019 Tender documentation is documentation that contains technical specifications, contract conditions, templates of documents to be supplied by economic operators, information on prescribed obligations and other documentation and data relevant for the preparation and submission of applications and bids. The content of the tender documentation is regulated in more detail by a bylaw – Rulebook on the Content of the Tender Documentation in public procurement procedures ("Official Gazette of the RS", no. 21/21), issued by the Public Procurement Office.

This misdemeanor refers to the provisions of Article 95 of the PPL/2019, which stipulates that the contracting authority is obliged to send the tender documentation for publication on the Public Procurement Portal[8], simultaneously with sending for publication the public call, the call for submission of applications or the call for submission of bids or negotiations in the qualification system. However, this Article also stipulates that in case the tender documentation cannot be published via electronic means on the Public Procurement Portal, for example in the case of procurement for defense and security purposes (Article 45, paragraph 3, item 6) of the PPL/2019), the contracting authorities shall be obliged to state in the public call or in the call for submission of applications or the call for submission of bids or negotiations in the qualification system that the tender documentation will be sent by other means than the electronic

[8] More information about the publication of public procurement notices is stated in the part of this Manual in which the act of committing the misdemeanor referred to in Art. 236, paragraph 1, item 8) of the PPL - Non-publication of notices referred to in Article 105, paragraph 1, item 6), 8) and 11) of the PPL.

ones. On the other hand, if the tender documentation contains confidential information in terms of Article 45, paragraph 5 of the PPL/2019, the contracting authority in the public call or in the call for submission of applications or the call for submission of bids or negotiation in the qualification system, specifies measures aimed at protecting confidential information which are, then, not published on the Public Procurement Portal (parts of tender documentation containing them), but are otherwise delivered to potential bidders who have undertaken to keep them confidential. For example, if a public procurement procedure is conducted on the basis of technical specifications that represent someone's intellectual property or state secret, and are not directly related to defense and security (for example, works in the vault of the National Bank of Serbia), the contracting authority will first require the bidders to sign a special statement (or agreement) on the storage of confidential data, and then each of the bidders who signed such a document will be personally delivered the confidential parts of the tender documentation without publishing those parts on the Public Procurement Portal.

According to the Instructions for the Use of the Public Procurement Portal ("Official Gazette of the RS", No. 93 of 1 July 2020), jointly adopted by the Public Procurement Office and the Office for IT and eGovernment, the tender documentation prepared by the contracting authority and published on the Portal consists of several parts that together form the tender documentation. When preparing the public procurement notice, the Portal guides the contracting authority to enter in certain order data on the public procurement procedure, based on which certain templates and parts of the tender documentation are formed, and other parts that are not formed automatically, the contracting authority independently uploads to the Portal (uploads prepared documents from its computer). The documents of the tender documentation that the contracting authority forms on the Portal and uploads independently on the Portal, become available on the Portal upon publishing a public call and can be downloaded from the Portal. Tender documentation can be downloaded from the Portal only by registered users of the Portal. The contracting authority places on the Portal documentation whose content and form are correct and accurate, and publishes data whose content must be identical in both the tender documentation and the public call.

In connection with the above, it should be borne in mind that in the negotiated procedure without prior publication of a public call, the tender documentation will not be published on the Public Procurement Portal. Namely,

in accordance with the provisions of Article 62 of the PPL/2019, this procedure is carried out by the contracting authority first publishing a notice on the Public Procurement Portal on the implementation of this procedure, which contains an explanation of the grounds for its application, and then in writing sending a call to negotiate to one or, if possible, a number of economic operators, and with that call it delivers the tender documentation to them (it does not publish it on the Public Procurement Portal).

ARTICLE 236 PARAGRAPH 1 ITEM 8) OF THE PPL *- NON-PUBLICATION OF THE NOTICE REFERRED TO IN ARTICLE 105 PARAGRAPH 1 ITEMS 6), 8) AND 11) OF THE LAW*

Public procurement notices are prescribed by Article 105 of the PPL/2019. These notices are published via the Public Procurement Portal on standard templates, the content of which is determined by a bylaw of the Public Procurement Office. It is a Rulebook on Determining the Content of Standard Templates for Publishing Public Procurement Notices through the Public Procurement Portal ("Official Gazette of the RS", No. 93/20). Hence, the Public Procurement Portal enables contracting authorities to electronically prepare and send for publication public procurement notices on standard templates. Two more bylaws are relevant for the actions taken by the contracting authority in the public procurement procedure. Those are: Instructions on the Manner of Sending and Publishing Public Procurement Notice ("Official Gazette of the RS", No. 93/20), and the Instruction for the Use of the Public Procurement Portal ("Official Gazette of the RS", No. 93/20).

Electronic preparation of public procurement notices implies data entry via an application on the Public Procurement Portal. Contracting authorities shall enter the required data in the standard templates for publishing public procurement notices, in the fields provided for that purpose, which offer a choice between the offered options or require the entry of information. The contracting authority is obliged to enter accurate and true data.

After entering the data required for preparing the notice, the contracting authority via the Public Procurement Portal creates a public procurement notice on a standard template (automatically created by the Portal based on the entered data) and sends it for publication on the Public Procurement Portal. Namely, the automatically generated notice (created on the basis of the entered data) is sent by the contracting authority for publication by clicking on the "Finish" option,

which is subsequently performed automatically by the Portal.

The public procurement notice is published automatically on the Public Procurement Portal on the day following the day of sending the notice. Irrespective of the day of preparing the public procurement notice, the contracting authority may choose the day of sending the notice for publication, which may be the same or the day following the one when the notice was prepared. The day of preparing, the day of sending and the day of publishing the public procurement notice can be a working or a non-working day.

Paragraph 1 of the mentioned Article 105 of the PPL/2019 envisages 14 types of notices, however, the specific misdemeanor refers to the non-publication of only 3 notices, namely:

- notice on contract award, suspension of the procedure or annulment of the procedure;
- notice on contract amendment;
- notice of the results of the design competition.

The contract award notice is published in case of positive termination of the public procurement procedure - if a decision on contract award has been made, and also if a public procurement contract has been concluded after that. Article 109, paragraph 1 of the PPL/2019 stipulates that the contracting authority is obliged to send the contract award notice for publication within 30 days from the day of concluding the public procurement contract or framework agreement. However, for individual contracts concluded on the basis of a framework agreement and a dynamic procurement system, paragraph 2 of that Article stipulates that the contracting authority is obliged to publish a quarterly summary notice on the award of contracts concluded on that basis, within 30 days of the date of the expiry of the quarter in which the contracts were concluded.

Notice on suspension of the procedure is published in case of negative termination of the public procurement procedure - if the contracting authority makes a decision on suspension of the procedure referred to in Article 147 of the PPL/2019. That Article provides for 8 reasons for suspension of the procedure which are the basis for making such a decision by the contracting authority. On the other hand, the **notice on annulment of the procedure** is published in case of annulment of the public procurement procedure within the procedure for protection of rights. Article 109, paragraph 4 of the PPL/2019 stipulates that

in case of suspension or annulment of the public procurement procedure, the contracting authority is obliged to publish that information in the contract award notice template within 30 days of the day the decision on suspension or annulment of the public procurement procedure becomes final.

Notice on contract amendment is published on the basis of the provision of Article 155, paragraph 2 of the PPL/2019. This provision stipulates that in the event of an amendment to the contract referred to in Art. 157 and 158 of the Law, the contracting authority is obliged to send the notice on contract amendment for publication on the Public Procurement Portal within ten days from the day of the contract amendment. These articles provide for two grounds for amending the public procurement contract, for which the above notice is only published, if applied (it is not published for other grounds for amendment), namely:

- amendments in terms of additional goods, services or works;
- amendments due to unforeseen circumstances.

Notice of the results of the design competition is published on the basis of Article 77, paragraph 17 of the PPL/2019. It is interesting that this or any other provision of the law does not provide a deadline for publishing that notice. Article 2, paragraph 1, item 17) of the PPL/2019 stipulates that the design competition is a procedure that enables the contracting authority to obtain a plan or design most often in the field of urban or spatial planning, architecture, engineering or informatics, with the selection made by a jury, with or without an award ceremony.

We believe that the contracting authorities are obliged to strictly respect the stated deadlines for publishing specific notices, i.e. that the rule referred to in Article 85, paragraph 7 of the Public Procurement Law does not apply to them. The rule stipulates that if the last day of the deadline falls on a public holiday, Saturday or Sunday, the deadline ends upon the expiry of the first following working day. Namely, we are of the opinion that this rule can be applied only in relation to the actions taken by the participants in the public procurement procedure (economic operators, bidders or candidates), but not to the actions taken by the contracting authorities in that procedure.

ARTICLE 236 PARAGRAPH 1 ITEM 9) OF THE PPL *– CONCLUSION OF PUBLIC PROCUREMENT CONTRACT WITH THE BIDDER WITH THE GROUNDS FOR EXCLUSION REFERRED TO IN ARTICLE 111 PARAGRAPH 1 ITEMS 1) AND 2) OF THIS LAW, AND THERE ARE NO GROUNDS FOR APPLICATION OF THE PROVISION OF ARTICLE 111 PARAGRAPH 3 AND ARTICLE 113 OF THIS LAW*

Criteria for qualitative selection of an economic operator are, in essence, conditions for participation of bidders in the public procurement procedure (as they were called in the previous PPL/2012). Therefore, the bidders must prove that there are no reasons on their part for which they must be excluded from the public procurement procedure, and that they are able to execute a specific public procurement contract, so that their bid can be considered.

Criteria for qualitative selection of an economic operator are:

1. Grounds for exclusion, sub- divided into:

   1) mandatory bases;

   2) optional bases.

2 Selection criteria, which can be:

   1) compliance with conditions for performing professional activity;

   2) financial and economic capacity;

   3) technical and professional capacity.

The terms mandatory and optional grounds for exclusion are not the terms used in the PPL/2019, but can be used colloquially to present the difference between the two groups of grounds. Thus, the first group can be called mandatory bases, because the contracting authority is obliged to request them from economic operators, which will exclude them from the public procurement procedure if it is proven that some of these bases exist for them. The second group can be called optional, because the contracting authority is not obliged to request them, but if it requests them it will also be obliged to exclude economic operators from the public procurement procedure if it is proven that some of these grounds exist for them.

Among the mandatory grounds, there are 5 grounds for exclusion presented in Article 111, paragraph 1 of the PPL/2019, and the specific misdemeanor refers to the first two grounds for exclusion from that provision. Namely, this

misdemeanor is committed by the contracting authority that concludes a public procurement contract with the bidder when there are these two grounds for exclusion. Therefore, firstly, the public procurement contract must be concluded, and secondly, it must be determined whether on the side of the selected bidder (with whom the contracting authority concluded the contract) there are any of the following two grounds for exclusion:

1) Conviction for certain criminal offenses

This basis applies both to the economic operator itself and to its legal representative. It is relevant whether the economic operator or its legal representative have been convicted by a final judgment of certain criminal offenses in a certain period. Criminal offenses are specified individually in this law (unlike the PPL/2012, which, for example, generally listed criminal offenses against the economy).

The period in which there must be no conviction is five years prior to the day of expiry of the deadline for submission of bids, i.e. applications, unless a final judgment sets another period for exclusion from participation in the public procurement procedure. Therefore, it is possible for someone to be convicted by a final judgment 6 years prior to the deadline for submission of bids, but that there are still grounds for the exclusion at the time for submission of bids because the measure of exclusion from participation in the public procurement procedure is still in force.

2) Non-payment of due taxes and contributions

The economic operator is obliged to prove that it has settled the due taxes and contributions for mandatory social insurance so that its bid would not be excluded. Unlike the PPL/2012, the PPL/2019 provides for the possibility for an economic operator to prove that a binding agreement or decision, in accordance with a specific regulation, authorizes the postponement of debt payment, including all accrued interest and fines, in order to prevent itself from being excluded due to unpaid taxes and contributions for mandatory social insurance. A specific regulation governing the deferral of payment of due taxes is the Law on Tax Procedure and Tax Administration[9]. In that sense, the provisions of Articles 73, 74 and 76 of that law are relevant.

[9] Law on Tax Procedure and Tax Administration ("Official Gazette of the RS", No. 80/2002, 84/2002 - corr., 23/2003 - corr., 70/2003, 55/2004, 61/2005, 85/2005 - other law, 62/2006 - contracting authority, 63/2006 - corr. of other law, 61/2007, 20/2009, 72/2009 - other law, 53/2010, 101/2011, 2/2012 - corr., 93/2012, 47/2013, 108/2013, 68/2014, 105/2014, 91/2015 - authentic interpretation, 112/2015, 15 / 2016, 108/2016, 30/2018, 95/2018, 86/2019 and 144/20).

The misdemeanor also states ***"...and there are no grounds for the application of the provisions of Article 111, paragraph 3 and Article 113 of this Law"***. It is obvious that there are exceptions to the obligation of the contracting authority to reject a bid, even though there are two grounds for exclusion. In certain situations, the contracting authority "may pardon them", i.e. it may decide that it is not necessary to exclude a bidder, even though there are grounds for exclusion. These situations are provided in Article 111, paragraph 3 and Article 113 of the PPL/2019. Therefore, in such situations, this misdemeanor would not even exist, if the contracting authority decided not to exclude the bidder. Thus, **Article 111, paragraph 3** stipulates that the contracting authority may desist from the exclusion of an economic operator due to overriding reasons related to the public interest, such as public health or environmental protection. We still do not know how this provision will be interpreted, but until the first view of the competent authorities in this regard are obtained, we can refer to the preamble of the European Union Public Procurement Directive 2014/24, which lists one possible example of such an exception:

"(100) Public contracts should not be awarded to economic operators that have participated in a criminal organization or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering or terrorist financing. The non-payment of taxes or social security contributions should also lead to mandatory exclusion at the level of the Union. Member States should, however, be able to provide for a derogation from those mandatory exclusions in exceptional situations where overriding requirements in the general interest make a contract award indispensable. This might, for example, be the case where urgently needed vaccines or emergency equipment can only be purchased from an economic operator to whom one of the mandatory grounds for exclusion otherwise applies."

On the other hand, **Article 113** provides for another exception to the rule that the contracting authority excludes an economic operator from the public procurement procedure if there are grounds for exclusion. This exception refers to three mandatory grounds for exclusion - conviction, then, violation of obligations in the field of environmental protection, social and labor law, and the existence of conflicts of interest, as well as all non-mandatory grounds for exclusion (but only conviction is relevant for this misdemeanor). In order for this exemption to apply, it is necessary for the economic operator to provide the contracting authority with evidence that it has taken measures to prove its reliability, regardless of the existence of the mentioned grounds for exclusion.

Paragraph 1 specifies what should be proven by the economic operator. In this sense, three groups of facts that must be proven are listed, so that all three must exist in a particular case. Namely, the bidder must prove:

1) that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offense and
2) that it has fully clarified the facts and circumstances by actively cooperating with the investigating authorities and
3) that it has taken specific technical, organizational and personnel measures that are appropriate to prevent the commission of criminal offenses.

We consider that the stated exceptions to the application of the grounds for exclusion must be interpreted restrictively.

ARTICLE 236 PARAGRAPH 1 ITEM 10) OF THE PPL *- NON-SUBMISSION OF THE PROPOSAL TO THE PUBLIC PROCUREMENT OFFICE TO INSTIGATE MISDEMEANOR PROCEEDINGS REFERRED TO IN ARTICLE 131, PARAGRAPH 6 OF THIS LAW*

Article 131 stipulates that an economic operator that intends to entrust the execution of a part of the contract to a subcontractor may state in the bid that the contracting authority will directly pay the subcontractor for the part of the contract, if the subcontractor requests that the due receivables be paid directly. That, then, must be stated in the public procurement contract. The contracting authority is thus obliged to directly pay the due receivables to the subcontractor for the part of the contract that it executed.

However, if the bid (and the contract) does not provide for direct payment of due receivables to the subcontractor for the part of the contract executed, the contracting authority, after payment to the economic operator (bidder) with which it concluded the contract, requests the bidder to submit proof and a statement from the subcontractor confirming that its claims have been paid. Precisely in this regard, Art. 131, paragraph 6 of the PPL/2019, which is referred to in this misdemeanor, stipulates that if the economic operator with which it concluded the contract within the specified period does not submit proof and statement of the subcontractor, the contracting authority is obliged to submit to the Public Procurement Office a proposal to instigate misdemeanor proceedings. If it fails to do so, the contracting authority will be the one committing this

misdemeanor. However, it is not stated within what period the contracting authority is obliged to submit the said proposal for instigating misdemeanor proceedings to the Public Procurement Office.

ARTICLE 236 PARAGRAPH 1 ITEM 11) OF THE PPL *- NON-PUBLICATION OR NON-DELIVERY OF THE DECISION IN ACCORDANCE WITH THE PROVISIONS OF THIS LAW (ARTICLES 146-148)*

The decisions this misdemeanor refers to are the contract award decision, the decision to suspend the proceedings and the decision to exclude the candidate.

The contract award decision referred to in Article 146 of the PPL/2019 positively ends the public procurement procedure and the selection of the bidder with whom the contracting authority will conclude the public procurement contract is performed (the contract is awarded). Paragraphs 3, 4 and 5 of Article 146 stipulate that the contract award decision is made by the contracting authority within 30 days from the expiry of the deadline for submission of bids, unless it has specified a longer deadline in the tender documentation, then that decision must be reasoned and must contain, in particular, data from the report on the public procurement procedure and instructions on the legal remedy, and that the contracting authority is obliged to publish the contract award decision on the Public Procurement Portal within three days from the day of its adoption.

Attention should also be paid to the provision of Article 146, paragraph 6 of the PPL/2019 which allows not to publish certain data from the decision on contract award if their publication would be contrary to the provisions of that law or otherwise contrary to the general interest, if it would prejudice legitimate business interests of a particular economic operator or might prejudice competition on the market.

Article 146, paragraph 7 of the PPL/2019 stipulates that the provisions of that Article shall be accordingly applied to the decision on concluding a framework agreement. The framework agreement is regulated by Art. 66 and 67 of the PPL/2019 and does not constitute a special public procurement procedure, but a technique used within the prescribed procedures. Practically, the contracting authority, instead of a public procurement contract, concludes a framework agreement, and subsequently, on the basis of a framework agreement, individual contracts when the need for the execution of a specific

procurement arises. The framework agreement as a method of procurement is a specific practical solution for frequent procurement of goods, services and works, i.e. when the contracting authority in a certain period has the need to conclude several contracts with identical subject of procurement. In that case, the contracting authority will, using the possibility of concluding a framework agreement, conduct a public procurement procedure, in which it will select a bidder, one or more, with whom it will conclude a framework agreement, and later, when there is a specific need for goods, services or works that are the subject of a concluded framework agreement, the contracting authority will conclude a public procurement contract in the manner provided for in the framework agreement.[10]

The decision to suspend the procedure referred to in Article 147 of the PPL/2019 ends negatively the public procurement procedure, i.e. that decision concludes that the procedure failed, in the sense that the bidder to whom the public procurement contract is to be awarded has not been selected. The reasons for making such a decision are provided in paragraph 1 of the said Article. For example, one of those reasons is when no bid has been submitted. Similar to the contract award decision, paragraphs 3 and 4 of Article 147 stipulate that the decision must be reasoned and must contain, in particular, data from the report on the public procurement procedure and instructions on the legal remedy, and that the contracting authority is obliged to publish the decision to suspend the procedure on the Public Procurement Portal within three days from the day of its adoption. Moreover, as per this decision, Article 147 stipulates the possibility not to publish certain data from the decision to suspend the procedure (for example, if their publication would be contrary to the general interest, etc.).

Decision on exclusion of candidates referred to in Article 148 of the PPL/2019 is adopted in the first stage of two-stage procedures. Two-stage procedures are public procurement procedures in which in the first stage the application is submitted by all interested economic operators and in that stage it is determined whether they meet the criteria for qualitative selection of the economic operator specified in the tender documentation. Hence only those for which the qualification is recognized may be invited to submit their bids, initial bids or to participate in a dialogue (depending on the type of procedure) in the second stage. Thus, paragraph 1 of Article 148 stipulates that this decision is adopted in a restrictive procedure, a competitive procedure with negotiation, a

[10] Public Procurement Directorate, Instruction on the Manner of Concluding Framework Agreements, 2016, *http://www.ujn.gov.rs/dokumenti/smernice-i-uputstva/*

competitive dialogue, a negotiated procedure with a public call and innovation partnership. The contracting authority is obliged to provide to the economic operators (candidates) whose qualification have not been recognized because there are grounds for their exclusion or who do not meet the criteria for qualitative selection of the economic operator, or those whose qualifications have been recognized and still will not be invited to submit a bid because they do not meet the criteria or rules set to reduce the number of eligible candidates, in accordance with Article 64 of the PPL, the decision on exclusion of candidates, taking care not to disclose information about other candidates. Therefore, this is a decision which, unlike the previous two, is not published on the Public Procurement Portal, but is delivered to candidates who are excluded, and this is not specified in Article 148, but in the provisions governing the procedures referred to in the said paragraph 1 of Article 148. These are the provisions of Article 53, paragraph 5, Article 55 paragraphs 8 and 9, Article 58 paragraphs 3 and 4, Article 60 paragraphs 9 and 10, Article 63 paragraphs 6 and 7 of the of the PPL/2019. These provisions do not specify the deadline for delivering that decision. Pursuant to the provisions of Article 148 of the PPL/2019, that decision also must be reasoned and contain the reasons why qualification was not recognized for the candidate, i.e. the reasons for non-compliance with the criteria or rules set for reducing the number of eligible candidates, as well as instructions on legal remedies.

We believe that the contracting authorities are obliged to strictly respect the stated deadlines for publishing specific decisions, i.e. that the rule referred to in Article 85, paragraph 7 of the Public Procurement Law stipulating that if the last day of the deadline falls on a public holiday, Saturday or Sunday, the deadline ends upon the expiry of the first following working day, does not apply to them. Namely, we are of the opinion that this rule can be applied only in relation to the actions taken by the participants in the public procurement procedure (economic operators, bidders or candidates), but not to the actions taken by the contracting authorities in that procedure.

ARTICLE 236 PARAGRAPH 1 ITEM 12) OF THE PPL *- CONCLUSION OF PUBLIC PROCUREMENT CONTRACT WITHOUT COMPLYING WITH THE REQUIREMENTS REFERRED TO IN ARTICLE 151 OF THIS LAW*

After making the decision on awarding the contract in the public procurement procedure, the conclusion of the contract between the contracting authority and the bidder to whom the contract was awarded follows, and after

that the execution of that contract. However, the contracting authority cannot conclude the contract immediately after the decision is made, but is obliged to wait for the deadline for submitting a request for protection to elapse, for the dissatisfied bidders to be able to challenge that decision. On the other hand, if a request for protection of rights has been submitted, the contract can be concluded only if the request for protection of rights has been dismissed or rejected by a final decision, or if the procedure for protection of rights has been suspended. Article 151, paragraph 1 of the PPL stipulates that the contracting authority may conclude a public procurement contract, i.e. a framework agreement, after making a contract award decision, or a decision on concluding a framework agreement and if no request for protection of rights has been filed within the deadline provided by that law, or if filed, it has been dismissed or rejected by a final decision, as well as if the procedure for the protection of rights has been suspended.

Deadlines for submitting requests for protection of rights are determined in Art. 214 and 215 of the PPL/2019, and the course and manner of deciding on the submitted request are regulated by Art. 219 – 227.

However, Article 151, paragraph 2 of the PPL/2019 envisages situations in which the contracting authority may conclude a contract immediately after the contract award decision has been made - practically not to wait for the deadline for submitting a request for protection of rights to expire. These are the situations in which the public procurement contract is concluded:

1) on the basis of a framework agreement;

2) in case of applying the dynamic procurement system;

3) if only one acceptable bid has been submitted;

4) in the case of applying the negotiated procedure without prior publication of a public call referred to in Article 61, paragraph 1, item 2) of the Law.

Regarding the mentioned item 1), we point out that Article 66, paragraph 1 of the PPL/2019 stipulates that a framework agreement is an agreement between one or more contracting authorities and one or more bidders, which determines the conditions and manner of awarding the contract during the period of validity of the framework agreement, especially in terms of price and, where appropriate, quantity. Therefore, in these situations, the contracting authority, after conducting an expert evaluation of bids, concludes a framework

agreement, instead of a public procurement contract, and then, during the validity of the framework agreement (cannot last longer than four years, except in specifically justified cases), concludes individual contracts when the need for a particular procurement arises. Actually, when concluding these individual contracts, the contracting authority is not obliged to wait for the expiration of the deadline for submitting the request for protection of rights after the decision on awarding the contract has been made.

The dynamic procurement system referred to in item 2) is regulated by Article 68 of the PPL/2019. It is a system that enables the contracting authority to award the contract by electronic means during the entire period of its duration. In the dynamic procurement system, any interested economic operator may submit an application during the entire period of its duration. When economic operators submit an application for admission to the dynamic procurement system, they become candidates. After evaluating their applications in accordance with the criteria for qualitative selection of the economic operator, the contracting authority makes a decision on the admission of the economic operator to the dynamic procurement system. After making and delivering the decision on the results of evaluation of applications, the contracting authority may start with individual procurements within the dynamic procurement system. Its obligation is to simultaneously, by electronic means, invite all selected candidates involved in the dynamic procurement system, in accordance with Article 65 paragraphs 2 and 3 of the PPL/2019, to submit a bid for each individual procurement within the system. The public procurement contract within the dynamic procurement system are awarded to the bidder who submitted the most favorable bid on the basis of the contract award criteria. Due to such a system, in which all interested economic operators can have all relevant information from the beginning in a transparent manner, it is not necessary to wait for the deadline for submitting requests for protection of rights after the decision on awarding the contract has been made.

With regards to the mentioned item 3) we can only state that when one bidder submits a bid and its bid is acceptable (meets all the requirements of the contracting authority) it is logical that the bidder will not initiate procedure for protection of its rights because it will be awarded a contract, therefore it is not necessary to wait for the deadline for submitting the request for protection of rights to pass in order for the public procurement contract to be concluded.

The mentioned item 4) refers to the case of applying the negotiated procedure without prior publication of a public call referred to in Article

61, paragraph 1, item 2) of the PPL/2019. That provision stipulates that the contracting authority may conduct a negotiated procedure without publishing a public call to the extent necessary, if due to extreme urgency caused by events which the contracting authority could not have foreseen, it is not possible to act within the deadlines set for open procedure or restrictive procedure or competitive negotiated procedure or negotiated procedure with publication of public call, provided that the circumstances invoked by the contracting authority to justify extreme urgency must not be caused by its actions. Hence, this is a procedure that is conducted in circumstances that do not tolerate delay, so that the public procurement contract must be concluded immediately after making the contract award decision, but the conditions for the application of this type of procedure must be interpreted restrictively.

ARTICLE 236 PARAGRAPH 1 ITEM 13) PPL *- FAILURE TO PROCEED IN EXECUTION OF PUBLIC PROCUREMENT CONTRACTS IN ACCORDANCE WITH ARTICLE 154 PARAGRAPH 1 OF THIS LAW*

Article 154, paragraph 1 of the PPL/2019, which this misdemeanor refers to, stipulates that the public procurement contract is to be executed in accordance with the conditions specified in the procurement documents and the selected bid. Directly linked to that provision is the provision of paragraph 2 of the same Article which stipulates that the contracting authority shall be obliged to control the execution of the public procurement contract in accordance with the conditions specified in the procurement documents and the selected bid.

The phase of execution of the public procurement contract is important, because even in the situation when there was no favoring of a certain bidder in the phases of planning and conducting of the public procurement procedure, it can be done in the phase of execution of the contract, if the selected bidder is allowed: unjustified price increase, delivery of what was not offered and what is not in accordance with what was requested by the contracting authority in the tender documentation, non-compliance with the deadlines for contract execution, as well as the lack of realization of collateral for non-fulfillment of contractual obligations (bank guarantees, bills, etc.). Thus, procurement in which none of the bidders (even the competent authorities) doubted or indicated that discrimination and restriction of competition was committed when determining what the contracting authority will procure, and what will be the technical specifications and criteria for qualitative selection, can turn into a complete opposite in the phase of execution of the public procurement

contract, if on that occasion, with the support of the contracting authority, the selected bidder does not respect the offered technical specifications, offered prices and deadline, and other contractual obligations. So, in such situations, a seemingly fair competition in the final phase turns into the exact opposite - allowing one bidder to execute the contract in a way that denies the results of that competition. The choice of the most favorable bid in these situations does not make any sense, because the bid that was assessed as the most favorable for the contracting authority will be annulled when it is most needed to be respected, and that is during the execution of the public procurement contract.

Some of the irregularities that may occur at this stage and which would constitute the act of committing this misdemeanor are:

- change of the subject of procurement, so that the contracting authority allows the bidder to deliver something that is of lower quality and technical characteristics in relation to what is offered (the same applies to the provision of services or performance of works);
- change of the subject of procurement, so that the contracting authority allows the bidder to deliver something that is not even provided for in the public procurement contract;
- change of the agreed quantity of goods that will be delivered, or change of the agreed scope of works or services, in way that the contracting authority requests or allows execution in excess to what is determined by the contract;
- other changes that represent a change in the offered conditions, on the basis of which the bid was selected (such as a change in the contractual price, delivery deadline, method of payment);
- payment executed without valid accounting documentation;
- executed advance payment that has not been contracted;
- calculation and collection of interest rate for each day of delay was not effectuated;
- the bank guarantee was not activated and the contracted goods were not delivered;
- false invoices - occur with contracting authorities with weak internal financial controls, which the contractors recognize and submit incorrect or "inflated" invoices;

- invoiced goods or provided services/works are not in the signed documents or there is no issued order for the purchase of invoiced goods/services/works;
- the prices stated in the invoices, the descriptions of the stated items or the stated deadlines do not correspond to the content of the contract, nor to the internal records of the contracting authority;
- duplicate invoices or reissued invoices that have been already charged (multiple payments of the same invoice).

It is understood that some of the above irregularities do not have to be interpreted as such if they were the subject of permitted amendments to the contract in the manner prescribed by the provisions of Articles 155 - 161 of the PPL/2019. In these cases, the specific misdemeanors will not be committed.

ARTICLE 236, PARAGRAPH 1, ITEM 14) OF THE PPL *- MODIFICATIONS TO THE CONCLUDED PUBLIC PROCUREMENT CONTRACT CONTRARY TO THE PROVISIONS OF THIS LAW (ARTICLES 155 – 161);*

Provisions of Article 155 through 161 of the PPL/2019, which this misdemeanor refers to, regulate allowed modifications to public procurement contracts. Thus, Article 155, paragraph 1 prescribes that the contracting authority may modify a public procurement contract during its term in accordance with the provisions of Articles 156 - 161 of this Law without conducting public procurement procedure. However, paragraph 2 of the same Article prescribes that only in the event of modification of contract referred to in Articles 157 and 158 of this Law, the contracting authority shall send the notice of modification of public procurement contract for publication on the Public Procurement Portal within ten days from the date of modification of contract. Hence, the contracting authority is obliged to post the contract modification notice only if these modifications concern additional goods, services or works, as prescribed under Article 157 of the PPL/2019 and in case such modifications are made due to unforeseen circumstances as prescribed under Article 158 of the PPL/2019. On the other hand, in case of modification to contract made in accordance with provisions of Articles 156, 159, 160 and 161 of the PPL/2019 (other grounds for contract modifications envisaged under the Law), contracting authority shall not publish notice of contract modification on the Public Procurement Portal.

The mere reasons for allowed modification to the public procurement contract are prescribed by the provisions of the mentioned Articles 155-161 of

the PPL/2019. We may conclude that the Law envisaged much more possibilities in terms of such modifications to contracts compared to the previous iteration of the Law. So, the PPL/2019 envisages under certain conditions modifications to contract due to following reasons:

1) Based on contracted provisions (Article 156)

A public procurement contract may be modified, irrelevant of the values of modification, provided that modifications were envisaged under the tender documentation and public procurement contract in a clear and unambiguous way, which may also cover provisions of price or option modifications. However, contractual provisions cannot envisage modifications that would alter nature of the contract. Adjustment of price to the previously clearly defined parameters in the public procurement contract shall not constitute price modification.

2) Additional supplies, services or works (Article 157)

A public procurement contract may be modified for the purpose of procuring additional supplies, services or works that have become necessary and that were not included in the initial public procurement contract, where a change of the economic operator with whom the contract has been concluded:

1) cannot be made for economic or technical reasons, such as requirements of compatibility with existing equipment, services or works procured under the initial procurement and

2) would cause significant inconvenience or substantial increase in costs for the contracting authority

It is important to underline that an increase in contract value cannot exceed 50% of the value of the initial contract (it is allowed total value of all modification, if a contract is modified on several occasions). Likewise, it is important to stress that contracted additional works do not constitute modification to public procurement contract. In accordance with the Special Trade Customs for Construction ("Official Gazette of the SFRY", no. 18/77), which are still in use, additional works in construction contracts are quantities of executed works that exceed the agreed quantities of works, and the agreed unit price is also valid for additional works, if they do not exceed 10% of the contracted quantities of works.

3) Due to unforeseen circumstances (Article 158)

A public procurement contract may be modified where all of the following conditions are fulfilled:

1) the need for modification occurred due to the circumstances which a diligent contracting authority could not have foreseen;

2) the modification does not alter the nature of the contract;

Alike the previous reason for modification, in the case of the increase of contractual value it cannot exceed 50 % of the value of the initial contract and such limitation refers to the total value of all modifications, in case such contract is modified several times.

4) Change of contracting party (Article 159)

It is possible to change a selected bidder with whom the contracting authority has concluded the public procurement contract in the case of universal or partial legal succession of that bidder, following corporate restructuring, including takeover, merger, acquisition or insolvency, with another economic operator that fulfils the initially established criteria for the qualitative selection of economic operator, provided that this does not entail substantial modifications to the contract and is not aimed at circumventing the application of the Public Procurement Law.

5) Increasing the volume of procurement (Article 160)

A public procurement contract may be modified so as to increase the volume of the procurement up to 10% of the initial value of a contract on public procurement of supplies or services, or up to 15% of the initial value of a contract on public procurement of works, and provided that the value of modification is below RSD 15,000,000.00 in the case of a contract on public procurement of supplies or services, or below RSD 50,000,000.00 in the case of a contract on public procurement of works. So, for example, in case of public procurement of goods or services with the estimated value of RSD 200 million, a contracting authority may increase a procurement volume for 9%, which amounts to RSD 18 million or around EUR 150,000. Possibilities are beyond any doubt much higher in case of public procurements of works. Moreover, such an increase should not have any special reason but for the contracting authority to simply deem that there is a need for such modification.

6) Replacing a subcontractor (Article 161)

A contracting authority may allow to a bidder:

1) to replace the subcontractor for the part of the public procurement contract which it has initially subcontracted to the subcontractor;

2) to introduce one or several new subcontractors, whose total share does not exceed 30% of the value of the public procurement contract without the value added tax, regardless of whether a part of the public procurement contract has, or has not been initially subcontracted to the subcontractor;

3) to take over the execution of the part of the public procurement contract that has been initially subcontracted to the subcontractor.

Paragraph 2 of Article 161 stipulates that, the economic operator with whom the contract has been concluded submits a request to replace subcontractor to the contracting authority together with the evidence of absence of the exclusion grounds under Article 111 of the Law concerning the new subcontractor.

ARTICLE 236, PARAGRAPH 1, ITEM 15) OF THE PPL *- FAILURE TO SUBMIT TO THE PUBLIC PROCUREMENT OFFICE WITHIN THE PRESCRIBED DEADLINE THE REQUESTED INFORMATION AND NOTICES WHICH ARE RELEVANT TO THE IMPLEMENTATION OF THE MONITORING (ARTICLE 180);*

Article 179 of the PPL/2019, prescribing activities performed by the Public Procurement Office, with item 1) stipulates that the Office monitors the application of public procurement regulations and prepares annual report on the conducted monitoring, while item 3) states that the Office files a motion to instigate misdemeanor proceedings for misdemeanors envisaged under this Law; it files a request for the protection of rights and initiates implementation of other relevant procedures before the competent authorities when, on the basis of the monitoring, it notices irregularities in the implementation of public procurement regulations

Rules concerning the monitoring are set forth under Article 180 of the PPL/2019. It is prescribed that the Public Procurement Office performs monitoring for the purpose of preventing, detecting and eliminating irregularities that might arise or have arisen in the course of the implementation of the PPL. The Law further regulates that monitoring procedure is carried out pursuant to an annual monitoring plan that is adopted by the Public Procurement Office by the end of the current year for the following year, ex officio in the event of the implementation of the negotiated procedure without invitation to bid referred to in Article 61, paragraph 1, item 1) and 2) hereof, as well as on the basis of

notification from a legal entity or natural person, state administration body, the autonomous province authority and the local self-government unit and other state authorities.

The most important for this misdemeanor is provision of Article 180, paragraph 4 of the PPL/2019 prescribing that state authorities, authorities of autonomous province and local self-government units and other state entities, contracting authorities and economic operators are obliged to submit within 15 days after the receipt of the request by the Public Procurement Office, all information and notices of importance for the monitoring.

The last paragraph of Article 180 prescribes that the Public Procurement Office is closely regulating the method of monitoring. In line with this authority, the Public Procurement Office has adopted the Rulebook on Monitoring the Application of the Public Procurement Regulations (hereinafter referred to as: the Rulebook), which was published in "Official Gazette of the RS", no. 93 of 1 July 2020 and it entered into force on the same day.

Article 2 of the Rulebook sets the list of entities subject to monitoring by the Public Procurement Office, specifically: state administration authorities, authorities of autonomous province and local self-government units, other state authorities and other contracting authorities. Thus, entities subject to monitoring are contracting authorities in accordance with the provisions of the Law.

Article 8 of the of the Rulebook prescribes that in the monitoring procedure, the Public Procurement Office may request from the entity subject to monitoring to submit all data and communications of importance for monitoring, specifically:

1) data on responsible person within the entity subject to monitoring (first and last name, personal identification number, address of residence);
2) procurement documentation;
3) public procurement contract or framework agreement, if concluded;
4) statement by entity subject to monitoring;
5) internet address where the whole or part of the documentation is available;
6) other documentation and data in connection with the entity subject to monitoring.

Within 15 days upon the receipt of such request, entity subject to monitoring submits all requested data and communications, which are submitted typically as uncertified copy, unless the request explicitly asks to submit original or certified copies or electronically, while the Office may inspect the documentation without asking the entity subject to monitoring to submit it, if electronic means of communication provide free, unrestricted and unimpeded access to the documentation or its part. The submitted original documentation is returned to the entity subject to monitoring upon the monitoring.

Following the monitoring, the Public Procurement Office prepares a report on the monitoring, which contains the following information (Article 9 of the Rulebook):

1) name, seat and identification number of the entity subject to monitoring;
2) name and surname of the responsible person of the entity subject to monitoring;
3) basis for conducting monitoring;
4) a description of the irregularities pointed out by the notifier;
5) subject of procurement and type of procurement procedure, if conducted;
6) description of actions carried out during monitoring;
7) list of documentation that is important for monitoring;
8) factual basis in case of established irregularity;
9) evidence on the basis of which decisive facts have been established;
10) legal qualification of the identified irregularity;
11) opinion on the identified irregularities or a statement that no irregularities have been identified in the course of monitoring;
12) recommendation on the manner to prevent or eliminate irregularities, if applicable;
13) other necessary data, which are important for the monitoring;
14) place and date of preparation of the report;
15) signature of the Director of the Office and the signature of the official of the Office who was in charge of the monitoring and prepared the report.

ARTICLE 236, PARAGRAPH 1, ITEM 16) OF THE PPL *- FAILURE TO REGISTER DATA ON THE VALUE AND TYPE OF PUBLIC PROCUREMENT, OR TO PUBLISH THEM WITHIN THE PRESCRIBED DEADLINE ON THE PUBLIC PROCUREMENT PORTAL, OR TO DELIVER DATA ON INDIVIDUAL PUBLIC PROCUREMENT PROCEDURE OR CONCLUDED CONTRACT TO THE PUBLIC PROCUREMENT OFFICE (ARTICLE 181);*

Article 181, paragraph 3 of the PPL/2019 prescribes that a contracting authority is obliged to record all data on the value and type of procurement conducted in accordance with application of the exemptions referred to in Articles 11-21 of the Law, for each exemption ground separately, as well as public procurements referred to under Article 27, paragraph 1 of the Law. Provisions under Articles 11-21 of the PPL/2019 refer to exemptions to the application of the Law, i.e. situations in which contracting authorities, despite procuring goods, services or works, are not obliged to apply procedures envisaged under the Public Procurement Law. On the other hand, as already mentioned in this Manual, Article 27, paragraph 1 provides for threshold values for the application of the Law. As a reminder, that provision prescribed that the Public Procurement Law provisions are not to be applied for:

1) procurement of supplies, services and conducting of design competitions, the estimated value of which is less than RSD 1,000,000.00 and for the procurement of works, the estimated value of which is less than RSD 3,000,000.00;

2) procurement of supplies, services and conducting the design competitions, the estimated value of which is less than RSD 15,000,000.00, for the purposes of diplomatic missions and diplomatic-consular representative bodies and performance of other activities of the Republic of Serbia abroad; as well as for procurement of works for those purposes the estimated value of which is less than RSD 650,000,000.00;

3) procurement of social and other specific services referred to in Article 75 of this Law, the estimated value of which is less than RSD 15,000,000.00 when procurement is carried out by a public contracting authority, or less than RSD 20,000,000.00, when the procurement is carried out by a sectoral contracting authority.

Data referred to under paragraph 3 of Article 181 of the PPL/2019 are collectively posted by a contracting authority on the Public Procurement Portal

at the latest by 31 January of the current year for the previous one, in accordance with instructions posted by the Public Procurement Office on its website.

Further on, failure to register all mentioned data or to post them on the Public Procurement Portal is deemed misdemeanor. In that sense, it is important to stress that the Public Procurement Office posted its Instructions to post data on public procurements exempt for the application of the PPL on 1 July 2020. Those Instructions set the method to cumulatively post the data on value and type of public procurements referred to in Article 11-21 of the Law, as well as public procurements referred to under Article 27 of the Law. In that regards, the Instructions state that contracting authorities, for each grounds for exemption, cumulatively post the following data:

1. grounds for exemption from the application of the PPL;
2. type of subject of public procurements (supplies, services, works);
3. total number of contracts executed;
4. total contracted value without value added tax;
5. total contracted value with value added tax.

These Instructions also mention that the template for cumulative posting of the mentioned data is an integral part of the Public Procurement Portal, and the data are published in accordance with the instruction available on the Public Procurement Portal.

ARTICLE 236, PARAGRAPH 1, ITEM 16) OF THE PPL *- FAILURE TO ACT IN ACCORDANCE WITH THE DECISION OF THE REPUBLIC COMMISSION (ARTICLE 226, PARAGRAPH 4, ITEMS 1) AND 9))*

Article 226, paragraph 4 of the PPL/2019 determines which decision the Republic Commission adopts in the procedure upon the filed request for the protection of rights. Thus, this paragraph envisages that the Republic Commission decides as follows:

1) adopts the request for protection of rights as founded in its entirety or partially annuls the public procurement procedure (if it assesses at least some of the allegations of the request for protection of rights founded or acts outside the limits of the request in accordance with paragraph 1 and 2 of that Article);
2) rejects the request for protection of rights as unfounded (if it

assesses all allegations of the request for protection of rights as unfounded);

3) dismisses the request for protection of rights, in accordance with the provisions of the PPL (for example, if the request for protection of rights is untimely or if proof of fee payment has not been submitted in accordance with the Law);

4) suspends the procedure on the basis of receipt of a written notice on withdrawal from the request for protection of rights before making a decision;

5) dismisses the appeal against the decision of the contracting authority, in accordance with the provisions of this Law (if the appeal is, for example, untimely)

6) adopts or rejects the proposal referred to in Article 216, paragraphs 2, 5 and 6 of the Law (deciding on interim measures);

7) imposes fines;

8) annuls the contract;

9) adopts the appeal as founded and annuls the decision of the contracting authority;

10) rejects the appeal as unfounded and confirms the decision of the contracting authority;

11) suspends the procedure on the basis of receipt of a written notice on withdrawal from the appeal, before making a decision;

12) dismisses a written statement on the continuation of the procedure before the Republic Commission, in accordance with the provisions of this Law;

13) decides on the costs of the procedure for protection of rights.

Paragraph 5 of Article 226 of the PPL/2019 is also important. It prescribes that the Republic Commission is obliged to provide reasoning for its decision and can order the contracting authority to take certain actions within a time frame that cannot exceed 25 days, in order to conclude the public procurement procedure in orderly and lawful way.

However, as it can be observed in the qualification of this misdemeanor, it refers to contracting authority's failure to act in accordance with only two out of

13 listed decisions of the Republic Commission; specifically decision adopting the request for protection of rights as founded in its entirety or partially annulling the public procurement procedure (item 1) and decision upholding the appeal as grounded and canceling the decision of contracting authority rejecting the request for the protection of rights due to absence of some of procedural preconditions set forth under the PPL/2019 (item 9).

In accordance with the special authorization referred to in Article 230 PPL/2019 (article to which the following misdemeanor refers), the Republic Commission may control whether the contracting authorities act in accordance with the decisions of that body, and on that basis, if it finds that they have not acted in accordance with the mentioned decisions, it submits a motion to instigate misdemeanor proceedings in accordance with authorization referred to in Article 234 of the PPL/2019.

According to the provisions of the previous PPL/2012, non-compliance with the decisions of the Republic Commission was the basis for a fine by the Republic Commission, and now it is a misdemeanor. Due to the still underdeveloped practice regarding non-submission of reports under PPL/2019, we will present one example that occurred during the validity of the previous PPL/ 2012, and it is quite reasonable to expect that such examples will still be present during the implementation of PPL/2019 and that the Republic Commission will file motions to instigate misdemeanor proceedings in those cases. Thus, the Republic Commission, in its decision number 401-00-16/2017 of 27/11/2017 states the following:

"As provision of Article 160, paragraph 1 of the PPL envisages obligation for a contracting authority to act in line with findings of the Republic Commission contained in its decision within the deadline set under that decisions, and, in accordance with Article 160, paragraph 2 of the PPL, the Republic Commission may request from a contracting authority to submit a report, documentation and statement of contracting authority's representatives about the implementation of the decision of the Republic Commission, and that a contracting authority is obliged, in line with Article 160, paragraph 3 of the PPL, to submit documentation and statements within the deadline set by the Republic Commissions. Since, based on the report submitted by a contracting authority to the Republic Commission in the specific case, it was found that the contracting authority failed to act in accordance with the Decision of the Republic Commission number 4-00-1585/2015 of 23 September 2015, since it did not continue to act in accordance with provisions of the PPL and decision on contract awarding number 6359/2 of 30 April 2015 in

accordance with provision of Article 108 of the PPL, as instructed in the Decision of the Republic Commission, but it adopted a new Decision on suspension of the procedure on 26 October 2017, the Republic Commission therefore determined that the conditions were met in the specific case to impose a fine to the contracting authority and its responsible person in accordance with Article 162, paragraph 1, item 5 of the PPL."

ARTICLE 236, PARAGRAPH 1, ITEM 17) OF THE PPL *- FAILURE TO DELIVER REPORT ON COMPLIANCE WITH THE DECISION OF THE REPUBLIC COMMISSION (ARTICLE 230)*

It has been previously mentioned that the Republic Commission may in its decision order to a contracting authority to take certain actions within a deadline that cannot exceed 25 days in order to conclude the public procurement procedure in orderly and lawful way. In that regards, Article 230 of the PPL/2019 prescribes special authority of the Republic Commission to request from a contracting authority to submit its report on the compliance with the decision of the Republic Commission within the deadline set by the Republic Commission. This misdemeanor will occur if a contracting authority fails to submit to the Republic Commission the requested report within the set deadline, and the Republic Commission is authorized to file a motion to instigate misdemeanor proceedings in accordance with provisions of Article 234 of the PPL/2019.

According to the provisions of the previous PPL/2012, failure to submit the report on compliance with the decisions of the Republic Commission was the basis for a fine by the Republic Commission, and now it is a misdemeanor. Due to the still underdeveloped practice regarding non-submission of reports under the valid PPL, we will present one example that occurred during the validity of the previous PPL/2012, and it is quite reasonable to expect that such examples will still occur during the implementation of PPL/2019 and that the Republic Commission will file motions to instigate misdemeanor proceedings in those cases. Thus, the Republic Commission, in its decision number 401-00-75/2018 of 11 December 2018, states the following:

"On 3 January 2018, the Republic Commission has, in this specific case, and in accordance with provisions of Article 160, paragraph 2 of the PPL, sent its request of 26 December 2017 to a contracting authority to submit the report on compliance with the Decision of the Republic Commission, along with documentation and statements of a contracting authority representative as a proof of the mentioned. The contracting authority received the Republic Commission request on 4 January

2018. Bearing in mind that the contracting authority failed to act upon the mentioned request of the Republic Commission, in the course of 177 session of the Republic Commission, held on 16 July 2017, it was established that the contracting authority failed to comply with the request to submit the report on compliance with the decision of the Republic of Serbia, documentation and statements of the contracting authority representative as a proof of the mentioned, in the case no. 4-00-179/2017".

ARTICLE 236, PARAGRAPH 3 OF THE PPL *- PARTICIPATION OF CONTRACTING AUTHORITY REPRESENTATIVE IN A PUBLIC PROCUREMENT PROCEDURE CONTRARY TO THE PROVISIONS OF THIS LAW REGARDING CONFLICT OF INTEREST (ARTICLE 50)*

Article 50, paragraph 1 of the PPL/2019 prescribes that a contracting authority is obliged to undertake all measures to determine, prevent and eliminate any conflict of interest in relation with a public procurement procedure, so as to avoid violation of the principles of competition and equal treatment of economic operators. Whereas, paragraph 2 of the same Article sets forth that conflict of interest between contracting authority and economic operator covers situations in which representatives of the contracting authority, who are involved in conducting of that procedure, or may influence the outcome of that procedure, have direct or indirect financial, economic or other private interest, which might be perceived to compromise their impartiality and independence in that same procedure. Paragraph 3 of Article 50 envisages that a conflict of interest would particularly involve the following cases:

1) where contracting authority's representative takes part in economic operator's management, or
2) where contracting authority's representative holds more than 1% of economic operator's share or stocks.

Paragraph 4 of the Article stipulates that a contracting authority's representative would be:

1) contracting authority manager, or responsible person, or member of the administrative, executive or supervisory board of the contracting authority,
2) a member of public procurement committee, i.e., person conducting public procurement procedure.

However, paragraph 5 of that Article stipulates that provisions on conflict of interest are also applied to associated persons of the contracting authority's representative referred to in paragraph 4 of that Article, specifically the person who are in: lineal consanguinity; collateral kinship up to the third degree; in-laws up to the second degree of kinship; relationship of adopter and adoptee; marriage, irrespective of whether the marriage is terminated or not; extramarital union; relationship of guardian and ward.

After bid or application opening, a contracting authority's representative referred to under paragraph 4, item 2) of Article 50 (a member of a public procurement commission, or person conducting public procurement procedure) signs a statement on the existence or absence of conflict of interest, and each representative of the contracting authority referred to in paragraph 4 of the same Article is obliged to exempt himself/herself from the public procurement procedure in case he/she learns about the existence of conflict of interest in any public procurement stage.

These two situations referred to in paragraph 3 of Article 50 are certainly not the only ones in which a conflict of interest in public procurement may occur, because these are situations that are "in particular" (as stated in the provision) considered a conflict of interest, but that does not mean that there is no such conflict in many other situations. In that sense, all situations are significant in which those who can influence the outcome of the public procurement procedure, in turn have a direct or indirect financial, economic or other private interest, which calls into question their impartiality and independence in that procedure.

The Republic Commission has annulled public procurement procedures with its decisions several times so far, due to the existence of a conflict of interest. These decisions were made on the basis of the provisions of the PPL/2012. In that regards, the Decision of the Republic Commission number 4-00-683/2015 of 27 May 2015, among other things, stated the following:

"Having in mind that it was indisputably found in the specific case that the named person is the Executive Director (Technical Manager) of"…" d.o.o, i.e. a member of the Commission for the specific public procurement, thereby that person has indisputably the status of the contracting authority's representative in terms of Article 3, paragraph 1, items 8, 9 and 10 of the PPL.

Article 29 of the PPL stipulates that a conflict of interest exists when the relationship between the contracting authority's representative and the bidder

may affect the impartiality of the contracting authority in making a decision in the public procurement procedure, i.e. if the contracting authority's representative or an associated party participates in the bidder's management with more than 1% of the share, i.e. stocks of the bidder and if the contracting authority's representative or the associated party is employed or engaged by the bidder or is in a business relation with him/her.

Bearing in mind that it has been indisputably found that the Control Reports (Certificates of Conformity) submitted in the bid of the selected bidder were signed by A… P…, as a Technical Manager, for whom it has been indisputably established, in this particular case, to hold the status of a contracting authority's representative, thus according to the assessment of the Republic Commission, there is a business connection between the named person and the selected bidder.

Therefore, it has been indisputably established in the present case, that the said person, Ms. A… P…, is the contracting authority's representative, and that she is also in business relations with the selected bidder, as one of the participants in the present procedure, pursuant to Article 29 of the PPL, the Republic Commission, based on available data and documentation, concludes that there is a conflict of interest regarding the named person, i.e. that there is a relationship that may affect the impartiality of the contracting authority in making a decision in the public procurement procedure.

Having in mind the above, the contracting authority cannot conclude a public procurement contract with the bidder in the event of a conflict of interest, pursuant to Article 30, paragraph 1. of the PPL.

This is due to the fact that Article 168, paragraph 1, item 2. of the PPL stipulates that public procurement contracts concluded contrary to the provisions of this law regarding the prevention of corruption and conflicts of interest are null and void.

Having in mind the above mentioned it follows that in this case, in terms of the provisions of the PPL, there is a conflict of interest, i.e. there is a relationship that may affect the impartiality of the contracting authority in making its decision in the public procurement procedure. Therefore, the Republic Commission states that the contracting authority, by its actions taken when conducting the subject public procurement, for lot 2, caused the situation that the annulment of the entire procedure in question is the only possible consequence of acting upon the considered request for protection of rights.

Namely, the Republic Commission states that at this stage of the procedure it is not possible to partially annul subject public procurement procedure for lot

2, eliminate the above mentioned violations of the provisions of the PPL, and the consequences of improper conduct of the contracting authority in this case, so that the public procurement procedure in question is executed and concluded entirely in accordance with the provisions of the PPL, given that the named person is a member of the commission for the subject public procurement, who pursuant to Article 54, paragraph 13. of the PPL performs public procurement activities, and, among other things, opens, reviews, evaluates and ranks bids"

Misdemeanors of bidders

ARTICLE 237, PARAGRAPH 1, ITEM 1) OF THE PPL *- IF A BIDDER, CANDIDATE OR SUBCONTRACTOR SUBMITS IN ITS APPLICATION OR BID DECLARATION CONTAINING FALSE DATA OR UPON THE CALL OF THE CONTRACTING AUTHORITY SUBMITS DOCUMENTATION CONTAINING FALSE DATA (ARTICLES 118, 119 AND 130)*

Article 118 of the PPL/2019 stipulates the method used by economic operators (bidders) initially (in their bids) to prove that they meet all criteria for qualitative selection of economic operators (previously those were requirements for participation of bidders). On the Public Procurement Portal, they fill in and submit with the bid a Statement on the fulfilment of the criteria for the qualitative selection of economic operators. With this statement, the bidders confirm that there are no grounds for exclusion on their part; that they meet the required criteria for the selection of the economic operators (usually, the capacity to implement the contract), as well as that they meet the criteria or rules set for reducing the number of eligible candidates in line with Article 64 of this Law (in two-stage proceedings), if those criteria or rules have been determined by the contracting authority. Unlike the PPL/2012, which stipulated that the contracting authority may specify in the tender documentation that the fulfilment of all or some requirements for participation be proven by submitting a statement by which the bidder under full material and criminal liability confirms that it meets the conditions, Article 118 of the PPL/2019 stipulates that the contracting authority is obliged to accept one, essentially similar declaration, which proves the fulfilment of the criteria for qualitative selection. Therefore, the contracting authority no longer has the option to choose whether to allow bidders or not to submit an initial declaration, and then, in the expert evaluation of bids, request copies of specific evidence (if necessary, insight into the originals) from the bidder whose bid is most favorable, as it was the case in the PPL/2012. Pursuant to this Article of the PPL/2019, as well as the following provisions, the

contracting authority is obliged to request and allow the initial submission of the statement, and after that to request the submission of evidence from the bidder who offered the most favorable bid. The submission of the bid itself, with the mentioned statement, and the submission of evidence by the bidder whose bid is the most favorable, is done via the Public Procurement Portal. It is a statement made by filling in a standard template, the content of which, as stated in paragraph 7 of this Article, is determined by the Public Procurement Office.

Paragraph 2 of Article 118 determines who submits the said declaration in the case of submission of a bid, i.e. application by a group of economic operators (joint bids). In such a situation, the bid is to include a separate declaration from each member of the group (participants in the joint bid) containing information on the lack of grounds for exclusion, as well as on meeting the required selection criteria for the relevant capacities of each of them as group members. Relevant capacities should be considered to be the capacities of each member of the group with which it participates in fulfilling the total capacity at the level of the entire bid or application requested by the contracting authority.

Paragraph 3 of Article 118 prescribes how the declaration on fulfilment of criteria is submitted in case of submitting a bid with subcontractors, and in case of using the capacity of other entities in accordance with the provisions of Article 130 of this Law. Thus, it is determined that if the economic operator intends to entrust part of the contract to a subcontractor or to use the capacities of other entities, it is obliged to submit a separate declaration for the subcontractor, i.e. the entity whose capacities it uses, containing data on absence of basis for exclusion, and on fulfilment of required criteria for selection for the relevant capacities of the subcontractor, i.e. other entity, which it intends to use.

Paragraph 4 of Article 118 stipulates that economic operators should indicate in their declaration of fulfilment of criteria the issuers of evidence on the fulfilment of criteria for qualitative selection of the economic operator and declare that they will be able to submit such evidence upon request of contracting authority and without delay. By doing so, they practically undertake to submit the evidence in the course of the expert evaluation of bids, when requested by the contracting authority, before the decision is adopted by the contracting authority. On the other hand, paragraph 5 envisages what economic operators may optionally state in their declaration. Those are data that enable the contracting authority to obtain evidence on its own, i.e. to have insight in evidence on fulfilment of criteria for qualitative selection of an economic

operator. Namely, economic operators in their declaration may list data on their web pages for databases, all necessary identification data and declaration on consent, via which evidence might be collected, i.e. inspection of the stated evidence performed.

Paragraph 6 of Article 118 stipulates that economic operator may reuse its declaration of fulfilment of criteria already used in a previous public procurement procedure, provided that it confirms that the information contained therein continues to be correct. It implied that arbitrary grounds for exclusion and criteria for selection required by the contracting authority must be identical in these two procedures (in the procedure that is currently being conducted and the procedure in which the declaration was used).

As already stated in connection with Article 118 of the PPL/2019, economic operators initially, in their bids, submit declaration on fulfilment of criteria. On the other hand, Article 119 of the PPL/2019 prescribes that in the course of expert evaluation of bids, prior to the adoption of decision in the public procurement procedure, a contracting authority is obliged to request from a bidder that submitted the most economically advantageous bid, to submit evidence on fulfilment of the criteria for qualitative selection of economic operator, in the form of uncertified copies within an adequate deadline, not less than five working days. This is prescribed by paragraph 1 of that Article. Therefore, when during the expert evaluation of bids the contracting authority determines, by applying the contract award criteria, the most favorable bid, it will request specific evidence from the bidder who submitted that bid, which should confirm everything stated in the declaration on fulfilment of criteria. Everything that is stated in that Article (and in other articles that refer to the criteria for qualitative selection) for bids, also applies to applications.

Paragraph 2 of Article 119 prescribes one of the exemptions for the mentioned rule that the contracting authority requests specific evidence from the bidder that submitted the most economically advantageous bid, by not requiring the contracting authority to comply with it in the case of the public procurement with estimated value equal or less than RSD 5,000,000.00. However, paragraph 3 of the same Article stipulates that, regardless of the estimated value of the public procurement (although less than RSD 5,000,000.00), the contracting authority may ask the bidders and candidates to submit all or part of the evidence on fulfilment of criteria for qualitative selection for the sake of verifying the information stated in the declaration of fulfilment of criteria, where this is necessary to ensure the proper conduct of the procedure. Thus,

the contracting authority may verify the data specified in the declaration, by requesting evidence even when it is not obliged to request it due to the estimated value.

In addition to the aforementioned case, where the contracting authority does not have to request evidence from the bidder who submitted the most economically advantageous bid, paragraph 4 of Article 119 stipulates that the contracting authority is not obliged to request evidence also when on the basis of the information contained in the declaration on fulfilment of criteria it can obtain the evidence on its own, or have access to the evidence on fulfilment of the criteria for qualitative selection of economic operator. As already stated, Article 118, paragraph 5 of the Law stipulates that the economic operator may include in its declaration on fulfilment of criteria information on the internet address of the database, any necessary identification data and declaration of consent, on the basis of which evidence on the fulfilment of criteria for qualitative selection of the economic operator may be obtained, or accessed. Those are specifically data that enable the contracting authority to obtain evidence on its own, i.e. to inspect evidence on fulfilment of criteria for qualitative selection of an economic operator. In addition to the above mentioned, the contracting authority is not obliged to request evidence from the bidder that submitted the most economically advantageous bid also in the case when it possesses valid relevant evidence. It would most often be from previous public procurement procedures conducted by the same contracting authority. However, the question arises whether the contracting authority can possess such evidence irrelevant of any previously conducted public procurement procedure. For instance, if the Tax Administration is the contracting authority, with available evidence of settled (outstanding) tax liabilities as the authority competent for keeping these records. We believe that answer to that question is affirmative, because no one insists on manner in which the contracting authority obtained the evidence.

Paragraph 5 of Article 119 of the PPL/2019 prescribes that even after submission of the evidence on fulfilment of criteria for the qualitative selection of economic operator in a way prescribed under paragraph 1 of the same Article, the contracting authority may invite bidders or candidates to supplement or clarify the evidence pursuant to Article 142 of the Law. We point out that Article 142, paragraph 2 of the Law sets forth that where information or documentation submitted by a bidder or candidate is incomplete or unclear, the contracting authority may, while observing the principles of equality and transparency, request the bidders or candidates to supply necessary information or additional

documents within an appropriate deadline which shall not be shorter than five days.

Paragraph 6 of Article 119 of the PPL/2019 prescribes the consequence for not submitting evidence by the bidder (that submitted the most economically advantageous bid) upon the request of the contracting authority sent in accordance with provision 1 of that Article. That provision stipulates that when a bidder fails to supply required evidence within the specified deadline, or fails to prove by submitted evidence that it fulfils the criteria for qualitative selection, the contracting authority is obliged to reject the bid of that bidder, and call the bidder that submitted the next most advantageous bid, or suspend the public procurement procedure if there are grounds for suspension, in line with paragraph 1 of that Article. Reason to suspend public procurement procedure would at any rate exist if only one bid is submitted, and the bidder that submitted the bid fails to provide evidence upon request by the contracting authority.

Article 130 of the PPL/2019 prescribes the way an economic operator may prove compliance with certain criteria for selection by using capacities of other economic operators, which do not belong to them. Primarily, paragraph 1 of that Article sets forth that such possibility refers to both financial and economic capacities, as well as to technical and professional capacities. Further on, it is provided that economic operator may use capacities of other economic operators in two ways: firstly, it may use the capacities of participants in a group of economic operators - other participants in the joint bid it also takes part in; secondly, it may use capacities of other economic operators regardless of whether it is in a joint bid with them.

So, this misdemeanor may be committed in two ways. The first is the submission of a declaration by the bidder claiming compliance with all the criteria for qualitative selection, and then, when the contracting authority invites it as the bidder who submitted the most favorable bid - to submit evidence confirming what is stated in the declaration, it submits evidence containing data different from those in the statement, i.e. indicating that the data in the declaration were untrue. Another way of committing misdemeanor is when it is determined that the evidence itself, submitted by the bidder who submitted the most favorable bid upon the invitation of the contracting authority, contains untrue data. For example, these would be certificates of references for contracts that have never been concluded or have not been successfully executed.

***ARTICLE 237, PARAGRAPH 1, ITEM 2) OF THE PPL** - IF A BIDDER FAILS TO PROVIDE EVIDENCE OR DECLARATION REFERRED TO IN ARTICLE 131, PARAGRAPH 5 OF THIS LAW TO THE CONTRACTING AUTHORITY UPON ITS REQUEST WITHIN PRESCRIBED DEADLINE*

Article 131, paragraph 2 of the PPL/2019 prescribes two obligations for an economic operator which intends to subcontract a share of public procurement contract a to subcontractor. One is the obligation to make the engagement of that subcontractor transparent, and the second is to make direct payment to that subcontractor. Thus, that economic operator is obliged to state in the bid which part of the contract it intends to entrust to the subcontractor (by subject or quantity, value or percentage), then, data on subcontractors, and that the contracting authority will directly pay the subcontractor for the share of the contract it executed, if the subcontractor requests that the due receivables be paid directly.

Paragraphs 4, 5 and 6 of Article 131 of the PPL/2019 prescribe the manner of action of the contracting authority in respect of the said direct payment to the subcontractor. If the manner specified in the mentioned paragraph 2 of that Article is provided in the bid, the contracting authority is obliged to directly pay all due receivables to the subcontractor for the share of the contract it executed. However, if this is not foreseen in the bid (hence, it may not be foreseen), the contracting authority is obliged to, after the payment to the economic operator it had concluded the contract with, request to be submitted within 60 days a proof and statement of the subcontractor that the payment of its claims was effectuated. If the economic operator with which it concluded the contract does not submit the proof and the statement of the subcontractor within that period, the contracting authority is obliged to submit to the Public Procurement Office a motion to instigate misdemeanor proceedings.

***ARTICLE 237, PARAGRAPH 1, ITEM 3) OF THE PPL** - IF THE BIDDER HIRES AS A SUBCONTRACTOR A PERSON NOT NAMED IN THE BID OR IN THE PUBLIC PROCUREMENT CONTRACT, CONTRARY TO THE PROVISIONS OF THIS LAW (ARTICLES 131 AND 161)*

A bidder may subcontract a share of its public procurement contract to other entity - subcontractor. Bidders have different reasons for engagement of subcontractors, often financially and business related. For instance, a bidder may find it cheaper to engage a specialized subcontractor for a certain segment

of the contract, rather than to execute it itself. The reason thereto is that a specialized subcontractor would have the necessary equipment and expertise not available to the contractor. In some circumstances, a bidder may not be authorized to provide all services or works requested by a contracting authority. For instance, a bidder submitting a bid for a contract for public procurement of works may subcontract part of the works to another entity (either legal entity or natural person - entrepreneur) that possesses specific authorization or licenses necessary to dispose hazardous waste from a construction site. A different approach may imply the bidder and a specialized person for waste disposal forming a group and jointly submitting a bid and signing a contract with the public contracting authority. However, this approach may prove unacceptable from the perspective of the person dealing with waste disposal, as under such a contract it will have to take on responsibilities unrelated to the work it will perform (due to the joint and several liability of the participants in the joint bid). The mechanism of engagement as a subcontractor with limited liability (only the bidder is responsible, but not the subcontractors) will probably be a far more attractive solution for the person dealing with waste disposal.

The PPL/2019 does not set any limitations on a share of a contract that can be subcontracted, but the fact that it is only a share of the contract means that it is not possible to subcontract the entire contract, i.e. 100%. Paragraph 1 of Article 131 stipulates that a contracting authority may not require or restrict the economic operators to subcontract a share of public procurement contract to a subcontractor or to engage specific subcontractors, unless otherwise provided for by a separate regulation or an international agreement. That practically means that the contracting authority cannot prohibit submission of a bid with a subcontractor, nor request the bid to have to be submitted with a subcontractor, just as neither situation can be in favor of a specific subcontractor.

In accordance with Article 131, paragraph 2 of the PPL/2019, an economic operator (bidder) intending to subcontract a share of public procurement contract to subcontractor, is obliged to indicate in its bid:

1) which share of the contract it intends to subcontract (by subject-matter or in terms of quantity, value or percentage);

2) information about subcontractors;

3) that the payment will be made directly to the subcontractor for the part of the contract it has executed, where the subcontractor requests that direct payments of due claims are made directly to it.

Those data must be also stated in the public procurement contract, if an economic operator has subcontracted a share of its public procurement contract. In case the contracting authority subcontracts an entity not specified in a bid or public procurement contract as a subcontractor, this misdemeanor will be thereby committed.

However, provisions contained under Article 161 of the PPL/2019 must also be observed, as they also refer to this misdemeanor. Namely, Article 161 envisages when a replacement of a subcontractor constitutes a reason for modification of public procurement contract. There shall be no misdemeanor in those situations even if the bidder engages as a subcontractor an entity that is not specified in the bid or in the public procurement contract. As a reminder, Article 161, paragraph 1 prescribes that the contracting authority may modify the public procurement contract in case when the economic operator with which the contract is concluded, in the course of the execution of the public procurement contract requests from the contracting authority:

1) to replace the subcontractor for the part of the public procurement contract which it has initially subcontracted to the subcontractor;

2) to introduce one or several new subcontractors, whose total share does not exceed 30% of the value of the public procurement contract without the value added tax, regardless of whether a part of the public procurement contract has, or has not been initially subcontracted to the subcontractor;

3) to take over the execution of the part of the public procurement contract that has been initially subcontracted to the subcontractor.

Paragraph 2 of Article 161 prescribes that beside the request to replace a subcontractor, the economic operator with whom the contract has been concluded submits to the contracting authority evidence of absence of the exclusion grounds under Article 111 of the Law concerning the new subcontractor.

ARTICLE 237, PARAGRAPH 1, ITEM 4) OF THE PPL *– IF A BIDDER FAILS TO CONCLUDE A PUBLIC PROCUREMENT CONTRACT UPON THE REQUEST OF THE CONTRACTING AUTHORITY, UNLESS THERE ARE REASONS THE BIDDER COULD NEITHER INFLUENCE, NOR FORESEE, PREVENT, ELIMINATE OR AVOID, AND DUE TO WHICH CONCLUSION OR EXECUTION OF THE CONTRACT IN ACCORDANCE WITH THE REQUIREMENTS STATED IN THE PROCUREMENT DOCUMENTS AND SELECTED BID IS NOT POSSIBLE (ARTICLE 152)*

Article 152 of the PPL/2019, referred to by this misdemeanor, regulates the manner in which public procurement contract and framework agreement can be concluded. Paragraphs 1 and 2 of that Article envisage that a public procurement contract or a framework agreement is concluded in writing with the bidder to whom the contract or framework agreement has been awarded. The contracting authority submits to the bidder (for signing) the public procurement contract or framework agreement within ten days after the deadline for filing a request for the protection of rights has expired.

Paragraph 5 of Article 152 prescribes that a public procurement contract or a framework agreement should be concluded in accordance with the requirements laid down in the procurement documents and selected bid.

Paragraph 3 of Article 52 stipulates that if a bidder refuses to conclude a public procurement contract or a framework agreement, the contracting authority may conclude the contract or framework agreement with the next most advantageous bidder.

So, upon the expiry of the deadline to submit the request for protection of rights against the contract award decision (deadlines for submission of that request are regulated under Article 214 of the PPL/2019), a contracting authority is obliged to submit to awarded bidder a contract, i.e. framework agreement, for its signing. Contracting authority has a deadline for undertaking the mentioned action (10 days from the expiry of the deadline to submit the request for protection of rights). Awarded bidder (selected bidder) is obliged to sign the contract or framework agreement. However, the deadline under which the bidder should send signed copies of the contract, i.e. framework agreement to the contracting authority is not prescribed. In that sense, it is logical that the contracting authority set an appropriate deadline and in that way clearly bind the selected bidder. In addition, a public procurement contract or a framework agreement should be concluded in accordance with the requirements laid

down in the procurement documents and selected bid. If, however, the selected bidder fails to conclude the contract with the contracting authority with no justified reasons, it thereby commits the specific misdemeanor.

The substance of this misdemeanor indicates the justification of reasons due to which the selected bidder did not execute the contract with the contracting authority. Namely, it is obvious that this misdemeanor shall not exist even if the selected bidder fails to sign the contract "*when there are reasons the bidder could neither influence, nor foresee, prevent, eliminate or avoid, and due to which conclusion or execution of the contract in accordance with the requirements stated in the procurement documents and selected bid is not possible.*" For instance, one of the justified reasons of the selected bidder to withdraw from concluding the contract may be unforeseen disruption on the global market regarding prices of some materials used for the subject of the procurement or their shortage, and the selected bidder therefore was not able to envisage or avoid them, and on the other hand, is not able to execute the contract for the price it specified in its bid, or is no longer able to execute the contract. Those situations should surely be interpreted restrictively, particularly in terms whether the selected bidder could have foreseen them at the time it submitted its bid.

Another circumstance may justify failure of the selected bidder to sign the contract or framework agreement, and it is expiry of the bid validity. Namely, Article 137 of the PPL/2019 prescribes that the contracting authority sets forth the period of validity of bids, which may not be shorter than 30 days from the date of bid opening. In the event the period of validity of bid expired, the contracting authority is obliged to request the bidder, in writing, to extend the period of validity of the bid, and the bidder that accepts the request for extension of the period of validity of bid may not change its bid. Therefore, the bid obliges the bidder until the expiration of the validity period, which means that until then it has the obligation to conclude a contract or framework agreement if the contracting authority submits them for signing to it as the selected bidder. The contracting authority may set a longer period than the mentioned 30 days, and this is justified in situations when more extensive documentation in the bids is expected, as well as a larger number of bidders, which is why the expert evaluation of bids will take longer. In certain situations, the validity period of the bids expires also because the expert evaluation lasted unintendedly longer - for example, if a request for protection of rights was submitted, as long as that request was decided upon. In any case, we believe that the selected bidder would not be liable for a specific misdemeanor if the validity period of its bid expired (which was determined in accordance with the deadline required by the contracting authority).

Prosecution of the misdemeanors on the basis of Articles 57 and 103, paragraph 1, item 4 of the Budget System Law, as a parallel mechanism of a misdemeanor protection compared to the public procurement law

Article 57 of the Budget System Law ("Official Gazette of the RS", no. 54/09, 73/10, 101/10, 101/11, 93/12, 62/13, 63/13 – Corrigendum, 108/13, 142/14, 68/15 – Other Law, 103/19, 72/19 and 149/20) stipulates that the procurement contract concluded by public fund beneficiaries and beneficiaries of organizations for mandatory social insurance must be concluded in accordance with regulations governing public procurements. On the other hand, Article 103, paragraph 1, item 4) of the of the same law envisages that a fine ranging from RSD 10,000 to RSD 2,000,000, will be imposed to the accountable person of a budget beneficiary, accountable person in a beneficiary of organization for mandatory social insurance, or other accountable person if s/he fails to comply, among other things, with provisions of Articles 49-61 of the Law (also covering the quoted Article 57) in the budget execution procedure. It is clear that violation of regulations governing public procurements may be sanctioned with misdemeanors also in accordance with the Budget System Law.

The difference between the misdemeanors referred to in the Budget System Law and misdemeanors referred to Public Procurement Law is that the first ones are defined in general, so that it is not known what constitutes the action of those misdemeanors, while the latter ones are more specifically described in the Public Procurement Law. Namely, we conclude that the actions of misdemeanor referred to in the Budget System Law are situations in which public procurement contracts are not concluded in accordance with the regulations governing public procurement.

First of all, the question arises what are the situations when the contract has not been concluded in accordance with the stated regulations. It could be interpreted that a violation of any provision of the Public Procurement Law constitutes an act of that misdemeanor, which is an unsustainable position from the point of view of both law and logic. As stated at the beginning of this analysis, misdemeanors cannot cover all the provisions (articles and paragraphs) that make up a regulation, but only those that are of greater importance to the state and society, and thus achieving the purpose - the goal of a regulation in whole. Public Procurement Law clearly links each of the misdemeanors to a specific provision of that Law (Article and, if necessary, paragraph of the Law), while that is not the case for the misdemeanors referred to in the Budget System Law.

Secondly, the misdemeanor under the Budget System Law refers to the violation not only of any provision, but also of any of the regulations governing public procurements, and it is not only the Public Procurement Law, but also any of the bylaws that were passed on the basis of that law, and other regulations, such as the Budget System Law itself. For instance, provision of Article 54, paragraph 1 of the Budget System Law stipulates that commitments assumed by budget beneficiaries and beneficiaries of organizations for mandatory social insurance must conform to the appropriation approved for such purpose in the budget year. That provision at any rate refers to public procurement contracts, so that commitments assumed on the basis of those contracts in one budgetary year must correspond to the appropriation approved to the mentioned beneficiaries (contracting authorities) for that purpose in the given year. Also, provision contained under paragraph 3 of the same Article of the Budget System Law stipulates that beneficiaries (contracting authorities) are obliged to obtain consent of the competent authority - Government, competent executive local authority body, i.e. management board of the organization for mandatory social insurance for the assumed liability based on the capital project contracts prior to the initiation of the public procurement procedure wherein they would select a bidder to execute them.

All of the above aggravates the actions of authorities that should, within their control and inspection competencies, detect actions that constitute a misdemeanor from the Budget System Law, and initiate the misdemeanor proceedings, but also of the courts that conduct misdemeanor proceedings. Therefore, neither those who should detect misdemeanor (above all, the State Audit Institution and the Budget Inspection), nor the misdemeanor courts, can claim with certainty what act of misdemeanor is referred to in the Budget System Law, so that this way of misdemeanor sanctioning of the violations of the Public Procurement Law provisions currently in force is essentially ineffective. It also jeopardizes legal certainty, because a situation in which anything may be but doesn't have to be a misdemeanor creates insecurity for all participants in public procurement procedures, and also creates space for possible abuses (unfounded initiation and instigation of proceedings, or unfounded acquittal). In such a situation, it seems that the only legally grounded and logical interpretation of the misdemeanors referred to in the Budget System Law should be that under that law, misdemeanors related to public procurement are instigated for the same actions (violations) that are provided for by the Public Procurement Law as misdemeanors.

We believe that amendments to the regulations are necessary in a way that the Budget System Law provides for a misdemeanor that will refer exclusively to the provisions of that regulation, and not to all regulations governing public procurements in general, as is currently the case. Examples of these provisions are already mentioned before (Article 54, paragraphs 1 and 3 of the Budget System Law). We believe that those amendments would, at any rate, ensure greater efficiency of prosecution of misdemeanors in the public procurement area, as well as greater legal certainty in the enforcement of those types of sanctions.

PART III

PROCEDURAL AND SUBSTANTIVE LEGAL ISSUES OF IMPORTANCE FOR CONDUCTING MISDEMEANOR PROCEEDINGS IN THE PUBLIC PROCUREMENT AREA

Specificities in the instigation and proving of misdemeanors in the public procurement area

The PPL/2019 prescribes authorities of the Public Procurement Office and the Republic Commission to file motions to instigate misdemeanor proceedings for the misdemeanors set forth under that Law, provided that the proceedings will be instigated when the stated authorities, while performing other competencies, learn and obtain evidence that the misdemeanor was committed. Therefore, it is necessary that the proceedings before the misdemeanor court be preceded by procedures examining the legality of the public procurement procedure, or the monitoring procedure before the Public Procurement Office[11] and the procedure for protection of rights before the Republic Commission.[12].

Procedurally, it is specific that in the administrative procedure - the procedure for protection of rights before the Republic Commission, facts can be determined which are both the reason for the annulment of the public procurement procedure and the reason for initiating the misdemeanor procedure. Practically, the facts of importance for the misdemeanor procedure, i.e. those that refer to the very substance of the misdemeanor, were previously determined in the administrative procedure before the Republic Commission. Having in mind the above, the applicant for initiating a misdemeanor procedure, along with the stated initial enactment, may enclose its own final decision made in the procedure of protection of rights and propose its presentation as evidence. At this point, it is important to note that the methodology of drafting and the structure of the decisions of the Republic Commission are similar to those applied in court decisions, so within the statement of reasons there are clearly separate units; in the first part of the statement of reasons the allegations of the submitted request for protection of rights are stated, after which the established factual situation is pointed out, the evidence is evaluated and a legal assessment is provided. Also, the Republic Commission in the statement

[11] Provision of Article 179, paragraph 1, item 3 of the PPL/2019;

[12] Provision of Article 234, paragraph 1 of the of the PPL/2019;

of reasons for the decision made in the procedure for protection of rights declares in detail the violation of the PPL which is the reason for annulment of the procedure, and issues an order to the contracting authority to eliminate the irregularities[13], in a similar way as the second instance court in its decisions rendered upon the first instance judgement, upholding the appeal.

Further on, misdemeanors in the public procurement area are specific also due to the fact that most of decisive facts may be established by direct access to the Public Procurement Portal, consolidated information system that enables conducting all actions in the public procurement procedure. Actually, Public Procurement Portal records all substantive and procedural legally significant moments, due to which a misdemeanor court by accessing that information system, which has open and simple access, may determine not only chronology and timeliness of certain actions[14] in the procedure, but also the content of enactments of importance for misdemeanor proceedings; tender documents and their modifications, calls for public procurement, adopted decisions by the contracting authorities, etc. At any rate, authorized applicants for instigating misdemeanor proceedings may by printing an excerpt from the Public Procurement Portal or by proposing that the acting authority inspects the mentioned information system, prove numerous facts of importance to assess whether the actions committed by misdemeanants contain elements of misdemeanor.

In accordance with Article 183, paragraph 1 of the PPL/2019 the Public Procurement Portal enables:

1) contracting authorities to draw-up, send for publication and publish the public procurement notices on standard templates, make available procurement documents, and publish and deliver decisions in public procurement procedures, as well as to publish the public procurement plans;

2) contracting authorities to send public procurement notices on standard templates to the Publication Office in order to publish those in the Official Journal of the European Union;

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[13] This is particularly important for misdemeanor referred to in Article 236, paragraph 1, item 17 of the PPL/2019, when it is up to the Misdemeanor Court to assess whether a contracting authority acted in line with the order of the Republic Commission. For more details, see the part of the Manual focusing on the acts of committing a misdemeanor;

[14] Chronology in actions of the contracting authorities, posting of documents, or timely undertaking of certain actions are important elements with most of misdemeanors in the public procurement area.

3) any interested persons to have free of charge, unrestricted and direct access, to search, review and download published public procurement notices and procurement documents;

4) economic operators to submit bids, applications, plans and projects;

5) opening of bids, applications, plans and projects;

6) communication and exchange of information between contracting authorities and economic operators, in accordance with the provisions of this Law;

7) communication and exchange of information between the Public Procurement Office and contracting authorities in accordance with Article 62 paragraphs 2 and 3 of the Law;

8) filing requests for the protection of rights, other communication and exchange of documents between bidders, contracting authorities and the Republic Commission for the Protection of Rights in Public Procurement Procedures;

9) keeping of records of registered subjects;

10) managing database of information published and exchanged on the Portal;

11) access to the database, for the Public Procurement Office, the Republic Commission for the Protection of Rights in Public Procurement Procedures, the State Audit Institution, and the Republic Public Prosecutor's Office, for the needs of performing activities under the scope of their respective competences.

Instructions to Use Public Procurement Portal ("Official Gazette of the RS", number 93 of 1 July 2020) closely regulates free-of-charge access. These instructions were adopted jointly by Public Procurement Office and Office for Information Technologies and e-Government and is accessible at: http://www.ujn.gov.rs/wp-content/uploads/2021/02/Uputstvo-za-koriscenje-Portala-javnih-nabavki-93_2020-372.pdf

All instructions for the Public Procurement Portal users, and answers to frequently asked questions concerning the Portal are available at the following links: https://gizsr.visualstudio.com/Uputstva/_wiki/wikis/Uputstva/3779/Uputstva and https://gizsr.visualstudio.com/Uputstva/_wiki/wikis/Uputstva/3959/%C4%8Cesto-postavljena-pitanja

Bearing in mind the substance of the prescribed misdemeanors referred to in Articles 236 and 237 of the PPL/2019, as well as strictly formal character of public procurement procedures, most of proposed evidence by authorized applicants are **in writing**, which is why misdemeanor courts would mostly read evidence, such as different parts of tender documentation, public calls, submitted bids, public procurement contracts, decisions by the Republic Commission rendered in the procedure for the protection of rights and reports of state authorities.

Relation among misdemeanors prescribed under the PPL/2019 and criminal offence of abuse in public procurement referred to in Article 228 of the Criminal Code

For the actions of misdemeanor courts, it is important to consider certain issues related to enforcement actions, which in legal practice can be qualified as a misdemeanor prescribed by the PPL/2019, but also as a criminal offence of abuse in connection with public procurement under Article 228 of the CC.

First of all, it is important to note that the most severe possible violation of the provisions of the PPL/2019 is prescribed as a misdemeanor - the provision of Article 234 paragraph 1, item 2 of the said law, (the misdemeanor is committed by the contracting authority that awards the public procurement contract without a previously conducted public procurement procedure), while the elements of criminal offence of abuse in connection with public procurement incriminate various actions that offender can take only if the public procedure procurement is conducted. It seems that the quantification of the gravity of the violation of the PPL, i.e. the gradation of the violation of the law when determining whether the action is a misdemeanor or a criminal offence, has not been adequately made, given the fact that complete avoidance of the application of the PPL should rather constitute an action of committing a criminal offence and not misdemeanor. Execution of a public procurement contract without a previously conducted public procurement procedure is, by its legal significance, certainly the most serious form of violation of legality in that area.

There are two basic and one more severe form of criminal offence, and the legal description of each of them is extremely broad and insufficiently defined. In practice, that could lead to doubts when qualifying the actions of offender, or to dilemma whether the actions can be classified as legal description of one of the prescribed misdemeanors or criminal offences. The matter is further complicated by the fact that several state authorities may act in the same public procurement procedure in relation to the same violations of the PPL. So, for

example, Special Anti-Corruption Departments of the Higher Public Prosecutor's Offices in Novi Sad, Belgrade, Kraljevo and Niš review upon filed criminal reports the same public procurement procedures as the Republic Commission does upon filed requests for protection of rights, filing various initial acts before the criminal and misdemeanor courts. Having in mind the above, it is useful to check with the mentioned Public Prosecutor's Offices before making a decision on instigating misdemeanor proceedings whether criminal proceedings have been initiated on the same legal matter or to request such verification from the authority authorized to file motion to instigate misdemeanor proceedings.

In order to better understand the relationship between the prescribed misdemeanors and the criminal offence of abuse in connection with public procurement, we point out that the first basic form of this criminal offence concerns the bidders. Hence, it can be committed by a person who submits a bid based on false information in that public procurement procedure or a person who contrary to the law, colludes with other bidders, or undertakes other illegal actions in order to influence the decision-making process of the contracting authority. The perpetrator of this form of criminal offence may be any person who participates in the public procurement procedure. At this point, we indicate to the similarity with a misdemeanor referred to in Article 237 paragraph 1, item 1 of the PPL/2019, committed if a bidder, candidate or subcontractor submits in its application or bid declaration containing false data or upon the call of the contracting authority submits documentation containing false data. By carefully comparing the prescribed misdemeanor and the substance of the criminal offence, we can see that the misdemeanor refers to a statement by which bidders prove certain properties or capacities required by tender documentation containing false information, or a special document created by the bidder at the special request of the contracting authority (clarification of bid, additional evidence on the properties of the requested good, etc.) that contains false information. However, the problem in interpreting and establishing the difference between the criminal offence and the said misdemeanor arises when it is borne in mind that the criminal offence incriminates **basing the bid on false information**, which the offender can essentially undertake by preparing false statements attached to the bid, which in itself constitutes an act of committing a misdemeanor. Therefore, in each specific case, the implications and legal significance of the given untrue data for the public procurement procedure should be assessed, and it should be determined whether the degree of violations of the PPL justifies criminal

legal intervention. The only clearly defined and relatively precise part of the substance of this form of criminal offence is the one that refers to the offender who "colludes with other bidders in contravention of the law", although there are certain theoretical objections to this part of the substance[15].

The act of committing the first basic form of abuse in connection with public procurement is "undertaking other illegal actions in order to influence the decision-making of the contracting authority", which raises additional questions about what can be considered illegal actions, whether the illegality relates only to the law or also to the bylaws, etc. It seems that this problem would be solved if the legislator, within the substance of the act, at least (exempli causa - for example) listed the characteristic actions that would constitute violation of the integrity of the public procurement procedure (for example: direct or indirect promising or giving benefits; taking possession of confidential information in the phase of preparation of tender documentation; acting as a bidder by persons who participated in public procurement planning and preparation of tender documentation or persons related to them, etc.).

The first basic form of a criminal offence can be committed only by direct intent, obtaining benefits is not necessary - the offence is completed by submitting a bid, i.e. by colluding that does not have to have a result (to be realized), whereby intent (as a special subjective feature of the offence) should be present so as to influence the decision-making of the contracting authority.

Another basic form of criminal offence of abuse in connection with public procurement is "reserved" for responsible persons and officials in the contracting authority, who by using their position or authority, exceeding the limit of their authority or failing to perform their duties violate the law or other regulations on public procurement, and thereby causing damage to public funds. The legislator, obviously in an effort to incriminate various actions of contracting authorities and bidders, has set too broad legal description of this form of criminal offence, insufficiently specifying the action of its execution. This can result in a large number of irregularities of various degrees and significance in the public procurement procedure considered to be an action of committing a crime, while at the same time one can easily defend a completely opposite legal position with a valid explanation - that there is no crime in the offender's actions.

[15] The Bulletin of the Supreme Court of Cassation no. 2/2015 indicates that if an offender is charged with the act of collusion in the negotiated procedure, which can be conducted according to the Public Procurement Law, and within which the contracting authority directly negotiates with one or several bidders, whereby certain form of agreement, that is allowed, is reached;

The more severe form of the criminal offence implies that the two basic forms were committed in connection with public procurement whose value exceeds the amount of one hundred and fifty million dinars. There is one logical inconsistency in the definition of the more severe form of criminal offence: it is required that the value of the public procurement in connection with which the offence was committed exceeds a certain threshold (one hundred and fifty million dinars), while defining another form of criminal offence requires damage on the part of public funds. It would be logical to set the amount of damage incurred on the part of public funds as a circumstance that qualifies the offence as severe, and not the value of the public procurement itself, which may in fact be completely irrelevant in criminal proceedings. The severity of the incurred consequences should be the one that determines the gravity of the criminal offence, and not the estimated value of the procurement.

In the structure of the criminal offence substance, in both prescribed basic forms, the blanket (referring) character of the norm by which the criminal offence is prescribed can be noticed, and the Criminal Code only partially prescribes the characteristics of the criminal offence, while other elements that determine the substance of the criminal offence should be looked for in the other legislation - the PPL and other regulations in that legal area whose provisions are violated by the actions of the offenders. It remains unclear why the legislator did not explicitly foresee at least some of the most common and most severe violations of the Public Procurement Law, which would indisputably have the character of a criminal offence, such as adjusting the tender documentation to a certain bidder by the contracting authority. In practice, these would be the situations in which the contracting authority, for example by describing the technical characteristics of the requested good in the tender documentation or prescribing unjustified criteria for qualitative selection in the public procurement procedure, practically "depicts" one bidder, preventing its competitors from submitting acceptable bids and from equally participating in the public procurement procedure.

IV

OVERVIEW OF INDIVIDUAL PRACTICAL ISSUES IN PROSECUTION OF PUBLIC PROCUREMENT MISDEMEANORS

Having in mind the anti-corruption character of misdemeanor in the field of public procurement, we point out the fact that the World Bank provided a definition that treats the corruption as abuse of public authority for private purposes, and the execution of public procurement contracts as one of the riskiest legal transactions subject to corruption. In other words, the emphasis is on public officials and civil servants with discretionary powers when deciding on the rights and obligations of companies and citizens, as well as on public funds spending. At the same time, European anti-corruption standards represent a very dynamic system that is constantly evolving, and consequently the regulations governing public procurement procedures are being amended, making this procedure more transparent each time.

The specificity of misdemeanors in the field of public procurement is, among other things, reflected in the way of achieving the basic principles of misdemeanors proceedings, and it is appropriate to keep in mind the following:

- **Principle of legality** - ensures that no one who is innocent is punished, and that a misdemeanor sanction is imposed on a liable misdemeanant under the conditions provided by the Public Procurement Law and on the basis of lawfully conducted proceedings.
- **Legality in imposing misdemeanor sanctions** -a misdemeanor sanction can only be imposed by the court that conducts misdemeanor proceedings. In the case of misdemeanors in the field of public procurement, this principle is especially pronounced, since the latest amendments to the Public Procurement Law and the Law on Misdemeanors determine the exclusive jurisdiction of misdemeanor courts to conduct misdemeanor proceedings in the first and second instance, as opposed to the previous solution that implied that an administrative authority (Republic Commission for the Protection of Rights in Public Procurement Procedures) conducts the first-instance

misdemeanor proceedings and renders decisions.

- **Accusatory principle** - a misdemeanor proceeding is instituted and conducted on the basis of the motion filed by the Republic Commission for the Protection of Rights in Public Procurement Procedure and the Public Procurement Office being the authorized authorities or by the injured party.
- **Principle of proof** - burden of proof of the elements of a misdemeanor and misdemeanor liability is on the person filing the motion to instigate misdemeanor proceedings. In accordance with Article 89 of the Law on Misdemeanors, a party is obliged to obtain all the evidence s/he makes reference to, i.e. which presentation s/he has proposed. However, bearing in mind legal nature of the misdemeanors in the public procurement area, as well as their substances, provision of paragraph 5 of Article 89 of the Law on Misdemeanors constitutes an exception.
- **Assistance to a party ignorant about the law** - the court takes care that ignorance or lack of understanding by the parties is not to the detriment of their respective rights. Circumstance that both contracting authorities and bidders, due to the nature of activities they perform, are quite familiar with the PPL, does not free the court of the obligation to comply with this principle.
- **Economy of misdemeanor proceedings** is particularly pronounced with the misdemeanors in the area of public procurements both due to exceptional dynamics of public procurement procedure (short and preclusive deadlines for actions to be taken by contracting authorities and bidders) and the importance of the goal of conducting public procurement, to procure certain goods, services and works in a timely and optimal fashion in accordance with the law. Hence, the court is obliged to conduct the proceeding without delay, but in such a way that does not adversely affect a proper and lawful decision.
- **Free assessment of evidence** - the court assesses evidence at its sole discretion. It also decides what facts it shall take as proven, on the basis of conscientious and careful assessment of each piece of evidence separately, all the evidence together and on the basis of the results of the entire proceedings. This Manual presents the specifics of proving misdemeanors in the field of public procurement, of which the most

important is certainly the access to the Public Procurement Portal. In that sense, we point out that the provision of Article 183 para. 1, item 11 of the PPL/2019 prescribes the group of state authorities that have full access to the database of the Public Procurement Portal, which does not include misdemeanor courts, but at the same time we note that this is not an obstacle for inspecting the necessary documents in misdemeanor proceedings, because the lower level of access to the Portal is provided to everyone (public access), and it is sufficient to conduct misdemeanor proceedings. After a simple registration at the mentioned information system, the access to all relevant documents in the public procurement procedure is available.

- **Right to defense** - prior to making a decision, a defendant must be given the opportunity to declare about the facts and evidence incriminating him/her. Bearing in mind the complexity of the public procurement subject-matter, as well as the fact that it concerns the evidence that are mainly in writing, the use of the mechanism of written defense is appropriate.

- **Use of a language in misdemeanor proceedings** - the court conducts the proceedings in Serbian language and uses a cyclic script in the proceedings. Bearing in mind that foreign legal entities may be bidders, the court is therefore, for parties and other participants in the proceedings who are not citizens of the Republic of Serbia, i.e. who cannot understand proceedings conducted in Serbian language, obliged to enable them to use their language in the course of proceedings through certified interpreter. In those cases, the prompt conduct of the judge is decisive, and for the decision to be fair, it must be timely, especially bearing in mind that the defendant in the misdemeanor proceedings continues to participate in other public procurement proceedings until the final conclusion of the proceedings, and that the damage of those actions can be immeasurable.

Territorial Jurisdiction

Provision of Article 103 of the LoM stipulates that for conducting misdemeanor proceedings in the first instance, the court on whose territory the misdemeanor has been committed or attempted will have territorial jurisdiction. That implies that the court on whose territory the contracting authority's seat is located will have territorial jurisdiction for the misdemeanors

referring to the contracting authority. In the case of a bidder's misdemeanor, the territorial jurisdiction will be determined depending on whether it is a misdemeanor whose act of commission is by action or omission, and in case the place of commission of the misdemeanor cannot be determined, the court on whose territory the defendant resides has the territorial jurisdiction, i.e. where the registered office of the legal entity is situated. If the misdemeanor was committed within the territorial jurisdiction of several courts, when there are several bidders, the competent court would be the one where the motion to instigate misdemeanor proceedings was initially filed.

Instigation of misdemeanor proceedings

As previously stressed, the Republic Commission for the Protection of Rights in Public Procurement Procedure, as the authorized authority, submits the motion for instigation of misdemeanor proceedings before the court with territorial jurisdiction (in accordance with Article 187, paragraph 1, item 9, in connection with Article 234 of the PPL/2019), as well as the Public Procurement Office (in accordance with Article 179, paragraph 1, item 3, in connection with Article 234 of the PPL/2019). However, the question arises whether the injured party may file the motion to instigate misdemeanor proceedings in these proceedings. Legally, there are no impediments for the bidder to file the motion to instigate misdemeanor proceedings in accordance with Article 126 of the LoM, but only when the authorized authority desists the filed motion, in a way prescribed under Article 128, in connection with Article 127 of the LoM. If the Republic Commission/Public Procurement Office has filed a motion to instigate misdemeanor proceedings, it will inform the injured party in writing thereof. When the Republic Commission/Public Procurement Office has filed a motion to instigate misdemeanor proceedings before the injured party, the proceedings will be conducted upon the motion of the mentioned state authorities, and will be continue upon the motion of the injured party if the authorities desist from their motion. If the Republic Commission/Public Procurement Office desists from the submitted motion for instigating misdemeanor proceedings, it is obliged to inform the injured party within 8 days from the day of desisting so that it can continue the proceedings. At the same time, if the injured party filed a motion to instigate misdemeanor proceedings before the above-mentioned state authorities, the proceeding will continue upon its motion.

Also, a question arises whether the procedure for protection of rights must precede the instigation of misdemeanor proceedings, and what happens if

the injured party files a motion to instigate proceedings, without previously conducting a procedure for protection of rights before the Republic Commission. The answer will certainly be provided by case law, and here we point out that it is certainly not purposeful to instruct the injured party to first exercise its rights before the Republic Commission in the procedure for protection of rights, because that is not legally possible due to the deadline for submitting request for protection.

Misdemeanors of contracting authorities and responsible persons

When assessing whether the defendant's actions have characteristics of a misdemeanor, it is important to keep in mind that according to the provisions of the PPL/2019, two types of contracting authorities can be distinguished - **public** and **sectoral**. The distinction between the two is explained in the part of this manual referring to the misdemeanor under Article 236, paragraph 1, item 2 of the PPL/2019 - award of a public procurement contract without previously conducted public procurement procedure. Having in mind the fact that the PPL/2019 prescribes penalties for contracting authorities, and that the category of public contracting authorities, among others, includes state authorities, authorities of territorial autonomy and local self-governments, we note that in accordance with Article 17, paragraph 2. of the LoM, Republic of Serbia, territorial autonomies and local self-government units and their bodies cannot be liable for the misdemeanor. However, as per the misdemeanor under the condition referred to in Article 18, paragraph 1 of the LoM, a responsible person in a state authority, territorial autonomy authority or the one from a local self-government unit may be held liable.

If the motion to instigate misdemeanor proceedings has been submitted against the public contracting authority referred to in Article 3, paragraph 1, items 1-3 of the PPL/2019, which cannot be charged in terms of Article 17 of the LoM, two situations are possible:

- that the judge, immediately after receiving the case, makes a decision on the separation of proceedings, and then dismisses the motion in relation to the contracting authority that cannot have the status of a defendant in misdemeanor proceedings, and instigates, conducts and closes the court proceedings in relation to the responsible person;

– that the judge instigates proceedings against the contracting authority who cannot be accused and against the responsible person (then the statement of reasons of the ruling would cover both defendants, but the liability of a responsible person would be decided upon, and the proceedings against the public contracting authority under Article 248, paragraph 2 of the LoM (for other reasons prescribed by law) would be discontinued, whereby the statement of reasons would present reasons for discontinuation.

In addition to the above, it is necessary to pay attention to the fact that as per misdemeanors from Article 236 of the PPL/2019, within the penal provision, in addition to the penalty for the contracting authority and the responsible person, the legislator prescribed a penalty for a representative of the contracting authority, which is a special category of persons who may be liable for misdemeanor, which misdemeanor judges have never encountered so far. Therefore, at this point we clarify once again that **a representative of the contracting authority**, in terms of the provisions governing the conflict of interest, is considered to be in particular:

1) a head of the contracting authority, i.e. a responsible person of the contracting authority, a member of the administrative, executive or supervisory board of the contracting authority;

2) a member of the public procurement commission, i.e. a person conducting the public procurement procedure.

Thus, a motion to instigate misdemeanor proceedings, in certain situations, may be filed against three defendants: the contracting authority, responsible person and a representative of the contracting authority.

Misdemeanors of bidders

Article 237 of the PPL/2019 envisages misdemeanor liability for the bidder, candidate, or. subcontractor, then for a responsible person of the bidder, candidate and subcontractor, as well as for an entrepreneur and natural person who participates in the public procurement procedure as a bidder, candidate or subcontractor. The PPL/2019 prescribes a fine, whereby it can be noticed that the penalty ranges are identical to those of misdemeanors of contracting authorities, which is an unusual solution of the legislator, especially bearing in mind that contracting authorities are, as a rule, in an economically dominant position and that it is their function to protect the budget of the Republic of Serbia.

Bidders may be imposed a protective measure prohibiting participation in public procurement procedures for certain misdemeanors, the legal nature and significance of which are explained in the part of the Manual that refers to the general characteristics and legal nature of misdemeanors in the area of public procurement. It should be noted here that if one judgement for several misdemeanors establishes several protective measures of the same type, which are prescribed to be imposed for a certain duration, a single protective measure equal to the sum of the duration of individually determined protective measures will be imposed, provided that it cannot exceed the maximum statutory limit of the duration of that type of protective measure, in this case two years.

The question is raised of **liability of foreign legal entities**, which can be found as bidders in the public procurement procedure, since the provision of Article 31, paragraph 2 of the LoM prescribes that a foreign legal entity and a responsible person will be punished for a misdemeanor committed on the territory of the Republic of Serbia, if it has a business unit or representative office in the Republic of Serbia or if the misdemeanor was committed by its means of transport, provided that the regulation governing that misdemeanor does not prescribe some other penalty. Having in mind that the misdemeanors of bidders are prescribed by a special law - PPL/2019, there is no obstacle for imposing misdemeanor sanctions against this category of persons, but it remains for the case law to confirm that and to take a position.

V

GLOSSARY OF TERMS OF IMPORTANCE FOR CONDUCTING MISDEMEANOR PROCEEDINGS

Recording and publishing data by the contracting authority - means that the contracting authority is obliged to record data on the value and type of procurement carried out by applying exemptions, on each basis for exemption separately, as well as on public procurement below the thresholds for the application of law. Those data are collectively posted by a contracting authority on the Public Procurement Portal at the latest by 31 January of the current year for the previous one, in accordance with instructions posted by the Public Procurement Office on its website.

Conclusion of contract - means the contracting authority concluded the public procurement contract with the bidder who was awarded, after the expiry of the deadline for filing the requests for the protection of rights being the first legal remedy to dispute the contract award decision.

Exceptions from the application of the law - means situations in which contracting authorities are not obliged to apply the Public Procurement Law even though they procure goods, services or works. These situations are prescribed by that Law and must be interpreted restrictively.

Public contracting authorities - a category of contracting authorities that conduct the so-called "classic public procurements", in contrast to sectoral contracting authorities that conduct procurements for the purpose of performing sectoral activities, which are: water management, energy, traffic and postal services, or more precisely, gas and heating energy, electricity, water management, transport services, ports and airports, postal services, oil and gas extraction and exploration or extraction of coal or other solid fuels.

Candidate - means an economic operator that has submitted an application in two-stage proceedings: restrictive procedure, competitive negotiated procedure, negotiated procedure, competitive dialogue or innovation partnership.

Tender documentation - means documentation that contains technical specifications, contract conditions, templates of documents to be submitted by economic operators, information on prescribed obligations and other documentation and data of importance for the preparation and submission of applications and bids. As a rule, the contracting authority is obliged to send the tender documents to be posted on the Public Procurement Portal simultaneously with sending for the publication the

public call, call to submit applications or call to submit bids or negotiate in the system of qualification.

Criteria for qualitative selection of an economic operator - in essence represent the conditions for the participation of bidders in the public procurement procedure (as they were called in the previous PPL/2012). Therefore, the bidders must prove that there are no reasons on their part for which they must be excluded from the public procurement procedure, and that they are able to execute a specific public procurement contract, so that their bid can be considered.

Monitoring of the implementation of public procurement regulations - means monitoring conducted by the Public Procurement Office in order to prevent, detect and eliminate irregularities that may occur or have occurred in the application of the Public Procurement Law. The monitoring procedure is carried out pursuant to an annual monitoring plan that is adopted by the Public Procurement Office by the end of the current year for the following year, in the event of the implementation of the negotiated procedure without invitation to bid referred to in Article 61, paragraph 1, item 1) and 2) of the PPL, as well as on the basis of notification from a legal entity or natural person, state administration body, the autonomous province authority and the local self-government unit and other state authorities.

Optional grounds for exclusion of an economic operator - means the contracting authority is not obliged to request them, but if it requests them, it will also be obliged to exclude economic operators from the public procurement procedure if it is proven that some of these grounds exist for them.

Direct payment to subcontractors - means if direct payment to engaged subcontractors is provided for in the bid, the contracting authority is obliged to directly pay the due receivables to the subcontractor for the part of the contract that it executed. However, if this is not foreseen in the bid (hence, it may not be foreseen), the contracting authority is obliged to, after payment to the economic operator it had concluded the contract with, request to be submitted within 60 days with a proof and statement of the subcontractor that the payment was effectuated based on its claims. If the economic operator with which it concluded the contract does not submit the proof and the statement of the subcontractor within

that period, the contracting authority is obliged to submit to the Public Procurement Office a motion to instigate misdemeanor proceedings.

Mandatory grounds for exclusion of an economic operator - the contracting authority is obliged to request them from economic operators, that will be excluded from the public procurement procedure if it is proven that some of these grounds exist for them.

Contract award notice - means a notice published by the contracting authority in case of positive termination of the public procurement procedure, if a decision on contract award has been made, and also if a public procurement contract has been concluded thereafter.

Notice of suspension of the procedure - means a notice published by the contracting authority in case of negative termination of the public procurement procedure, if the contracting authority makes a decision to suspend the procedure referred to in Article 147 of the PPL.

Contract change notice - means a notice published by the contracting authority in case of changes in the public procurement contract for two reasons determined by law:

- changes in terms of additional goods, services or works;
- changes due to unforeseen circumstances.

Notice of the results of the design competition - means a notice published by the contracting authority after the design competition, which is a procedure that allows the contracting authority to obtain a plan or design, usually in the field of urban or spatial planning, architecture, engineering or informatics. The selection is performed by a jury, upon the conducted competition, with or without an award.

Publication of the public procurement procedure - means sending the public call for bid submission for publication and publication of the tender documentation (on the basis of which the bids are submitted) on the Public Procurement Portal.

Contract award decision - means a decision made by the contracting authority, which positively ends the public procurement procedure and selects the bidder with whom the contracting authority will conclude a public procurement contract (contract award is performed). This decision must be reasoned and contain in particular data from the report on the

public procurement procedure and instructions on the legal remedy, and the contracting authority is obliged to publish it on the Public Procurement Portal within three days from the day of its adoption.

Decision on suspension of the procedure - means a decision made by the contracting authority, which negatively ends the public procurement procedure, i.e. that decision states that the procedure failed, in the sense that the bidder to be awarded the public procurement contract was not selected. This decision must be reasoned and contain in particular data from the report on the public procurement procedure and instructions on the legal remedy, and the contracting authority is obliged to publish this decision on the Public Procurement Portal within three days from the day of its adoption.

Decision on exclusion of candidates - means a decision made by the contracting authority in the first stage of the two-stage proceedings. Two-stage procedures are public procurement procedures in which in the first stage the application is submitted by all interested economic operators and in that phase it is determined whether they meet the criteria for qualitative selection of the economic operator specified in the tender documentation, and only those for which the qualification is recognized may be invited in the second stage to submit a bid, an initial bid or to participate in a dialogue (depending on the type of procedure). The contracting authority is obliged to provide economic operators (candidates) whose qualification was not recognized in the first stage due to the fact that there are grounds for their exclusion or who do not meet the criteria for qualitative selection of economic operator, or those who have been recognized qualification and who will not be invited because they do not meet the criteria or rules set for reducing the number of eligible candidates, with a decision on exclusion of candidates, taking care not to disclose information about other candidates.

Framework agreement - is not a special public procurement procedure, but a technique used within the prescribed procedures. Practically, the contracting authority, instead of a public procurement contract, concludes a framework agreement, and then on the basis of a framework agreement, it concludes individual contracts when the need for the realization of a specific procurement arises. The framework agreement as a method of procurement is a special practical solution for frequent procurement of goods, services and works, i.e. when the contracting

authority in a certain period has the need to conclude several contracts with identical subject of procurement. In that case, the contracting authority will, using the possibility of concluding a framework agreement, conduct a public procurement procedure, in which it will select a bidder, one or several of them, with whom it will conclude a framework agreement, and later, when there is a specific need for goods, services or works subject to a concluded framework agreement, the contracting authority shall conclude a public procurement contract in the manner provided for in the framework agreement.

Opening of bids - is carried out automatically, via the Public Procurement Portal (on which occasion the opening report is automatically generated), except for the mentioned parts of bids that cannot be submitted electronically and which are opened before the Public Procurement Commission of the contracting authority.

Public Procurement Plan - means an annual public procurement plan adopted by the contracting authority and published on the Public Procurement Portal (as well as all its amendments), which contains the following information:

1) subject of public procurement and CPV code;

2) estimated value of public procurement;

3) type of public procurement procedure;

4) approximate time of initiating the procedure;

5) information that the contracting authority conducts the procurement through the body for centralized public procurement (if conducted in that way).

Violation of the integrity of the procedure - means situations in which the bidder, candidate or associated person in terms of the law governing the position of economic operators and the law governing corporate income tax was in any way involved in the preparation of the procurement procedure.

Submission of bids - is done via the Public Procurement Portal, except for the parts of bids that cannot be submitted electronically, such as: originals of bills of exchange, bank guarantees, samples and models of the subject of procurement.

Initiating public procurement procedure - means making a decision on the implementation of the procedure and establishment of the public procurement commission, and then preparation of the tender documentation by that commission.

Bidder - means an economic operator that has submitted a bid.

Public procurement procedure - means a procedure in which the contracting authority awards a contract or framework agreement, i.e. selects a bidder with whom it will conclude a public procurement contract or a framework agreement.

Acting in compliance with the decisions of the Republic Commission - means the contracting authority is obliged to act in accordance with the orders of the Republic Commission contained in its decision. The Republic Commission may request the contracting authority to submit a report on the implementation of the decision of the Republic Commission, and the contracting authority is obliged to submit such a report within the deadline determined by the Republic Commission.

Thresholds up to which the law does not apply - means value limits prescribed in the PPL/2019. If the same type of procurement is below these values on an annual basis, the law does not apply to them.

Negotiated procedure without publication of a public call - means a public procurement procedure in which, in relation to all other procedures, competition is mostly limited and which is least transparent in that the contracting authority invites a certain bidder or several of them to negotiate without publishing a public call. The Law prescribes the reasons for the application of that procedure, which must be interpreted restrictively. This procedure is carried out by the contracting authority first publishing a notice on the Public Procurement Portal on the implementation of this procedure, which contains an explanation of the grounds for its application, and then in writing sending an invitation to negotiate to one or, if possible, several economic operators, submitting the tender documentation along with invitation (does not publish it on the Public Procurement Portal).

Business operator - means any person or group of persons offering goods, services or works on the market (broader term than a bidder, because it also refers to potential bidders who have not yet submitted a bid and, for example, ask questions to the contracting authority for the purpose

of submitting a bid).

Preparation of the public procurement procedure - means market research, identification of needs and public procurement planning - publication of the public procurement plan on the Public Procurement Portal.

Deadline for submission of bids - means the period in which potential bidders prepare bids and can for that purpose ask questions to the contracting authority through the Public Procurement Portal and in the same way receive answers. The Public Procurement Law sets minimum deadlines for the submission of bids or applications that the contracting authority must apply when conducting public procurement procedures.

Sectoral contracting authorities - means contracting authorities that perform sector-related activities stipulated by the Law, and they are: water management, energy, traffic and postal services, or more precisely, gas and heating energy, electricity, water management, transport services, ports and airports, postal services, oil and gas extraction and exploration or extraction of coal or other solid fuels. Sectoral contracting authorities apply provisions envisaged for that type of contracting authorities when the subject of the specific public procurement is intended for some of the mentioned sectoral activities.

Sending the public call for publication - is done via the Public Procurement Portal, and as of that moment the deadline for bid submission commences. It is one of the notices published by the contracted authority. After entering the data required for compiling the notice, the contracting authority through the Public Procurement Portal creates a public procurement notice using a standard template and sends it for publication on the Public Procurement Portal.

Expert evaluation of bids - means determining whether bidders meet the criteria for qualitative selection, and then all those bids that are assessed to meet these criteria are subject to the application of contract award criteria whose purpose is to rank bids based on price and, possibly, other criteria.

Dynamic procurement system - means a system that allows the contracting authority to award a contract by electronic means during the entire period of its duration. In the dynamic procurement system, any interested economic operator may submit an application during the entire period of its duration. After evaluating their applications in accordance with the

criteria for qualitative selection of the economic operator, the contracting authority makes a decision on the admission of the economic operator to the dynamic procurement system. After making and submitting a decision on the results of the evaluation of applications, the contracting authority may start with individual procurements within the dynamic procurement system.

Conflict of interest – means situations in which the representatives of the contracting authority involved in the conduct of a public procurement procedure either are likely to influence the outcome of that procedure, have a direct or indirect financial, economic or any other private interest, which could be considered to call into question their impartiality and independence in that procedure.