

<https://doi.org/10.22364/jull.15.05>

Recommendations for Overcoming Challenges of Whistleblowing in Public Procurement Procedures

Dr. iur. Jelena Kostić

Institute of Comparative Law
Senior Research Fellow and Associate Professor
E-mail: j.kostic@iup.rs

Dr. iur. Marina Matić Bošković

Faculty of Law, Megatrend University
Research Fellow and Lecturer
Institute of Criminological and Sociological Research
E-mail: m.m.boskovic@roldevelopmentlab.com

Public procurement is an area very vulnerable to corruption, which was especially evident during the Covid-19 virus pandemic. Pandemic called for prompt state response, including urgent public procurement procedures that resulted in numerous irregularities (e.g., “Silver Raspberry” case). The possibility of discretionary decision-making contributed to irregularities, and the absence of financial controls, which due to the urgency of the procedure could not be implemented in a timely manner. Therefore, if financial control systems are not able to function smoothly, the question of modalities of strengthening transparency and control in public procurement procedures arises. One possibility to inform the public about irregularities is through whistleblowers. However, this also depends on the level of whistleblower protection in respective national legislation. Whistleblowers in public procurement can face a variety of challenges. Starting from the assumption that the protection of whistleblowers and the whistleblowing process itself needs to be further improved, authors offer recommendations for improving the position of whistleblowers in public procurement procedures at the national level of European countries based on the application of dogmatic-legal method and content analysis.

Keywords: importance of whistleblowers, public procurement, prevention, irregularities.

Contents

<i>Introduction</i>	58
1. <i>Public procurement in urgent procedures</i>	59
2. <i>Types of abuse in public procurement</i>	60
3. <i>Prevention mechanisms</i>	62
4. <i>Concept of whistleblowing and relevance for public procurement</i>	63
5. <i>Whistleblowing regarding public procurement and public interest</i>	65
6. <i>Whistleblowing and protection of data confidentiality</i>	66
<i>Summary</i>	67
<i>Sources</i>	68
<i>Bibliography</i>	68
<i>Normative acts</i>	69
<i>Other sources</i>	69

Introduction

Public procurement as purchase by governments and state-owned enterprises of goods, services and works represents a significant amount of total public expenditure. At the level of the European Union, public authorities spend about two billion annually on public procurement, which represents about 14% of gross domestic product.¹ In OECD countries, the existing statistics show 12% of gross domestic product and 29% of government spending.²

Due to the fact that public spending is financed partially from taxes paid by citizens, hence, the citizens have a considerable interest to be informed regarding expenditure of public funds. To ensure spending of funds in a legal and efficient manner, it is necessary to have adequate control mechanisms. External control in the public sector is mostly performed in accordance with the annual plan, while internal audit mostly informs the top management of a certain institution about irregularities. The question is how to act in a situation when the top management has participated in these illegal activities. Furthermore, some facts that indicate illegal conduct can be established only by performing a certain job within the contracting authority or bidder. The whistleblowers are not necessary the persons whose job description requires to determine the illegalities in business activities at the institution, nor are they tasked with collecting relevant evidence, but they can perform any job and get knowledge on irregularities. The institute of whistleblowers was established to motivate persons to report irregularities and to guarantee a certain degree of protection from retaliation by the employer and other persons, as well as to protect them from criminal and civil liability if they have reported irregularities in accordance with the standards that guarantee the protection of whistleblowers.³

Whistleblowers protection is now part of international and regional standards. The general principles in the field of public procurement are incorporated in

¹ European Commission. Public Procurement. 2021. Available: https://ec.europa.eu/growth/single-market/public-procurement_en [last viewed 13.04.2022].

² OECD. Public Procurement, 2019. Available: <https://www.oecd.org/governance/ethics/public-procurement.htm> [last viewed 13.04.2022]; *Matić Bošković, M. Kostić, J.* The Legislation of the Republic of Serbia in the Field of Prevention of Corruption on Public Procurement, *Bratislava Law Review*, Vol. 5, No. 1, 2021, p. 146. Available: <https://doi.org/10.46282/blr.2021.5.1.234> [last viewed 13.04.2022].

³ European standards in the field of whistleblower protection are contained in: Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, *Official Journal of the European Union*, L 305/17, 26.11.2019.

the Treaty on the Establishment and Functioning of the European Union, as well as the practices of the European Union institutions. These principles are: transparency, equal treatment, competition and non-discrimination. However, the aforementioned principles are often violated in public procurement procedures. Having in mind the challenges in public procurement and especially irregularities during the Covid-19 pandemic, in the paper authors try to highlight the important role of whistleblowers in public procurement procedures and the need to improve their protection. In addition, the authors assessed incentives for whistleblowers within the public sector institutions, bearing in mind challenges they are in both the public and private sector.

Given the fact that during the pandemic of the Covid-19 virus it was not possible to conduct both external and internal control procedures in a timely manner, in the first part of the paper we point out the importance of role of whistleblowers in conducting urgent public procurement procedures. Then, having in mind that abuses are possible in each stage of public procurement procedures, in a separate chapter we analyse irregularities in each of them and, based on the example from practice, we have highlighted that inadequate protection of whistleblowers is the most common reason for non-reporting of irregularities in public procurement procedures by employees. In the third and fourth chapters, we consider the mechanisms of prevention of irregularities in public procurement procedures, and we especially emphasize the importance of whistleblowers in combating irregularities. Then, in the fifth chapter of the paper, we gauge the content of the public interest in public procurement, having in mind its complexity, as well as the fact that its protection must be the only motive for whistleblowers in the public and in the economy sector. To emphasise the need for special training in the field of handling classified information when informing the public, in the sixth chapter we analysed the data protection, which is highly important for public procurement in the defence and security sector. In the last section, we offer recommendations for improving the system of whistleblower protection not only at the national, but also at the institutional level to encourage whistleblowing in public procurement procedures, which seems to us to be under-represented in practice due to inadequate protection of whistleblowers.

1. Public procurement in urgent procedures

During the Covid-19 pandemic, numerous irregularities in public procurement procedures were noticed. This has affected the quality of products delivered and services rendered, which are important in saving lives and providing assistance to those at risk.

The absence of financial control, as well as discretion in procedures and decision-making, contributed to growing irregularities during the pandemic.⁴ That is why citizens should be encouraged to report irregularities that indicate corruption.⁵ Thus, during the pandemic in Bosnia and Herzegovina, an affair was recorded regarding corruption in public procurement procedures. For the needs of treating patients with the virus, 100 ventilators were procured from China from the company “Silver Raspberry”, which is engaged in the production of raspberries with no previous experience or a license to trade in medical products.⁶ In addition, ventilators other than

⁴ *Teichmann, F., Falker, M. C.* Public procurement and corruption during Covid-19; self monitoring and whistleblowing incentives after Srebrena Malina. SEER Journal for Labour and Social Affairs in Eastern Europe, Vol. 24, issue 2, 2021, p. 185, doi: [org/10.5771/1435-2869-2021-2-181](https://doi.org/10.5771/1435-2869-2021-2-181).

⁵ *Ibid.*, p. 187.

⁶ *Ibid.*, p. 181.

those specified in the contract were delivered. If this type of irregularities is observed, the whistleblowers should inform the public to prevent such actions.

The lack of timely control and discretionary decision-making procedures contributes to irregularities, even in countries with a very long tradition of controlling public spending, such as Great Britain. Although the Supreme Audit Institution played a significant role in improving the transparency of Great Britain, it could not exercise its powers during the pandemic. The audit of the expediency of public procurement was performed somewhat later. However, in its Report from 2020, the Supreme Audit Institution pointed out a number of irregularities in public procurement procedures conducted under an urgent procedure.⁷ According to the Report, contracts were awarded without publishing or invitations to submit bids in some cases. In most situations, there was a lack of explanation of how the supplier was selected and how the risk of corruption was reduced, as well as the possibility of conflicts of interest.

Apart from the above, according to the findings of the Supreme Audit Institution, there was no clear trace of internal audit that would support public procurement decisions. During August 2020, the Cabinet of Ministers asked the Government Agency for Internal Audit to audit six contracts. On that occasion, the Agency determined that there was no evidence that control procedures had been applied and there were shortcomings in the documentation, so it was unclear how some suppliers were awarded contracts.⁸

These irregularities may be the result of not only gross negligence, but also corruption in public procurement procedures. To prevent potential illegalities in public procurement procedures, it would be of great importance to gather evidence against their perpetrators in such situations. Bearing in mind that in the specific case, the public procurements referred to the procurement of equipment for the protection of health and treatment of patients with Covid-19, there is a multiple public interest in finding out such information.

Procurement of equipment and materials of inadequate quality endangers human health, giving unfounded advantages to certain bidders violates the principle of free competition, simultaneously causing damage to public funds. Abuses in public procurement can be present in all phases of its implementation, from planning to the implementation of contracts, not only in public procurement that is carried out under urgent procedures, but also in other procedures.

2. Types of abuse in public procurement

Abuses in public procurement procedures can be detected at every stage of their implementation. The planning phase remains the weakest link in the public procurement chain, since it is still impossible to ascertain whether the technical specifications and quantities correspond to the real needs of the contracting authority; whether the estimated value of the particular public procurement corresponds to a view to

⁷ Investigation into government procurement during the Covid-19 pandemic. Report by the Comptroller and Auditor General, Cabinet Office, 26. November 2020, p. 10. Available: [//www.nao.org.uk/wp-content/uploads/2020/11/investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf](http://www.nao.org.uk/wp-content/uploads/2020/11/investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf). [last viewed 13.04.2022]; See: *Kostić, J., Matić Bošković, M.* Public Procurements during the Covid-19 Pandemic Time – Lessons for the Republic of Serbia, In: International organizations and State's response to Covid-19 *Jelisavac Trošić, S. Gordanić, J.* (eds). Belgrade: Institute of International Politics and Economics, 2021, p. 341.

⁸ Investigation into government procurement during the Covid-19 pandemic, Report by the Comptroller and Auditor General, Cabinet Office, Op. cit., p. 10.

the objectives of the procurement, the technical specifications and the quantities; and whether the contracting authorities have the goods being procured on stock. During the planning process, it is possible that the public procurement is conducted for the procurement of goods, services or works for which there is no need, or for goods that contracting authority already has in a certain quantity and quality. Although it might be expected that such abuses will be detected by internal or external control mechanisms, it is sometimes possible that another person whose control is not stipulated by the job description will come across certain information while performing his/her job duties. Sometimes these people notice the presence of illegal activities much sooner than the control mechanisms. Sensitive matter is also the procurement of intellectual services, e.g., consulting services by persons for whose engagement there is no need.⁹

Furthermore, abuses can occur during the public procurement process, when certain public procurements are treated as confidential. This could be public procurement in the security and defence sector when it comes to the purchase of goods that should not be treated as confidential (i.e., office furniture or fuel). It is also possible for the procuring entity to consciously choose the subject of procurement that can be performed only by one bidder, and he does not have proof that only he can do that, as well as if the evidence possessed by the procuring entity does not indicate that only a certain bidder can realize the procurement.

At the phase of performance of awarded contract abuses are possible through the permission for the contract to be performed in way that differs from what was offered and stipulated. This usually happens in the form of prohibited annexes to the contract: change of stipulated price even though the tender documents do not provide for an objective reason for which the contracting authority could allow that; change in payment terms and conditions, so that, for instance, the stipulated price is paid in advance – entirely or partially, even though the public procurement contract specified that the payment would be made only once the work was performed, that is, only when all the obligations were performed by the bidder; change of the stipulated time limit for performance, where the contracting authority allows the bidder to provide the service or perform works within time limits longer than those offered, that is, allow the bidder to delay performance; change in subject of the tender, where the contracting authority allows the bidder to deliver something that is of a lower quality and of inferior technical characteristics compared to what was offered (this also relates to provision of services and works); change of subject of procurement where the contracting authority allows the supplier to deliver something that was not envisaged in the procurement contract; change of the stipulated amount of goods to be delivered, that is, change off stipulated scope of works or services, where the contracting authority demands or allows a performance below or exceeding what was stipulated, etc. In addition, abuses are possible through agreements between bidders and purchasers, as well as between the bidders themselves.¹⁰ It is possible to find out about the existence of such agreement from the whistleblower who is employed by the purchaser or the bidder. However, inadequate protection against retaliation seems

⁹ On the procurement of intellectual services see also: *Varinac, S., Ninić, I.* Korupcijska mapa sistema javnih nabavki u Republici Srbiji [Corruption map of the public procurement system in the Republic of Serbia]. Belgrade: OEBS, 2014, pp. 5 and 48.

¹⁰ *Matic Boskovic, M.* Krivično delo zloupotreba u javnim nabavkama – izazovi u primeni [Criminal offense of abuse in public procurement – challenges in implementation]. In: (Privredna krivična dela [Economic crimes], *Stevanović, I., Čolović, V.* (eds). Belgrade: Institute of Criminological and Sociological Research and Institute of Comparative Law, 2017, pp. 215–229.

dissuasive to them, so the practice of whistleblowing is not sufficiently present in public procurements. This is confirmed by examples from practice.

During 2010, Lubica Lapinová, employed in the public sector in the Slovak Republic (National Forestry Centre), reported the misuse of public funds during a tender for a project worth 700 000 euros. The employee worked on controlling the spending of funds. After discovering the violation, she refused to sign the document approving the financing of the project. This resulted in her dismissal during 2012, which was justified by reducing the redundancy. In addition, the employer filed two criminal charges against Lapinova, which were rejected as unfounded. In 2016, a regional court upheld a municipal court ruling that firing whistleblowers was illegal. However, the consequences of retaliation by the employer were long-lasting. The whistleblower could not get a job for many years after she was fired, and Ms Lapinova waited for three years for the Supreme Court to decide that employer was obliged to pay her lost earnings. However, her endeavour was rewarded by non-governmental organizations in Slovakia, when she was awarded the Civic Courage Award in 2014.¹¹

This shows that the whistleblowers who report illegalities to protect the public interest face serious consequences, such as long-term unemployment. Due to such examples, many employees who would otherwise report an irregularity, decided not to react in such situations. Therefore, it seems necessary not only to prescribe measures concerning the protection of whistleblowers by national legislation, but also to establish internal procedures and procedures at the level of institutions and to apply an effective system of protection of whistleblowers in practice. In addition, it indicates the need to prescribe and apply sanctions against employers who take retaliatory measures against employees who report irregularities in the public interest.¹² Although the monetary compensation for whistleblowers is a questionable measure due to risk of abuse, it seems that a some kind of compensation for the whistleblower would be acceptable.¹³ Moreover, the establishment of cash funds could be considered to help whistleblowers to overcome the material problems they may face due to the retaliatory measures until they find a new job. In addition, it is necessary to keep in mind the mandatory application of sanctions against employers who take retaliatory measures against whistleblowers.

3. Prevention mechanisms

To date, various mechanisms for preventing illegality in public procurement procedures have been established in the practice of many countries. Among them, the most common are external audit and internal financial controls. However, both control mechanisms have their limitations, thus, in some situations it is more realistic to expect that irregularities in public procurement procedures will be found out thanks to the activities of whistleblowers. The State Audit Institution across the world

¹¹ Whistleblower gets justice after 7 years, 26.06.2019. Available: <https://spectator.sme.sk/c/22154429/it.took.lubica-lapinova-7-years-to-get-justice-done-white-crow.html> [last viewed 13.04.2022]; Estimating the Economic Benefits of Whistleblower Protection in Public Procurement, Final Report, Luxembourg: European Commission, 2017, p 87. Available: <https://op.europa.eu/en/publication-detail/-/publication/8d5955bd-9378-11e7-b92d-01aa75ed71a1/language-en> [last viewed 13.04.2022].

¹² Article 23 of the Directive (EU) 2019/1937 stipulates that Member States should take all measures to protect a person who reports irregularities from retaliation, including the imposition of effective, proportionate and dissuasive penalties for natural or legal persons who prevent, attempt to obstruct or retaliate against a whistleblower.

¹³ Article 20, paragraph 2 of the Directive provides for the possibility for Member States to prescribe financial support for persons who report irregularities.

operates in accordance with the annual plan of activities and never performs audits in all public sector institutions during the year. During the audit procedure, it can be determined that there are irregularities in the public procurements that were conducted in the previous period, and due to the obsolescence of criminal prosecution, it may be too late to sanction the perpetrators. Internal audit reports irregularities to the top management of the institution in which it is established. In such situations, a problem arises if the top management has participated in public procurement procedures in which irregularities have been identified.

In some countries significant role has civil sector since it acts during public procurement procedure. The institute of civic supervisor was established in the Republic of Serbia in 2012 by the Law on Public Procurement for procurements whose estimated value exceeded one billion dinars (about 10 million euros).¹⁴ All documents in the public procurement procedure were available to him and he was able to publicly present opinion and make recommendations to the contracting authority. Based on the 2012 Law, the Institute of civic supervisor had two important roles: overseeing and analysing the procedure and pointing out the relevance, which could consist of submitting requests for protection of rights in public procurement procedures or reporting on corruption.¹⁵

Bearing in mind that civic supervisor's role also included informing on irregularities in public procurement procedures, it could be said that he in some way had the role of an authorized whistleblower, who acted on the basis of an employment contract. One of the differences in relation to the classic role of whistleblower was that the civic supervisor could be a legal entity (non-governmental organization), in whose name its members acted. However, the institute of civic supervisor itself has not, in practice, been fully set in motion. The reason for that is the lack of adequate reaction from the competent institutions to which the reports on irregularities were submitted. In addition, high oversight costs were present. The lack of monetary compensation discouraged civic supervisors.¹⁶ Although the aforementioned institute was an important mechanism in the prevention of corruption in high-level public procurement procedures, it was repealed by the new Law on Public Procurement, which was passed in 2019.¹⁷

4. Concept of whistleblowing and relevance for public procurement

Employees in either the public or private sectors are often afraid to inform the authorities about the illegal activities of their superiors. The main reason for such an attitude is to avoid revenge for undertaking such activities.¹⁸ To prevent retaliation,

¹⁴ The Law on Public Procurement, Official Gazette of the Republic of Serbia, No. 124/12.

¹⁵ *Matić Bošković, M., Kostić, J.* The Legislation of the Republic of Serbia in the Field of Prevention of Corruption on Public Procurement. Op. cit., p. 151.

¹⁶ *Šarić, M., Stojanović, M.* Nadzornici odustaju od kontrole najskupljih javnih nabavki [Supervisors give up control of the most expensive public procurement]. Centar za istraživačko novinarstvo Srbije [Center for Investigative Journalism of Serbia], 2018, Available: <https://www.cins.rs/nadzornici-odustaju-od-kontrole-najskupljih-javnih-nabavki/>. [last viewed 14.04.2022].

¹⁷ The Law on Public Procurement, Official Gazette of the Republic of Serbia, No. 91/2019.

¹⁸ *Šuput, J.* Državna revizorska institucija i prevencija kriminaliteta belog okovratnika u javnom sektoru [State Audit Institution and White Collar Crime Prevention in the Public Sector], Zbornik radova Pravnog fakulteta u Nišu [Proceedings of the Faculty of Law in Nis], No. 67, 2014, p. 322; *Martić, M.* Urednopravni aspekti pojma uzbunjivača [Comparative legal aspects of the notion of whistleblowers]. Strani pravni život [Foreign Legal Life], 60(1), 2016, p. 210; *Višekruna, A.* Modeli podsticanja aktivnosti uzbunjivanja na finansijskom tržištu [Models for encouraging whistleblowing activities in the financial market]. Pravo i privreda [Law and economics], No. 4–6, 2016, p. 370.

a whistleblower protection system has been established at the international level in both the public and private sectors.

At the EU level, the important instrument for protection of whistleblowers is Directive (EU) 2019/1937 on the protection of persons who report breaches of Union Law (hereinafter Directive (EU) 2019/1937)¹⁹ According to the aforementioned Directive, EU member states should establish adequate protection for persons who inform the public about irregularities they uncover while doing their job. The target groups to which Directive applies is broadly defined. The Directive applies to persons who have the status of employees in a particular institution, including civil servants, persons who have the status of self-employed persons, persons who perform administrative, managerial and supervisory activities, including volunteers and trainees, as well as persons who are under the supervision or in a contractual relationship with the person in whose business irregularities were noticed. According to the provisions of the Directive, the protection of whistleblowers must also be established for persons who report irregularities observed in the work of the legal entity with which they were engaged as suppliers or subcontractors. Its provisions also apply to persons who report irregularities which they have come upon during their terminated employment, as well as persons who report irregularities that they have learned about during the employment procedure (Article 4). The Directive specifically offers several types of protection in situation when a whistleblower suffered retaliation for reporting a breach. Public procurement is mentioned as one of the areas in which the Directive provides support in case of disclosure.

An important basis for providing protection to the whistleblower is the existence of a motive to provide information by the whistleblower in the public interest. Given that both legal entities from the public sector and those from the economic sector participate in the public procurement procedure, the question could be asked which information in the public interest could be provided by public employees and which by private sector employees. In the case of the contracting authority, this could be information concerning the appropriateness of public procurement or possibly negotiating with a particular tenderer or tenderers to favour a particular person over others. When it comes to the economic sector, it could be the information concerning the agreement between the bidders on the amount of the offered price, as well as the agreement of the bidder with the procuring entity itself.

Whistleblowers can report illegal orders from superiors in public procurement procedures, although their role may be linked to wider activities. The work environment must have an incentive for whistleblowers to report irregularities to contribute to both strengthening integrity and reducing budget losses. Employees in the public sector can detect fraud and corruption in their institutions, and to act as whistleblowers, they must be familiar with the protection of whistleblowers. Whistleblowing has multiple meanings, as it contributes to strengthening accountability, fighting corruption and encouraging transparency. To prevent harassment, discrimination, or any other form of retaliation against the whistleblower, it is necessary to ensure that their protection is implemented in the internal legal acts of the institutions and legal entities in which they are employed.²⁰

¹⁹ Directive (EU) 2019/1937.

²⁰ Rabrenović, A., Kostić, J., Matić, M. Open Dilema: How to react to illegal orders from a superior. In: Integrity and Good Governance in the Western Balkans. RESPA, Regional School of Public Administration, Rabrenović, A. and Knežević Bojović, A. (eds). 2018, p. 313. Available: <http://iup.rs/wp-content/uploads/2020/10/Integrity-and-Good-Governance-in-the-WB.pdf> [last viewed 13.04.2022].

5. Whistleblowing regarding public procurement and public interest

According to international standards, whistleblowing must be done in the public interest. Even if its definition is not determined by law, it does have its constitutive elements and forms. These forms include external and internal security, public order and peace, continuous supply of energy and food, uninterrupted functioning of public services, orderly and uninterrupted traffic, public communications, communications, protection of the environment from pollution, functioning of the market, protection of competition, provision information of public importance, protection of personal data²¹ Authors considering the theory of administrative law have similar views. According to Tomić, the constitutive elements of the public interest are the exercise and protection of human rights and freedoms, development of social life and orderly work of state bodies and public services.²² Some authors consider the interests of all individuals who together make up the public to be in the public interest. Therefore, it should be assessed whether the interests related to the rule of law, i.e., the division of power and the protection of human rights, have been realized.²³ According to some authors, the protection of the public interest should overcome the employee's sense of loyalty to the organization, because whistleblowing is an effective tool for investigating and sanctioning corruption. However, in that case it is necessary to take into account whether the protection of the public interest has been the main motive of the whistleblower.²⁴

Some authors consider that if one wants to assess the ethics of whistleblower behaviour, one should take into account loyalty to the community rather than to the employer himself.²⁵ Therefore, the whistleblower in such cases should enjoy an adequate level of protection in accordance with the standards that guarantee effective protection of the whistleblower.²⁶

One of the first European standards in the field of whistleblower protection is the 2014 Council of Europe Recommendation on the Protection of whistleblowers. According to this document, when it comes to the public interest in the public sector, the disclosure of information can be undertaken to enable increased democratic participation, the formulation of sound policies and public oversight of state action. In the private sector, the public interest is consumer protection, fair market competition

²¹ Đurić, V., Vranješ, N. Pravni okvir uloge lokalne samouprave u ostvarivanju javnog interesa – Primeri Republike Srbije i Republike Srpske [Legal framework of the role of local self-government in the realization of public interest – examples of the Republic of Serbia and the Republic of Srpska]. *Godišnjak fakulteta Pravnih nauka* [Yearbook of the Faculty of Law], No. 10, 2020, pp. 49–50.

²² Tomić, Z. Javni poredak: Pojam i struktura [Public order: Concept and structure]. *Anali Pravnog fakulteta u Beogradu* [Annals of the Faculty of Law in Belgrade], Vol. 67, No. 2, 2019, p. 36.

²³ Boot, R. E. The Feasibility of a Public Interest Defense for Whistleblowing. *Law and Philosophy*, Vol. 39, No. 1, 2020, p. 34.

²⁴ Scaturro, R. *Defining Whistleblowing*. Laxenburg: International Anti Corruption Academy, 2018.

²⁵ Bowden, P. In the public interest: Protecting whistleblowers and those who speak out. Prahara: Tilde University Press, 2014, p. 11 cited in *Dussuyer, I., Armstrong, A. and Smith, R. Research into Whistleblowing, Protection Against Victimisation*. *Journal of Law and Governance*, Vol. 10, No. 3, 2015, p. 37. Available: <https://doi.org/10.15209/jbsge.v10i3.860> [last viewed 13.04.2022].

²⁶ “The Biela Vrana Award” is a positive example of the community's gratitude to conscientious citizens. That award is established in the Slovak Republic by non-governmental organizations to thank the courageous citizens who have acted in the public interest. More information about the aforementioned award is available at: <https://bielavrana.sk/ocenie/> [last viewed 13.04.2022].

and an adequate way of regulating financial and other business activities (item 15).²⁷ Bearing in mind the above, it can be concluded that publishing information on illegal actions in public procurement procedures would enable public oversight of the state and thus protect the public interest in relation to the functioning of the public sector. The benefit for economic sector would be, e.g., ensuring free competition, which is a very important principle of public procurement.

6. Whistleblowing and protection of data confidentiality

A particular problem with whistleblowing may be the fear of liability for leaking classified information. This applies, in particular, to classified information in the field of public procurement in the defence and security sector. Therefore, only the definition of data secrecy and the termination of their secrecy should be clearly defined by national regulations. The Directive (EU) 2019/1937 does not apply to the responsibility of Member States to ensure national security or the protection of essential security interests. This means that it will not apply to reports of breaches of procurement rules that include aspects of defence or security unless covered by relevant Union acts.²⁸ However, in such situations, there should be some rules at the level of institutions in which public procurement is conducted regarding the manner of internal information about irregularities, if they are noticed at work. Information that is secret cannot be made public, nevertheless, there should be internal rules for effective control of the legality of actions.

If a secret is declared a business secret, the measures, procedures and legal remedies for the protection of a legal entity that has provided certain information as a business secret shall not be applied, if the exercise of the right to freedom of expression prescribed by Article 10 of the Convention on Human Rights and Fundamental Freedoms of the Council of Europe, as well as in the case of detecting illegal activities in order to protect the public interest.²⁹ However, in some situations, it may happen that the security sector revokes the confidentiality of data concerning the information that is declared secret only to cover up illegality. Hence, it is crucial that whistleblowers are aware of the national regulations governing the confidentiality of data and the conditions under which certain data may be declared business secrets. If these regulations are not known, whistleblowers may be discouraged from reporting irregularities. Therefore, training of security and defence staff in dealing with confidentiality data is of particular importance. When it comes to informing employees in the economic sector about irregularities in public procurement, the question can be asked whether they are sufficiently encouraged to report irregularities. As the Directive provides equal protection for both public and private employees, it can be concluded that they enjoy equal protection in this regard.

²⁷ Recommendation CM/Rec(2014)7 adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and explanatory memorandum. Available: <https://rm.coe.int/16807096c7> [last viewed 14.04.2022].

²⁸ Article 3 of the Directive (EU) 2019/1937.

²⁹ Article 5 of the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, Official Gazette of the European Union, L 157/1. Available: <https://wipo.int/en/text/423032> [last viewed 13.04.2022].

Summary

1. The importance of whistleblowers in detecting irregularities in public procurement is of great importance for the legality and transparency of the procedure, as well as for the protection of bidders' rights. Although there are various mechanisms in the public sector that can identify irregularities such as external audit and internal control, it seems likely that most irregularities in public procurement procedures will be identified exclusively by employees, not only in the public procurement sector, but also in other sectors such as e.g., finance or human resources sector. In addition to the employees of the contracting authority, the role of employees in the economic sector is also very important, for disclosure of irregularities. However, whistleblowers should solely act to protect the public interest. The actions of whistleblowers are of particular importance in the procedures of undertaking urgent public procurements, because then discretionary decision-making is possible, and therefore there is a greater possibility of abuse. In these situations, the timely performance of control activities by external and internal audit is disabled, hence, certain evidence that indicates illegal conduct may be hidden or illegalities may be covered up. With a higher probability that the perpetrators will be discovered, and their actions will be punished, the number of illegalities in public procurement procedures will be reduced.
2. Employees in the security and defence sector may face a particular challenge in reporting irregularities in public procurement procedures. The question arose as to how they should handle classified information. According to the Directive (EU) 2019/1937, classified information cannot be disclosed. This is possible only if the information is presented as secret to cover up illegalities in public procurement procedures. Therefore, it is essential that employees are educated properly to know if some information can be declared as secret information in accordance with European standards and national legislation.
3. However, the fear of losing the job and economic insecurity due to retaliation by the employer can affect the whistleblower's decision to report irregularities noticed in public procurement procedures. Therefore, a certain fund should be established at the national level to provide assistance to a whistleblower who has acted in the public interest. The support should last during the court proceedings pursuant to illegal dismissal. In addition, it is necessary to take adequate sanctions against employers for revenge against the whistleblower. This is the only way to encourage whistleblowers to report irregularities in public procurement procedures. This is important for both the public and private sectors, where there seems to be a greater possibility of being fired by the employer. Furthermore, the criteria that apply to public, must also be applied in the economic sector when it comes to the protection of whistleblowers. It can be concluded that it is not enough to have whistleblower protection standards at the national level. It is necessary to specify the manner and procedure of whistleblowing in the internal rules, while prescribing in detail the manner of handling classified information. Whistleblowing in public procurement procedures should not only include the persons conducting public procurement, but also whistleblowing by other persons employed in the financial sector and who are in charge of planning funds and monitoring financial realization, as well as persons from the human resources sector and other persons participating in any of the phases in public procurement procedures.

Sources

Bibliography

1. *Boot, R. E.* The Feasibility of a Public Interest Defense for Whistleblowing. *Law and Philosophy*, Vol. 39, No. 1, 2020, pp. 1–34.
2. *Dussuyer, I., Armstrong, A. and Smith, R.* Research into Whistleblowing, Protection Against Victimisation. *Journal of Law and Governance*, Vol. 10, No. 3, 2015, pp. 34–42.
3. *Đurić, V., Vranješ, N.* Pravni okvir uloge lokalne samouprave u ostvarivanju javnog interesa – Primeri Republike Srbije i Republike Srpske [Legal framework of the role of local self-government in the realization of public interest – Examples of the Republic of Serbia and the Republic of Srpska]. *Godišnjak fakulteta Pravnih nauka* [Yearbook of the Faculty of Law], No. 10, 2020, pp. 48–69.
4. *Kostić, J., Matić Bošković, M.* Public Procurements during the Covid-19 Pandemic Time-Lessons for the Republic of Serbia. In: *International organizations and State's response to Covid-19, Jelisavac Trošić, S., Gordanić, J.* (eds). Belgrade: Institute of International Politics and Economics, 2021, pp. 339–359.
5. *Martić, M.* Uporednopravni aspekti pojma uzbunjivača [Comparative legal aspects of the notion of whistleblowers]. *Strani pravni život* [Foreign Legal Life], 60(1), 2016, pp. 201–214.
6. *Matic Boskovic, M.* Krivično delo zloupotreba u javnim nabavkama – izazovi u primeni [Criminal offense of abuse in public procurement – challenges in implementation]. In: *Privredna krivična dela* [Economic crimes], *Stevanović, I., Čolović, V.* (eds). Belgrade: Institute of Criminological and Sociological Research and Institute of Comparative Law, 2017, pp. 215–229.
7. *Matić Bošković, M., Kostić, J.* The Legislation of the Republic of Serbia in the Field of Prevention of Corruption on Public Procurement. *Bratislava Law Review*, Vol. 5, No. 1, 2021, pp. 145–158. Available: <https://doi.org/10.46282/blr.2021.5.1.234> [last viewed 13.4.2022].
8. *Rabrenović, A., Kostić, J. and Matić, M.* Open Dilemma: How to react to illegal orders from a superior. In: *Integrity and Good Governance in the Western Balkans*, Respa, Regional School of Public Administration. In: *Rabrenović A. and Knežević Bojović A.* (eds). 2018, pp. 303–314. Available: <http://iup.rs/wp-content/uploads/2020/10/Integrity-and-Good-Governance-in-the-WB.pdf> [last viewed 13.04.2022].
9. *Scaturro, R.* Defining Whistleblowing, Laxenburg: International Anti-Corruption Academy. 2018.
10. *Teichmann, F., Falcker, M. C.* Public procurement and corruption during Covid-19; self-monitoring and whistleblowing incentives after Srebrena Malina. *SEER Journal for Labour and Social Affairs in Eastern Europe*, Vol. 24. Issue 2, 2021, pp. 181–206. Available: <https://doi.org/10.5771/1435-2869-2021-2-181> [last viewed 13.04.2022].
11. *Tomić, Z.* Javni poredak: Pojam i struktura [Public order: Concept and structure]. *Anali Pravnog fakulteta u Beogradu* [Annals of the Faculty of Law in Belgrade], Vol. 67, No. 2, 2019, pp. 34–48.
12. *Varinac, S., Ninić, I.* Korupcijska mapa sistema javnih nabavki u Republici Srbiji [Corruption map of the public procurement system in the Republic of Serbia]. Belgrade: OEBS, 2014.
13. *Višekruna, A.* Modeli podsticanja aktivnosti uzbunjivanja na finansijskom tržištu [Models for encouraging whistleblowing activities in the financial market]. *Pravo i privreda* [Law and economics], No. 4–6, 2016, pp. 368–385.
14. *Šarić, M., Stojanović, M.* Nadzornici odustaju od kontrole najskupljih javnih nabavki [Civic supervisors give up control of the most expensive public procurements], *Centar za istraživačko novinarstvo Srbije*. 2018. Available: <https://www.cins.rs/nadzornici-odustaju-od-kontrole-najskupljih-javnih-nabavki/> [last viewed 14.04.2022].
15. *Šuput, J.* Državna revizorska institucija i prevencija kriminaliteta belog okovratnika u javnom sektoru [State Audit Institution and White-Collar Crime Prevention in the Public Sector]. *Zbornik radova Pravnog fakulteta u Nišu*, broj 67/2914, pp. 321–346.

Normative acts

1. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and 14, Rome, 4.XI.1950. Available: https://www.echr.coe.int/documents/convention_eng.pdf [last viewed 13.04.2022].
2. Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, L 157/1. Available: <https://wipo.int/wipolex/en/text/423032> [last viewed 14.04.2022].

3. Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. Available: <https://www.legislation.gov.uk/eudr/2019/1937> [last viewed 14.04.2022].
4. Recommendation CM/Rec(2014)7 adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and explanatory memorandum. Available: <https://rm.coe.int/16807096c7> [last viewed 14.04.2022].
5. The Law on Public Procurement, Official Gazette of the Republic of Serbia, No. 124/12.
6. The Law on Public Procurement, Official Gazette of the Republic of Serbia, No. 91/2019.

Other sources

1. Estimating the Economic Benefits of Whistleblower Protection in Public Procurement. Final Report, Luxembourg: European Commission, 2017. Available: <https://op.europa.eu/en/publication-detail/-/publication/8d5955bd-9378-11e7-b92d-01aa75ed71a1/language-en> [last viewed 13.04.2022].
2. European Commission. Public Procurement. 2021. Available: https://ec.europa.eu/growth/single-market/public-procurement_en [last viewed 13.04.2022].
3. Investigation into government procurement during the Covid-19 pandemic. Report by the Comptroller and Auditor General, Cabinet Office, 26. November 2020. Available: <http://www.nao.org.uk/wp-content/uploads/2020/11/investigation-into-government-procurement-during-the-COVID-19-pandemic.pdf> [last viewed 13.04.2022].
4. OECD. Public Procurement. 2019. Available: <https://www.oecd.org/governance/ethics/public-procurement.htm> [last viewed 13.04.2022].
5. Whistleblower gets justice after 7 years, 26.06.2019. Available: <https://spectator.sme.sk/c/22154429/it.took.lubica-lapinova-7-years-to-get-justice-done-white-crow.html> [last viewed 13.4.2022].

© University of Latvia, 2022

This is an open access article licensed under the Creative Commons Attribution 4.0 International License (CC BY-NC 4.0) (<https://creativecommons.org/licenses/by-nc/4.0/>).