

## **Recommendations for amendments of legal framework related to the work of civil supervisors of public procurements in the Republic of Serbia**

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### **Introduction**

The Law on Public Procurement from 2012 was adopted, among other things, to make fight against corruption in public procurements more efficient in cases where it was identified as a serious problem. For this purpose, the Law prescribed many rules that aim at preventing corruption and other irregularities to occur, or at detecting them more easily, by introducing prohibitions, obligations and measures of supervision and control. These measures are grouped in a special section entitled "Prevention of corruption and conflict of interest." A major innovation in this concept is the introduction of a special type of "civil control" in public procurement system - "civil supervisor". This concept was partly inspired by some solutions from comparative practice, but it cannot be said that a model of any specific country was adopted. It should also be emphasized that civil supervisor, as "a watchful public eye", does not represent the only possible channel of public knowledge about events taking place within a public procurement, or the only possible means for the procurement to be monitored thoroughly. On the contrary, many information can possibly be collected in other ways. First of all, many documents related to public procurements have to be published in advance on the Public Procurement Portal, and these documents are available to concerned party without any request. In addition to the information published on the Public Procurement Portal, in regards to the public procurement procedure, certain information can be found in other documents - in the Law (or decision) on the budget, in the rationale of the draft Law or in information booklets of state bodies, all of which must be published elsewhere in advance. When some information are not available in advance, they can be obtained through a request for free access to information. In general, all documents related to public procurements should be made available in this way, besides rare exceptional cases (e.g. cases of classified procurements or cases of tender documents and bids containing business secrets). The disadvantage of this type of control is reflected in the fact that the deadline for submission of documents by request is "without delay, and no later than 15 days". In practice, this process can take significantly longer, especially when the public authority does not respond to the request or unreasonably denies it, which creates a possibility of appeal to the Commissioner for Information of Public Importance and/or initiation of an administrative dispute before the Administrative Court. Any interested person may attend certain actions in the procedure – e.g. bid opening, and monitor the manner in which that part of the procurement is implemented. If this is the case, first question that arises is - what is the specific role of civil supervisor and which innovations and benefits he or she brings compared to the previous legal situation? First of all, civil supervisor has the ability to faster receive documents and information than any other interested party. Another advantage of civil supervisor is the fact that he or she can discover the existence of certain documents and processes through communication with representatives of contracting authorities, and request additional information. The third advantage of civil supervisor is that he or she can discover possible irregularities or problematic situations related to specific procurement from third parties who would directly address civil supervisor for this purpose - whether these are representatives

of contracting authority, representatives of bidders or third parties that contacted civil supervisor knowing that he or she oversees that particular procurement. In this way, civil supervisor can gain insights that otherwise would not have been obtained. The fourth advantage of civil supervisor is reflected in his or her additional opportunity to influence the elimination of errors in public procurement procedures. In addition to directly pointing out potential or committed irregularities to the contracting authority, civil supervisor has the possibility to apply the request for protection of rights in situations where bidders and state authorities are reluctant to do so (even though they perhaps have a justified reason for that). Finally, civil supervisor can use the report submitted to the Public Procurement Office and the competent parliamentary committee to indicate weaknesses of the public procurement systems that exceed any other specific case in regards to their importance and thus influence initiation of an important question.

Recommendations:

- Define the concept of civil control, so that it can be used for defining the powers and obligations of civil supervisor.
- Instead of imperative norm of civil control as condition for the implementation of procurement (for the buyer), precisely define obligations for the contracting authority and for the Public Procurement Office in regards to the procedure that precedes the appointment of civil supervisor.
- Regulate the manner of publishing information on planned procurements worth more than the amount prescribed by Law (1 billion RSD).
- Introduce the possibility of appointing civil supervisors to other purchases of great public interest or large risk of corruption and regulate the procedure for appointment in such cases.
- Introduce the possibility of appointing civil supervisors in cases when procurements were not carried out according to the Law on Public Procurement, for any of the reasons listed in Section 7 of the LPP (international agreements, etc.).
- Allow the possibility for the job of civil supervisor to be performed by more than one person/organization simultaneously, so that that their integrated knowledge and insights can enable comprehensive control.
- Define consistent rules in regards to persons who can be appointed as civil supervisors (in terms of individuals/associations' work areas and knowledge).
- Prescribe additional conditions for performing the tasks of civil supervisor, in addition to existing ones, especially in terms of expertise and experience that need to be held by the persons who will perform supervision on behalf of the organization.
- Clearly regulate illicit forms of association between a civil supervisor and a contracting authority (authorities).
- Align the requirements for appointment with the provisions of other legislation.
- Specify existing conditions for the appointment of civil supervisor, both positive and negative ones.
- Prescribe additional requirements for the selection of civil supervisor by by-law or by Law.

- Authorize Public Procurement Office to prescribe criteria for the selection of civil supervisor among several potential candidates, or prescribe such criteria by Law (e.g. whether the same person may simultaneously monitor several public procurement procedures and regulate rules for appointing a supervisor who has not filed a report on previously performed work or who has not completed the assigned task according to the evaluation of the Board/assembly committee).
- Regulate the procedure that precedes the appointment of civil supervisors – registration of potential candidates and candidates interested in the job, preparation of permanent list of civil supervisors and publication of such lists and qualifications on the website of the Public Procurement Office, so that the persons who have information on someone's lack of qualifications or conflict of interest could timely report it.
- Regulate the situations of subsequently identified hindrances to the work of the appointed civil supervisors (time of notification, procedure of replacement).
- Oblige contracting authorities to notify the Office prior to the deadline for submission of procurement plans of any intent to conduct procurements worth more than one billion RSD.
- Establish an obligation or find a software solution for quick identification of procurements worth more than one billion RSD in the plans of public procurement.
- Revise the provision so that the obligation of contracting authorities relates to timely notifying the Board of their intention of conducting public procurement. Instead of prohibiting the implementation of public procurement, consider other possible solutions – e.g. punishing contracting authority for failure and allowing all interested parties that contact the authority to monitor public procurement with the powers of a supervisor, in order to avoid potential damages which could occur due to non-implementation of public procurement at scheduled time.
- Specify legal obligations of civil supervisor (minimum duty) in regards to the supervision of public procurement procedures, with tasks within these minimum obligations regulated through by-law.
- Specify legal obligations of the contracting authority in relation to the civil supervisor.
- Specify rights of civil supervisor in regards to contracting authority, especially in situations of requesting documents that preceded procurement procedure, and the data that were not submitted to the supervisor at the time of occurrence.
- Specify supervisor's actions in regards to the recommendations requested by contracting authority and bidders and (non)binding opinion issued by supervisors on that occasion, or supervisors' right to refrain from giving advice and opinion.
- Extend deadline for submission of civil supervisors' reports (always or in cases of justifying reasons).
- Allow contracting authority to comment on the report, either by submitting reports of civil supervisor to contracting authority or by submitting a draft report (before submission to the Office and the assembly committee).
- Prescribe obligation of publishing reports of civil supervisor on all relevant websites.
- Regulate the procedure for examining reports of civil supervisor, the deadline for the examination and decision making.

- Regulate supervision and reporting on the implementation of public procurement contracts.
- Precisely regulate duties of civil supervisor when he or she undoubtedly discover illegality in a procedure or a threat of possible illegality, particularly in terms of deadlines for warning contracting authorities and notification of other competent authorities.
- Regulate rights and obligations of civil supervisors in regard to verification of the information with contracting authority, before notifying other competent authorities and public about illegal activities, as well as duties of contracting authority upon such request of the supervisor.
- Regulate rights and obligations of civil supervisors and the Public Procurement Office so as to provide their efficient communication in terms of clarifying contentious legal issues (short deadline for PPO response and perhaps even phone consultations with PPO lawyers in regards to urgent matters, whereby the contact details of responsible persons from PPO would be included in the decision).
- Specially regulate obligations of civic supervisor in cases of criminal offense suspicion, in order to ensure the collection of high-quality evidence for future investigation.
- More precisely regulate the manner of informing the public about detected irregularities.
- Within the Law on Public Procurement, specify bodies that civil supervisors should contact in the event of detecting illegal actions and the extent of illegality that civil supervisors are obliged to indicate (is it only a violation of regulations in the field of public procurement or in other fields as well).
- Review the regulations about civil supervisors in context of possible application of norms of the Law on the protection of whistleblowers.
- Legally regulate the right to remuneration and compensation of civil supervisors that would be paid by the Public Procurement Office or the competent assembly, as well as control of the quality of performed work that would precede the payment of these remunerations. That measure could be accompanied by opening opportunities for other persons who are interested in exercising this supervision to do so at their own expense.
- Legally regulate the possibility for the implementation of civil control tasks to be funded by other persons, and the situations when this might be permitted (to ban indirect funding by contracting authorities or bidders).