

Summary
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**OPEN DOORS OF
PUBLIC
PROCUREMENT
IN THE HEALTH
SECTOR**



FONDACIJA ZA OTVORENO DRUŠTVO, SRBIJA
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1. INTRODUCTION

Public procurements represented in the Health Care system of the Republic of Serbia are at the forefront in relation to other areas where their implementation is mandatory. The responsibility of the relevant subjects is reflected through the legal framework regulating the procurement procedure, as well as through the accountability of funds intended for the financing of public procurement, and efficient functioning of the health system.

The Law on Public Procurement (PPL)¹ adopted by the National Assembly of the Republic of Serbia on December 29, 2012, came into force on April 1, 2013. After it began to be applied, during 2015, the LPP was changed twice. The Public Procurement Law monitors a large number of rules, decisions, instructions and opinions.

The "Open Doors of Public Procurement in the Health Sector" aims to:

1. Point out the necessity of greater transparency during the procedures,
2. Contribute to the reduction of corruption,
3. Ensure better functioning of public procurement procedures,
4. Enable more effective enforcement of laws in prosecution cases.

In order to achieve these goals, the Law Scanner considers that it is of great importance if the entire public procurement system becomes more accessible to the public. Accordingly, an interactive map consistent of the 292 healthcare professionals was created. Based upon this interactive map, a database with more than 100,000 collected data was created in the period from November 1, 2016 to March 15, 2017.

The project was fully supported by the Open Society Foundation, Serbia.

2. METHODOLOGY

Interactive maps and databases are based on a variety of information relating to the purchasers (healthcare providers) and suppliers, and also to the data relating to current public procurement procedures and available documents, as well as estimated and contracted values.

The team monitored public procurement in healthcare sector in the period from November 1, 2016 to March 15, 2017. An extensive database, consisting of contracting authorities in the health sector, was created containing information on: the number and details of invitations to submit tender that had been released over a period of two months (November and December 2016); The method and the subject of public procurement; The type and number of documents that had been published for each public procurement

¹ "Official Gazette of the RS", No. 124/12, 14/15 and 68/15

individually, the status of the contract, the contracted value of the public procurement, as well as the information on the suppliers.

All together 294 (two hundred ninety-four) requests for access to public information, as well as 7 (seven) complaints have been sent to the Commissioner for Information of Public Importance and Personal Data Protection.

Parallel to this process, the decisions of the Republic Commission for the Protection of Rights in Public Procurement Procedures (Republic Commission) in administrative and misdemeanor proceedings were analyzed. Decisions of Commercial Courts, the Administrative Court, Basic and Higher Courts for the criminal offense of misuse regarding Public Procurement, pursuant to Article 234a of the Criminal Code, were collected and analyzed. In addition to the mentioned sources, the work of Public Prosecutors' Offices (basic and higher) were analyzed as well.

The Law Scanner's team conducted 21 direct monitoring of open procedures for public procurement in health care facilities and institutions in Belgrade.

The data were collected and any noticed irregularities were analyzed in detail in Chapter 3 -The analysis of the negotiated procedures without prior publication; Chapter 4 - Protection of the rights, and Chapter 5 - Transparency of the Public Procurement.

3. ANALYSIS OF THE NEGOTIATED PROCEDURES WITHOUT PRIOR PUBLICATION

A detailed review and analysis confirmed that the most transparent public procurement procedure is a negotiated procedure without prior publication. The PPL provides that the contracting authority shall request opinion of the Public Procurement Office (PPO) on the justifiability of applying the negotiated procedure. The PPO could give a positive or negative opinion, and may, in certain cases, initiate a misdemeanor procedure. The surveys have shown that out of eight reasons stipulated in the PPL, contracting parties are mostly invoked on only four reasons regarding the public procurements in health care system, and those are:

1. If, due to technical reasons of the subject of public procurement, or for reasons connected with the protection of exclusive rights, the contract may be executed only by a particular supplier;
2. In the case of the extreme urgency, as well as in some emergency situations;
3. In the case of additional deliveries of goods, if change of suppliers could cause disproportionate technical difficulties regarding business and maintenance;
4. In case of need for additional services or works that were not included in the initial public procurement.

3.1. Negative Opinions

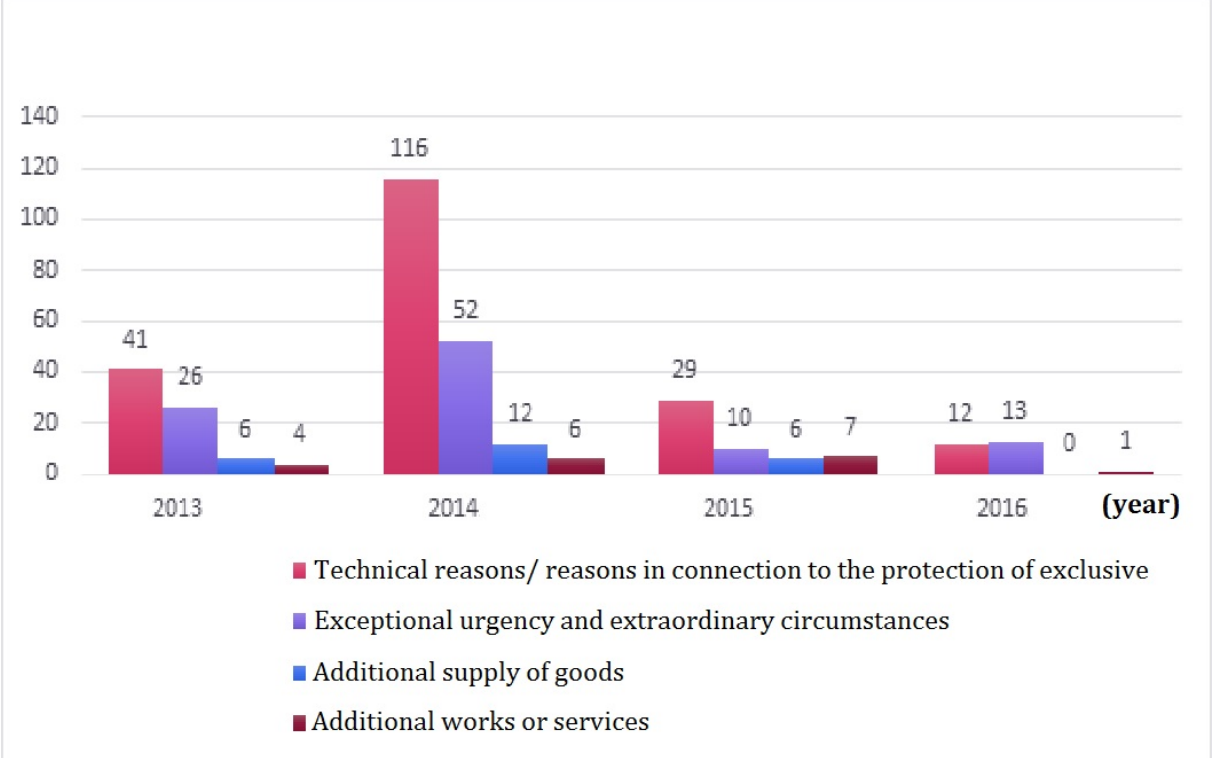
During the implementation of the research, negative opinions were gathered from April 1, 2013 to December 31, 2016 and they were the subject of analysis. There were a total of 341 such opinions regarding the public procurements in the health sector.

The survey found that most of the procedures related to the first reason (a total of 198 negative opinions), were related to the most problematic example of the **conditional donation**. "The Observer" Information System was donated to the Clinical Center of Serbia. The only company that was able to perform the repairs (repair service) was the "MTS" d.o.o. from Uzice. In its Act No. 404-02-516/2015 dated March 5, 2015, the Public Procurement Office (PPO) issued a negative opinion, as requested, that this was a conditional donation. Negative opinion of the Management Board, in such cases, prevents participants in public procurement procedures from undertaking corruptive actions and monopolizing the market.

During the analysis of negative opinion, it was noted that if a contracting authority required for an opinion after launching a negotiated procedure without an invitation for bid, the PPO could only initiate misdemeanor proceedings.

After analyzing the negative opinions, it was found that a large number of contracting authorities conducted the open procedures, but in most cases only one legal entity occurred as a possible supplier, and for that same entity an opinion was submitted as well.

Chart 1 – Review of negative opinions over the years



3.2. Positive opinions

Taking into account large number of positive opinions given by the PPO since the beginning of the application of the current PPL, only positive opinions were analyzed in 2016, and there were 317 of them.

While analyzing the positive opinions of the Administration, the attention was drawn to the opinions of three Health Centers (Health Center Grocka, Novi Sad Health Center and Health Center "Dr Djordje Lazic" from Sombor). Namely, in all cases, the subject matter

was purchasing the consumables - hematology reagents for hematology analyzer of the manufacturer "Shenzen Mindray Bio-Medical Electronics Co." from China. All three Health Centers submitted to the Managing Board the authorization of the manufacturer that a particular business company was exclusive and sole distributor of reagents for the device model of the appliance owned by the customer. It is important to point out that these were the same manufacturer's appliances and that they all had the same purposes, but the models were different.

4. PROTECTION OF RIGHTS

Protection of rights may be carried out via four types of procedures: misdemeanor, criminal, civil and administrative, but an administrative dispute could be undertaken as well.

4.1. Misdemeanor proceedings

The Misdemeanor Law² stipulates that the first instance misdemeanor procedure for misdemeanors in the field of public procurement is led by the Republic Commission. Misdemeanor proceedings may be initiated by the Public Procurement Office, the State Audit Institution or other authorized body, as well as the Republic's Commission ex officio.

Based on the request for access to information of public importance, the Republic Commission submitted 43 decisions for misdemeanor proceedings, as well as the information that not a sole misdemeanor proceeding was conducted by the Republic Commission since 2013. Of the total number of decisions, in 30 cases it came to a conclusion to reject a request for initiating a misdemeanor procedure due to the lack of actual legality, while in 13 cases Republic Commission reported as not competent for the subject matter. When it comes to real incompetence, two reasons were mentioned:

1. Violation was made prior to the entry into force of the PPL, which defines the legal frame for the Republic Commission to conduct misdemeanor proceedings;
2. The misdemeanor court should be in charge of a misdemeanor proceeding, considering that it represented a violation of the Law on Budget System.

The Second Instance Misdemeanor Procedure was brought before the Misdemeanor Appellate Court, which had already filed 16 legal decisions based on the claim for protection. Only one decision was related to public procurement in the field of health.

Through the analysis, the Law Scanner concluded that in practice it often happens that the Republic Commission and the Misdemeanor Court have proclaimed themselves as unconstitutional, leading to the postponement of the misdemeanor proceedings. Therefore, it is of great importance to have more effective ways of conducting misdemeanor procedures in the area of public procurement.

² "Official Gazette of the RS", No. 65/2013, 13/2016 and 98/2016 - Decision of the Constitutional Court of the RS

4.2. Administrative procedure and administrative dispute

4.2.1. Administrative procedure

Administrative procedure, regarding public procurement procedures, is reflected in submission of request for protection of rights to the Republic Commission. In addition to suppliers, a request may be filed by: the Public Procurement Office, the State Audit Institution, Public Prosecutors' Office and Ombudsman's Office.

Through the research, the Law Scanner noticed that in the course of 2016, the Republic Commission issued a total of 275 decisions on the request for protection of rights, out of which 39 conclusions and 236 solutions.

During 2016, 118 proceedings were partially annulled, while only 16 of the proceedings were annulled completely. The partial annulment was most commonly made in applications challenging the expert evaluation of bids and contract award decisions.

Based on the analysis of the decisions of the Republic Commission, during the year 2016, health institutions were obliged to pay a total amount of 13,667,421.27 RSD.

An example of discriminatory conditions in the tender documentation was: The Health Center Svilajnac, in the tender documentation predicted that in awarding the contract they will use a criterion of economically most advantageous bid based by two elements: price and terms of payment. However, the contracting authority, during the expert evaluation of bidders, decided that "while offering the price, the bidder gave the solvency of 30% of the offered price." The Republic Commission issued a Decision No. 4-00-111/2016 of June 16, 2016, in which they adopted the request of the "Fresenius Medical Care Serbia" d.o.o. Vrsac, and annulled the procedure of public procurement of the contractor - The Health Center Svilajnac, for batches 1- 6.

In addition to a positive example from the practice of the Republic Commission, there are those that suggest that because of the Commission's strictly formal attitude, it may be difficult to protect the rights. This becomes evident when it came to proving of payment the taxes. Although, the Bidder submitted the evidence of a paid tax containing all the elements to conclude which public procurement was in question, the Republic Commission rejected the request for protection. Afterwards, the Administrative Court considered that such a solution should be annulled, but the Republic Commission in their re-decision remained on the same position (4-00-2082/2013 of January 22, 2016, , the Purchaser - Health Center Bojnik, the Bidder - "C & B" Doo Gornje Stopanje - Leskovac). In such a sequence of events, the importance of the administrative dispute may be jeopardized.

When it comes to active legitimation, the Republic Commission takes the view that a request for protection of rights cannot be filed by a bidder who noticed a violation of the law, if their bid did not meet all that was required in tender documentation.

The Law Scanner analysis concluded that the most demands for the protection of rights were filed in public procurement procedures which were carried out by the Clinical Center of Serbia (23 in total). As a result, the Clinic Center was obliged to reimburse the costs resulted from claims submitted from applicants in total amount of 1,927,829.00 RSD.

4.2.2. Administrative dispute

The administrative dispute can be initiated once the Republican Commission decides on a claim for the protection of rights.

Based on requests for access to information of public interest, the Administrative Court for the period from April 1, 2013 to December 2, 2016, delivered 308 decisions to Law Scanner. 15% of mentioned decisions was related to the procurement procedures in the field of health care, where the Republic Commission was the defendant.

The practice of the Administrative Court is uniform, i.e. there are no significant deviations in decision-making in public procurement procedures in the health sector and in all other areas (lawsuits were rejected as unfounded - 51%, lawsuits were acknowledged - 34%, lawsuits were dismissed - 13% - 2%, proceedings terminated otherwise - 0%).

Based on the analysis of legal judgments, it can be concluded that the Administrative Court made a larger percentage (57%) decisions after oral public debates, which can be explained by a very complex public procurement material.

4.3. Criminal proceeding

Public procurement misuses are incriminated by the fact that Article 234a of the Criminal Code stipulates misuse related to public procurement as a criminal act for which as responsible persons may be held ones of the authority, as well as ones from the bidder. Ex officio procedure can be run by Basic and Higher Public Prosecutors' Offices.

Of 58 basic public prosecutors' offices, for the period from April 1, 2013 to January 24, 2017, in connection with Article 234a, 52 basic public offices responded to Law Scanner's requests for access to information of public importance. From 25 Higher Public Prosecutors', 22 replied (Article 234a, Paragraph 3).

In 37% of the basic public prosecutor's offices, one or more criminal charges were filed for this criminal offense. Out of 190 criminal reports filed, 77 were rejected, not one warrant was issued on the conduct of the investigation, while there were altogether eight indictments raised. The rest of the criminal proceedings are still in progress.

The Law Scanner found that only 12% of the courts had conducted criminal proceedings in relation to public procurement (12 proceedings).

By reviewing the legal verdicts, it was found that only three trials had been completed, and that one procedure had been related to public procurement in health care sector.

Before the Basic Court in Sombor, a criminal proceedings was conducted that ended in a conviction. A verdict for the crime of misuse in connection to public procurement was a suspended sentence, and a prison sentence in duration of six months. However, the reasoning of the judgment contains only a few sentences from which it cannot be concluded on what evidence the court found the perpetrator guilty and reached such a verdict. Based on the above, it is necessary to emphasize that for the fight against corruption in public procurement, a court practice is of great importance, and that it is necessary to improve the capacity of judicial institutions through specialized training.

In the case of higher public prosecutors' offices, only two higher prosecutors' offices filed criminal charges, and the number of charges were 17. Four criminal charges were dismissed and nine orders for conducting the investigation were issued. Others are still in process. All 25 higher courts responded. No criminal proceedings were initiated before a higher court for the criminal offense of Public Procurement Misuse.

As concluded from the work of the Law Scanner, 91% of criminal charges filed for the criminal offense of Misuse in Public Procurement have been turned down in the practice of the relevant public prosecutors' offices. A large number of rejected criminal charges, and a small number of criminal proceedings, show that it is necessary to organize and conduct specialized training for public prosecutors and judges in order to make this mechanism more effective.

4.4. Civil proceedings

Civil proceedings shall be instituted if the contracting authority or the bidder fail to fulfill the contract concluded following the procedure of public procurement.

The Law Scanner received copies of legal decisions of 12 commercial courts (75%) for the period from April 1, 2013 to January 23, 2017. It was concluded that the vast number of verdicts were made in 2013, and that the number of verdicts decreased in 2015. 150 decisions in which health institutions appeared as prosecutors or defendants were processed, and it was established that in 67% of the procedures the health institutions were in the role of the respondent.

When it comes to the economic value of disputes, between March 2013 and December 2016, it amounts about 155,000,000.00 RSD.

While processing the data, special attention was paid to the costs of civil proceedings and at whom was the burden of payment. The total cost was about 10,600,000.00 RSD, of which health care facilities paid little more than 8,000,000.00 RSD (76%). This relationship is logical considering the fact that in a much higher percentage health institutions were sued (were respondent).

From 221 contracting parties (purchaser) contained in the Law Scanner's database, only 44 health institutions appeared in legal rulings. Most of the procedures were conducted against the Health Center Valjevo³ (16), the Health Center Vranje (12), the Health Center Uzice (11), the General Hospital "Djordje Jovanovich" (6), Sombor General Hospital (4) and the Clinical Center of Vojvodina (4). These six health institutions paid a total amount of 4,800,000,000.00 RSD for the litigation costs.

The proceedings before commercial courts were completed with the full adoption of the lawsuits in 56% of cases, while in 11% of cases the lawsuits were partially adopted. A significant number of procedures was completed by making a judgment on the basis of recognition (15%) or withdrawal of the lawsuit (17%). These data show that all the procedures that were initiated, were established because contracts between the

³ Procedures conducted before the separation of Valjevo General Hospital and the Health Center Valjevo. Only in one procedure Valjevo General Hospital was sued.

purchaser and the bidders were not executed. Also, practice has shown that courts do not accept requests for termination of contract.

5. TRANSPARENCY OF PUBLIC PROCUREMENT

During the research, special attention was paid to the transparency of public procurement procedures. With this goal, Law Scanner's team has undertaken several activities.

In order to gain an insight into the course of the proceedings, the team attended the open procedures of 21 public procurements of goods and services in institutions responsible for procurement in healthcare, and healthcare facilities in Belgrade. During these events, there were no present citizens other than representatives of the Law Scanner, and in majority of cases, the bidding was opened without the presence of the Bidder's representatives.

The team also searched public procurements on the Public Procurement Portal. This job was largely slowed down and complicated due to the functionality of the Portal itself, and because of the format in which the data were published. While public procurements and documents can be searched on multiple criteria (public procurement code, key words, purchaser's name and the etc.), the problem was that purchaser may specify data freely, and there is a lack of standardization in this section. Thus, the name of the purchaser usually can be found as the "Clinical Center of Serbia" or "Health Center Clinical Center of Serbia".

Low level of transparency was noticed in the responses to the requests for access to information of public importance. Some institutions and courts have concealed information, even though they were not from the group of information for which secrecy needs to be provided. The institutions provided documents in which the name of the legal entity was protected, as well as the number of case, and other data that should not be protected (i.e. they must be accessible to the public).

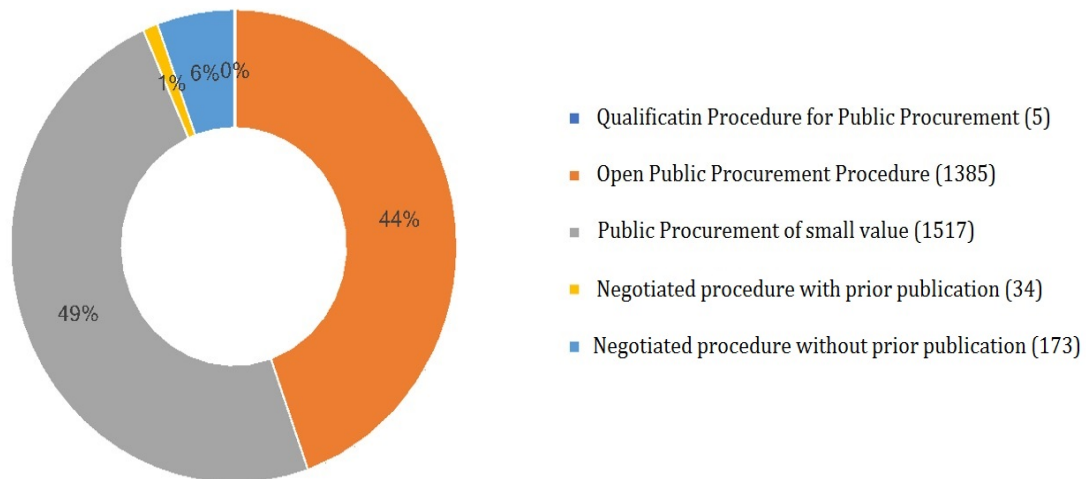
In order to enhance the level of transparency of public procurement procedures, representatives of the Law Scanner have created and published an Interactive Folder with all of 292 Customers on the Law Scanner's website (www.pravni-skener.org/sr/mapa-narucilaca).

5.1. Other results reached during the research - 221 Subscribers from the Law Scanner's base in the period November 1 – December 31, 2016; public procurements whose invitation to submit tender were published during that period.

	No. of invitations to submit tender	No. of requirements for additional Clarification of Tender documentation	No. of filed requests For the rights' protection	No. of Suspended procedures	No. of Continued procedures Despite the claims for Protection of rights
November 1- December 31, 2016	1422	487	44	241	5

The largest number of contracts were in connection to the health institutions. In the same period, some contracts were concluded with the Superlab – 102, and Makler d.o.o. - 84. As for the **total value** of all contracts concluded in the same period: the value for Makler d.o.o. was 103,352,905.00 RSD, and for the Superlab was 28,117,220.00 RSD.

Groups and representation of public procurement procedures advertised in the period November 1, 2016 - March 15, 2017 (3114 calls for public procurement)



It is estimated that the total value of concluded contracts in public procurement procedures in the field of health, in the period from November 1, 2016 to December 31, 2016, was 4,223,437,661.00 RSD without VAT, or something over 34,000,000.00 EURO.

6. COMPARATIVE ANALYSIS

The development of public procurement, as well as protection mechanisms used in the European Union are also very important for Serbia, which is obliged to align its legal acts with international regulations.

The current Strategy for the Development of Public Procurement in the Republic of Serbia for the period 2014 – 2018, as one of the strategic goals, defines the full harmonization of domestic regulations with the directives and other acts of the European Union in the field of public procurement, as well as their full implementation in the practice.⁴

⁴ The obligation assumed by the Stabilization and Association Agreement (signed in 2008, started to apply on September 1, 2013)

The latest analysis of the harmonization of positive legislation in the field of public procurement of the Republic of Serbia, and directives, as well as other regulations of the European Union, regulating the area of public procurement, which represented one of the foundations for the development of the Law on Amendments to the Law on Public Procurement in August 2015. It showed that the degree of compliance is at a high level, which is especially important given that the Republic of Serbia is in the process of accession to the European Union, and is obliged to harmonize domestic legislation in the field of public procurement with the directives and other relevant acts of the European Union, which in this case, is the subject of obligation under the negotiating Chapter 5 - Public Procurement.⁵

However, there is a need for further harmonization, wherein the respective analysis indicated both - the case of non-compliance, and the degree of the same; also the way in which further harmonization is needed, with a clear indication of the provisions of the European directives which have not been implemented in the PPL, whose provisions have already been partially implemented, and those which provisions are not in line with European regulations. Finally, there are provisions of our law which are more stringent in relation to the relevant EU legislation. This alignment will be made by adoption of the new Public Procurement Law, which is planned for the last quarter of this year, 2017.

When we talk about approximation of Serbian and European legislation, we primarily think about aligning the RS Procurement Law and the EU Public Procurement Directive in the so-called "class sector", 2014/24/EU (hereinafter referred to as: the Directive).⁶ However, harmonization is also necessary in the interpretation and practical application of the norms and principles of public procurement; harmonization in conducting behavior both contracting authorities, as well as the bidders; and the decisions of the body responsible for the resolution of appeals of the participants in the proceedings.

CONCLUSION

The largest problem in the public procurement process is the low level of transparency. Although, there is a Portal of Public Procurement, it cannot be said that all the data are easily accessible to the public. In large number of cases, searching for information on public procurement procedures is hampered by the lack of clear data entry criteria. In particular, analyzing the details of individual procedures, Law Scanner noted that transparency was the lowest in negotiated procedure without prior publication. Resorting to this type of contracting process, the purchasers, as well as the suppliers, were able to conceal the elements of corruption. Therefore, remains a general impression that the public should play more significant role in monitoring the conduct of public

⁵ Chapter 5, on Public Procurement, was opened at the Intergovernmental Conference on Serbia's EU Accession, held on December 13, 2016 in Brussels.

⁶ For the purposes of comparative analysis, the GAP analysis of the Law on Public Procurement of the Republic of Serbia, the Directive 2004/18/EC of the European Communities and the new EU Directive 2014/24 EU, was carried out by the Public Procurement Department with the support of PLAC

procurement procedures, which should also be influenced by better public information on public procurements as such.

When it comes to the protection of rights, it can be said that numerous mechanisms are available through all types of procedures, but they are not efficient enough. There are several reasons for this conclusion. The first is that the capacities of administrative bodies and courts are not at the level capable to provide adequate protection. The second reason relates to the complete lack of specialized education of responsible persons who make decisions in the course of the proceedings. In this case, the remarks are mostly directed to: the administrative procedures (the Republic Commission for the Protection of Rights), the Misdemeanor proceedings (Republic Commission for the Protection of Rights and Misdemeanor Courts), and the Criminal Procedure (Basic and Higher Public Prosecutors' Offices and Courts).

In order to reduce the aforementioned shortcomings, Law Scanner will continue to monitor public procurements in healthcare sector, and to initiate procedures for the protection of rights. One of the core tasks of the organization is to contribute in reducing corruption and increasing a bid competitiveness. The aforementioned Law Scanner's activities will affect more efficiently on spending financial resources (funds).