

Sensitive Data and Access by the Institutional Entities Responsible for Procurement, Issues and Legal Vacuum

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Abstract: Public institutions in our country, during the implementation of procurement procedures, based on the procurement law to promote free competition, transparency and efficiency, are responsible for the preservation of confidential information, personal and sensitive data of economic operators participating in the tender. Legal changes in harmony with European laws and the implementation of the new Electronic Procurement System (EPS), aimed at electronic publication of all data and documentation related to procurement procedures, consistently highlight the importance of cyber security investments and development for public institutions.

The verification of the legislation is noted that it has not been regulated and there are legal gaps in terms of protection procedures in terms of cybersecurity and sensitive data protection. Institutional practice has also demonstrated contradictory and ununified positions regarding accountability and procedures to be followed to preserve confidential information and sensitive data, reflected in standard tender documents, according to legal provisions.

The purpose of this study is to present through a detailed analysis the necessary legal and technical improvement, regarding the actions of the responsible officials, part of these institutions, during the development of procurement procedures, in order to prevent their unauthorized interference in sensitive personal data and cyber security. In this context, the analysis aims to clarify a fundamental question: Whether sensitive data in procurement procedures are affected by the lack of good definition of institutional responsibilities in law, for officials involved in public procurement, or by the involvement and access of many institutions in the tender documentation published in EPS?

Key words: sensitive data, unauthorized access, administrative investigation, cyber security, procurement procedure

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1. Introduction

Various officials and institutional entities, when exercising functional tasks related to procurement, access confidential information and sensitive data, regarding the economic operators competing in the tender, as well as for third parties, which have an agreement with economic operators.

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Referring to the legal arrangements for public procurement as well as the format of the “Standard Tender Documents” (STD)¹, approved by the Public Procurement Agency (PPA), as the highest supervisory body of the procurement system, for ensuring efficiency, transparency, as well as drafting guidelines and rules of operation of the procurement process, competitive economic operators, the obligation arises to publish any information and probative documentation, required in (STD).

This publication in the Electronic Procurement System (EPS) aims to develop transparency and efficiency of procurement procedures, the use of public funds, minimizing costs and maximizing the benefits and quality of products, goods and services, benefited from public contracts. The file published by the economic operators, referred to the requirements reflected in the (STD), relates to economic and financial elements and technical capacities, as well as the annual turnover of the company (personal data), which prove the fulfillment of technical specifications, as well as the technical and legal criteria of qualification in the competitive procedure. Also, part of the standard tender documents is the self-declaration form, consisting of confidential information and sensitive data, about economic operators. Specifically, this information consists of sensitive data about the judicial situation. The economic operator declares his or her state of court, also for criminal offences, which may have been prescribed, as well as the fact that he has not been convicted by a final court decision, for a certain of criminal offences. These offences are participation in a structured criminal group, criminal organization, armed gang, terrorist organization, corruption, fraud, money laundering or financing terrorism, terrorist offences, counterfeiting, child labor and other forms of human trafficking². In this self-declaration form, confidential and sensitive information for the economic operator is also reflected, which is not in the process of bankruptcy, has not been sentenced to a final court decision for criminal acts of professional activity, and has paid all the electricity and social obligations. This information is further verified by the institution’s officials (Offers Assessment Commission). Also, referring to legal provisions and in the function of the protection of sensitive personal data, the economic operator lists and declares information or documentation, which requires to be kept confidential, and argues the request and legal provisions supporting this request. The Economic Operator has the right to request, not to disclose or disseminate certain information, such as technical or commercial secrets and confidential features of offers and requests for participation³. However, referring to legal provisions, even when information is not considered confidential, unauthorized interference and dissemination by institutional officials, affects cybersecurity, and the protection of personal, sensitive, financial, or professional data of economic operators. The amendments and the occasional adjustments to the law “On personal data protection”, but also the law “On Public Procurement”, aim to align and harmonize with the *acquis Communautaire* and implement EU standards, in function of personal and sensitive data protection. This harmonization has effected legal changes regarding the legitimacy of economic operators, to express their consent to their processing as owners, requiring that part of them not be distributed to third parties. Insofar as the legal provisions themselves, they grant the right to maintain confidentiality of information to economic operators, and also officials involved in public procurement procedures have the legal obligation to respect and protect sensitive personal data, processing these data only for legal purposes, in the application of their functional institutional duties.

Referring to a qualitative and critical analysis of legal regulations for public procurement, but also data

¹ The electronic format where all information and documentation is published by competing economic operators in procurement procedures

² Article 76, Law No. 162/2020 “On Public Procurement”.

³ Article 16, Law No. 162/2020 “On Public Procurement”.

analysis obtained from interviews with experts in the field of procurement and IT, this study is presented in two aspects:

- Identification of the legal vacuum, in order to protect personal and sensitive data, from unauthorized access, distribution and invasiveness by officials involved in public procurement.
- Identifying the lack of technical and legal mechanisms to develop the respect and protection of sensitive data, increasing the accountability of officials involved in public procurement, to access these data only for legal purposes during the administration of documentation, evaluation, investigation, handling of complaints and decision-making.

2. Literature Review and Development Hypothesis

The literature review regarding this study is limited, as the methodology used consists of qualitative and critical analysis of legal predictions and institutional practice. This study has brought innovations regarding the handling of sensitive and personal data protection issues in Albania, from unauthorized interventions of institutional entities that have access to information and documentation in the public procurement sector, as this topic has not been addressed by Albanian researchers.

Referring to Toci (1977), the historical aspect of the development of concessions in our country, seen in the view of the fact, that our country does not have an old tradition in the development of public procurement or foreign investment, and in dealing with the problems observed in them. According to Veniamin Toci reflected in his book “Intervention of Foreign Capital in Albania and the Attitude of Democratic Circles”, the first beginnings of concessional developments were encountered around the 1920s.

Referring to Bardhi (2016), the role and position of the Public Procurement Agency as the body responsible for public procurement, first and in terms of comparison with different states, as well as the principles on which public funds procurement works in our country.

Bano & Ahmeti (2022), has analyzed various cases of public procurement, in the practices of different states, regarding the need for unification and harmonization of procurement legislation in Albania with international directives.

Referring to the law review of practical cases, taken from various interviews, this study lays out the following hypothesis:

The Albanian legislation needs urgent improvement and development in the function of personal and sensitive data protection in the public procurement sector, from the intrusions of institutional entities responsible for procurement. In institutional practice, accountability should be developed in institutional practice and mechanisms and procedures should be implemented in order to process confidential information and sensitive data reflected in (STD), only for legal purposes.

3. Research Methodology

The methodology applied for the implementation of this study is combined, as it has been analyzed in a qualitative manner the law and the legal changes, seen under critical view, regarding the protection of sensitive data of competitive economic operators, reflected in (STD), published in the Electronic Procurement System. Also analyzed are the findings and data obtained from interviews conducted with public procurement officials. Specifically, ten unstructured interviews were conducted, with experts in the field of procurement in various

public institutions, with different functional tasks, as well as IT experts, based on which, concrete cases of problems from the practice were analyzed.

The application of this research methodology aims to develop and improve the legal and technical infrastructure, but also to draft effective policies, increase institutional accountability of officials and coordinated cooperation, address and implement effective measures for cyber threats, in relation to sensitive personal data, in the field of public procurement.

The findings found by the review of legal regulations, and the analysis of data obtained from interviews with experts in the field, address in detail the problematics and objectives of the study, by making valid conclusions and recommendations, regarding legal improvements for the protection of sensitive data from unauthorized interventions of procurement officials, high institutions, conducting administrative investigation, auditing institutions, or decision-making institutions and other entities, who, because of their duty, have access to sensitive data information.

This study lays out recommendations for the improvement and technological implementation of (EPS), in order to identify the responsible institutional officer or entity, which has violated the personal data of economic operators participating in the tender.

4. Challenges of Accessing Sensitive Data During Institutional Activity

The Contracting Authority is legitimized to administer all documentation for the procurement procedure, from its planning to the implementation of the contract. To this end, the Contracting Authority in any case to identify any procedural action, drafts minutes and administers the complete documentation for the procedures carried out⁴. In this case, institutional practice and legal provisions should prevent unauthorized interference, as well as the intrusion of sensitive and personal data by institutional entities involved in the procurement procedure. The development of technology and (EPS) has rated the legal obligation that no procurement procedure may be announced or finalized unless all the information required for the fulfillment of technical and legal specifications and criteria is publicly reflected electronically. Since app is the highest managing and monitoring institution of public procurement, the information published electronically is monitored in all cases by the (PPA), which verifies and controls in every case the Standard Tender Documents. (EPS) plays an essential role in this process, as it has provided for the format and technical rules for the publication of information. Legal changes in order to harmonize with European directives and the implementation of the new Electronic Procurement System (EPS) for electronic publication of any information and documentation regarding procurement procedures effect the need for investment and development in cyber security. During the development of procurement procedures, after exhaustion of the established legal deadlines and opening of tender, this information and published documentation becomes subject to check, verification and evaluation by the Offers Evaluation Commission (OEC), composed of officials involved in public procurement, in various institutions. The information and documentation reflected in the self-declaration form, which is found in (STD), may be accessed directly by officials of the Authority officials involved in the evaluation of the procurement procedure⁵. This moment in the development of the procurement procedure, through electronic access to information and documentation, from the Electronic Procurement System, is directly related to the risk of unauthorized interference and dissemination of personal and sensitive information

⁴ Article 21, Decision of The Council of Ministers No. 285/2021 “On the Approval of Public Procurement Rules”.

⁵ Article 26, Decision of The Council of Ministers No. 285/2021 “On the Approval of Public Procurement Rules”.

and data of the competing economic operators. This unauthorized access to officials and the distribution of information affects economic operators financially, but not only because the distribution of sensitive information may affect their dignity and personality. The Offers Evaluation Commission (OEC) composed of officials of the procuring institution, has as a functional duty, to conduct the review and evaluation in order to conduct the publication of the best tender in the course of the procurement documentation⁶. During the opening of tenders, the person responsible for procurement as a member of the Procurement Unit may be present, and they also access documentation deposited by economic operators, and their sensitive personal data⁷. Also, if the Offers Evaluation Commission needs verification, then it is officially addressed to various institutions or private entities, which administer the act or documentation, that must be verified⁸. From this analysis, the range of subjects, accessing information and documentation continues to expand. Information on the review, clarification, evaluation of tenders shall not be disclosed to other persons who are not officially engaged in this process until the contract is signed. No one economic operator, should also communicate with the officials of the Offers Evaluation Commission for the purpose of influencing the evaluation of the offers or disseminating the information of the competing economic operators⁹. Referring to this legal analysis it is noted that only during the evaluation phase are the institutional entities involved in the procurement procedure, and this effect the need for clear legal implementations for the protection of sensitive personal data of economic operators. Also, monitoring, auditing, decision-making authorities such as the Public Procurement Agency (PPA) and the Public Procurement Commission (PPC) etc. during the administrative investigation, which may be conducted in a Contracting Authority, or review of complaints, have the right of full access to the document submitted electronically in (EPS). If these institutions lack professional accountability when handling confidential and sensitive documentation of economic operators, and the use of this documentation is not done only for legal purposes, then unauthorized access to personal data may affect economic operators and their fundamental constitutional rights. Specifically, the Public Procurement Agency (PPA) has investigative powers in cases of the occurrence of legal violations committed by economic operators or by institutions and officials involved in procurement, after verifying the legality of procurement procedures even when the procedure has been completed and contracts have been signed¹⁰. The Public Procurement Agency (PPA), in view of its activity and the competence of the administrative investigation, has the right to request any kind of information that it deems necessary in connection with the investigation. Public institutions referring to the (PPA) request are obliged to make available all the information and documentation requested. PPA also has the right to receive from the institution any files or materials related to the investigation, as well as to conduct investigations in the country including access to any institutional office and the review of the materials or computer system of the institution in the country. PPA has full access and can carry out the investigation even by controlling all activity of the institution electronically in (EPS), as well as controlling documentation deposited by competing economic operators in the system. Public procurements may also be subject to various audits by internal, external auditors, as well as by the High State Audit, so these institutions also have access to documentation and sensitive data of economic operators. The Public Procurement Commission (PPC), in cases where it addresses a complaint regarding the decision of the contracting authority,

⁶ Article 75, Decision of The Council of Ministers No. 285/2021 “On the Approval of Public Procurement Rules”.

⁷ Article 80, Decision of The Council of Ministers No. 285/2021 “On the Approval of Public Procurement Rules”.

⁸ Article 82, Decision of The Council of Ministers No. 285/2021 “On the Approval of Public Procurement Rules”.

⁹ Article 95, Law No. 162/2020 “On Public Procurement”.

¹⁰ Article 129, Law No. 162/2020 “On Public Procurement”.

shall review the complaint submitted, as well as the authority's decision, together with the accompanying documents and explanations, supporting this decision¹¹. In this case, the (PPC) has full access to the documentation and information submitted to (EPS) by the economic operators, after ordering the contracting authority to make available in paper and electronic form the documentation subject to complaint, for the procurement procedure. So as clearly from this legal analysis, these investigative, verifying, auditing and decision-making institutions, on the one hand, have access to confidential information and sensitive and personal data, and on the other hand there is no clear prediction about their responsibility in the case of distribution of sensitive personal data. There are no technical and legal procedures and provisions regarding the possibility of identifying officials or institutional entities who may have distributed sensitive data or interfered with this data in an unauthorized manner. The Electronic Procurement System (EPS) does not identify and cannot track the official who has attempted or interfered with sensitive personal data.

5. Findings and Discussion

Referring to functional duties, various officials in institutions possess the right to access and information about sensitive personal data in the public procurement sector. Although their tasks and functions may be different, the legal purpose is the same, protection of sensitive and personal data, during the performance of the task and processing it only for legal purposes, in order to finalize the procurement procedure, and the signing of the public contract. The major technological development and implementation of the new Electronic Procurement System (EPS), although it has developed and improved the public procurement sector, meeting the requirements of European directives, in terms of determining the personal responsibility of the officials involved in public procurement, presents a shortcoming since they cannot be identified and traced in the case of unauthorized interference or processing of sensitive data in violation of the law¹². Specialists in the field say that officials involved in public procurement do not lack professional skills and training, but must increase and develop their professional and personal accountability¹³. The fact that the legal provisions themselves determine certain officials performing a certain function makes it difficult to identify personal liability in the case of sensitive data¹⁴. Even the Public Procurement Agency (PPA) or the audit institutions in cases where, after the administrative investigation, they have non-individual collegial administrative measures, for the commission charged with the specific task¹⁵.

The legal provisions also provide that any economic operator is disqualified from the procurement procedure, in cases where he is or has been convicted by a final judicial decision for a category of criminal offences listed in the law. The obligation to disqualify an economic operator shall apply even when the person convicted by a final judicial decision is the administrator, director or supervisor, shareholder, or has representative, decision-making or controlling powers within it. If the economic operator has pleaded that he has not been convicted by a final court decision for this category of criminal offences and results contrary, the contracting authority shall disqualify him

¹¹ Article 115, Law No. 162/2020 "On Public Procurement".

¹² Hatixhe Çollaku Bilabashi, ICT expert in private sector, unstructured interview, interviewed by Abdul, Entela dt. 19 tetor 2023.

¹³ Unstructured interview with exs-Procurement Specialist Lisandër Prekperaj, now Specialist of General Advocacy of State in Albania (public institution). Interviewed by Entela Abdul on November 27, 2023.

¹⁴ Unstructured interview with Procurement Specialist Sadika Veshi, DPÇK, Municipality of Tirana, (public institution of executive power). Interviewed by Entela Abdul on November 27, 2023.

¹⁵ Unstructured interview with Procurement Specialist Alisona Meçe, DPÇK, Municipality of Tirana, (public institution of executive power). Interviewed by Entela Abdul on November 27, 2023.

from the procurement procedure. In this case, the official of the contracting authority, who has the right and credentials given by the Ministry of Justice, exercises control over the judicial situation of the economic operator and has full access to his sensitive personal data¹⁶. The official is accessed and gets the knowledge, whether the administrators, supervisors, shareholders or partners of the economic operator have been sentenced to a final court decision. The official then requests information from the General Directorate of Prisons regarding the criminal offense for which these operators have been convicted. It is understood that if these official uses or processes this information received due to the duty and credentials given by the Ministry of Justice for non-legal purposes, it affects and harms the data subject in relation to this sensitive information about his judicial situation¹⁷. By sharing this information, the dignity and integrity of the data subject is affected, but also its confidentiality and quiet private life. Also, if referring to credentials that this official possesses because of his duty, he exercises this unauthorized verification and access to other entities, which are not part of the legal obligation of the procurement sector, by violating their sensitive personal data, it affects cyber security by committing cybercrime¹⁸. Public institutions have qualified and trained human resources, but the legislation has not regulated the role and responsibilities of personal data processors, which they get knowledge of because of their duty, in different institutions¹⁹. They are not legally defined, nor in the employment contract, the rights, duties and procedures they must follow in the processing of personal data. It is worth noting that one of the ways of interacting sensitive personal data is also affected by technological problems of the implementation of the new Electronic Procurement System (EPS), which does not go in the same direction as the legal provisions, and does not provide for all legal and practical situations of the activity of public institutions²⁰. It is worth noting that one of the ways of interacting sensitive personal data is also affected by technological problems of the implementation of the new Electronic Procurement System, which does not go in the same direction as the legal provisions, and does not provide for all legal and practical situations of the activity of public institutions. To change the person responsible for procurement in the system, the contracting authority must technically de-escalate the procedure again and after making the change of the person responsible, reseal it. The Electronic Procurement System (EPS) had not technically foreseen the resettling, the legal situation occurred and this procedure was not re-reset, causing problems and impossibility to finalize the procurement procedure, and its cancellation²¹. The Public Procurement Agency (PPA), referring to the request for technical assistance in relation to the handling of this case, confirmed that the Electronic Procurement System (EPS) has no technical way to change the person responsible and the procurement unit²². This PPA assertion confirms the fact that the legal framework and the Electronic Procurement System (EPS) are not in accordance with each other, do not move at the same pace, as the legal framework prevails the electronic system, causing difficulties in the realization of public services and finalization of procurement procedures. It is worth noting that the (PPA), contrary to the legal provisions and the

¹⁶ Joint announcement between PPA and the Ministry of Justice Nr. 1155 Prot, date 01.02.2019.

¹⁷ Unstructured interview with Procurement Specialist Manjola Koçi, DPÇK, Municipality of Tirana, (public institution of executive power). Interviewed by Entela Abdul on February 27, 2024.

¹⁸ PHD Lorenc Stojani, Head of the Criminal Justice Department, “Luarasi” University, unstructured interview, interviewed by Abdul, Entela dt. 28 February 2024.

¹⁹ Endri Plasari (IT expert, Lecturer at “Luarasi” University), unstructured interview, interviewed by Abdul, Entela dt. 13 tetor 2023.

²⁰ Renato Biba (IT expert), exs-Procurement Specialist, DPÇK, Municipality of Tirana, unstructured interview, interviewed by Abdul, Entela on March 14, 2024.

²¹ Unstructured interview with Procurement Specialist Ivona Lame, DPÇK, Municipality of Tirana, (public institution of executive power). Interviewed by Entela Abdul on November 27, 2023.

²² Unstructured interview with Procurement Specialist Lorena Allmuça, DPÇK, Municipality of Tirana, (public institution of executive power). Interviewed by Entela Abdul on February 27, 2024.

above-mentioned analysis, after receiving knowledge of the case and conducting the administrative investigation, against the head of the procurement unit, issued the disciplinary measure of “Notice with warning of termination of labor relations”²³. It is also worth noting that this technological problem of (EPS) indirectly causes negative institutional consequences, as it affects the attractiveness of personal data and develops unauthorized access of former officials of institutions, already removed from office. If for these former officials, there is no technical possibility of being removed from the procurement unit, they continue to have the login credentials of entry into the system and unauthorized control of procurement documentation, by encroaching sensitive personal data.

6. Conclusions

6.1 Regarding Technical and Legal Improvement

In so long as the legal provisions themselves, grant the right to confidentiality to economic operators, it is necessary to supplement and improve the technical and legal framework to develop the moral and professional accountability of officials involved in the administration, review, evaluation, investigation or decision-making of public procurement procedures, implementing legal mechanisms for the observance and protection of sensitive personal data, as well as its processing only for legal purposes.

6.2 Regarding the Lack of Definition of Institutional Responsibilities and Accountability

The involvement of many institutional entities with access to sensitive personal data, as a result of their functions and the monitoring, auditing, verification and decision-making competencies they have in the public procurement sector, effects the risk of not accurately determining responsibilities and accountability in regard to unauthorized access, distribution and intrusion of personal data. The procedural actions carried out by the (PPA), (PPC) or internal and external audit institutions, although carried out in accordance with legal provisions, and functional tasks for the good management of public funds and the protection of a higher public interest, simultaneously contradict the protection of personal data and the privacy statement drafted by the participating economic operator. Lack of professional accountability, as well as the technical impossibility of identifying and tracking the institutional entity/officer who has unauthorized access or distributed sensitive information, increases the negative effects and risk of sensitive personal data.

7. Recommendations

7.1 Toughening Administrative and Penal Penalties

Referring to this study, legal changes are recommended in view of the toughening of administrative and criminal penalties, in case of incidence of intrusion, unauthorized access or distribution of sensitive data by the responsible officials involved in the development of procurement procedures.

7.2 Investing in Technological Improvement

The study lays out recommendations for the improvement and technological implementation of (EPS), in order to protect personal data of economic operators participating in the tender, investing in technological developments, in terms of the ability to identify and trace the official or institutional entity, who interferes

²³ Unstructured interview with Procurement Specialist Sadika Veshi, DPÇK, Municipality of Tirana, (public institution of executive power). Interviewed by Entela Abdul on November 27, 2023.

unauthorizedly, or distributes and processes sensitive personal data, contrary to legal provisions. Investment in technology for identifying and tracking procedural actions and unauthorized access to data of third parties unrelated to the procurement procedure conducted by the official who possesses credentials from the Ministry of Justice for verifying the judicial situation of economic operators is also suggested. This is aimed at increasing institutional accountability of officials and coordinated cooperation in the implementation of effective measures to prevent cyber threats in sensitive data.

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