

EFFECTIVENESS OF THE REVIEW OF PUBLIC PROCUREMENTS IN SELECTED COUNTRY

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ABSTRACT

Supervision and control of public procurement is a crucial topic as public funds are used on a considerable amount of money with a significant amount of money from public budgets. If the contracting authority favors one of the participants, this will have a negative impact on all the country's inhabitants. These phenomena must be avoided; therefore, the regulation and controls in this area are important and necessary from the point of view of the independent body.

In the Czech Republic, this power is placed in the hands of the Office for the Protection of Competition. The aim of the paper is to determine how the contracting authorities react to significant fines imposed by the Office for the Protection of Competition. Also, if the fine imposed worked as a means of modifying the public procurement procedure and if there were new measures or a revision of the existing procedures adopted to avoid repeated violations of the Public Procurement Act.

Based on research over the period 2013 to 2014, the effectiveness of the Office for the Protection of Competition supervision is not very high. The inefficiency stems primarily from the unwillingness to identify the responsible person who caused the breach of the law.

Keywords: *Public procurements, Office for the Protection of Competition, review process, Public Procurement Act, Czech Republic.*

1 INTRODUCTION

Supervision and control over public procurement is a very critical topic, as public funds are expended on a considerable amount of money in a year with a significant amount of money from public budgets (Halásková & Halásková, 2018). In the Czech Republic, about 10% of the gross domestic product represents public funds spent on public procurement, which in the year 2016 amounted to about CZK 486 billion (Ministry for Regional Development of the Czech Republic, 2017). The purpose of public procurement is above all to ensure the production of a particular good or the provision of a service resulting from public needs or the public interest.

The success of the tenderer in obtaining a public procurement is determined by several criteria - mainly depends on the price and quality of the goods and services offered. In the case that, the contracting authority favors one of the parties for its own enrichment, it will have an adverse effect on all the population of the country. For, as already mentioned, public procurement is financed by tax and fees. Such behavior will have a significant impact on the financial part of the contract or on the quality of the purchased goods and services (Soukoupová and Bakoš, 2017; Gavurova, B., Tuček, D., Tkacova, A. and Danko, J., 2018). This problem occurs not only in the Czech Republic but also in other countries of the world. The above-mentioned phenomenon must be avoided in order to prevent its adverse impact on the economic market. Therefore, the necessary regulation and control in this area are important and independent from the point of view of the public authority. In the Czech Republic, this

power is placed in the hands of the Office for the Protection of Competition (hereinafter referred to as the "Office").

The review procedure belongs to the part of the procurement procedure, which helps to ensure transparency, equal treatment, proportionality and non-discrimination as enshrined in § 6 of Act No. 134/2016 Coll. on Public Procurement tendering (hereinafter referred to as the "Act").

Supervision of public procurement is the responsibility of the Office, the Supreme Audit Office, the tax authorities and the financial auditors. The Office starts its own initial review procedure when, on the basis of its own investigation, it finds doubts about the acts of the contracting authority and also on the basis of a complaint from an individual or a legal entity. Such a person is obliged to pay a fee of CZK 10,000 for each written application for each contract separately. The fee is non-refundable. The complaint cannot be lodged by a person who could lodge an objection within the prescribed time-limit for the opposition proceedings. The first step in the protection against the wrong procedure of the contracting authority is the opposition procedure, followed by a review procedure and a decommissioning procedure, which may not always occur. The last option is the administrative procedure before the court. Opposition procedure is a statutory control mechanism under § 241 of the Act and provides the potential contractor or tenderer with the opportunity to remedy the unlawful procedure of the contracting authority when awarding a public contract. The reason for the objection is to prove the occurrence or imminent harm. The objection procedure precedes the initiation of the review procedure with the Office and cannot be omitted. In the event that the petitioner opts out the opposition proceedings and submits a petition for review to the Office, his proposal will become invalid and the Office will not deal with it. An exception is the emergence of new facts which were not known within the deadline for objection. Such a fact is the claimant's duty to prove. Objections may be made against any act or omission of the contracting authority, the choice of the type of procurement procedure or the procedure of the contracting entity.

Following the unsuccessful acceptance of the objection by the contracting authority is the review procedure within it, the petitioner can turn to the application by submitting a proposal to the Office. With the proposal submitted to the Office, the obligation to deposit a bail of 1% of its bid price in the Office's account. The amount of the deposit must be at least 50 thousand; the upper limit is 10 million crowns. If the bid price cannot be determined, then the deposit is set at CZK 100,000.

In order to ensure the protection of the rights, any interested party may bring an ordinary appeal, that is, the decomposition under § 152 of the Code of Administrative Procedure, if it disagrees with the decision already issued by the Office at first instance. The decomposition must comply with the general requirements pursuant to § 37 (2) of the Administrative Procedure Code and must be submitted within 15 days from the date of notification of the decision. The Chairman of the Office has the competence to decide on the appeal based on the proposal submitted by the Board of Appeal. The chairman may, on the basis of the proposal, withdraw, amend or reject the first-instance decision. The Act defines a resolution against which it is inadmissible to file a decomposition. In particular, it is a provision that a) governs the conduct of an administrative procedure, b) a period has been set for the execution of the act, or c) obvious inaccuracies have been corrected unless the decision is corrected. (§ 262 of the Act).

If any of the interested parties continue to disagree with the second-instance decision, the party concerned may turn to an action brought before the Regional Court in Brno. In the event that the judgment of the Regional Court will still affect the person concerned abstaining from his rights and will not agree with the conclusions of the court, he may oppose the judgment by filing a cassation complaint to the Supreme Administrative Court. A cassation complaint may also be filed by the Office. The number of judgments issued by the Regional Court in Brno and the Supreme Administrative Court is in favor of the Office with both institutions

according to the published statistics of the Office (Ministry for Regional Development of the Czech Republic, 2017).

The aim of the paper is to determine the extent to which and how the contracting authorities react to significant fines imposed by the Office for the Protection of Competition. Also, if the fine imposed was a means of changing the way in which public procurement was undertaken and whether new measures were adopted or a revision of existing procedures so as to avoid repeated violations of the Public Procurement Act.

2 MATERIALS AND METHODS

The basis for the research on the efficiency of the public procurement review was the analysis of the fines imposed by the Office for the period from 2013 to 2014. During the reporting period, the Office imposed a fine of 176 on institutions for violation of the Public Procurement Act. Some of the organizations that have committed violations of the abovementioned law have been approached so that, within the framework of the obligations laid down by Act No. 106/1999 Coll. on Free Access to Information, answered four questions about the Sanctions authorized by the Office and the way the measures were taken so as to repeatedly not breach the law.

Specifically, fifty organizations (25 subjects for each analyzed year) who were fined more than 50,000 thousand crowns were included. The above-mentioned criterion has been set on the basis of a situation whereby less serious misconduct could be avoided to influence the research that could occur. The structure of the questions asked was as follows:

- Did you identify a person responsible for breach of the Public Procurement Act?
- If so, was the personal responsibility of the employee concerned? In what way?
- If the culprit was not identified, is there a documentation explaining this fact?
- Have measures been taken to prevent a repeat offense? If so, please specify them.

In order to analyze the value of the fines set, a box diagram is used to determine the minimum and maximum values of all data. Those data are also referred to as extremes and the "box" middle part is bounded from the bottom of the 1st quartile and from above by the third quartile. Inside of that box occurs the median value.

3 RESULTS

Analysis of the effectiveness of the review in the Czech Republic

In the research carried out, 50 bodies were contacted asking for information on the imposed fine. Relevant responses from addressed entities can be considered as 20 in 2013 and 21 in 2014. As some entities are being sued before the Regional Court in Brno or before the Supreme Administrative Court or criminal proceedings and, until such time as these proceedings are closed, they do not want these entities to provide information on the basis of the law on free access to information. Tab. 1 also does not include organizations that have not responded or replied that they are not considered to be the subject of an obligation to disclose information on the basis of the abovementioned law.

Table 1: Number of addressed entities by its legal form in 2013 and 2014 (own processing)

	Number of addresses 2013	Relevant answers 2013	Number of addresses 2014	Relevant answers 2014
a.s., s.r.o.	2	1	2	2
State enterprise	-	-	1	1
Organizational unit of the state	2	2	5	4
Contributory organisation	5	4	3	3
Health insurance	1	0	-	-
College, high school	3	3	2	1
Public Research Institution	-	-	1	1
Bundle of municipalities	-	-	2	0
Municipality	11	9	8	8
Region	1	1	1	1
Total	25	20	25	21

The amount of the fine should be set with regard to the significance of the breach of the law and also proportionate to the size of the organization or the amount of its annual budget. The amount of the fine imposed should reflect the fact and affect the fined entity that should deal with who or what caused the deviation from the law. Provided that the violation was committed by a natural person, he can also assume his personal responsibility according to the degree of fault for the fined facts. The guilty party should also take action, either by introducing new or revising existing internal directives, emphasizing multiple control or simply establishing separate staffing departments involved in the procurement process and more frequent training of these staff to avoid recurring mistakes. This is the only way to say that the control process has been effective.

There is a summary of the addressed entities who have not filed a lawsuit before the court or whose proceedings have been finally disposed of in Tab. 2 The report provides information on which of the fined subjects identified the person responsible for the violation and how many of these people are required to pay or otherwise compensate for the damage caused. The last mention is information on the adoption of measures to avoid repetition of the situation.

Table 2: Summary of addressed entities (own processing)

Judicial proceedings are not under way (n)	41
responsible person designated	18
% of n	43,90 %
Compensation required	13
% of n	31,71 %
Other measures have been taken	26
% z n	63,41 %

The imposition of a fine as a remedy for certain organizations is not an effective way of preventing non-observance of the law. If the Office imposes a fine on an organizational unit of the state, it is an ineffective remedy, because, as one of the ministry addresses the letter sent with questions about the imposed fine from the Office, the imposed fine is by no means a

pity. Acceptance and subsequent payment to the account of the customs office is only a transfer of funds from one account to another State account. The organizational unit does not need to look for a responsible individual or group, change the existing procurement process or take steps to prevent recurrence. The Ministry or other fine-tuning organizational units will raise the budget for the fines paid next year and the resulting loss for this entity is zero. On the other hand, the fine of the organizational unit has certain effects on the state, namely the costs of control and proceedings before the Office, in the case of bringing the action also court costs, costs of external experts and others. The fine imposed on any organizational component of the state is an ineffective remedy.

Fines must be avoided by state-owned companies, joint-stock companies, and other legal entities, as they must earn the fine to pay the fine. The fine is usually paid out of the unexpected event or similar, but it will also reduce the potential profit.

A similar situation applies to municipalities and towns. By paying the fine, their annual budget will be reduced and funds will not be used for other activities in the public interest. If these entities want to engage in public procurement, it is advisable to have a well-executed contract with an external company that can help them get the contract and, at the same time, seek compensation in the event of a sanction. However, there are some organizations, for example, small municipalities that are unable to draw orders because of the financial and time-consuming nature of the contracts. For these entities, there is a high effort not to violate the law and thus not to impose a fine other than the state's organizational units. A remedy in the form of a fine makes sense if the fined entity is a state enterprise, a legal person or a municipality.

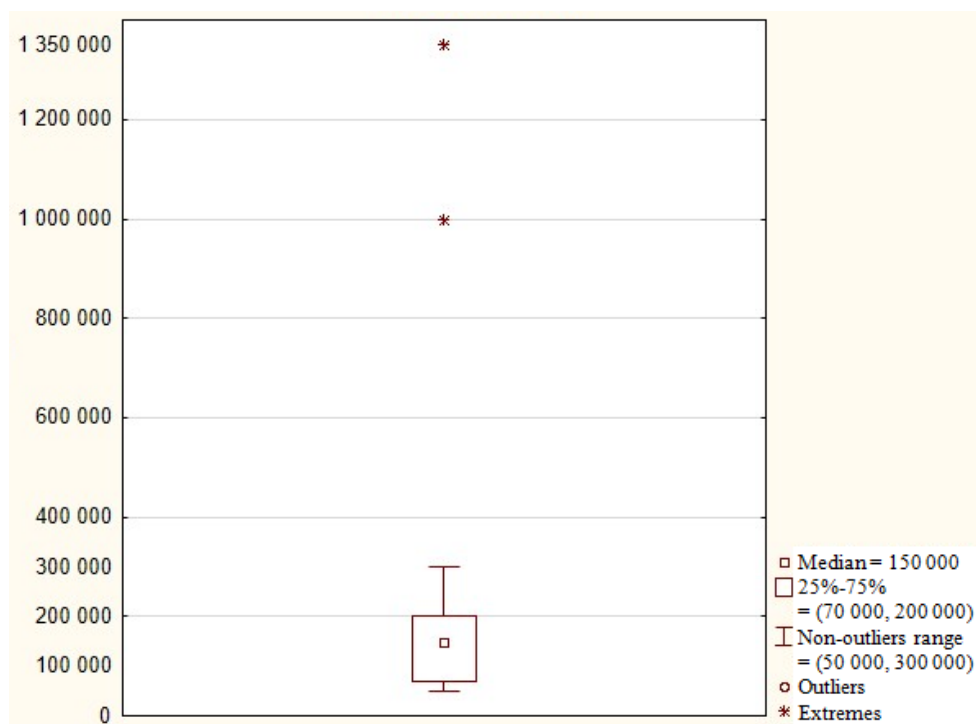
Amount of the fine

If the Office finds a non-compliance with the Public Procurement Act, it shall decide to impose a corrective action or a fine on the guilty party. The imposition of a corrective action makes it impossible for the contracting authority to continue the ongoing proceedings or, as a result, the entire award procedure will be canceled. If the Office decides to impose a fine, it means that the contractor or, more often, the sponsor committed an illegal procedure and committed an administrative offense or misdemeanor (according to the current law).

The imposed fine has a preventive and repressive function. The purpose of the preventive function is to prevent a violation of the law and the amount of the fine imposed should be determined in the light of the benefits to the lawful offender. On the other hand, the repressive function of the fine should include the impact on society and reflect the degree of seriousness of the fault in the law. The Office, other than the amount of the fine, must also take into account the subjective aspects of the hearing whether it was intentional or negligent, the consequences of the infringement on the economic market and the length of the duration of the act in question. Also, the Office must not forget about the consequences of the fines on the complainant's position on the market and the impact on its profitability.

As illustrated by the box graph in Fig. 1, in fifty decisions analyzed, the fines imposed ranged from CZK 50,000 to CZK 8.5 million. The median value is CZK 150,000, the average amount of the fine being CZK 491,600. The so much different average amount of the fine from the median value is primarily caused by three entities whose fine exceeded one million crowns. The largest number of imposed fines is between 70,000 and 200,000 CZK.

Figure 1: Amount of fines imposed (own processing)



In 2013 and 2014, the Office imposed a fine of more than CZK 300,000 on a small number of subjects, only 3 subjects - the health insurance company, the ministry, and the joint-stock company - had finalized fines. The amount of the fines imposed on the first two entities is shown in the graph as an extreme, for reasons of clarity of the chart, the fine of CZK 8.5 million is not mentioned in the joint stock company.

Analysis of the effectiveness of the activities of the Office

The effectiveness assessment of the Office is aimed at the period 2012 to 2016. The Office has several missions. Mainly, monitoring and advising on public support, overseeing spending on public procurement, and thus achieving greater transparency and ensuring the functioning of the economic market in accordance with competition rules to avoid cartels or abuse of dominant power vis-à-vis competitors or residents.

The total cost of covering all the agenda and operation of the Office is about 200 million crowns, only about one fifth higher in 2012, worth about 242 million crowns. This is state expenditure and the bulk of it (92% in 2016) is for current expenditure, with the largest item being salaries and related expenses. Other funds are invested in capital expenditures (8% for 2016), mainly for the acquisition of tangible and intangible fixed assets. Tab. 3 illustrates the evolution of the above-mentioned costs of the Office and the level of salaries for 2012-2016.

Table 3: Expenditure of the Office for the Protection of Competition, in thous. CZK (own processing based on Office for the Protection of Competition (2018a))

	Total costs of the Office	Of which salaries and related expenditure
2016	203 475	138 697
2015	197 159	142 149
2014	202 268	123 260
2013	240 745	112 843

2012	241 785	101 173
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"Decision-making in public administration is an important and integral part of the process of social management. It is characterized by certain stability or regularity, a considerable degree of legal regulation and possibilities of coercion and, last but not least, institutional structure in accordance with the division of powers and competencies in the system of public administration organization" (Skulová, 1996). Any decision issued by an administrative body must comply with the requirements of the Code of Administrative Procedure and contain the operative part, the justification and the instructions of the participants on the remedies. Tab. 4 is the number of individual decisions issued by the Office for the period 2012-2016. In 2016, one-third of the entities were appealed against the first-instance decision and, on the basis of the decomposition, the Office initiated new proceedings. In the following years, the number of respondents ranged between 18 and 28%.

Table 4: Number of decisions issued and decisions on decomposition (own processing according to the annual reports of the Office)

	Number of first-degree decisions issued	Number of decomposition decisions issued	Total
2016	943	480	1 423
2015	1 074	423	1 497
2014	1 063	368	1 431
2013	959	282	1 241
2012	1 049	229	1 278

If the contracting authority commits a violation of the Public Procurement Act when awarding a public procurement, the Office shall impose a fine on the entity in accordance with the law and the degree of fault. Every year, the Office will impose a fine in the amount of over ten million crowns. As shown in Table 5, a significant increase in fines was imposed in 2014 and a little lower in 2013. Other years, the fines imposed were around 30 million crowns. In the event that some entities disagree with the first-instance decision, they may file a hearing. On the basis of the lodged decomposition, the Office may take into consideration the objections raised in the declassification and the first-instance decision to cancel or change. Cancellation or change may also apply to the amount of the fine imposed. In the column of the amount of the fine imposed in the second stage, it can be seen that some organizations have succeeded in reducing the overall obligation to pay the penalty for each period. The final amount may be even lower, as the unsuccessful body can still apply to the courts, which may also reduce or cancel the fine. If the court considered the entity to be true, the Office would have the obligation to repay the money paid and, moreover, to pay interest on the amount arrested, but the percentage of success in the judicial inquiries is in favor of the Office. Only in 2012 in each second judicial review was a positive result for the Office. From 2013, the success rate is 98% and higher.

In 2016, the Office ordered the payment of 78 costs, that is, on average, every eighteenth subject of the proceedings had to pay the costs of the Office for the control process. In previous years the Office decided to pay the costs of the body more than in 2016. The costs of one procedure amounted to about CZK 30,000.

The last column of Tab. 5 is the amount of the failed deposit, which has become the revenue of the state budget. Submission of a proposal by a participant to an error in the award procedure is based on the lodging of a deposit to prevent the submission of purposeful and

unreasonable proposals. In 2013, the amount of CZK 16,350,000 was transferred to the state budget.

Table 5: The total amount of imposed fines, costs of proceedings and the amount of the deposit lost, in thous. CZK (own processing according to the annual reports of the Office)

	The amount of the fine imposed in stage 1	The amount of the fine imposed in stage 2	Amount of the costs incurred	The amount of the deposit lost
2016	34 441	26 717	2 340	11 566
2015	31 790	19 357	2 700	9 734
2014	72 421	41 265	3 067	6 547
2013	58 761	28 555	3 520	16 350
2012	39 511	22 085	3 420	5 689

Efficiency is generally the ratio of outputs and inputs. The goal of efficiency is to minimize costs or maximize benefits. However, the contribution is only a rough analysis of effectiveness. The primary objective of the Office is not to generate profits or to select the largest amount of funds, but to oversee the economic market and to prevent unfair competition, abuse of dominant market position and other competencies already mentioned.

Tab. 6 shows the amount of funds attributable to the operation of the whole of the Office and also what part of this amount belongs only to the section dealing with public contracts. The total cost of the public procurement section is calculated as the total cost multiplied by the percentage of the persons involved in public procurement at the Office.

Costs are calculated by counting all decisions issued since, in the event of an appeal, the employees of the Office must re-acquaint themselves with a specific case and set the time needed to assess the issue. The number of decisions includes also interim measures, as well as those which are dismissed and revoked. The average cost per review is then calculated as the total cost of the public procurement section for the total number of decisions. The average cost of one review was CZK 70,000 in 2012. Since then, one review by the employees of the Office has been significantly reduced, to CZK 47,000 in 2016

Table 6: Costs of the Office for the period 2012 - 2016, in thous. CZK (own processing according to the annual reports of the Office)

	Total cost	Total cost of the PP section	Number of decisions	Average cost / review
2016	203 475	67 147	1 423	47
2015	197 159	67 472	1 497	45
2014	202 268	72 783	1 431	51
2013	210 745	77 798	1 241	63
2012	241 785	89 460	1 278	70

Tab. 7 shows the amount of the Office's revenues. Deliberate revenue is the sum of the fines imposed in the second stage, the amount of the costs and the amount of the forfeited deposits. The total amount of revenue does not include an amount that would correspond to the sum of the charges for the complaints submitted. The incentives are charged from October 2016 and the fee has reduced the number of complaints filed, so I consider this amount to be non-material for the calculation of the gross effectiveness analysis. Revenues are considered to be notional because they are not included in the budget of the Office but in the budget of the state.

The average earnings per review are calculated as the sum of total earnings per number of decisions per year. In 2013, a higher number of bail went down than in other years, so the average income this year is significantly higher than in other years. In 2014, on the other hand, the level of fines paid in level 2 dominated, which reflected higher average income for review.

Table 7: Revenues of the Office for the period 2012 - 2016, in thous. CZK (own processing according to the annual reports of the Office)

	Total Revenues	Number of decisions	Average revenue / review
2016	40 623	1 423	29
2015	31 791	1 497	21
2014	50 879	1 431	36
2013	48 424	1 241	39
2012	31 194	1 278	24

Tab. 8 shows the comparison of the national revenues and costs of the Office. The table shows that the average cost of one review has decreased since 2012. On the other hand, the average income from one review in 2016 is only five thousand higher than it was in 2012. The Office's activity has long been inefficient in this respect and its operation must be subsidized from the state budget.

Table 8: Comparison of cost and income per review, in thous. CZK (own processing according to the annual reports of the Office)

	Average cost / review	Average revenue / review
2016	47	29
2015	45	21
2014	51	36
2013	63	39
2012	70	24

The results of the survey are compared with the results from previous research, which dealt with similar facts in other years in Tab. 9 (Bachan 2009, Čechová 2011, Pavlas 2017). The only difference between the comparative research is that the Čechová's and Bachan's researches include entities controlled by the Office, as well as entities, audited from the point of view of the Supreme Audit Office. This difference can be considered as minimal with respect to the number of responses.

Table 9: Comparing the results of the survey with the results of previous research (own processing according to the annual reports of the Office)

	Bachan	Čechová	Pavlas	Own research
Judicial proceedings are not underway (n)	33	30	36	41
The responsible person	11	12	17	18

designated				
% of n	33,33 %	40,00 %	47,22 %	43,90 %
Compensation required	6	9	14	13
% of n	18,18 %	30,00 %	38,89 %	31,71 %
Other measures have been taken	16	9	15	26
% z n	48,48 %	30,00 %	41,67 %	63,41 %

Even though publications and methodical guides on the interpretation of the law have been published since the beginning of validity of the Act No. 137/2006 Coll. On Public Procurement, there has been no increase in the knowledge and experience of the employees of individual entities who have or were obliged to award the contract within the framework of the aforementioned Act. This is reflected in Table 9, where, on the basis of a comparison of individual surveys, it can be said that the control system is long-term ineffective.

The only improvement is seen in the number of entities that have taken other measures to avoid recurring errors and shortcomings in the procurement procedure. As mentioned above, an example may be the adoption of a new directive or revision of existing, ongoing employee training, the use of external advice, a multi-level check, and others.

CONCLUSION

Legislation on public procurement has undergone several minor changes over the last few years. The biggest change took place in 2016 when a new law came into force incorporating the requirements of EU directives. It is clear from the very scope of the new Public Procurement Act that public procurement is a very comprehensive and demanding topic.

The volume of public procurement significantly contributes to the amount of annual GDP and, as a result, public goods are redistributed; therefore, it is important to regulate this area by legislation, but also to supervise and control the ineffective management of public funds. That power lies in particular with the Office.

Based on research over the period 2013 to 2014, the effectiveness of the Office supervision is low. The inefficiency stems primarily from the unwillingness to identify the responsible person who caused the breach of the law. There may be several reasons - indifference, personal ties to the job, or the mere fact that it is public finance. The organizational components of the state appeared among the often punished subjects in the research. If such a body is fined, it can be said that the state is imposing it on itself. In terms of public budgets, these penalties have a neutral impact but are linked to the Office's administrative costs. Employees of the fined organizational unit of the state do not solve the administrative costs associated with the imposition of a fine and any appeal, even though they are all of us. It is these subjects who do not have to identify a particular person. For others, the fine can mean a meaningful interference in their budgets. For this reason, external firms are used to a greater extent and, in the case of a properly drawn up contract, they may claim damages in the amount of the fine imposed. Infringement of the Public Procurement Act may also occur due to the ignorance and complexity of the law. Difficulty can also be reflected in the more frequent use of external firms.

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