PUBLIC PROCUREMENT MONITORING REPORT

FOR THE REPUBLIC OF MACEDONIA

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ABBREVIATIONS

BPP – Bureau of Public Procurements

SAO – State Audit Office

SCPPA – State Commission on Public Procurement Appeals

CA – Contracting Authorities

EO – Economic Operators

EPPS – Electronic Public Procurement System

EU – European Union

PPL – Public Procurement Law

RM – Republic of Macedonia

CCC – Center for Civil Communications

KEY FINDINGS AND RECOMMENDATION

- **The annulment problem is increasingly intensified for the larger tender procedures, that is, so-called open procedures for procurement of goods and service in the amount over EUR 20,000 and for works implementation in the amount over EUR 50,000. According to the monitored sample, such unfavorable trend is mostly due to the adopted decisions to annul the tenders because the estimated value of the procurement is lower than the financial offers by the companies bidders, and therefore, the institutions with their budgets cannot afford to pay them.**

Recommendation: As a first step towards the decrease of the annulments may be to amend the PPL, in particular, Article 169, referring to cases when the contracting authority can annul the procedure for awarding public procurement contract: 'unforeseen budget changes' and 'changes in the contracting authority needs', it should be provided that the same procurement which is annulled on the grounds of the aforementioned cases must not be repeated during the same budget year. At the same time, considering the identified issues with the procurements value estimate it is necessary for the contracting authorities to do market research and to estimate the procurement value more realistically.

- **Companies are requested evidence for previous public procurement contracts concluded with state institutions in order to participate in tender processes. Continuous extension of the eligibility criteria list needed to prove their eligibility makes the companies' participation in public procurement procedures even more complicated. A case has been identified within the monitored sample when a company was requested to employ the dismissed waiting staff from a certain health institution as a precondition to be awarded a tender for hospital catering.**

Recommendation: The Bureau of Public Procurements should conduct an analysis what the most frequent eligibility criteria are and to determine which ones are inappropriate, disproportionate and discriminatory.

- **Part of the institutions still fail to comply with the rule of accurate definition of the point-ranking manner to evaluate the bids. Instead of the quality of the bids, tender processes mainly evaluate the experience of the companies - bidders.**

Recommendation: Only accurately set evaluation parameters that will be clearly provided in the tender documentation can result in objective bid point-ranking. Thus, it is necessary for the institutions to comply with the Public Procurement Law and to precisely define the bid point-ranking elements.

- **The non-transparent negotiated procedure without a call announcement in the third quarter of 2012 is applied for the conclusion of 210 contracts with total value of EUR 14 million which is about 90% more than the value of the contracts concluded in the same period of the previous year. In the first nine months of 2012 such contracts amount to approximately EUR 32 million.**

Recommendation: It is necessary to influence the reduction of negotiated procedure without a call announcement, considering that it is a procedure with no transparency included in its realization which increases the corruption risks.

- **Insignificant competition in a significant share of tenders remains a serious issue. As regards the monitoring sample, in 45% of the tenders there were no more than two bidders.**

Recommendation: Apart from the BPP's engagement, the overcoming of such issue should necessarily involve the business sector and their association which should try to openly locate the reasons and to suggest efficient measures for their elimination.

- **E-auction is planned, but not conducted in 35% of the monitored procedures.**

Recommendation: Since the e-auction is mandatory for all public procurement procedures, institutions face even greater responsibility to provide competition conditions among the companies and e-auction realization.

- **The comparative analysis of the Public Procurement Law of the RM as regards the exclusion of companies from the public procurements through submitting negative references conducted with seven countries (Croatia, Slovenia, Montenegro, Hungary, the Czech Republic, Bulgaria and the United Kingdom) pointed out that no other country creates so-called "black-lists" of bidders that are banned from participating in tender processes for a given time period (1 to 5 years) due to the same law violations as it is in Macedonia.**

Recommendation: Competent institutions should take into consideration the examples provided below when evaluating the effects of negative references and the potential future harmonization of the Macedonian regulations on this issue with the EU regulations.

GOALS AND METHODOLOGY

Since November 2008, the Center for Civil Communications from Skopje has continuously analyzed the implementation of the public procurement process in the Republic of Macedonia as regulated with the Public Procurement Law. The analysis aims at assessing the public procurement process implementation in light of the new Public Procurement Law and establishing whether and to what extent the following fundamental public procurement principles are met: transparency, competitiveness, equal treatment of economic operators, non-discrimination, lawfulness, cost-effective, efficiency, effective and rational use of budget funds, commitment to obtain the best bid under most favorable terms and conditions, as well as accountability for the funds spent for procurements.

The analysis of the public procurement process in the Republic of Macedonia is performed based on the monitoring of randomly selected public procurement procedures (40 per quarter). Monitoring activities start with the publication of calls for bids in the Official Gazette, followed by attendance on public opening of bids and data collection on the procedure course by the means of in-depth interviews and structured questionnaires submitted to economic operators, as well as data obtained from contracting authorities by means of Freedom of Information applications.

The analysis of the present Report has been performed based on monitoring of selected sample of 40 public procurement procedures implemented by central-level contracting authorities, while the public opening of those bids took place in the period July – September 2012. The present Report also includes a comparative analysis of the application of the economic operators' exclusion from participating in public procurement procedures (negative references).

DETAILED QUARTERLY REPORT ON THE PUBLIC PROCUREMENT MONITORING

- **The annulment problem is increasingly intensified for the larger tender procedures, that is, so-called open procedures for procurement of goods and service in the amount over EUR 20,000 and for works implementation over EUR 50,000. According to the monitored sample, such unfavorable trend is mostly due to the adopted decisions to annul the tenders because the estimated value of the procurement is lower than the financial offers by the companies bidders, and therefore, the institutions with their budgets cannot afford to pay them.**

An extremely unfavorable structure can be found behind the usual high percentage of 25.79% annulled of the total number of tenders announced in the Republic of Macedonia in the third quarter of 2012. The number of annulled tenders implemented through open procedures applied for higher value procurements is increased, compared against the annulments of tenders implemented through the bid collecting procedures intended for procurements of goods and service amounting from EUR 500 to EUR 2,000, that is, EUR 50,000 for implementation of works.

In the period from July-September 2012, the share of annulled tender procedures implemented through open procedure amounts up to 41.37% of the total number of monitored procedures of such type. Such high share of annulments of published open tender procedures is also registered in the EPPS. In the period from July-September 2012, 38.23% of the total number of published open tender procedures in the Republic of Macedonia were annulled, that is, the total of 1,062 tenders were published, and 406 open tender procedures were annulled. On the other hand, as regards the so-called bigger tenders, compared to the same period last year, there is a drop in the number of annulled tenders applied for smaller procurements implemented though simplified bid collecting procedure, and their share is 18.11% (361 tenders are annulled out of the total number of 1,993 such calls).

The inefficiency of the public procurement process manifested through the annulment of tenders gains worrying dimensions when considered that procurement procedures increasingly fail in the case of bigger tenders, contrary the previous years when here was a balance between the bigger and smaller tender processes.

Overview of annulments in the third quarter

(share of annulled tender procedures)

	July-September 2011	*July-September 2012*
Annulled tenders in all procedures	27%	26%
Annulled tenders in open procedures	25%	38%
Annulled bid collecting procedures	27%	18%

In order to discover the reasons for such trend, the present Report analyzed the reasons for the made annulment decisions, in the monitored sample, as well as all such decisions published in EPPS.

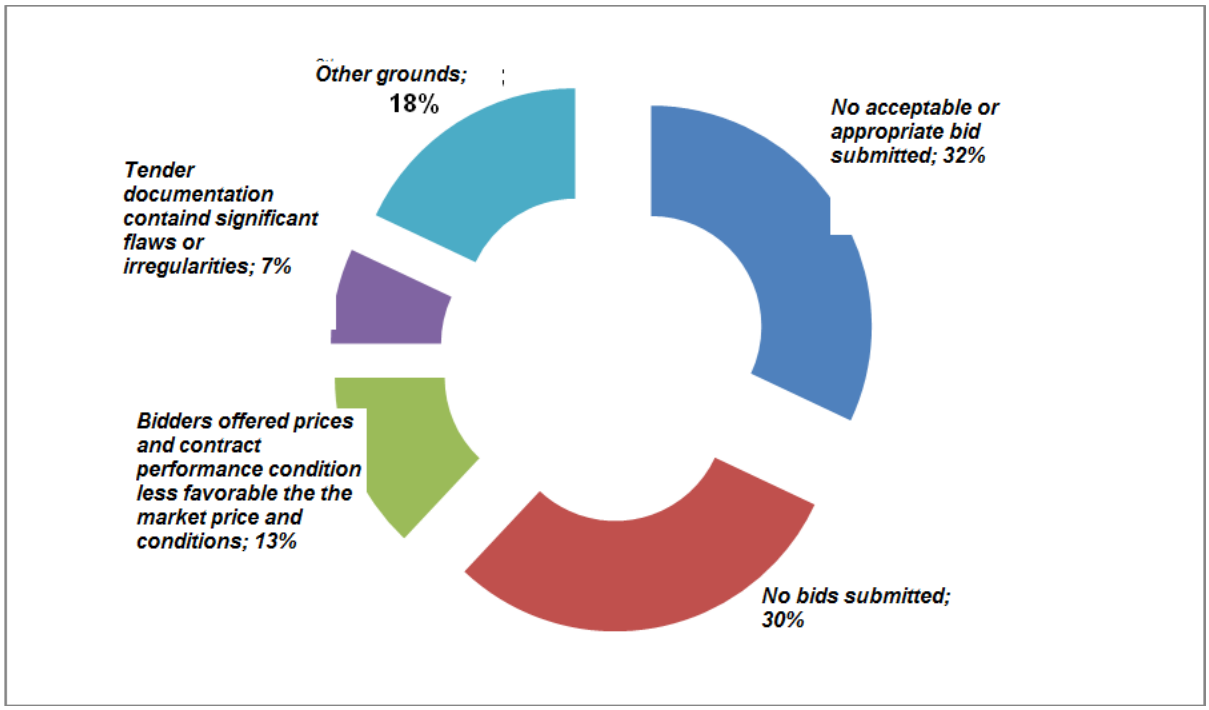
As regards the monitored sample, most dominant are annulment decisions referring to Article 169, paragraph 2 of the PPL, stating that 'no acceptable or appropriate bid was submitted'. An acceptable bid is any bid submitted by a company which met the laid down criteria on economic and financial standing, as well as the criteria for proving the technical or professional competences, while appropriate is any bid which financially meets the level of the estimated procurement value or, if it is higher than the estimated value, but still fits the budget abilities of the institution.

More specifically, the analyzes of the tenders subject to monitoring leads to a conclusion that greatest share of the decisions to annul procurement procedures were made because the institutions received only one bid and they were not able to hold an e-auction as a price-reducing process. Nevertheless, none of the institutions which annulled the tender procedure because it could not implement e-auction did not make a use of the legal grounds to negotiate with the sole bidder without announcing a call and, hence, to conclude a contract upon a lower price. If cases of monitored tenders where the annulments followed the implementation of e-auctions,

that is, after the reduction of the prices primarily received from the companies, are taken into consideration, the conclusion is that the institutions face the problem of unrealistic estimation of a procurement value. It indicates a lack of knowledge on the market conditions and confirms the predominant rule – the value of the current procurements is estimated based on the previous year, without taking into consideration the changed which have occurred in the meantime.

But, apart from the said problem noted through the monitored sample, the EPPS data indicate that a significant share of tender processes is annulled because no bid was submitted at all. The reasons for reduced activities at the public procurements market by the business sector can be sought in the tender documentations where extremely high criteria are laid down for companies to meet in order to submit a bid, as well as in the past problems the companies identified in the conducted surveys, and which relate to favoring certain companies, as well as the issues of payment for the realized procurements.

Reasons for the procedure annulment in the third quarter of 2012



The monitored procurement of toilet paper and hand wipes is a good example that institutions make the annulment decisions too lightly, abusing the fact that for them there are no legal sanctions against such acts. Six companies submitted bids for this procurement, and the implementation of e-auction followed, which was held on 14 September. Three days after, on 17 September, the institution-supplier made a decision to annul the procedure, explaining that there had been unforeseen changes in the contracting authority's budget. It remains unclear what happened in those three days that led to making such decision and why the contracting authority did not provide detailed explanation elaborating how the unforeseen changes affected precisely the said regular procurement. It is understandable that due to the fact that institutions use the possibility to annul the procedures so lightly, not only the inefficiency of public procurements increases, but also, the lack of trust by the companies in the institutions increases and puts them both in a non-equal position. On the other hand, when companies renounce their bid they receive negative references, which means a prohibition to participate in public procurement procedures for a year.

Recommendation: The increasing trend of annulments, particularly evident in the open procedures, must be stopped. Therefore, it is necessary to limit and define

more accurately the possibilities for annulment of public procurement procedures. As a first step towards the decrease of the annulments may be to amend the PPL, in particular, Article 169, referring to cases when the contracting authority can annul the procedure for awarding public procurement contract: 'unforeseen budget changes' and 'changes in the contracting authority needs', it should be provided that the same procurement which is annulled on the grounds of the aforementioned cases must not be repeated during the same budget year. At the same time, considering the identified issues with the procurements value estimate it is necessary for the contracting authorities to do market research and to estimate the procurement value more realistically.

- **Companies are requested to provide evidence on previous public procurement contracts concluded with state institutions in order to participate in the tender processes. Continuous extension of the eligibility criteria list needed to prove their eligibility makes the companies' participation in public procurement procedures even more complicated. A case has been identified within the monitored sample when a company was requested to employ the dismissed waiting staff from a certain health institution as a precondition to be awarded a tender for hospital catering.**

The requirement imposed on the companies to prove their previous business experience in order to participate in tender processes is more often related to the requirement to provide a list of previous contracts concluded with state institutions. Apart from procurements which may be considered typical for the public sector, the monitoring identified cases when proof of previous business experience with state institutions was required in procurements of printing paper and training delivery, which may be used both for public and private sector. In such cases, for example, in procurement of printing paper for a period of 1 year in the value of MKD 800,000, the companies-bidders, were requested to possess or have at disposal at least two cargo vehicles for delivery of goods, to have at least five employees engaged

in/responsible for the implementation of the contract, and to have realized at least four printing paper delivery contracts with state institutions within the past three years, including data on buyers, contract value and dates (reference lists). Also, the requirement that the companies should have a minimum turnover of 6 million MKD in the past three years in order to be qualified for the said tender, which is 7.5 times higher than the procurement value, can be stressed as problematic.

Previous experience with the public sector was also required in the procurement procedure for training delivery services, where companies, in order to participate in the tender process, needed to prove they had realized minimum 40 trainings (seminars) a year in the past two years and to submit at least 5 references from institutions related to trainings realized in the past 2 years. This case also noted the disproportion between the experience requested from the companies and the size of the procurement. Namely, the companies were requested to realize 40 trainings (seminars) a year, and their obligation related to the said procurement was to deliver 3 trainings, 7 visits around Macedonia, one closing conference and a cocktail party. A single company submitted its bid, and even that single bid was evaluated as unacceptable and the procedure was annulled.

Almost in each tender process the companies are requested to submit balance sheet statement certified by a competent authority and an extract of the company's total turnover (profit and loss account data, or the reviewed profit and loss account). Extracts are required even in cases when the contracting authorities have not laid down minimum annual turnover the company must realize to prove its eligibility as a bidder. Furthermore, some of the contracting authorities started to require from the companies to have realized positive financial outcome, and in some of the procedures monitored in the reporting quarter they referred to the last year, and in some procedures they referred to the past three years.

The tender for construction of a section of the trunk road A4 (M6) Shtip –Strumica is another example of the laid down high criteria, where, among the other criteria, the construction companies were required to have successful experience in at least three construction, reconstruction or rehabilitation contacts for highways or trunk roads or regional roads in the past five years, each with a value amounting up to 2.5 million euros. Two larger construction companies from Macedonia bid, but one of

them failed to meet the said criteria, and the other company requested higher amount than envisaged in the budget. The epilogue was: annulled tender process.

There are two more examples in the monitored sample supporting the claim that contracting authorities lay down conditions suitable for them, but not for the business sector. The first example refers to hospital catering procurement, where a university clinic required from suppliers to have at least 5 professional full-term employed chefs and at least 20 employees (to be proved by M1/M2 form), and also to undertake a responsibility of employing seven waiting ladies whose employment with the contracting authority had ceased due to economic, technological, structural or other changes introduced in the clinic for the period of contract duration. A single company submitted a bid and a contract was concluded with that company.

Following case is an example noted in the monitored sample of a requirement additionally burdening the already high criteria required from the companies, and it is about procurement of sound proofing in order to improve the acoustics in a sports center acoustics. In this procurement procedure, the bidders were requested, apart from the bid bank guarantee (3%) and the performance guarantee (5%), to submit a guarantee in the amount of 5% of the contract values, thus obligating the selected company to guarantee for the quality of the performed works during the warranty period of 2 years. Considering the costs any company bidding in this tender process would incur, it is not surprising that no company responded to the announced call. Apart from discoursing the bidders, it should be noted that financial forms of protection of the institutions against any possible withdrawal of bids, or low performance of contracts, as well as failure to comply with the provided warranty period, in the end, make the procurement more expensive because even if a company was motivated to provide such bank guarantees, they most certainly would have calculated them in the contract value.

Recommendation: The Bureau of Public Procurements should conduct an analysis what the most frequently laid down tender participation criteria are and to establish which of them are inappropriate, disproportionate and discriminatory. It is this particular concern to which BPP should also pay more attention while educating the representatives of the contracting authorities by pointing out what is considered inappropriate, disproportionate and discriminating criterion. Should the education fail

to provide results, than legal provisions related to the criteria should be amended and the manner of criteria selection and definition should be elaborated.

- **Part of the institutions continue to disobey the rule of precise definition of the bid point-allocation. Instead of quality of the bid, the tenders mainly appraise the experience of the bidding companies.**

Lowest price as a most favorable bid selection criterion still dominates in the public procurement procedures. In smaller share of tenders applying the “economically most favorable bid’, quality is mostly listed as point-allocation criterion, apart from the price. The public procurement monitoring discloses that contracting authorities have problems defining certain sub-elements that will evaluate the quality. Bid quality points are mainly allocated on the basis of company’s previous experience. In the case of the procurement of medical equipment for central sterilization, the ‘economically most favorable bid’ criterion awarded 70 points for price, 20 points for quality and 10 points for the delivery deadline. According to the tender documentation, in this procedure, the quality was evaluated with the following sub-elements – past experience (10 points) and meeting all required technical specification characteristics in compliance with the listed norms and standards and set dimensions (10 points). The problem with the first sub-element is the lack of definition on what grounds the company’s experience would be evaluated, or proven, whether it should be previous contracts for the same type of procurements, and how many points should be appointed to the number of contracts. As regards the second sub-element, the problem arises in the approach of the contracting authority which, on one hand, states that the meeting of all tender specification requirements would be evaluated, and then, excludes one of the two submitted bids because it did not meet the required technical specifications. Therefrom, it seems that the institution has clearly defined technical specification which must be followed, and in such case, evaluating the bids on this ground bears no justification at all. Besides the ‘quality’, the most favorable bid selection criterion for this procedure included the ‘delivery deadline’. Thus, it was stated that the bidder which would deliver the equipment

within 7 days shall be appointed the maximum 10 points. Evaluation of the delivery deadline, and establishment of such short deadlines may be abused in favoring a certain bidder. Another disputed issue in this tender documentation is the provision stating that if economic operators offer the same price for the same subject of procurement, and following the completion of the e-auction the offered price remains unchanged, the selection shall be made by drawing lots in the presence of the economic operators. The PPL and the by-laws regulating this sphere do not provide for selection of most favorable bidder by means of drawing lots.

The experience of the companies-bidders was an evaluation sub-element for the quality of bids in the procurement procedure for revitalization and repair services of electrical and mechanical equipment on foundation and capturing structures on dams. Namely, 40 points of the total 60 points provided for quality refer to the experience companies have in the performance of such type of works, and 20 points are provided for evaluation of the offered realization team. The positive side is that the 40 points for company's previous experience are described in details in the tender documentation, so the bidders are provided with accurate evaluation of the number of points they will get for previous contracts. Nevertheless, such sub-element stresses the company, and not the quality of the offer, which deranges the concept of public procurements and their goal to receive the best value for the money spent from the companies by means of public competition.

In the monitored procurement of power supply and air-conditioning system maintenance services, the 'economically most favorable bid' criterion was applied, where elements of 'price' (50 points), 'quality of service plan' (30 points) and 'competences of engaged staff' (20 points). The problem identified here is that there are no sub-elements to evaluate the 'quality of service plan', which makes the biased point-allocation in bid evaluation process possible.

In another monitored procurement of work uniforms and clogs, the 'economically most favorable bid' criterion provided allocation of 80 points for the 'price' and 20 points for 'quality. In addition, the tender documentation stated that the 'quality' should be evaluated by checking the submitted samples and certificates of the bid, but no clear sub-elements were laid down.

In the monitored procurement of laboratory and medical equipment, the selection of the most favorable bid was through the 'economically most favorable bid' criterion with allocation of 30 points for 'quality'. The tender documentation stated that the 'quality' is to be evaluated in accordance with the technical features (catalogue performances) without specifying how many points were to be allocated to which technical features.

Recommendation: Only accurately set evaluation parameters which will be clearly provided in the tender documentation can lead to objective bid evaluation. Hence, it is necessary for the institutions to consistently comply with the PPL and to specify the bid evaluation elements.

- **The non-transparent negotiated procedure without a call announcement in the third quarter of 2012 is applied for the conclusion of 210 contracts with total value of EUR 14 million which is about 90% more than the value of the contracts concluded in the same period of the previous year. Within the first nine months of 2012 the value of such contracts amounts to approximately EUR 32 million.**

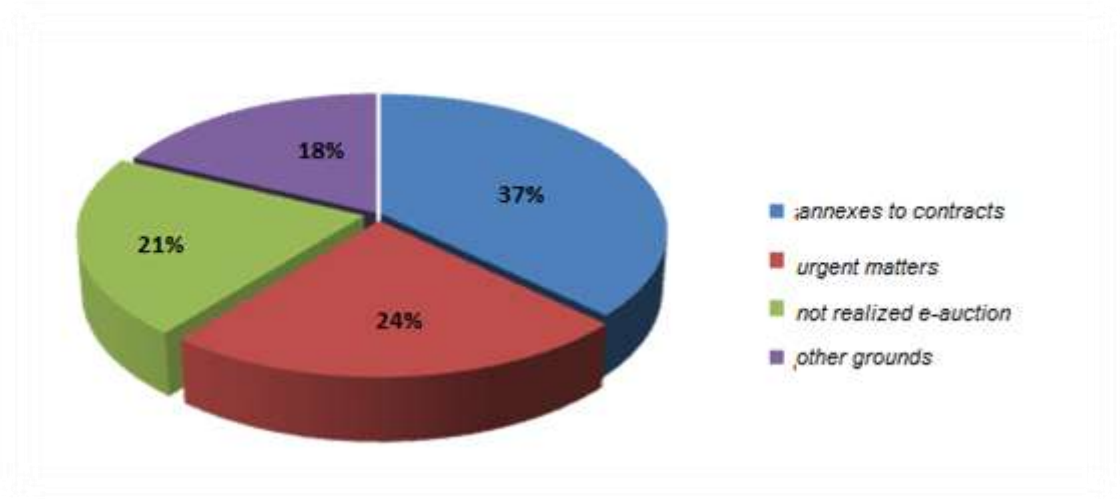
Compared at quarterly level (July-September 2012), the value of contracts concluded through negotiated procedure without prior announcement of a call is extremely high. Total value of such contracts amounts to MKD 870 million, or EUR 14 million, which is by 141% higher compared to the previous quarter (April-June 2012). Also, the great rise of value (90%) of such contracts can be noted compared to the same period last year.

If the structure of the procedure application is analyzed, in terms of the number of contracts, it can be concluded that it mainly occurs due to urgency of certain procurement the institutions could not envisage in time. 67 contracts were concluded on such grounds with a total value of EUR 3.3 million. In terms of the contract value,

most of the funds through such procedure were spent for conclusion of annexes to contracts, or, as the PPL stipulates in cases when additional works or services cannot be technically or economically separated from the basic contract without causing any problems to the contracting authority. 27 contracts were concluded on such grounds with a total value of EUR 5.2 million.

In terms of both parameters, highly ranked are contracts concluded when in open procedure, limited procedure, negotiated procedure with a call and request for proposals procedure, the contracting authority fails to schedule e-auction due to the lack of competition – 32 contracts were concluded with a total value of approximately EUR 3 million. The value of contracts concluded on other legal grounds for application of negotiated procedure without a prior call is lower and amounts to total of EUR 2.5 million.

Reasons to conclude direct contract



The great rise in the value of the contracts concluded through direct negotiations between the institutions and the companies in the third quarter affected the record increase of the value of such contracts in the first nine months of 2012, compared since 2009 until today.

Value of contracts concluded though the negotiated procedure without prior call

Period	Value of contacts in million EUR
January-September 2012	**31.9**
January-September 2011	29.2
January-September 2010	19.6
January-September 2009	15.8

Source: Electronic Public Procurement System

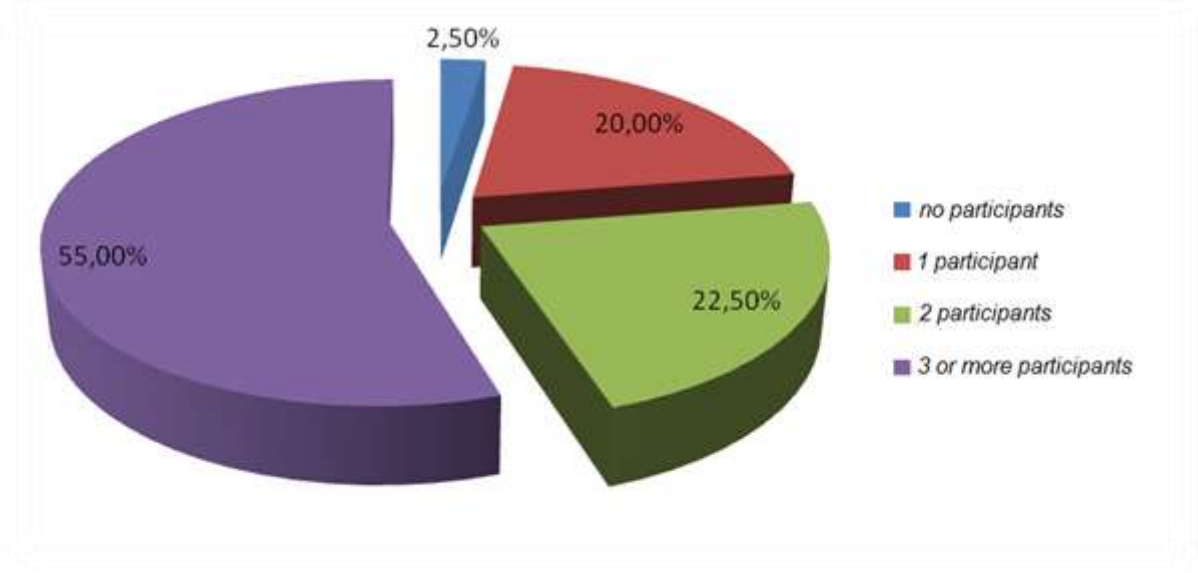
Recommendation: It is necessary to influence the downward trend of the negotiated procedure without a prior call, since it is a procedure that is conducted without transparency, which increases the corruption risks.

- **Little competition remains a serious problem for significant share of tenders. As regards the monitored sample, there were no more than two bidder in 45% of the tenders.**

Insignificant competition in tenders which initiates a series of other problems, such as annulment of procedures, or conclusion of contracts with the single bidder without realization of e-auction remains to be one of the most disadvantageous characteristics of the public procurement market.

Overview of the competition in monitored tender procedures

(July-September 2012)



The lack of competition results from the high criteria laid down to evaluate the company's abilities as a prerequisite for submitting bid, great administrative and financial burden on the companies to develop and submit the bids, payment issues and lack of trust in the objectivity of the system.

Recommendation: It is necessary to undertake urgent measures to overcome the insignificant competition problems in the dominant share of tenders because it threatens one of the fundamental instruments needed for the functioning of the market economy – fair competition providing supply of better and more competent goods, services or works, for less public money spent. Apart from the BPP's engagement, the overcoming of such issue should necessarily involve the business sector and their association which should try to openly locate the reasons and to suggest efficient measures for their elimination. Business associations should discuss and analyze the reasons why companies continuously lose interest in participating in public procurements and, in cooperation with the competent state authorities, undertake concrete measures to eliminate such reasons.

- **E-auction was planned, but not realized in 35% of the procedures monitored. Since the competition conditions the e-auction, the slight improvement of the situation was noted in terms of this monitoring parameter.**

Due to the fact that only a single bid was submitted, or only one bid of several submitted bids was evaluated as acceptable (the company-bidder met the eligibility criteria), e-auction was planned, but not realized in 35% of the procedures monitored.

In some of such procedures the tender process was annulled, and in some of them the contract was concluded with the single bidder. This situation leads to conclusion that the e-auction, as a manner for reducing the price of public procurements requires certain preconditions to be met, i.e., greater competition at the public procurement market in order to fulfill its objective.

Recommendation: Since the e-auction is mandatory for all public procurement procedures, institutions face even greater responsibility to provide competition conditions among the companies and e-auction realization. Otherwise, without e-auction when the contract is concluded with the single bidding or eligible company, there is a risk that the contract value is higher than the real value, since the price in the initial offers usually are set higher, expecting their decrease during the e-auction negative bidding. In addition, there is a risk of annulment of such procedures, due to divergence from the estimated value.

- **Insufficient application of the statement on seriousness of bids as an alternative for bank guarantees which increase the company costs for tender participation.**

As of the 1 July 2012, legal provisions became effective, envisaging possibility for contracting authorities to replace the bank guarantee requirement with a requirement for companies to submit a statement on seriousness. But, in the first three months since the application of this provision, it has been registered in only 25% of the procedures monitored. Institutions continue to prefer bank guarantees which were requested in 48.7% of the monitored tender procedures. This leads to conclusion that there is still lack of awareness among the contracting authorities for the need to reduce the financial burden on the companies as an incentive for the competition.

Recommendation: In order to stimulate competition among companies to a highest level possible, it is necessary that the institutions require dominantly statements on seriousness in the bids instead of bank guarantees. This will have an impact to the reduction of company costs for tender participation..

- **In almost half of the monitored procedures there was electronic publishing of the tender documentation. Certain institutions still insist on submitting the tender documentation in hard copy, and they continue charging fees for it.**

Fee for obtaining tendering documentation was required in 17.5% of the procedures monitored. It points to a slight, but constant downward trend of the number of procedures where fee was charged for obtaining tendering documentation. The average amount of the fee for obtaining tender documentation in the monitored sample was MKD 1,214.

There are no significant improvements in the electronic publishing of tendering documentation in EPPS. In this quarter, in 55% of the procedures monitored, the tendering documentation had been published electronically and obtainable from EPPS, while in the remaining 45% of the cases, the documentation could have been obtained at the contracting authority premises in hard copy only.

Recommendation: The increase rate of tendering documentation publishing in EPPS is slow and it seems that if the manner of publication of the tendering documentation were left to the free will of the contracting authorities, electronic publishing would never become a general practice. Similar with that brave step with the introduction of an obligation for electronic publishing of tendering documentation and mandatory e-auctions made a couple of years ago, the next step should be mandatory publishing of the tendering documentation in EPPS. There is willingness among all stakeholders – all contracting authorities have been using EPPS to publish calls and notices for many years, and an enormous number of companies have registered in EPPS and use it at least to participate in e-auctions. The advantages of the electronic publishing of tendering documentation are following: for contracting authorities - reduces the period of time for public procurement procedure, saves funds and provides possibility for taking documentation from another authority; for companies - saves human, financial resources and time; for the public - provides easy and better insight into the operations of legal entities regarding public spending.

COMPARATIVE ANALYSIS CONCERNING THE EXCLUSION OF ECONOMIC OPERATORS FROM PARTICIPATION IN THE CONTRACT AWARD PROCEDURES (NEGATIVE REFERENCE)

- **The laws on public procurement of the Member States of EU and of those countries which are soon to join the Union provide for the exclusion of a tenderer from a specific contract award procedure under strictly defined criteria and reasons, but none of them has provided for the development of list of tenderers with negative references, by which the tenderers will be excluded from the contract award procedures for a longer period of time, with the exception of a single country – Slovenia, where the negative references are published due to serious violations of the law other than those laid down by the Law on Public Procurement of Macedonia.**

The analysis aims at making a comparison of the legislation in RM with those of the other countries in the region and of EU Member States relating to the exclusion of candidates and tenderers from the contract award procedures and the development of a list of tenderers with the so called negative references. The scope of the analysis includes three countries from the region of former Yugoslavia, one of which an EU Member State, another soon to accede to EU, and the third one progressing fast toward the EU accession, as well as three countries that have become EU Member States several years ago and one of the oldest Member States of the Union. What is common for all of these countries is the fact that their legislations have been harmonized to the EU one.

Republic of Macedonia: The Law changing and amending the Law on Public Procurement from December 2011 ("Official Gazette of RM" no. 185/11), in its article 40, paragraph 2, lays down a prohibition for the economic operators, individually or as a member of a group, to participate in the contract award procedures by virtue of the publication of the so called negative references. In accordance with the provisions of articles 47 and 48 of the Law, the economic operators (tenderers) who have been issued one or several negative references shall not be eligible to take part

in the contract award procedures for a period of one year as of the day of publication of the last negative reference.

a). The basic provision in the Law, in article 47, provides that the contracting authority may require a tender guarantee in the form of a bank guarantee or deposited funds, or, otherwise, mandatorily requires a statement on the steadiness of the tender, which is stated in the tender documentation.

The contracting authority shall collect the tender guarantee, retain the deposited funds, i.e. activate the statement on steadiness of the tender, if the tenderer:

- withdraws its tender before the expiry of its validity period;
- fails to accept the correction of the arithmetical mistakes made by the commission;
- fails to sign the public procurement contract, or
- fails to provide the performance guarantee, if the contracting authority made such a requirement in the tender documentation.

If it comes to collecting the guarantee of the tender, retaining the deposited funds or violating the statement on steadiness of the tender, in accordance with the amended law, the contracting authority shall publish a negative reference that results in exclusion of the particular tenderer from all the further contract award procedures in a period of one year as of the day of publication, in case of a first negative reference. Furthermore, the contracting authority is obliged to make publicly available the data on the negative references via the Electronic System for Public Procurement (ESPP), and notify the economic operator (tenderer) thereof. The period of exclusion from the contract award procedures is extended for one additional year for every subsequent negative reference, but it may not exceed five years. This prohibition also applies to a group of economic operators having as a member an economic operator with a negative reference, as well as economic operator representing an associated company to an economic operator with a negative reference. The contracting authority publishes the negative references at the same time as the publication of the notification for a contract award or for cancellation of the procedure. In case of a simplified competitive procedure, the negative reference is published within a period of 30 days upon the day of entering into the public procurement contract or the day of cancellation of the procedure.

b). Under article 48 of the Law, the contracting authority may require from the economic operator whose tender has been selected as most favorable to provide a performance guarantee in a form of a bank guarantee amounting to 5%-15% of the value of the public procurement contract, and it shall mandatorily state this in the tender documentation.

In this case, too, if it comes to collecting the performance guarantee, the contracting authority has an obligation to submit a negative reference to ESPP, that results in exclusion of the particular tenderer from all the further contract award procedures in a period of one year as of the day of publication, in case of a first negative reference, and notify the tenderer thereof. The period of exclusion from the contract award procedures is extended for one additional year for every subsequent negative reference, but it may not exceed five years.

The prohibition to participate in the contract award procedures under the terms of this article, similar to the one relating to the bank guarantee under article 47, also applies to a group of economic operators having as a member an economic operator with a negative reference, as well as economic operator representing an associated company to an economic operator with a negative reference. This negative reference is to be submitted by the contracting authority within a period of five working days as of the day when the guarantee has been collected.

The negative reference, which has been introduced as a novelty by the amendments to the LPC, has raised a lot of issues concerning its advisability, taking into account that fact that is considered to be a drastic measure. The foreign experts' warning are mostly concerning the wide list of institutions (more than 1000) which are given the possibility, even in case of contracts with value above 500 EUR, to prevent a company from doing business with the state for a period of at least one year. On the other hand, it also leaves room for corruption in the cases when the state institution should, but is not issuing such a negative reference for a specific company.

These are the exact reasons behind the development of this brief comparative analysis, which should indicate the experiences of other countries in the neighborhood and EU Member States with this matter. The competent institutions should take into account the examples referred to below when they will make an

assessment of the impact of negative references and for any future alignments of the Macedonian legislation on this issue with the EU legislation.

Croatia: The new Law on Public Procurement has been enacted in 2011. The Law lays down a requirement for security-guarantee. In accordance with article 76, the contracting authority may require economic operators to submit several types of guarantees, in particular:

- concerning the steadiness of the tender, in the event that the tenderer decides to withdraw its tender during its term of validity;
- For delivery of incorrect data (the economic operator is required to submit a certificate issued by the tax authority concerning its state of indebtedness or an equivalent document issued by the competent authorities (which may not be older than 30 days of the date of commencement of the public procurement procedure);
- If the economic operator refuses to sign the public procurement contract or framework agreement, or fails to submit the performance guarantee.

Furthermore, the Law provides for the following types of guarantees, in particular:

- performance guarantee in the event of breach of certain contractual obligations;
- framework agreement guarantee when the framework guarantee is binding on the conclusion of a public procurement contract;
- overpayment guarantee in the event that the overpaid amount is to be repaid (repayment of advance payment or in line with a payment plan);
- warranty period guarantee in the event that the agent fails to meet the obligation of rectifying defects, arising from the warranty or compensation of damages within the warranty period;
- professional liability insurance guarantees warranting the rectification of damages which might occur in connection with the performance of a specific activity.

The contracting authority states the means and conditions of the guarantee in the contract notice and in the tender documents. The validity of the tender guarantee is

determined in line with the term of validity of the tender, and it is stated in the absolute amount, which, except in justified cases, must not exceed 5% of the estimated value of procurement. If the term of validity of the tender expires, the contracting authority may require from the tenderer to extend the term of validity of the tender and of the tender guarantee in accordance with such extended term. The contracting authority is obliged to return the tender guarantee to the tenderer immediately after the completion of the public procurement procedure. The Law (article 133) stipulates an obligation for the contracting entities to specify in the public procurement procedures the reasons for exclusion of economic operators pursuant to article 67 of the Law.

The law does not provide for a negative reference for the tenderers due to violation of the provisions on the guarantee or other provisions.

Slovenia: The Public Procurement Act has been enacted in November 2006 and is in force since 2007. The PPA has been amended in 2008 and 2010.

The primary Public Procurement Act sets forth a measure of exclusion of the tenderers from the future public procurement procedures in specific cases and a publication of list of tenderers with negative references. Thus, the Public Procurement Act contains a provision (article 77) which regulates the examination of the public procurement (the tender) and the measures to be taken if the tenderer fail to comply with the requirements of the announcement relating to the required documentation and data. The contracting authority has a legal obligation, prior to the awarding of the contract at the latest, to examine the existence and content of data provided in the selected tender and other information provided therein. Where the contracting authority in the public procurement procedure establishes that the proof submitted by a tenderer in a tender is false and/or misleading it is obliged to eliminate the said tenderer from further public procurement procedure. The contracting authority is obliged to notify thereupon the Ministry of Finance, which keeps records of tenderers with negative references. Such tenderer or subcontractor shall be eliminated from public procurement procedures for a period of three years when the subject of the contract is goods or services, or for a period of five years

when the subject of the contract is works. The Ministry of Finance shall publish the list of tenderers with negative references on its website.

The amendments to the Public Procurement Act (Article 77-a) concerning the maintenance of records on the negative references, provide for a solution under which the body deciding on the misdemeanors under article 109-a shall notify the competent Ministry of Finance thereof. The notification shall include all data about the tenderer, as well as the date when the tenderer has been excluded from the procedure. The Ministry of Finance maintains the records on the negative references, which shall contain all necessary data, as well as data on the sanctions pronounced for a breach of this obligation. The amended PPA, in its section about the penal provisions, in addition to the fine for a violation stipulated by the original Act (ranging from 5000 – 350,000 EUR) for the contracting authority which has awarded a public contract to a tenderer from the list of tenderers with negative references, also provides for a fine for the tenderer (in the amount of 5000 – 100,000 EUR) for the same violation.

Therefore, the negative reference is stipulated in the cases when the tenderer submits false data in its tender, or data that may be misleading, which strengthens the tenderers' responsibility in terms of their seriousness concerning the participation in the procedure, but also in view of preventing awarding the contract to a tenderer that failed to meet the criteria of the announcement.

Montenegro: the new Public Procurement Law was enacted on 29 July 2011, and entered into force on 1 January 2012. The Law (article 57) governs the provision of monetary funds – tender guarantee for the purposes of:

- protection against trivial tenders,
- performance guarantee
- providing a guarantee to secure advance payment or other guarantee to protect against breach of contract.

Under this article, the contracting authority (principal) is obligated, for a public procurement with estimated value that exceeds EUR 300,000, to establish an obligation in the contract notice, invitation to tender and tender documents of

submitting a tender guarantee or other guarantees in order to protect the public procurement contract. The tender guarantee shall not exceed 2% of the public contract value, and the performance guarantee shall not exceed 10% of the contract value. The contracting authority shall activate the means of financial security provided with the tender in case that the tenderer, after expiry of the time limit for submission of tenders, changes, supplements or revokes its tender or if it fails to sign the contract after its tender was selected as the most favorable one. The contracting authority shall return the tender guarantee to the tenderer, within 15 days upon the day when the decision on selection of the most favorable tender becomes final. The Law does not provide for the creation of a list of tenderers with negative references, but it contains provisions strengthening the tenderers obligations, and introduces inspection supervision for the purposes of controlling the public procurement process.

Hungary: The new Act on Public Procurement was enacted on 11 July 2011.

Several provisions of the Act stipulate a possibility to prohibit the tenderer to participate in the public procurement procedure, upon a final judgment of the court, for a specific period of time (article 57) on several grounds, in particular:

- non-payment of taxes, customs duty … in accordance with the EU regulations;
- supplying false data in an earlier contract award procedure, concluded within the previous three years, which resulted in exclusion of the tenderer from the procedure;
- when the supply of false data was ascertained by a final judgment, until the time-limit set with the force of res iudicata;
- in relation to a contract concluded as a result of an earlier contract award procedure after 15 September 2010, if the tenderer failed to meet, towards their subcontractor, more than 10% of their payment obligation established by an enforceable administrative or court judgment which has been pronounced within the last two years.

In accordance with article 57 of the Law, the contracting authority may stipulate in the notice launching the procedure that the economic operator shall be excluded from participation in the procedure if it has violated the law concerning its business activities or professional conduct and this fact has been established by a final judgment, but also in the cases when:

- it has violated its contractual obligations undertaken in a previous contract award procedure within the last two years,
- does not hold the permit or license or is not a member in a professional organization or chamber,
- a serious breach of professional duty,
- committed, as defined by legislation, a serious breach of professional duty or an act violating professional ethics established in a procedure for breach of the code of ethics enacted by a professional organization specified in a separate act of legislation, within the last three years.

As opposed to the detailed requirements for the economic operator for participation in the procedures, economic operators authorized to provide the relevant service in the EU Member States of their establishment shall not be excluded from the procedure on the grounds that they do not fulfill the legal and organizational criteria (e.g. being a legal entity) stipulated by Hungarian legislation.

The Law also stipulates (article 59) a possibility for the contracting authorities to require a tender guarantee to be provided by tenderers at the time of submission of their tenders, or by the deadline specified by the contracting authority, as well as proof that such a guarantee has been provided. The tender guarantee may be provided by having the prescribed sum deposited into the payment account of the contracting authority, by the provision of bank guarantee or by furnishing a promissory note, according to the choice of the tenderer. The amount of the tender guarantee shall be established in a way that ensures equal opportunity to all tenderers and set so as to cover any potential cost to be incurred, as foreseeable, by the contracting authority in the event of infringement of the validity period of the tender, in the event of the tenderer withdrawing his tender within the validity period, or if the contracting fails due to reasons within the tenderer's sphere of interest. If the tenderer withdraws its tender during the validity period or the contract is not

concluded due to a reason arising within the tenderer's sphere of interest, the tender guarantee shall be forfeit and can be claimed by the contracting authority.

The tender guarantee shall be refunded to tenderers within ten days after the withdrawal of the contract notice or the invitation to tender, after having their tender declared invalid, after the conclusion of the contract, unless the contract notice stipulated the tender guarantee to be retained and transferred as additional security for the ensuing contract. The contracting authority shall, within ten days, refund double the amount in case of a tender guarantee furnished in cash, or an amount equivalent to the tender guarantee in all other cases to tenderers in the event of failing to notify tenderers of the results of the procedure during the validity period as set in the invitation to tender.

The Law does not provide for a negative reference, and the tenderer may be excluded from the procedure due to supplying false data or in the case of violations of the regulations relating to its business activities and professional conduct, which has to be established by a final court judgment.

Czech Republic: The Act on Public Contracts (no. 137) was enacted on 14 April 2006.

The Act (article 67) provides for a collateral as a guarantee as a guarantee for the performance of the public procurement contract. The contracting entity may require in the notice of open procedure, restricted procedure, negotiated procedure with publication or competitive dialogue that the tenderers should provide collateral as a guarantee of meeting their obligations resulting from their participation in the award procedure. Collateral shall not be required if the dynamic purchasing system is set up. The absolute amount of such collateral shall be determined by the contracting entity as 2 % of the estimated value of the public contract. The collateral shall be provided by the tenderer by paying a cash amount to the account of the contracting entity ("pecuniary collateral") or by a bank guarantee.

The Act lays down in detail the procedure concerning the activation and the release of the required collateral to the tenderer after the decision for the selection of the most advantageous tender and the conclusion of the contract. The contracting entity

shall release the pecuniary collateral to: the tenderer whose tender has been selected as the most advantageous one or that has become eligible to conclude the contract in accordance with the terms set forth in the notice, within 7 days of the of the conclusion of the contract; to the tenderer whose tender has not been selected as the most advantageous and that has not become eligible to conclude the contract in accordance with the terms set forth in the notice (within 7 days of the delivery of the notice of the selection of the most advantageous tender); to the tenderer that has been excluded from the award procedure, immediately following such exclusion. It should be noted that the pecuniary collateral to be released by the contracting authority shall include the relevant interest credited by the financial institution. If the tenderer has submitted any objections and the contracting entity has accepted such objections, the tenderer shall re-pay the pecuniary collateral that had been released by the contracting entity, within 7 days of the delivery of the decision of the contracting entity. If the tenderer fails to comply with this obligation, the contracting entity may exclude it from the award procedure. If the tenderer has filed a proposal for the commencement of administrative proceeding for the review of conduct of the contracting entity, the tenderer shall re-pay the pecuniary collateral that had been released by the contracting entity, and enclose a receipt testifying to the payment of the collateral to the proposal. If the collateral should be provided in the form of a bank guarantee, the tenderer shall ensure its validity for the entire period of the award term. The entire paid collateral including interest credited by the financial institution shall be forfeited to the contracting entity if the tenderer, contrary to the Act or tender requirements, should cancel or modify the tender or refuse to conclude the contract. The paid collateral including interest credited by the financial institution may also be forfeited to the contracting entity if the tenderer has failed to comply with the obligation of providing the contracting entity with due cooperation towards the conclusion of the contract.

The Act does not provide for a negative reference for violations of its provisions or failures to comply the requirements set forth in the notice.

Bulgaria: The Public Procurement Law had been enacted in 2004 (it entered into force on 01.10.2004) and was amended on several occasions until 2007.

The Law contains specific provisions governing the matter of the guarantee. Each candidate or tenderer is obliged to provide a guarantee (article 59) for participation in the public procurement award procedure, and the tenderer that has been selected as supplier, contractor or service provider, shall provide a performance guarantee upon signature of the contract.

The contracting authority shall determine the terms and the amount of the participation guarantee as a fixed sum of money which may not exceed 1 per cent of the value of the procurement contract. The contracting authority shall determine the terms and the amount of the contract performance guarantee as a percentage of the value of the public procurement contract, which may not exceed 5 per cent of the value of the said procurement.

The Law (article 60) provides for the possibility for the contracting authority to require a tender guarantee, which may be provided in the form of a cash deposit or as a bank guarantee.

The candidate or tenderer or the selected supplier, contractor or service provider shall be free to choose a form of the participation guarantee or of the performance guarantee. The contracting authority (article 61) shall have the right to retain possession of the participation guarantee when the candidate or tenderer in a public procurement award procedure:

- withdraws the tender after expiry of the time limit fixed for the receipt of tenders;
- lodges a claim against the decision of the contracting authority announcing the results of the prequalification stage or the decision for selection of contractor - until settlement of the dispute;
- is selected as supplier, contractor or service provider but fails to fulfill the obligation thereof to conclude a public procurement contract.

Where the candidate or tenderer has provided a bank guarantee, the contracting authority shall have the right to proceed with exercise of the rights arising from the said guarantee.

The Law (article 62) provides that the contracting authority shall release the participation guarantee:

- provided by any excluded candidates, within three working days after expiry of the time limit for the lodging of an appeal against the decision of the contracting authority on qualification;
- provided by any excluded tenderers and ranked candidates, within three working days after expiry of the time limit for the lodging of an appeal against the decision of the contracting authority on selection of a supplier, contractor or service provider.

Upon termination of the public procurement award procedure, the guarantees provided by all candidates or tenderers shall be released within three working days after expiry of the time limit for lodging an appeal against the decision on termination. The contracting authority shall release the guarantee without owing interest for the period during which the said guarantee was in its legal possession.

The Public Procurement Commission may exclude the tenderer from the public procurement procedure if:

- it has failed to submit any of the documents required in the notice,
- the tenderer has submitted a tender which is not complying with the criteria announced by the contracting authority,
- the tenderer has submitted a tender which does not satisfy the requirements set forth in the notice.

However, the Commission may not propose exclusion of a tenderer when in Member State in which it is established, the said tenderer is entitled to provide the relevant service, regardless of the status of a legal person.

The Public Procurement Law of Bulgaria, despite providing a possibility for exclusion of a tenderer or a candidate from the public procurement procedure under precisely defined conditions, relating to the course of the procedure and the conclusion of a public procurement contract and in line with EU legislation, does not stipulate the creation of a list of tenderers with negative references.

United Kingdom: the public contracts regulations have been enacted in 2006, under the title: Public Procurement, England and Wales, Public Procurement Northern Ireland and the Regulation on Public Procurement of Scotland, also enacted in 2006.

The Public Contracts Regulations of the United Kingdom (UK) – one of the oldest and most powerful Member States of EU – has been fully harmonize with the EU legislation, with certain specifics that are characteristic for this country. The Regulations does not contain a requirement for a guarantee – bank guarantee or performance guarantee, or a negative list of tenderers. However, the Public Contracts Regulations strengthens the criteria for participation in the procedures and clearly defines the reasons for exclusion from this process. Thus, in addition to the defined reasons for mandatory exclusion from the procedure (tender), such as: participation in a criminal organization, money laundering, bankruptcy, etc., which are also contained in the legislation of other countries, in compliance with the EU Directives, a tenderer shall be excluded from the procedure also if the tenderer:

- has been convicted of a criminal offence relating to the conduct of his business or profession;
- has not fulfilled obligations relating to the payment of social security contributions under the UK laws;
- has committed an act of grave misconduct in the course of his business or profession - is guilty of serious misrepresentation in providing any information required of him.

Furthermore, the tenderer shall be excluded from the procedure as a member of partnership constituted under Scots law, inter alia, if the tenderer has become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate.

The Public Contracts Regulations of the United Kingdom prescribe that the contracting authority may automatically exclude the tenderer from the public procurement procedure without any evaluation of its qualifications if there are reasonable doubts concerning its personal position – i.e., will not be able to fulfill the required criteria (e.g. bankruptcy or lack of professional ability). The tenderer shall also be assessed or excluded from the public procurement process on grounds of its economic and financial standing (e.g. overall turnover in the previous three years) and the technical ability (e.g. experience in similar contracts in the previous five years).

For the purposes of efficiency of the public procurement procedures, as well as in view of the consistent and full compliance with the primary objective of these procedures, the UK regulations indicate that it is essential for to the contracting authority to strictly adhere to the following key principles:

a) to be open and transparent and make it possible for the tenderers to understand what they have to do and how to do it;

b) to be objective and to ensure equal treatment among all economic operators – fair and equal opportunities for the awarding of the contract;

c) to be consistent – deliver what they have promised to do.

If the contracting authorities have higher awareness of their obligations, it shall be beneficial for the contractors and the tenderers. The contractors and tenderers have to ensure that they have understood the tender procedure and their rights under the Regulations.