JANUARY – JUNE 2016

27 REPORT

FROM MONITORING OF PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

USAID FROM THE AMERICAN PEOPLE

FOUNDATION OPEN SOCIETY MACEDONIA
ФОНДАЦИЈА ОТВОРЕНО ОПШТЕСТВО МАКЕДОНИЈА

Center for Civil Communications
Центар за граѓански комуникации

REPORT FROM MONITORING OF PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

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ABBREVIATIONS:

BPP	Bureau of Public Procurements
SCPPA	State Commission on Public Procurement Appeals
CA	contracting authorities
EO	economic operators
EPPS	Electronic Public Procurement System
EU	European Union
LPP	Law on Public Procurements
CCC	Center for Civil Communications

KEY FINDINGS AND RECOMMENDATIONS

- THE MECHANISM ESTABLISHED IN TERMS OF MARKET RESEARCH AND OBTAINING APPROVAL FROM THE COUNCIL OF PUBLIC PROCUREMENTS DOES NOT YIELD EXPECTED EFFECTS, HAVING IN MIND CONTINUED PRACTICES ON SETTING ELIGIBILITY CRITERIA FOR ECONOMIC OPERATORS THAT ARE IRRELEVANT AND DISPROPORTIONAL TO RELEVANT PROCUREMENT SUBJECTS, WHICH ULTIMATELY RESULTS IN LIMITED COMPETITION.

RECOMMENDATION: THE MECHANISM RELATED TO MARKET RESEARCH AND ISSUANCE OF APPROVAL BY THE COUNCIL OF PUBLIC PROCUREMENTS SHOULD BE RE-EXAMINED AND FULLY CANCELLED OR IT SHOULD BE ESSENTIALLY CHANGED, BECAUSE IT HAS PROVED TO BE PURPOSELESS AND HAS LED TO INCREASED BUREAUCRATIZATION AND COST-INEFFECTIVENESS OF PUBLIC PROCUREMENTS.

- DECISION-MAKING AT THE COUNCIL OF PUBLIC PROCUREMENTS IS BOTH INEFFICIENT AND INCONSISTENT. MOST OFTEN, THE COUNCIL ISSUES APPROVAL ONLY AFTER SUBMISSION OF SECOND CORRECTED APPLICATION, AND SOMETIMES EVEN AFTER SUBMISSION OF THIRD

APPLICATION. THIS SITUATION RESULTS IN EXCEPTIONALLY HIGH NUMBER OF APPLICATIONS FOR APPROVAL. IN THE FIRST SIX MONTHS OF 2016, THE COUNCIL WAS PRESENTED WITH TOTAL OF 8,360 APPLICATIONS FOR APPROVAL, WHILE CONTRACTING AUTHORITIES WERE INVOICED COSTS FOR THEM IN TOTAL AMOUNT OF 877,595 EUR.

RECOMMENDATION:

UNTIL AN ADEQUATE SYSTEMIC SOLUTION IS FOUND TO REDUCE ADMINISTRATIVE AND FINANCIAL BURDEN ON CONTRACTING AUTHORITIES, LPP SHOULD BE AMENDED WITH A VIEW TO INTRODUCE LEGAL SOLUTION WHEREBY IN CASES OF NON-ISSUED APPROVALS THE COUNCIL OF PUBLIC PROCUREMENTS SHOULD – BY DEFAULT AND WITHOUT ADDITIONAL ENGAGEMENT OF EXPERTS – ISSUE APPROVAL TO CONTRACTING AUTHORITIES FOR RELEVANT PROCUREMENT PROCEDURES AFTER THEY HAVE PRESENTED IT WITH EVIDENCE ON HAVING ACTED IN COMPLIANCE WITH RECOMMENDATIONS PROVIDED (ARTICLE 14 OF THE LPP).

- AVERAGE NUMBER OF BIDS CALCULATED FOR THIS MONITORING SAMPLE IS 2.92. HOWEVER, THIS AVERAGE IS DUE TO EXCEPTIONALLY HIGH NUMBER OF BIDS SUBMITTED IN ONLY 37% OF MONITORED PROCEDURES THAT WERE MARKED BY UP TO 14 BIDS PER TENDER PROCEDURE. ON THE OTHER HAND, 39% OF TENDER PROCEDURES WERE PRESENTED WITH ONLY ONE BID AND 19% OF MONITORED PROCUREMENTS WERE PRESENTED WITH 2 BIDS EACH. ADDITIONAL CONCERNS ARE RAISED BY THE FACT THAT MONITORING ACTIVITIES ESTABLISHED AN UNPRECEDENTED HIGH NUMBER OF COMPANIES WHOSE BIDS HAVE BEEN ASSESSED AS UNACCEPTABLE IN THE BID-EVALUATION STAGE AND WERE EXCLUDED FROM SELECTION OF THE MOST FAVOURABLE BID.

RECOMMENDATION:

CHANGES SHOULD BE MADE TO THE LEGAL PROVISION REQUIRING STATEMENTS ON INDEPENDENT BID TO BE SIGNED EXCLUSIVELY BY RESPONSIBLE PERSONS AT ECONOMIC OPERATORS IN ORDER TO ALLOW THESE STATEMENTS TO BE SIGNED BY OTHER AUTHORIZED PERSONS. THAT WILL ELIMINATE OR WILL AT LEAST REDUCE MISTAKES IN SIGNING OF STATEMENTS/DOCUMENTS THAT ARE CURRENTLY TRIGGERING REJECTION OF FAVOURABLE BIDS.

- E-AUCTIONS WERE NOT ORGANIZED IN HALF OF MONITORED PROCUREMENTS (49.6%). IN MANY CASES IN WHICH E-AUCTIONS DID TAKE PLACE, EFFECTS THEREOF IN TERMS OF BUDGET SAVINGS ARE INSIGNIFICANT. IT SEEMS THAT THE MODULE ON SUBMISSION OF FINAL PRICE BARELY PRODUCES ANY EFFECT.

RECOMMENDATION:

BUREAU OF PUBLIC PROCUREMENTS, IN THE CAPACITY OF STATE AUTHORITY RESPONSIBLE FOR KEEPING COMPREHENSIVE AND HISTORICAL DATABASE, SHOULD PERFORM A SEPARATE AND IN-DEPTH ANALYSIS OF COMPETITION ON SPECIFIC PROCUREMENT MARKETS. IN THAT, PROCUREMENT SUBJECTS THAT ARE REGULARLY MARKED BY COMPETITION AND RESULT IN ORGANIZATION OF E-AUCTIONS AND REDUCTION OF PRICES SHOULD BE DISTINGUISHED FROM PROCUREMENT SUBJECTS THAT ARE CHARACTERIZED BY LOW COMPETITION AND WHOSE E-AUCTIONS BARELY HAVE ANY EFFECT. FINDINGS FROM THAT ANALYSIS SHOULD SERVE AS BASELINE FOR THE DECISION WHETHER E-AUCTIONS WILL BE MANDATORY ONLY FOR CERTAIN TYPES OF PROCUREMENT SUBJECTS OR THEY WILL BE FULLY OPTIONAL.

- THE TREND ON REDUCED USE OF NON-TRANSPARENT NEGOTIATION PROCEDURES WITHOUT PRIOR ANNOUNCEMENT OF CALL FOR BIDS CONTINUED. IN THE FIRST HALF OF 2016, THE AMOUNT OF FUNDS SPENT UNDER THIS TYPE OF PROCUREMENT CONTRACTS ACCOUNTED FOR 6.6 MILLION EUR, WHICH IS BY 42.6% LESS COMPARED TO THE SAME PERIOD LAST YEAR.

RECOMMENDATION:

TREND ON REDUCED USE OF NEGOTIATION PROCEDURES WITHOUT PRIOR ANNOUNCEMENT OF CALL FOR BIDS SHOULD CONTINUE IN THE FUTURE.

- IN THE FIRST HALF OF 2016, 22% OF ANNOUNCED TENDER PROCEDURES WERE ANNULLED, WHICH IS INDICATIVE OF INCREASED NUMBER OF TENDER ANNULMENTS BY 3.5 PERCENTILE POINTS COMPARED TO THE SAME PERIOD LAST YEAR. IN THIS MONITORING PERIOD, AS WAS THE CASE BEFORE, THE MOST DOMINANT REASON INDICATED FOR TENDER ANNULMENT IMPLIED THE FACT THAT NO BIDS HAVE BEEN SUBMITTED.

RECOMMENDATION:

IF THE SHARE OF TENDER ANNULMENTS IS NOT REDUCED TO MORE REASONABLE LEVEL (FOR EXAMPLE, AROUND 10%) IN FORESEEABLE FUTURE, VALID IS THE NEED FOR INTRODUCTION OF SANCTIONS AGAINST CONTRACTING AUTHORITIES THAT ARE CHARACTERIZED BY HIGH NUMBER OF ANNULLED TENDER PROCEDURES.

- IN THE FIRST HALF OF THIS YEAR, COMPANIES PRESENTED THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS WITH 312 APPEALS, WHICH IS BY 24% HIGHER THAN THE SAME PERIOD LAST YEAR. THE SHARE OF APPEALED TENDER PROCEDURE REMAINS AT THE LOW LEVEL OF 3.4%.

RECOMMENDATION:

CHANGES PROPOSED INCLUDE EXTENSION OF CURRENT DEADLINES FOR SUBMISSION OF APPEALS TO 10 DAYS AND INTRODUCTION OF NEW MODEL ON SETTING COSTS FOR APPEAL PROCEDURES WHEREBY CHARGES FOR INITIATION OF APPEAL PROCEDURES SHOULD BE SET AS SHARE OF THE PROCUREMENT'S VALUE. THESE CHANGES SHOULD BE ACCOMPANIED WITH GREATER EFFORTS FOR EDUCATION OF PARTICIPANTS IN PUBLIC PROCUREMENTS AIMED AT BETTER UNDERSTANDING OF THEIR RIGHTS.

- COMPARISON OF EU REGULATIONS AND RELEVANT LEGISLATION OF COUNTRIES IN THE REGION, BOTH EU MEMBER-STATES AND CANDIDATE COUNTRIES, SHOWS ALIGNMENT OF LEGAL PROVISIONS GOVERNING CRITERIA ON CONTRACT AWARD WITH THE OLD AND, IN THE CASE OF EU MEMBER-STATES, WITH THE NEW EU DIRECTIVE. ALL COUNTRIES INCLUDED IN THE COMPARATIVE ANALYSIS USE "ECONOMICALLY MOST FAVOURABLE BID" AS THE SINGLE CRITERION (WITH "LOWEST PRICE" DEFINED AS SUB-CRITERION) OR BOTH CRITERIA IN PARALLEL. MACEDONIA REMAINS AMONG THE FEW, IF NOT THE ONLY COUNTRY IN EUROPE THAT USES "LOWEST PRICE" AS THE ONLY CRITERION FOR SELECTION OF THE MOST FAVOURABLE BID.

RECOMMENDATION:

THE LEGAL PROVISION STIPULATING THAT LOWEST PRICE SHOULD BE USED AS THE ONLY SELECTION CRITERION NEEDS TO BE REVISED. IN ADDITION TO ALIGNING NATIONAL LEGISLATION WITH THE EU DIRECTIVES, DUE CONSIDERATION SHOULD BE MADE OF IN-COUNTRY SPECIFICITIES AND SPECIFICITIES OF PARTICULAR PROCUREMENT SUBJECTS WITH A VIEW TO ENABLE RESPECT FOR BASIC PRINCIPLES UNDERLYING PUBLIC PROCUREMENTS, INCLUDING EFFICIENT USE OF FUNDS, I.E. OBTAINING THE BEST VALUE FOR MONEY SPENT.

GOALS AND METHODOLOGY

From November 2008, the Center for Civil Communications from Skopje is continuously analysing implementation of public procurements in the Republic of Macedonia, as regulated under the Law on Public Procurements. The analysis aims to assess implementation of public procurements in the light of the new Law on Public Procurements and application of underlying principles of transparency, competitiveness, equal treatment of economic operators, non-discrimination, legal proceedings, cost-effectiveness, efficiency, effectiveness and rational use of budget funds, commitment to obtain the best bid under the most favourable terms and conditions, as well as accountability for public spending in procurements.

In the period November 2008 - June 2014, monitoring activities were implemented on quarterly monitoring samples comprised of randomly selected public procurement procedures, and starting from the second half of 2014 the monitoring sample is defined on semi-annual level and includes random selection of 60 public procurement procedures. Monitoring activities start with the publication of procurement notices in the *"Official Gazette of the Republic of Macedonia"* and in the Electronic Public Procurement System (EPPS), followed by attendance at public opening of bids and data collection on the course of procedures, and use in-depth interviews and structured questionnaires submitted to economic operators, as well as data collection from contracting authorities through EPPS and by means of Freedom of Information (FOI) applications. Some monitoring parameters (number, share and structure of annulled tender procedures, value of signed contracts per particular type of procurement procedure and the like) are now analysed by processing all data submitted to EPPS.

The analysis presented in this report is performed on the basis of monitoring a randomly selected sample comprised of 60 public procurement procedures organized by contracting authorities on central level, whose public opening of bids took place in the period January - June 2016. In addition, this report also includes an analysis of procedures led in front of the State Commission on Public Procurement Appeals in the period January - June 2016, as well as comparative analysis related to the use of "lowest price" as criterion for selection of the most favourable bid.

PUBLIC PROCUREMENT MONITORING REPORT

- THE MECHANISM ON MARKET RESEARCH AND OBTAINING APPROVAL FROM THE COUNCIL OF PUBLIC PROCUREMENTS AIMED TO PREVENT OR SIGNIFICANTLY REDUCE SETTING OF TENDER PARTICIPATION CRITERIA FOR ECONOMIC OPERATORS AND DEFINITION OF TECHNICAL SPECIFICATIONS THAT ARE DISCRIMINATORY AND LIMIT COMPETITION IN PUBLIC PROCUREMENTS. HOWEVER, CONTRACTING AUTHORITIES CONTINUED TO SET ELIGIBILITY CRITERIA FOR ECONOMIC OPERATORS THAT ARE BOTH IRRELEVANT AND DISPROPORTIONAL TO PROCUREMENT SUBJECTS. IN THAT, THE DEFINED CRITERIA ARE OBSCURE OR DO NOT CONCERN ECONOMIC OPERATORS' ABILITY, BUT GOODS BEING PURCHASED, WHICH CREATES CONFUSION AND PROBLEMS AT LEAST.

2014 amendments to the Law on Public Procurements introduced comprehensive mechanism for market analysis that should be conducted prior to announcement of procurement notices. Said mechanism is comprised of relevant market research conducted in a manner stipulated by the law, and in case of failed market research, contracting authorities seek approval from the Council of Public Procurements. Previous semi-annual monitoring reports already established that this mechanism, in its entirety, is erroneously designed and makes public procurements more bureaucratic, complicated and cost-ineffective. Monitoring of public procurements in the last six months showed that this mechanism is ineffective as well. Notably, the main purpose of this mechanism is to prevent contracting authorities from setting criteria related to economic-financial and technical-professional ability and from defining technical specifications that favour small number of companies and are considered discriminatory against much greater number of companies. Unfortunately, practices observed in the monitoring sample allow the conclusion that such criteria were still defined in certain number of public procurements. Hence, the question is raised whether this expensive and bureaucratic mechanism is conductive to attainment of the purpose for which it was introduced.

In addition, although it has been more than eight years since LPP entered in effect, contracting authorities continue to make numerous mistakes in terms of the type of conditions defined and manner in which they are defined. Use of words such as "adequate", "needed" and the like, which are not accompanied by definition of the minimum requirement that should be fulfilled by economic operators, creates confusion among tender participants about what they need to fulfil in terms of eligibility criteria. At the same time, such practices leave space for broad interpretation and different approach during the bid-evaluation stage about which entities do (not) fulfil said requirements. All that leads to serious mistakes and omissions.

Following examples from the monitored procurements below further confirm this conclusion.

Despite the fact that market research was conducted and approval was sought from the Council, the procurement procedure published for services related to upgrading of the National Electronic Register required economic operators to demonstrate minimum annual turnover in amount that is 25 times higher than the procurement's estimated value, to demonstrate profitable financial operation and access to funds in the amount of the procurement's value (200,000 EUR), and included 18 different criteria related to technical-professional ability and 3 standards on quality assurance systems that should be met by economic operators!

The procurement procedure for oil derivatives, whose value did not exceed 5,000 EUR, organised by contracting authority that is seated in Skopje and does not have regional offices, enlisted an excessive number of criteria and irrelevant requirements, such as previous record on successfully performed contracts and network of petrol stations in 10 towns across the country.

The procurement procedure for cleaning services defined criteria for technical-professional ability as follows: "[economic operators should] dispose with necessary equipment and relevant machinery" and "use professional and eco-labelled cleaning products", but failed to include details about said equipment and products. The contracting authority found it sufficient for economic operators to submit a statement confirming that they dispose with/use adequate equipment and products.

Same was observed in the procurement procedure for motor vehicle, which included criteria on technical-professional ability that required economic operators to provide list of references and demonstrate technical and staff equipment, without enlisting the minimum requirement in that regard. Moreover, the said public procurement required economic operators to own exhibition hall and warehouse for spare parts that are considered irrelevant because it was a matter of one-time procurement of goods. In the procurement procedure organized for construction and craftsmen works, criteria on technical-professional ability did not enlist the minimum requirement that should be demonstrated by economic operators, but merely referred to "adequate number".

The procedure on procurement of blood-sampling bags included eligibility criteria (registration of medical blood bags) that should be part of the technical specifications, in particular because they concern the procurement subject and not the ability of economic operators.

In the procedure for procurement of ambulance vehicles, the four criteria for economic operators' technical-professional ability concerned warranty for the vehicles, free-of-charge vehicle servicing, warranty for the equipment and certificate for vehicle equipment, but they should not have been defined as eligibility cri-

teria because they are not used to assess economic operators' ability. On the contrary, these requirements are related to the product that is being purchased, i.e. they concern procurement performance.

Another procurement procedure organized for computers and computer equipment included a requirement on equipment warranty that should not have been defined as criterion for economic operators' technical-professional ability because it is not related to eligibility for tender participation, but to the product that is defined by means of technical specifications.

This monitoring sample also included problematic technical specifications, although in much lower number. For example, technical specifications defined for procurement of expert supervision on construction site enlisted only the approximate value of the construction building that should be supervised, without including details on the basis of which bidding companies would be able to form their price.

Technical specifications for procurement of services related to risk assessment at work and workplace enlisted the number of employees per topic that should be targeted with training, but lacked more detailed description or request for bidding companies to provide more detailed description of their relevant training contents.

On the other hand, there were several obvious examples of defining criteria that would not contribute to filtering of economic operators, i.e. participation of economic operators that are truly able to perform the procurement contract. Manner in which the minimum requirement was defined implied that it could be fulfilled by any company operating on the market, thus raising the question why it was defined at all.

As part of its procurement procedure for project designs for schools, one contracting authority required economic operators to demonstrate total revenue in the last three years of at least 3 million MKD, which is an amount lower than the procurement's value, but included low criteria on technical-professional ability, i.e. defined eligibility criteria that could be easily fulfilled by large number of economic operators in the Republic of Macedonia.

The procurement procedure organized for oil derivatives included a requirement on minimum annual revenue in the amount of 5,000 EUR, which could be easily attained by single traders, let alone companies engaged in trade with oil derivatives.

No criteria on economic-financial and technical-professional ability were defined for the procurement of exhibition hall renovation in the estimated value of 850,000 EUR, which is quite unusual given the procurement's value and type.

Application of law-stipulated mechanism on market research (analysis) and obtaining approval from the Council of Public Procurements is not unified. Public procurement officers take actions that are neither mandatory nor purposeful, thus spending time and budget funds. Monitoring activities established non-unified application of rules related to research on service markets and research on economic operators' eligibility. In cases of procurement of services, some contracting authorities do not conduct any research, while others conduct such market research without adopting final report or drafting another document based on the market research, and a third group of contracting authorities compiles reports based on their market research. Some contracting authorities conduct market research also in cases of so-called non-priority services (health, legal, accommodation and catering services, etc.), as well as in regard to economic operators'

status and ability for performance of professional activity which – according to Article 17, paragraph (3) and Article 36-a of the Law on Public Procurements – do not necessitate market research. Namely, public procurements organized for so-called non-priority services in estimated value up to 20,000 EUR are subject of application of Articles 2 and 103 of the LPP, which means that contracting authorities should ensure transparency in terms of announcement of procurement notices and notifications on contracts signed. Contracting authorities are obliged to seek approval from the Council prior to publishing their procurement notices when they have anticipated eligibility criteria for economic operators, except in cases of criteria related to economic operators' status and ability for performance of professional activity. Having in mind these legal provisions, above-elaborated unnecessary steps additionally bureaucratise and delay the overall procurement procedure. Ultimately, such practices imply waste of officers' working hours on unnecessary activities and spending of budget funds secured by citizens and companies in the capacity of tax payers.

Several examples from the monitoring sample are illustrative of this conclusion. In the public procurement organized for services related to risk assessment at the workplace, the contracting authority was not obliged to conduct market analysis in order to establish whether there are sufficient number of economic operators fulfilling the criterion on ability for performance of professional activity (registration for performance of this activity with the Ministry of Labour and Social Policy and certificate for performance of expert services), but it still conducted such research. Another contracting authority conducted market analysis for services related to equipment maintenance in order to establish whether economic operators fulfil criteria related to status and ability for performance of professional activity, and later – as part of its report based on the market analysis – concluded that according to the Law on Public Procurements there is no need to conduct such analysis for these criteria.

Unclear is the reason why the contracting authority organizing public procurement for construction of info stands has conducted market analysis, given that it did not define any eligibility criteria for economic operators. One contracting authority organized procurement procedure for non-priority services (services provided by an event organization agency) that was preceded by official market research.

Prior to implementing the public procurement for office supplies, one contracting authority conducted market analysis and later decided to use standard tender documents for this type of procurement, which does not require market research.

On the other hand, another contracting authority from the monitored procurements did not conduct market research for procurement of services (development of geodesy studies) and, according to its official position, procurement of services does not necessitate any type of market research.

It should be noted that monitoring activities identified an example in which the contracting authority has violated the Law on Public Procurements by relying on results from market research conducted for previous procurement procedure for the same procurement subject, which was organized in the previous calendar year (almost 10 months prior to announcement of procurement notice for the monitored procedure) and was annulled. The Law is decisive that contracting authorities are not obliged to seek approval from the Council in cases when they repeat the procurement procedure in the same fiscal year for which they have previously obtained approval and which ended with decision on tender annulment. In this specific case, the procurement procedure was annulled in 2015, while the

monitored procedure organized for the same procurement subject started with publication of the procurement notice in January 2016, which means that the repeated procedure is organized in another calendar year.

Monitoring activities observed several market researches that raise concerns whether contracting authorities have requested and have obtained affirmative responses from existing economic operators. In the market analysis conducted for the procurement procedure related to construction of info stands none of the five companies contacted has indicated which person is submitting the confirmation on behalf of the company and all companies had similar e-mail addresses (company-figure@gmail.com).

Finally, attention should be paid to the case in which one contracting authority voluntarily annulled its procurement procedure on the basis of having made significant violations to LPP, which were described as failure to compile report with rationale based on the market research conducted and failure to present said report to the responsible person, followed by organization of the public procurement. This has been established after the only acceptable bidding company presented its final price and the contracting authority had to take a selection decision.

RECOMMENDATION:

FROM THE START OF ENFORCEMENT OF THE MECHANISM ON MARKET RESEARCH AND ISSUANCE OF APPROVALS BY THE COUNCIL OF PUBLIC PROCUREMENTS, OUR MONITORING REPORTS CONTINUOUSLY INDICATED THAT THIS MECHANISM IS PURPOSELESS, OVERLY BUREAUCRATISED, AND COST-INEFFECTIVE. THEREFORE, THE MAIN RECOMMENDATION FOR RE-EXAMINATION AND FULL CANCELLATION OR SIGNIFICANT CHANGES TO THIS SYSTEM IS STILL VALID.

- DECISION-MAKING AT THE COUNCIL OF PUBLIC PROCUREMENTS IS BOTH INEFFICIENT AND INCONSISTENT. MOST OFTEN, THE COUNCIL ISSUES APPROVAL ONLY AFTER SUBMISSION OF SECOND CORRECTED APPLICATION, AND SOMETIMES EVEN AFTER SUBMISSION OF THIRD APPLICATION. THIS SITUATION RESULTS IN EXCEPTIONALLY HIGH NUMBER OF APPLICATIONS FOR APPROVAL. IN THE FIRST SIX MONTHS OF 2016, THE COUNCIL WAS PRESENTED WITH TOTAL OF 8,360 APPLICATIONS FOR APPROVAL, WHILE CONTRACTING AUTHORITIES WERE INVOICED COSTS FOR THEM IN TOTAL AMOUNT OF 53,972,100 MKD, I.E. 877,595 EUR.

Approval from the Council was sought in 35% of procurement procedures from the monitoring sample. In that, some of these procedures applied for approval on two different grounds: use of criteria on establishing technical-professional ability of economic operators and use of technical specifications for procurement of goods. In this monitoring sample, the Council rarely approved the first application for use of eligibility criteria and especially for use of technical specifications. Most often, approvals were issued upon second application that contained the Council's suggested corrections, and sometimes even after submission of third application for approval. Even in cases of third application, approvals issued by the Council included directions for contracting authorities to make additional corrections prior to publication of their respective tender documents.

According to data obtained from the Council of Public Procurements on the basis of requests for access to public information (FOI), in the first half of 2016 this state institution has been presented with total of 8,360 applications for approval. The number of submitted applications is reduced by 19% compared to the same period last year. This reduction is not a result of the number of tender procedures implemented in the first half of 2016, which has increased compared to the same period last year, but is rather due to use of standard tender documents and standard technical specifications that were introduced by the Council of Public Procurements earlier this year. When contracting authorities use these standard documents, they are not obliged to obtain approval from the Council. Thus far, tender documents and technical specifications have been standardized for engine petrol, diesel fuel and liquefied petroleum gas; hygiene products; office supplies; heating wood; medicines; medical supplies; and beverages and sweeteners.

Applications for approval submitted to the Council of Public Procurements

Period	Number of applications	Change	Value of costs invoiced by the Council (in EUR)	Change
January-June 2016	8,360	-19%	877,595	-27%
January-June 2015	10,362	/	1,207,626	/

As regards decisions taken by the Council, the ratio between positive and negative opinions was 49.6%:50.4%, i.e. decisions were taken for 8,010 applications and approvals were issued for 3,976 of them, whereas the Council denied issuance of approval (negative opinion) for the remaining 4,034 applications.

The table below provides overview of legal grounds on which approval was requested. In that, table data do not include 31 applications for approval that did not concern public procurements, i.e. they concerned establishment of eligibility in cases of public-private partnerships (21 applications), approval for use of special requirements for participation in procurements, sales or giving under lease state-or municipality-owned real estate (5 applications), and use of special requirements for participation in sales or giving under lease business facilities and business premises owned by the Republic of Macedonia (5 applications).

As seen in the table below, as many as 76% of applications concerned request for opinion related to technical specifications for procurement of goods.

Structure of legal grounds indicated by contracting authorities for requesting approval

Legal ground	Number of applications
Use of requirements in technical specifications for individual lot in the public procurement for goods (Article 36-a, paragraph 1)	6,345
Use of requirements in technical specifications for individual lot in the procedure on awarding framework contracts (Article 36-b, paragraph 1)	236
Use of criteria to establish economic operators' ability (Article 36-a, paragraph 2)	1,257
Use of criteria to establish economic operators' ability in the procedure on awarding framework contracts (Article 36-a, paragraph 2)	52
Use of the criterion defined as economically most favourable bid (Article 160, paragraph 3)	16
Use of negotiation procedure without prior announcement of call for bids for additional works (Article 99 , paragraph 3)	10
Use of the negotiation procedure without prior announcement of call for bids for additional services (Article 99, paragraph 3 and Article 198, paragraph 3)	33
Use of negotiation procedure without prior announcement of call for bids due to urgency reasons (Article 99, paragraph 3)	216
Use of negotiation procedure without prior announcement of the call for bids after two unsuccessfully implemented procedures (Article 99, paragraph 3)	34
Establishing procurement lot from several procurement items in cases of medicines, medical aids and/or medical supplies (Article 15, paragraph 7)	106
Signing framework contracts with less than 7 economic operators (Article 118, paragraph 2)	24

As regards actions taken by the Council, it should be noted that monitoring activities established that the Council often disagreed with opinions provided by engaged experts, even when there is consensus among them for issuing approval. It is not disputable that the Council could also disagree with expert opinions. Actually, the Law on Public Procurements allows that, which is also the case in court procedures when the judge or the judicial panel is not obliged to agree with the opinion provided by forensic experts. However, if employees at the Council hold sufficient expertise and if experts are not merited and professional in their performance, then why is engagement of experts anticipated as mandatory? As a reminder, this entire mechanism and, in particular, engagement of experts makes procurement procedures longer and more expensive.

This assessment is best illustrated by several examples from the monitoring sample. In the case of procurement procedure for computer accessories, the Council fully disagreed with the three positive opinions issued by experts and requested the contracting authority to correct its tender documents prior to publishing the procurement notice. The Council's insistence on precision of technical specifications has resulted in rejection of three from the total of four bids received for procurement of ambulance vehicles in terms of their technical offer because they did not match the technical specifications, although it seems that deviations identified were insignificant (the stair chair should have maximum weight of 10 kg, and it weighted 10.5 kg).

In the procedure for procurement of services related to digital restoration of feature films, the experts have unnecessarily focused on criteria related to individual status and ability to perform professional activity, having in mind that according to LPP these requirements do not necessitate market research or approval from the Council, and have not paid great attention to specific requirements, i.e. whether economic operators on foreign markets fulfil the minimum requirements related to expert staff. As regards the procurement of materials for construction of bikeways, the Council's decision enlisted that application for approval was submitted for the first time, while experts' opinions emphasized that corrections have been made to the technical specifications in compliance with the previous decision issued by the Council.

RECOMMENDATION:

UNTIL AN ADEQUATE SYSTEMIC SOLUTION IS FOUND TO REDUCE ADMINISTRATIVE AND FINANCIAL BURDEN ON CONTRACTING AUTHORITIES, LPP SHOULD BE AMENDED WITH A VIEW TO INTRODUCE LEGAL SOLUTION WHEREBY IN CASES OF NON-ISSUED APPROVALS THE COUNCIL OF PUBLIC PROCUREMENTS SHOULD – BY DEFAULT AND WITHOUT ADDITIONAL ENGAGEMENT OF EXPERTS – ISSUE APPROVAL TO CONTRACTING AUTHORITIES FOR RELEVANT PROCUREMENT PROCEDURES AFTER THEY HAVE PRESENTED IT WITH EVIDENCE ON HAVING ACTED IN COMPLIANCE WITH RECOMMENDATIONS PROVIDED (ARTICLE 14 OF THE LPP).

- AVERAGE NUMBER OF BIDS CALCULATED FOR THIS MONITORING SAMPLE IS 2.92. HOWEVER, THIS AVERAGE IS DUE TO EXCEPTIONALLY HIGH NUMBER OF BIDS SUBMITTED IN ONLY 37% OF MONITORED PROCEDURES THAT WERE MARKED BY UP TO 14 BIDS PER TENDER PROCEDURE. ON THE OTHER HAND, 39% OF TENDER PROCEDURES WERE PRESENTED WITH ONLY ONE BID AND 19% OF MONITORED PROCUREMENTS WERE PRESENTED WITH 2 BIDS EACH. ADDITIONAL CONCERNS ARE RAISED BY THE FACT THAT MONITORING ACTIVITIES ESTABLISHED AN UNPRECEDENTED HIGH NUMBER OF COMPANIES WHOSE BIDS HAVE BEEN ASSESSED AS UNACCEPTABLE IN THE BID-EVALUATION STAGE AND WERE EXCLUDED FROM SELECTION OF THE MOST FAVOURABLE BID.

Average number of bidding companies for this monitoring sample is calculated at the level of individual lots in cases of tender procedures comprised of several lots. These calculations showed that the average number of bids per procurement procedure is 2.92. Judging on the basis of average number of bids for the monitoring sample, competition level in the first half of 2016 is within the range of the weighted average of 2.91 bids calculated for all public procurements in 2015.

However, it seems that the average number of bids does not provide truthful image about the actual situation, notably because it is a result of exceptionally high number of bids submitted in one portion of tender procedures, such as, for example, the total number of 14 bids submitted in the lot-divided procurement for equipment maintenance and servicing, or the total number of 10 bids submitted in the procurement procedure for air-conditioning equipment and the procurement procedure for services related to risk assessment at work.

Competition level of 3 and more bidders was observed in only 37% of tender procedures from the monitoring sample, which is indicative of deteriorated situation compared to the same period in 2014 and 2015, when satisfactory level of competition was recorded in 56%, i.e. 51% of monitored tender procedures, respectively.

Full absence of competition was recorded in 39% of monitored procedures, which is higher share compared to the same period in the last two years. Share of tender procedures that were presented with 2 bids each accounted for 19% and is identical with the share recorded in the previous year.

Competition in tender procedures, semi-annual overview*

Period	No bids	1 bid	2 bids	3 and more bids
January-June 2016	5%	39%	19%	37%
January-June 2015	4%	26%	19%	51%
January-June 2014	5%	28%	11%	56%

*Calculations are based on the monitoring sample for the period January-June 2016. In the case of tender procedures comprised of several lots, the number of bids was analysed at the level of individual lots.

However, the average number of bids and the competition structure shown in the table above are calculated according to the number of bids submitted by companies, but practices show that significant portion of received bids is exempted from further evaluation by public procurement committees under justification of being unacceptable. Exemption of bids from the bid-evaluation process was noted as problem in previous monitoring periods, but it seems that it has never been as prominent as in the first six months of 2016. Some bids have been exempted due to assessments made by public procurement committees indicating that they are not in compliance with technical specifications or that bidding companies have failed to demonstrate fulfilment of eligibility criteria for tender participation, and portion of bids have been assessed to contain certain formal shortcomings.

In that, especially worrying are practices observed in two procurement procedures from the monitoring sample. The first procedure concerns procurement of flexible Naso-Pharyngo-Laryngoscope for which the health care institution requested bidding companies to submit relevant certificate on trading with medical equipment. In that, as many as four of the five bids have been rejected because relevant bidding companies have provided certificates on trading with medical aids (medical apparatus and parts) and only one bidding company submitted certificate on trading with medical equipment. According to data obtained by means of direct presence at public opening of bids, it was established that the company that provided the relevant certificate has submitted the highest-priced bid (1,230,000 MKD, without VAT), which is by 63% higher than other bids. Having in mind that only one bid was assessed as acceptable, the bidding company was invited to submit final price and upon submission of the final price it reduced the initially bided price by 1.63%. Nevertheless, after the contracting authority took the decision for selection of the single acceptable bid, one of the bidding companies lodged an appeal in front of the State Commission on Public Procurement Appeals (SCPPA). In attachment to the appeal, the company submitted clarification issued by the Agency for Drugs and Medical Aids, wherein it is enlisted that according to the Rulebook on Drugs and Medical Aids legal entities in the Republic of Macedonia can only be categorized by means of certificate on trading with medical aids (medical apparatus and parts) and no other document. SCPPA approved the appeal and requested the contracting authority to revoke its decision and conduct new bid-assessment process by accepting all five bids. Nevertheless, monitoring activities established that, instead of conducting new bid-evaluation process, the contracting authority has fully annulled the tender procedure. It has been six months since the first tender procedure, but the contracting authority has not re-announced this public procurement, which is highly surprising if the contracting authority in question actually needs this type of medical equipment.

In the procedure organized for procurement of 12 ambulance vehicles with installed medical equipment, one of the four bids was rejected because the bank guarantee had been issued in an amount lower than the law-stipulated 3% from the procurement's value, and the remaining three bids were rejected because the stair chair weighted 10.5 kilograms, which is not in compliance with technical specifications that enlisted its weight at 10 kilograms. It is not clear how could technical specifications include requirements that are obviously not in compliance with what is offered on the market.

In this monitoring period, number of cases were recorded in which bids have been rejected due to formal shortcomings, which is indicative of poor instructions issued by contracting authorities or of bidding companies' poor information and weak training. All this sometimes results in rejection of favourable bids due to mundane reasons and failure to select the most favourable bid, which undermines the principle of "obtaining the best value for the money".

Most prominent example in this regard is the procurement procedure organized for services related to risk assessment at work, which was presented with 10 bids, but all of them were rejected due to formal shortcomings (all pages of the bid were not endorsed with handwritten signatures, bank guarantee had shorter date of validity, individual prices did not match certain items...).

At the same time, the monitoring sample included several procurement procedures in which bids have been rejected due to recorded shortcomings in terms of signing the statement on independent bid. Namely, according to the Law on Public Procurements, this statement is signed exclusively by the company's responsible person (manager) and unlike the bid and other statements required in public procurements authorization cannot be given to another person to sign this statement. While introduction of the obligation for each bid to be accompanied with signed statement on independent bid is understandable (due to past indications that economic operators had entered back dealings and have engaged in illegal agreement prior to submitting their bids), insistence for this statement to be signed only by the company's responsible person, without the possibility for another person to be authorized to sign this document, remains unclear. Evident is that this requirement continues to create confusion among bidding companies whose managers have already authorized other employees to sign bids. Although the number of e-procurements in the monitoring sample is not high, it is sufficient to infer the conclusion that some bidding companies are still not fully clear and do not understand certain issues related to electronic signing, resulting in rejection of their bids.

RECOMMENDATION:

CHANGES SHOULD BE MADE TO THE LEGAL PROVISION REQUIRING THE STATEMENT ON INDEPENDENT BID TO BE SIGNED EXCLUSIVELY BY RESPONSIBLE PERSONS AT ECONOMIC OPERATORS IN ORDER TO ALLOW THESE STATEMENTS TO BE SIGNED BY OTHER AUTHORIZED PERSONS. THAT WILL ENABLE UNIFIED SIGNING OF ALL DOCUMENTS (BIDS, STATEMENTS) AND WILL NOT TRIGGER MISTAKES ON THE PART OF BIDDING COMPANIES THAT OFTEN RESULTS IN REJECTION OF THEIR BIDS. ELECTRONIC SIGNING OF DOCUMENTS SHOULD BE THE MAIN FOCUS OF ALL TRAINING, COUNSELLING AND OTHER EVENTS ORGANIZED BY THE BUREAU OF PUBLIC PROCUREMENTS, AS WELL AS TENDER DOCUMENTS, INFORMATIVE PUBLICATIONS AND OTHER MEANS OF INFORMATION DISSEMINATION FOR PARTICIPANTS IN PUBLIC PROCUREMENTS. THAT WILL ELIMINATE OR WILL AT LEAST REDUCE MISTAKES IN SIGNING OF ELECTRONIC DOCUMENTS THAT ARE CURRENTLY TRIGGERING REJECTION OF FAVOURABLE BIDS.

- E-AUCTIONS YIELD EXPECTED EFFECTS IN TERMS OF BUDGET SAVINGS ONLY IN THE CERTAIN TYPES OF PROCUREMENTS. COMPETITION AMONG ECONOMIC OPERATORS WAS NOT OBSERVED IN LARGE NUMBER OF PROCUREMENT SUBJECTS FROM MONITORED PROCEDURES, AND CONSEQUENTLY THEY WERE NOT FINALIZED WITH E-AUCTIONS. IN MANY CASES IN WHICH E-AUCTIONS DID TAKE PLACE, EFFECTS THEREOF IN TERMS OF BUDGET SAVINGS ARE INSIGNIFICANT. IT SEEMS THAT THE MODULE ON SUBMISSION OF FINAL PRICE BARELY PRODUCES ANY EFFECT, HAVING IN MIND THAT ONLY 15% OF SINGLE BIDDERS THAT HAVE BEEN INVITED TO SUBMIT FINAL PRICE HAVE ACTUALLY REDUCED THEIR INITIAL PRICES.

The purpose behind introduction of mandatory organization of e-auctions was to contribute toward budget savings. Based on previous experiences, the saving effect is most often achieved in procurement of certain standardized goods (computers, office supplies) and services priced per labour hours (servicing) or intellectual work. Be that as it may, e-auctions do not necessarily yield expected effects, which was observed in this monitoring sample as well.

If individual lots under divisible procurement procedures from the monitoring sample are treated as separate procurements, it can be concluded that competition in public procurements remains low, because e-auctions were not scheduled in almost half of procurement procedures (49.6%). It means that these procurements were presented with only one (acceptable) bid or have not received any bids or procedures were annulled in the bid-evaluation stage due to other reasons. Price reduction was observed in 86.4% of procurement procedures that have scheduled and organized e-auctions. In some cases, prices were reduced once or twice, but in other cases the initial price was reduced more than 100 times (initial price in the procurement of conservation and restauration construction works was reduced 170 times!), which is mainly result of contracting authorities' poor design of upper and lower thresholds on difference between bided prices.

The additionally introduced obligation for contracting authorities to invite the only bidding company to submit final price has barely yielded any effect. The single (acceptable) bidding company was invited to submit final price in 38.5% of monitored procurements. However, single bidders reduced their initially bided price in only 7 from total of 45 cases, accounting for 15.6% of procurement procedures in which bidding companies were invited to submit final price. This means that in most cases bidding companies remained on their initially bided prices. It can be concluded that the module on submission of final price is contributing to prolonged procedure (bidding companies are awarded at least two days to submit their final price), rather than to budget savings. Therefore, the question is raised whether the module on submission of final price should be mandatory.

Significant share of procurement procedures that were not marked by competition are under risk of having signed procurement contracts at prices that are higher than actual prices. There is an unwritten rule that, in anticipation of planned e-auctions, companies indicate prices that are higher than actual prices.

RECOMMENDATION:

BUREAU OF PUBLIC PROCUREMENTS, IN THE CAPACITY OF STATE AUTHORITY RESPONSIBLE FOR KEEPING COMPREHENSIVE AND HISTORICAL DATABASE, SHOULD PERFORM A SEPARATE AND IN-DEPTH ANALYSIS OF COMPETITION ON SPECIFIC PROCUREMENT MARKETS. IN THAT, PROCUREMENT SUBJECTS THAT ARE REGULARLY MARKED BY HIGH COMPETITION AND RESULT IN ORGANIZATION OF E-AUCTIONS AND REDUCTION OF PRICES SHOULD BE DISTINGUISHED FROM PROCUREMENT SUBJECTS THAT ARE CHARACTERIZED BY LOW COMPETITION AND WHOSE E-AUCTION BARELY HAVE ANY EFFECT. IN ADDITION, ANOTHER ISSUE THAT SHOULD BE EXAMINED IS WHETHER, IN CONTINUITY, LOWEST PRICES ATTAINED AT E-AUCTIONS FOR CERTAIN TYPE OF PROCUREMENT SUBJECTS UNDER WHICH CONTRACTS HAVE BEEN SIGNED ARE (MUCH) LOWER THAN ACTUAL/AVERAGE MARKET PRICES OR APPARENTLY LARGE PRICE REDUCTIONS ARE DUE TO THE FACT THAT COMPANIES' INITIALLY BIDED PRICES ARE SET TOO HIGH. FINDINGS FROM THAT ANALYSIS SHOULD SERVE AS BASELINE FOR THE DECISION WHETHER E-AUCTIONS WILL BE MANDATORY ONLY FOR CERTAIN TYPES OF PROCUREMENT SUBJECTS OR THEY WILL BE FULLY OPTIONAL. THE MODULE ON SUBMISSION OF FINAL PRICE SHOULD NOT BE MANDATORY, ESPECIALLY WHEN INITIALLY BIDED PRICE FALLS WITHIN THE PROCUREMENT'S PLANNED BUDGET. IMPLEMENTATION OF THIS RECOMMENDATION WILL ACCELERATE PORTION OF PROCUREMENT PROCEDURES AND WILL RELIEVE THEM FROM CERTAIN DEGREE OF BUREAUCRATIZATION.

- CONTRACTING AUTHORITIES HAVE DIFFERENT APPROACH TOWARDS UNUSUALLY LOW PRICES BIDED BY COMPANIES. SOME OF THEM DO NOT REQUEST ANY CLARIFICATION ABOUT THE MANNER IN WHICH THE PRICE WAS FORMED AND IMPLIES DRAMATIC DEVIATION FROM MARKET PRICES, ALTHOUGH THE LAW ON PUBLIC PROCUREMENTS INCLUDES STRAIGHTFORWARD OBLIGATION IN THIS REGARD. CONTRACTING AUTHORITIES THAT DO REQUEST SUCH CLARIFICATION ARE PURSUING THIS PROCEDURE PRO-FORM, AS THEY HAVE ACCEPTED ALL AND ANY KIND OF CLARIFICATION OFFERED. IN MANY SITUATIONS, THIS APPROACH TO SELECTION OF BIDS WITH VERY LOW PRICES CREATES DISLOYAL COMPETITION AND IMPLIES MAJOR RISK FOR PROCUREMENT PERFORMANCE.

When particular bid includes an unusually low price that is significantly lower than actual market prices, thus raising concerns about the contract performance, contracting authorities must request the company to provide details about the bid which are important and should examine evidence submitted in justification of bid's price. Contracting authorities reconsider clarification and evidence provided by companies, focusing on economic logic behind the price-setting method that reflects manufacturing processes or service provision. Adherent enforcement of provisions stipulated under Article 163 of the LPP requires contracting authorities to request clarification in all cases of major deviation between prices bided and market prices, but also to engage in serious analysis of clarification and evidence provided, and even reject bids on this ground.

Common practices in this regard, as confirmed in monitored procurements, include situations in which contracting authorities:

- do not request details about the bid that would justify its low price, or
- do request such clarification, only for the purpose of complying with the law, but do not analyse responses obtained and accept the low price by default.

By accepting such low prices for the purpose of saving money, contracting authorities expose themselves to risks of possible poor quality or untimely performance of procurements. In addition, acceptance of such low bids inflicts serious damages to businesses of other market participants offering the same goods or services.

Several examples from the monitoring sample are illustrative of such practices.

Two bids were submitted in the procurement procedure for motor vehicle repair and servicing and during the e-auction the initial price of 58,100 MKD was reduced to 5,600 MKD. The contracting authority did not request clarification for this unusually low price and should have requested, given that in the last two years it had signed contracts for the same procurement subject with the same bidding company, but at much higher prices of 150,000 MKD and 23,000 MKD, respectively.

In the procurement procedure for equipment maintenance and servicing, divided into several lots, one bidding company submitted an initial price of 0.01 MKD and therefore it was impossible to schedule e-auction, while the company was asked to justify its unusually low price. Its obscure explanation enlisted that it had already signed public procurement contracts with other contracting authorities and that it has long-standing cooperation with this contracting authority. Such explanation was deemed acceptable by the contracting authority. E-auctions organized for remaining five lots from this procurement procedure resulted in reduction of initial prices (ranging from 1,200 MKD and higher) to 0.01 MKD. Procurement reports do not include information that clarification was requested for this unusually low price, as was the case with one initial bid under the same price submitted for other lots in this procedure. After this, bids were accepted and selected as the most favourable.

Moreover, it remains unclear why the selected bidder in the procurement of vari-light vertical blinds had not been requested to provide clarification for its unusually low price, having in mind that the price bided is almost ten times lower than the procurement's estimated value.

RECOMMENDATION:

IN CASES WHEN BIDED PRICES IMPLY DRAMATIC DEVIATION FROM ACTUAL MARKET PRICES, CONTRACTING AUTHORITIES ARE OBLIGED TO REQUEST DETAILS AND JUSTIFICATION FOR SUCH PRICES, AS STIPULATED BY THE LAW. WHEN CONTRACTING AUTHORITIES ARE PRESENTED WITH JUSTIFICATION AND EVIDENCE, IT DOES NOT NECESSARILY MEAN THAT THE BID IS ACCEPTABLE BY DEFAULT, BUT IT SHOULD BE SUBJECT OF MORE SERIOUS ANALYSIS. ULTIMATELY, IF CLARIFICATIONS OFFERED ARE SCARCE OR ARE NOT SUSTAINED, THE BIDS SHOULD BE REJECTED FOR THE PURPOSE OF PROTECTING CONTRACTING AUTHORITIES AGAINST POOR CONTRACT PERFORMANCE, BUT ALSO FOR THE PURPOSE OF PROTECTING THE MARKET FROM DISLOYAL COMPETITION.

- UNDER CONDITIONS WHEN CONTRACTING AUTHORITIES MUST SELECT BIDDING COMPANIES ON THE BASIS OF LOWEST PRICE, RISK FOR POOR QUALITY OF CONTRACT PERFORMANCE IS HIGHER. THEREFORE, CONTRACTING AUTHORITIES OFTEN VIEW BANK GUARANTEES ON QUALITY PERFORMANCE OF CONTRACTS AS THE MOST EFFECTIVE METHOD OF PROTECTION AGAINST SUCH PRACTICES. NEVERTHELESS, THE FACT THAT 58.3% OF MONITORED PROCUREMENTS HAVE REQUESTED SUCH GUARANTEES IS INDICATIVE OF FREQUENT REQUESTS FOR BANK GUARANTEES, AND ULTIMATELY CONTRIBUTES TO SUBMISSION OF BIDS WITH HIGHER PRICES OR AFFECTS LIQUIDITY OF COMPANIES.

According to Article 47 of the Law on Public Procurements, contracting authorities can request bid guarantees in the form of bank guarantees that should not be set in amount exceeding 3% of the procurement's value. According to Article 48 of the Law on Public Procurements, contracting authorities can request the company whose bid has been selected as the most favourable to provide guarantees on quality performance of contract in the form of bank guarantees that should be set in the amount of 5% to 15% of the contract's value. Introduction of statements on serious intent provided an adequate replacement for bid guarantees and might be more efficient instrument for contracting authorities to protect themselves against unserious bidding companies.

There are no instruments similar to the statement on serious intent in the contract performance stage and therefore contracting authorities perceive bank guarantees as the only safeguard in the course of contract performance.

Under conditions when the single selection criterion is lowest price (quality could not be required or ranked) and when electronic auctions often result in major reduction of initial prices, together accounting for signing of contracts at prices that dramatically deviate from market prices, it seems that contracting authorities have no other options to safeguard their interest but to request selected bidding companies to submit bank guarantees. In doing so, contracting authorities have assurances that in the course of contract performance companies will perform their obligations in timely and quality manner, knowing that they would be under pressure from possible activation and collection of bank guarantees. In that regard and having in mind worldwide experiences, guarantees on quality performance of contracts are instruments that should be practiced. The question is how often, i.e. in which cases they should be used.

Bank guarantees for quality performance of contracts were required in 58.3% of monitored procedures. Analysed against previous semi-annual monitoring reports that have established reduced use of guarantees for quality performance of contracts, it can be concluded that this monitoring period is marked by trend on increased use of these guarantees. A positive trend observed in that regard is the fact that most often bank guarantees are set in the lowest law-stipulated amount (5%), and rarely in the highest law-stipulated amount (15%). Average amount of bank guarantees required in the monitored procedures accounts for 7.8% of the procurement's value.

As regards bad practices, monitoring activities observed cases in which bank guarantees were requested for:

- small-scale procurements, especially those whose value does not exceed 5,000 EUR;
- procurements comprised of single delivery of goods for which tender documents and procure-

ment contracts include short delivery deadline from the day the contract is signed; and

- procurement of items offered or performed by renowned market entities with long-standing experience in performance of procurement contracts for the public sector.

Negative effects from frequent requests for bank guarantees must be duly analysed as well. Namely, aware that they need to pay bank commissions for issuance of guarantees and that their funds would be withheld for given period of time overlapping with the bank guarantee's validity, companies tend to calculate these funds into their bids, thus making them more expensive. The fact that large number of business entities has non-liquid funds makes the already fragile business sector more vulnerable.

Several examples from the monitoring sample provide illustration of above established effects.

Tender documents for procurement of services related to project design for schools included requirement for bank guarantees on quality performance in the amount of 7% from the procurement's value. In the case of procurement procedure for development of geodesy studies, the bank guarantee for quality performance was set at 10% from the procurement's value, although it was a matter of relatively low procurement value (8,500 EUR). In both cases, procurement value and subject seemed inadequate to request bank guarantees, especially knowing that it is a matter of contracts that imply small risks in terms of their performance, i.e. they concern performance of services by expert and authorized staff (whose professions are subject of regulations and/or licensing). Single risk identified in this regard is the possibility for selected bidding companies not to comply with defined deadlines. However, timely performance of contracts could have been achieved by means of agreed fines.

The procurement procedure organized for equipment maintenance and servicing, comprised of several lots, required bank guarantee for quality performance set at 5% from the procurement's value, although procurement value for some lots amounted to around 500 EUR. The question is raised whether this type of requirements additionally bureaucratize and make small-scale procurements more expensive. Bidding companies most certainly calculate costs for bank guarantees into their final price.

RECOMMENDATION:

CONTRACTING AUTHORITIES SHOULD NOT CONSIDER BANK GUARANTEES ON QUALITY PERFORMANCE OF CONTRACTS AS SINGLE SAFEGUARD INSTRUMENT IN THE COURSE OF CONTRACT PERFORMANCE. FIRST, THEY MUST ANALYSE THE RELEVANT MARKET AND SERIOUSNESS OF MARKET PARTICIPANTS, AND ASSESS WHETHER THERE ARE BIGGER OR MINIMAL RISKS RELATED TO POOR QUALITY AND UNTIMELY PERFORMANCE OF CONTRACTS. WHEN THERE ARE SERIOUS MARKET PARTICIPANTS AND SMALL RISKS, CONTRACTING AUTHORITIES SHOULD NOT REQUEST BANK GUARANTEES FOR QUALITY PERFORMANCE OF CONTRACTS, BUT DEVELOP CONTRACTUAL FINES AND USE THEM AS MAIN SAFEGUARD AGAINST COMPANIES THAT FAIL TO PERFORM PROCUREMENT CONTRACTS ACCORDING TO WHAT HAS BEEN AGREED.

- MONITORING ACTIVITIES IDENTIFIED CASES IN WHICH CONTRACTING AUTHORITIES HAVE DEFINED CERTAIN QUANTITY AS PART OF THEIR TECHNICAL SPECIFICATIONS, BUT ARE NOT OBLIGED TO PURCHASE THEM IN FULL. BY THE MANNER IN WHICH DELIVERY/CONTRACT PERFORMANCE IS DEFINED, CONTRACTING AUTHORITIES ATTEMPT TO SIGN FRAMEWORK CONTRACTS ON THE BACK DOOR, KNOWING THAT THE LAW ON PUBLIC PROCUREMENTS STIPULATES MUCH MORE STRINGENT CONDITIONS AND SPECIAL PROCEDURE FOR THIS TYPE OF CONTRACTS.

Several examples from the monitoring sample should be analysed in the context of this finding. The procurement procedure for car wash and tyre-fitting services required bidding companies to submit individual price per service unit without indicating the total number of service units, enlisting that services will be purchased according to contracting authority's actual needs. In another procurement procedure, the contracting authority exempted itself from the obligation to make orders for all types of geodesy studies for which it solicited bids. At the same time, this procurement's duration is 3 years, although it is not a matter of procurement subject that necessitates multiannual contract. In both cases, selected bidding companies do not have any guarantees that they will perform requested services in the planned scope, due to which they might have offered more favourable prices in compliance with economy of scope. In the second case, additional concerns are raised that, according to performance method (when needed) and contract duration (3 years), the contracting authority has signed a form of framework contract, which is liable to application of special law-stipulated rules.

RECOMMENDATION: CONTRACTING AUTHORITIES SHOULD NOT EXEMPT THEMSELVES FROM THE PROCUREMENT SCOPE IN TERMS OF AVOIDING GUARANTEED REALIZATION OF FULL QUANTITY OR NUMBER OF INDIVIDUAL SERVICES, BECAUSE SUCH PRACTICES ARE NOT CORRECT TOWARDS SELECTED BIDDING COMPANIES. ULTIMATELY, THE COUNCIL SHOULD NOT ISSUE APPROVAL FOR TECHNICAL SPECIFICATIONS THAT INCLUDE SUCH EXEMPTIONS.

- THE TREND ON REDUCED USE OF NON-TRANSPARENT NEGOTIATION PROCEDURES WITHOUT PRIOR ANNOUNCEMENT OF CALL FOR BIDS CONTINUED. IN THE FIRST HALF OF 2016, THE AMOUNT OF FUNDS SPENT UNDER THIS TYPE OF PROCUREMENT CONTRACTS IS BY 42.6% LOWER COMPARED TO THE SAME PERIOD LAST YEAR.

In the first six months of 2016, total of 256 contracts were signed by means of negotiation procedures without prior announcement of call for bids in total value of 406,772,073 MKD, i.e. 6,614,180 EUR. This decreasing trend is a result of the law-stipulated obligation intro-

duced in the second half of 2014 whereby contracting authorities need to obtain approval for use of negotiation procedures without prior announcement of call for bids. Evident is that the newly introduced control has disciplined institutions and has forced them to reduce use of this non-transparent procedure.

Overview of contracts signed under negotiation procedures without prior announcement of call for bids

Period	Value of contracts (in million EUR)	Change
January-June 2016	6,6	-42,6%
January-June 2015	11,5	-61,4%
January-June 2014	29,8	+31,9%

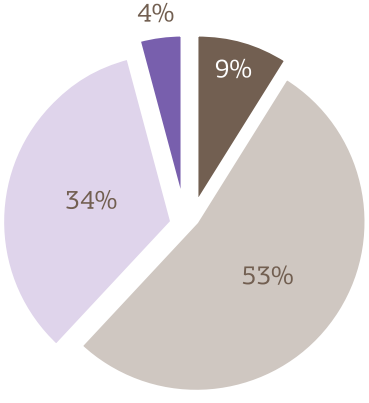
Calculations are made by 30.9.2016.

As regards the reasons for signing this type of contracts, most frequently indicated ground in this monitoring period as well implies urgency reasons and lack of time to organize public procurement procedure. This ground was used to sign as many as 77 contracts in total value of 3.5 million EUR, accounting for 53% of total funds spent under this type of procedures.

Next significant share of funds (34%) were contracted on the grounds of technical or artistic reasons, i.e. reasons related to protection of exclusive rights (patents and the like), whereby the contract can be performed only by one particular economic operator. Total of 141 contracts have been signed on this ground in total value of around 2.3 million EUR.

Overview of contracts signed by means of negotiation procedures without prior announcement of call for bids in the period January–June 2016

- Annex contracts
- Urgency reasons
- Technical or artistic reasons
- Other reasons



Detailed overview of contracts is available on CCC's official website: opendata.mk

As shown on the chart above, remaining grounds for use of negotiation procedure without prior announcement of call for bids include annex contracts, which account for around 600,000 EUR, i.e. 9% of total funds spend under this type of contracts. Other reasons indicated for signing contracts by means of negotiation procedure without prior announcement of call for bids as anticipated under LPP account for 4% of all funds spent in this manner.

RECOMMENDATION: TREND ON REDUCED USE OF NEGOTIATION PROCEDURES WITHOUT PRIOR ANNOUNCEMENT OF CALL FOR BIDS SHOULD BE MAINTAINED IN THE FUTURE.

- IN THE FIRST HALF OF 2016, 22% OF ANNOUNCED TENDER PROCEDURES WERE ANNULLED, WHICH IS INDICATIVE OF INCREASED NUMBER OF TENDER ANNULMENTS BY 3.5 PERCENTILE POINTS COMPARED TO THE SAME PERIOD LAST YEAR. IN THIS MONITORING PERIOD, AS WAS THE CASE BEFORE, THE DOMINANT REASON INDICATED FOR TENDER ANNULMENT IMPLIED THE FACT THAT NO BIDS HAVE BEEN RECEIVED.

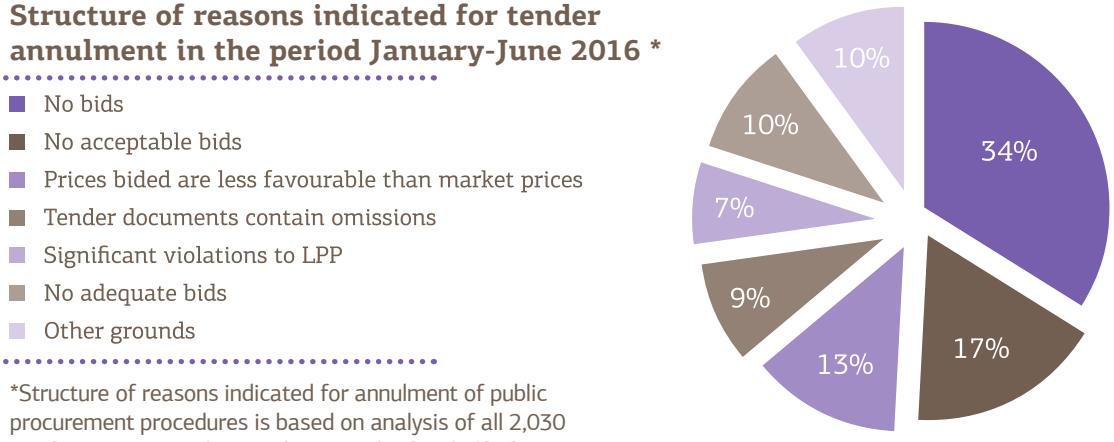
Total of 9,220 procurement notices were announced in the first half of this year, of which 2,030 tender procedures have been fully or partially annulled. In this monitoring period, the share of annulled tender procedures accounted for 22% and is still considered exceptionally high and unfavourable, given that it is by 3.5 percentile points higher compared to the share calculated for the first half in 2015.

Annulment of tender procedures on semi-annual level

Period	Number of procurement notices	Number of decisions on tender annulment	Share of annulled tender procedures
January-June 2016	9,220	2,030	22.0%
January-June 2015	8,657	1,602	18.5%
January-June 2014	8,637	1,967	22.8%

As regards reasons indicated for tender annulment, dominant ground implied the fact that no bids have been received and was used to annul 34% of tender procedures. Next in frequency is the explanation that no acceptable bids have been received, which means that bids were not in compliance with requirements defined as part of tender documents, accounting for annulment of 17% of tender procedures. Third most frequently indicated reason for tender annulment implied that prices bided are more unfavourable than market prices, used to annul 13% of public procurement procedures.

Structure of reasons indicated for tender annulment in the period January-June 2016 *



*Structure of reasons indicated for annulment of public procurement procedures is based on analysis of all 2,030 notifications on tender annulment in the first half of 2016 submitted to EPPS by September 2016.

RECOMMENDATION:

IF THE SHARE OF TENDER ANNULMENTS IS NOT REDUCED TO MORE REASONABLE LEVEL (FOR EXAMPLE, AROUND 10%) IN FORESEEABLE FUTURE, VALID IS THE NEED FOR INTRODUCTION OF SANCTIONS AGAINST CONTRACTING AUTHORITIES THAT ARE CHARACTERIZED BY HIGH NUMBER OF ANNULLED TENDER PROCEDURES.

- MONITORING ACTIVITIES OBSERVED SEVERAL CASES IN WHICH ELECTRONIC DOCUMENTS ISSUED BY OTHER INSTITUTIONS OR PRIVATE ENTITIES ARE NOT USED OR ARE NOT RECOGNIZED, ALTHOUGH THEIR ISSUANCE AND EXCHANGE IN ELECTRONIC FORM IS REGULATED BY LAW. HENCE, ECONOMIC OPERATORS ARE FACED WITH LEGAL INSECURITY WHEN SUBMITTING THEIR BIDS.

Number of state bodies, institutions and private companies that enable services they offer to legal and natural persons to be performed online is continuously increasing. Unfortunately, documents issued in electronic form are often not used or are not recognized by other state bodies. That is also the case in public procurements.

Monitored procurements included several examples of such practices. In the procurement procedure for services related to project design of schools that was organized in electronic form, all bank guarantees for bids were submitted in hardcopy. Large number of commercial banks in the Republic of Macedonia issue guarantees in electronic form, which means that either they failed to sufficiently promote these services or private sector entities are not interested in obtaining bank guarantees in electronic form. As part of the bid-evaluation process in the same procedure, many bidding companies were denied validity of employment confirmation documents issued by the Employment Agency's IT system, and were requested to submit stamp- and signature-certified documents. In this regard, it should be noted that the Employment Agency's IT system issues computer-generated documents that are officially regulated by law and are legally valid.

RECOMMENDATION:

ALL STATE BODIES PROVIDING ELECTRONIC SERVICES, INCLUDING THE BUREAU OF PUBLIC PROCUREMENTS AND THE MINISTRY OF INFORMATION SOCIETY AND ADMINISTRATION AS MAIN COORDINATION BODIES IN THE FIELD OF PUBLIC PROCUREMENTS, I.E. E-GOVERNMENT SERVICES, MUST TAKE BETTER EFFORTS TO PROMOTE ELECTRONIC SERVICES OR ELECTRONIC DOCUMENTS AS LEGALLY VALID.

- IT COULD BE ESTABLISHED THAT SOME PROCUREMENTS FROM THE MONITORING SAMPLE HAVE SPENT ENORMOUS AMOUNTS OF FUNDS ON PURCHASING GOODS OR SERVICES THAT ARE SEEMINGLY UNNECESSARY FOR CONTRACTING AUTHORITIES' ON-GOING OPERATION, ESPECIALLY NOT IN SUCH AMOUNTS.

Two of these cases concerned procurements organized and implemented by state-owned joint stock companies, which are more independent in terms of their financial operations compared to the classic type of state bodies and which should work on profitable basis. Irrespectively of this fact, since these contracting authorities are also obliged to implement the LPP, it means that their procurements need to be cost-effective and purposeful. The third case concerns procurement procedure organized by governmental body. Hence, the question is raised about the necessity to spend funds in the amount of:

- 100,000 EUR for procurement of services related to risk-assessment at work, as organized by joint stock company that operates on the border of profitability;
- 700,000 EUR for procurement of furniture that is delivered and used at the contracting authority's headquarter office; and
- 200,000 EUR for procurement of consultancy services in the field of energy policy legislation.

RECOMMENDATION:

WHEN DEFINING THEIR ANNUAL BUDGETS AND PUBLIC PROCUREMENT PLANS, CONTRACTING AUTHORITIES SHOULD ANTICIPATE PROCUREMENTS THAT ARE NECESSARY FOR THEIR ON-GOING OPERATION AND PERFORMANCE OF COMPETENCES. HAVING IN MIND THE PUBLIC SECTOR'S INSUFFICIENT ECONOMIC POWER, THEY SHOULD AVOID PROCUREMENTS THAT IMPLY "SPENDING ON LUXURY". IN CASES WHEN THEY TRULY NEED REPLACEMENT OF ASSETS AND EQUIPMENT, RELEVANT PROCUREMENTS SHOULD BE PURSUED GRADUALLY, OVER A PERIOD OF SEVERAL YEARS, WHILE FUNDS ALLOCATED FOR CONSULTANCY AND SIMILAR SERVICES SHOULD BE REASONABLY PRICED.

- IN THE FIRST HALF OF 2016, 29 NEGATIVE REFERENCES WERE ISSUED TO 26 COMPANIES. MAJORITY OF NEGATIVE REFERENCES WERE ISSUED TO COMPANIES THAT HAVE REFUSED TO SIGN THE CONTRACT AFTER THEIR BIDS WERE SELECTED AS THE MOST FAVOURABLE.

By means of said 29 negative references, 23 companies were prohibited to participate in all tender procedures organized in the country for a period of one year, and three companies were issued 2 negative references each and were prohibited from tender participation for a period of two years. Majority of negative references, i.e. 31% of them were issued to companies that have refused to sign the contact after their bids were selected as the most favourable. Second in frequency are negative references issued after companies have had their bank guarantees for quality performance of contracts activated (24%). Third most frequent reason for issuance of prohibition for tender participation includes cases in which bidding companies have failed to submit documents to demonstrate their status (21%). Fourth and fifth frequent reasons include cases in which bidding companies have withdrawn their bids prior to expiration of their validity (14%) and in which bidding companies have not secured bank guarantees for quality performance of contracts that were anticipated as part of tender documents (10%).

As regards negative references issued in 2016, there are no significant deviations from the previous year when 33 negative references were issued in the first half and 25 negative references were issued in the second half of 2015.

The law-stipulated possibility for institutions to issue negative references, i.e. prohibit companies from tender participation in the Republic of Macedonia for a period of 1 to 5 years is not in compliance with legal regulations adopted in the European Union.

RECOMMENDATION:

LAW ON PUBLIC PROCUREMENTS SHOULD BE AMENDED WITH A VIEW TO DELETE LEGAL PROVISIONS FROM ARTICLE 47, PARAGRAPH (5) WHEREBY NEGATIVE REFERENCES WOULD NOT BE ISSUED WHEN BIDDING COMPANIES WITHDRAW THEIR BIDS PRIOR TO EXPIRATION OF THEIR VALIDITY AND WHEN BIDDING COMPANIED DO NOT SIGN THE PUBLIC PROCUREMENT CONTRACT IN COMPLIANCE WITH TERMS AND CONDITIONS ENLISTED UNDER RELEVANT TENDER DOCUMENTS AND SUBMITTED BIDS. NEGATIVE REFERENCES STIPULATED UNDER ARTICLE 47, PARAGRAPH (6) SHOULD RESULT IN EXEMPTION OF SAID BIDDING COMPANIES FROM PARTICIPATION IN PROCEDURES ON AWARDING PUBLIC PROCUREMENT CONTRACTS ORGANIZED ONLY BY THE CONTRACTING AUTHORITY THAT HAS ISSUED THE NEGATIVE REFERENCE.

ANALYSIS OF PROCEDURES LED IN FRONT OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS IN THE PERIOD JANUARY – JUNE 2016

- IN THE FIRST HALF OF THIS YEAR, COMPANIES PRESENTED THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS (SCPPA) WITH 312 APPEALS, WHICH IS BY 24% HIGHER THAN THE SAME PERIOD LAST YEAR.

Trend on increased number of appeals submitted by companies to the competent commission (SCPPA) that was observed in the second half of 2015 continued in this monitoring period as well. Namely, in the period January–June 2016 companies participating in tender procedures have submitted a total of 312 appeals. Given that the total number of tender procedures announced in the same period accounted for as many as 9,220, it can be concluded that the share of appeals in relation to the total number of tender procedures organized in the first half of 2016 accounts for only 3.4%. Share of appeals in total number of organized tender procedures is a significant parameter used to assess utilization of legal protection mechanisms on the part of economic operators. Hence, the share of 3.4% can be assessed as low, having in mind all problems accompanying the public procurement process that have been duly noted as part of monitoring activities and reports. Such low level of utilization of legal protection mechanisms provides the conclusion that companies are passive in defending their rights in public procurement procedures.

Overview of the ratio between public procurement procedures and appeals lodged in front of SCPP

Year	Number of tender procedures	% of change	Number of appeals lodged	% of change	Share of appeals in relation to all tender procedures (%)
Jan-June 2016	9,220	+6.5	312	+23.8	3.4
Jan-June 2015	8,657	-0.1	252	-23.6	2.9
Jan-June 2014	8,670	-4.2	330	+13.4	3.8

Calculations are based on processing of data related to appeals lodged in front of SCPPA and published on its official website.

Every second appeal lodged by companies has been approved by SCPPA, whereby the share of approved appeals accounts for 50.9% and is convincingly the highest share in overall structure of SCPPA's decisions. In that, from total of 159 approved appeals SCPPA has taken 92 decisions on full tender annulment and 67 decisions on revoking contracting authorities' decisions on selection of the most favourable bid and the procedure was returned for repeated bid-evaluation process.

Such ratio between decisions on tender annulment and decision on revoking selection of the most favourable bid, accounting for 58%:42%, is indicative of the fact that, in most cases, SCPPA has established essential violations to the procedure which necessitated annulment of tender procedures in their entirety, compared to the smaller number of cases in which non-compliance with the Law on Public Procurements could be addressed by means of repeated evaluation of bids.

In the first half of this year, SCPPA has taken decisions to reject 87 appeals as ungrounded (26.9%). The share of denied appeals accounts for 7.1%, and means that they have not been submitted within law-stipulated deadlines or companies have not settled charges for initiation of appeal procedure. In this monitoring period, 5.8% of appeals were withdrawn by companies, whereas contracting authorities requested termination of appeal proceedings for 9.3% of appeals by accepting allegations indicated by companies.

Structure of decisions taken by SCPPA in the period January - June 2016

Structure of appeals according to SCPPA decision	Number of appeals	Share (%)
Approved appeals	159	50.9%
Rejected appeals	84	26.9%
Denied appeals	22	7.1%
Withdrawn appeals (procedure is discontinued)	18	5.8%
Appeals acknowledged by the contracting authority (procedure is terminated)	29	9.3%
Total	**312**	**100%**

Calculations are based on processing of data related to decisions taken by SCPPA and published on its official website.

Compared against the situation observed in previous years, it can be concluded that trend on increased number of appeals continues, but is further enhanced by trend on increased share of appeals approved by SCPPA. Shar e of approved appeals in the first half of 2016 compared to the same period last year is increased by as many as 7.7 percentile points and is higher than the increase recorded in 2015 compared to 2014.

Understandably, on the account of increased approval of appeals, the number of rejected appeals is decreasing and their share is reduced by 7.6 percentile points compared to the same period last year. This change of structure in terms of decisions taken upon appeals, which is favourable for companies, is accompanied with increased share of appeals acknowledged by contracting authorities and followed by motion to terminate procedures led in front of SCPPA. Nevertheless, equally valid is the consideration whereby the high share of approved appeals can be directly correlated to the generally low number of appeals lodged. It seems that companies decide to lodge appeals in cases when they are facing significant violations to the Law on Public Procurements and when it is more likely that their appeals will be approved.

Comparison data on the structure of decisions taken in appeal procedure

Type of decision	Jan-June 2014	Jan-June 2015	Jan-June 2016
Approved appeals	39.7%	43.2%	**50.9%**
Rejected appeals	33.6%	34.5%	**26.9%**
Denied appeals	15.8%	14.3%	**7.1%**
Discontinued/terminated appeal procedure	10.9%	8.0%	**15.1%**
Total	**100%**	**100%**	**100%**

Calculations are based on processing of data related to decisions taken by SCPPA and published on its official website.

In the first half of 2016, monitoring activities established favourable dynamics in terms of reduced share of denied appeals. It is a matter of appeals that were lodged prior to the law-stipulated deadline and have been assessed as inadmissible, or were lodged beyond the law-stipulated deadline and have been assessed as untimely.

Analysis of reasons for submission of appeals shows that dominant share of them (71%) have been lodged against the selection decision on the most favourable bid. In that, by lodging these appeals companies contested the selection of bid submitted by another company or appealed the fact that their bid had been rejected as unacceptable. Detailed analysis of SCPPA's decisions shows that as many as 141 from the total of 223 appeals lodged on this ground have been submitted by bidding companies dissatisfied with decisions by means of which another economic operator's bid had been selected as the most favourable, while 82 appeals concerned motion for legal protection, i.e. companies believed that their bid had been unreasonably rejected as unacceptable.

Next most frequently indicated ground, as observed in 11% of appeals, concerns economic operators' dissatisfaction with contracting authorities' decision on tender annulment.

Third in frequency and accounting for 7% of appeals are those submitted on the grounds of remarks about tender documents.

Other reasons accounting for significantly smaller shares include appeals lodged against decisions on issuing negative reference, against actions taken during electronic auctions, against procurement notices, against minutes from organized technical dialogue, against minutes from public opening of bids, etc.

Analysis of SCPPA's decisions established that contesting tender documents, i.e. technical specifications and eligibility criteria for tender participation, is almost an impossible mission in cases when contracting authorities have obtained approval from the Council of Public Procurements for the tender documents in question. Based on its decisions, it seems that SCPPA does not engage in analysis of contested tender documents, but simply refers to approvals issued to contracting authorities by the Council of Public Procurements. In these cases, SCPPA has indicated the following official position: "The appealing party has not fulfilled requirements enlisted under individual points from the technical specifications that are integral part of tender documents and was eliminated [from tender participation] on that ground. The contracting authority has obtained approval for said technical specifications from the Council of Public Procurements, which has also issued approval for eligibility criteria used for economic operators. Given the above-enlisted, the State Commission on Public Procurement Appeals decided to reject the appeal because the contracting authority has implemented just and lawful procedure and has taken just and lawful decision."

Based on SCPPA's decisions, it can be established that when implementing procurement procedures contracting authorities must duly respect what has been enlisted in their tender documents. Monitoring activities recorded appeal procedures in which bidding companies have been required to provide documents and evidence that had not been previously enlisted in their relevant tender documents. In these cases, SCPPA makes due consideration of tender documents and accepts appeals lodged by companies.

At the same time, analyses show that companies' appeals are approved when it can be easily and measurably proven that their bids had been unjustly exempted from the bid-evaluation process and that their bids are in compliance with technical specifications, which is not the case when establishment of particular bid's compliance necessitates professional opinion and expertise.

Given the fact that e-auctions are mandatory, another problem concerns major reduction of prices during electronic downward bidding. In this context, it is important to emphasize that several bidding companies have unsuccessfully contested bids submitted by their competitors as being unrealistically low and suspicious. More specifically, cases were recorded in which companies requested SCPPA to revoke the selection decision on the most favourable bid and repeat the bid-evaluation process on the grounds that contracting authorities have not acted in compliance with Article 163, paragraph (1) of the Law on Public Procurements. This means that companies lodging appeals believed that contracting authorities should have requested bidders presenting the lowest price during e-auctions to provide written explanation for their unusually low price, which is significantly lower than actual market prices. Based on the analysis of SCPPA's decisions taken in this regard, it can be concluded that SCPPA did not approve this type of appeal allegations and does not believe that in such cases contracting authorities must act in compliance with Article 163 of the LPP, but only in cases when doubts are raised that the procurement contract will not be performed.

According to the Law on Public Procurements, contracting authorities should request explanation for unusually low prices offered by companies. There are series of examples related to appeals in which companies have indicated that the lowest price offered is unrealistically low and that it would most certainly have negative effect on the quality, but SCPPA did not admit such appeals even in cases when companies offering the lowest price have not provided clear explanation thereof, but indicated that their price is result of competitive bidding and effort for better market position.

In addition to companies, SCPPA is also presented with appeals lodged by contracting authorities when they are dissatisfied with decisions taken by the Council of Public Procurements, which started its operation on 1st May 2014. In the first six months of this year, SCPPA was presented with only 26 appeals of this type, which is significantly lower number compared to the same period last year when a total of 62 appeals were lodged against decisions taken by the Council of Public Procurements. In that, SCPPA approved only 4 from the total of 26 appeals lodged by contracting authorities.

Findings from the analysis based on monitoring activities impose the need for amendments to the Law on Public Procurements and greater education targeting participants in tender procedures with a view to better understand their rights. As regards legislative changes, proposals include the need to extend current deadline of 8 days for submission of appeals, i.e. deadline of 3 days in cases of bid collection procedures (Article 216, paragraph (2) of the LPP) to 10 days. Deadlines for submission of appeals contesting tender documents should start from publication of procurement notices and tender documents, instead of the current solution whereby this deadline starts from the public opening of bids. Proposals in this regard include changes to the current method on setting costs for initiation of appeal procedure in front of SCPPA (Article 229 of the LPP) in order to introduce the model whereby charges related to the appeal procedure are set as share of the procurement's value. That would address current situation in which the appeal procedure is most expensive for the most dominant type of tender procedures whose value ranges from 500 to 5,000 EUR and is the most cost-effective for large scale tender procedures.

In parallel, participants in public procurements should be targeted with continuous education on their rights, especially having in mind that legislation governing public procurements is exceptionally complex and is subject to frequent changes. Moreover, efforts are needed to create enabling environment for participants in public procurements to be encouraged to protect their rights by means of lodging appeals in front of SCPPA as precondition for attainment of the overarching societal goal, i.e. cost-effective and efficient public spending in compliance with the legislation in effect.

COMPARATIVE ANALYSIS OF CRITERIA ON AWARDING PUBLIC PROCUREMENT CONTRACTS

One of the most heavily criticized and essential provision in the legislation on public procurements in Macedonia includes mandatory use of "lowest price" as the single criterion on awarding public procurement contracts, in effect from May 2014. Law on Public Procurements allows the possibility for contracting authorities to use the criterion "economically most favourable bid" (in small number of cases and upon previously obtained approval from the Council of Public Procurements), but this provision is rarely or never used in practice.

Use of "lowest price" as the selection criterion, in combination with mandatory organization of e-auction for downward bidding, i.e. reduction of initially bided prices and contracting authorities' practice on avoiding definition of eligibility criteria for tender participation so they would not have to seek approval from the Council of Public Procurements, bring under question the quality of their procurements. This is particularly important in cases of procurement of food, medicines, equipment, etc. According to many analyses and in the opinion of officers implementing public procurements, the final result frequently implies double payment for one and the same procurement on the account of poor quality of goods/service received when using "lowest price" as all-encompassing approach for all procurements ranging "from needle to locomotive". In this context, a perpetually current question is whether lowest price defined as the only selection criterion hinders effective procurements instead of facilitating budget savings.

"Lowest price" used as single criterion on awarding public procurement contracts was indicated as the number one problem faced by companies participating in public procurements. On the last survey conducted among companies in early 2016, as many as 52.4% of companies or every second company indicated lowest price as the biggest problem they are facing in public procurements.

Except from failing short of full compliance with the old EU Directives (valid until April 2016), the concept on "lowest price" as only criterion in public procurements is contrary to the principle upheld by the new EU Directives (adopted in 2014 and in effect from April 2016).

EU regulations

New EU Directive on public procurements 2014/24/EU from February 2014, which entered in effect on 18th April 2016, defines "the most economically advantageous bid" as criterion on contract award.

In that, this directive clarifies that, from the point of view of contracting authorities, "the most economically advantageous bid" should be identified on the basis of price or costs, using the "cost-effectiveness" approach, for example, life-cycle costing, and may include the best price-quality ratio, which is assessed on the basis of criteria, including qualitative, environmental and/or social aspects related to the procurement subject.

These criteria may comprise: (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions; (b) organization, qualification and experience of staff assigned to contract performance, where the quality of staff assigned can have significant impact on the level of contract performance; or (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The "cost" element could take the form of fixed price or cost on the basis of which economic operators will compete on quality criteria only.

According to the new EU Directive, member-states are allowed to stipulate that contracting authorities may not use price only or cost only as the single criterion.

It is considered that criteria on contract award are linked to the procurement subject in any respect and at any stage of their life cycle, including factors related to: (a) specific process of production, provision or trading in given works, goods or services; or (b) specific process for another stage of their life cycle, even where such factors do not form part of their basic characteristics.

Award criteria must not have the effect of unrestricted freedom of choice for contracting authorities. They should ensure the possibility of effective competition and be accompanied by specifications allowing effective verification of information provided by bidding companies in order to assess how bids meet the award criteria. In case of doubt, contracting authorities should effectively verify accuracy of information and proof provided by bidding companies.

Life-cycle costing includes, to the relevant extent, parts or all of the following costs over the life cycle of goods, services or works: (a) costs borne by the contracting authority or other users, such as: (i) acquisition costs, (ii) costs of use, such as consumption of energy or other resources, (iii) maintenance costs, (iv) end-of-life costs,

such as collection or recycling costs; (b) costs arising from environmental externalities related to goods, services or works during their life cycle, provided their monetary value can be determined and verified; such costs may include those related to emissions of greenhouse gases and of other pollutant emissions, and other climate change mitigation costs.

Therefore, it can be established that the EU Directive includes straightforward instruction for contracting authorities to use the criterion on "the most economically advantageous bid" where the price should be put in relation to efficiency and quality.

Serbia

Law on Public Procurements, adopted in 2012 and in effect from April 2013 (amended in 2015), stipulates use of "economically most favourable bid" or "lowest price bided" as bid-assessment criteria.

In that, the criterion "economically most favourable bid" should be based on different elements depending on the procurement subject, such as: price bided, discount to the contracting authority's pricelist, delivery deadline or period for completion of services or works within minimum acceptable timeframe that would not endanger quality, as well as maximum acceptable timeframe for procurement performance. Other elements include running costs, costs related to the procedure's effectiveness, quality, technical and technology advantages, environmental protection and advantages, energy efficiency, post-sales services and technical assistance, warranty period and type of warranty, obligations related to spare parts, post-warranty maintenance, number and quality of staff engaged, functional characteristics, social criteria, life-cycle costs, etc. These elements can be further divided into sub-criteria. The law explicitly stipulates that conditions for tender participation cannot be defined as elements defined under criteria used for bid assessment/evaluation.

Croatia

Selection criteria defined under the Law on Public Procurements in Croatia (adopted in 2011 and amended in 2013) include "economically most favourable bid" or "lowest price". Moreover, the law stipulates that in case of economically most favourable bid used as selection criterion contracting authorities may include different elements related to the procurement subject for assessment of this criterion, such as: quality, price, technical advantages, aesthetical and functional characteristics, environmental characteristics, operational costs, cost-effectiveness, post-sales services and technical assistance, delivery date or period of procurement performance. In that, procurement notices must indicate the relative weight assigned to all individual elements. In cases when, due to justified reasons, contracting authorities cannot indicate relative weight of said individual elements, they should be enlisted/ranked according to their importance. When selecting the economically most favourable bid, elements comprising this criterion should not be discriminatory and must be clearly linked to the procurement subject.

Bosnia and Herzegovina

In Bosnia and Herzegovina, the Law on Public Procurements (adopted in May 2014) anticipates use of "economically most favourable bid" or "lowest price" as criteria on contract awarding. In that, contracting authorities are obliged to include detailed elaboration of the criterion "economically most favourable bid" in their respective tender documents by means of definition and detailed description of sub-criteria, according to the nature and the purpose of goods/services/works being procured. Sub-criteria are similar to those used in other countries and include: quality of the procurement, price, technical characteristic of the procurement subject, functional and environmental characteristics, operational costs, cost-effectiveness, post-sales services and technical assistance, delivery date or period of performance, etc. Contracting authorities are obliged to precisely define the methodology on valuation of individual sub-criteria.

Montenegro

Law on Public Procurements (adopted in 2011) anticipates "lowest price" or "economically most favourable bid" as selection criteria. Depending on the procurement subject, the criterion "economically most favourable bid" is based on series of sub-criteria: lowest price bided (in Montenegro, this criterion is given primacy), delivery date or period of performance for services and works, quality, ongoing maintenance costs, cost-effectiveness, technical and technology advantages, programme and extent of environmental protection, i.e. energy efficiency,

post-sales services and technical assistance, warranty period, warranty type and quality, provision of spare parts, aesthetic and functional characteristics, etc. When using the criterion on economically most favourable bid, the law obliges contracting authorities to rank individual bids according to sub-criteria and points allocated for these sub-criteria. In that, eligibility criteria for participation in public procurements cannot be defined as sub-criteria for selection of the most favourable bid. Lowest price is defined as the primary sub-criterion and is allocated at least 50 points in cases of goods and works, i.e. 40 points in cases of services.

Slovenia

Slovenia's Law on Public Procurements, adopted in November 2015, is fully aligned with the new EU Directive in this regard and anticipates use of economically most favourable bid as the selection criterion. In that, as stipulated under the EU Directive, the economically most favourable bid is established on the basis of price or cost, using the cost-effectiveness approach, for example, life-cycle costing, and may include the best value for money spent, while bids are assessed against criteria on quality, environmental or social characteristics related to the procurement subject. Furthermore, the law enlists examples for series of criteria that could be defined as elements under the economically most favourable bid.

Albania

In Albania, the Law on Public Procurements (adopted in 2006) stipulates that contracting authorities shall award public procurement contracts to bids that meet eligibility criteria and are considered adequate bids with the lowest price. Contracting authorities can use different criteria, such as quality, price, technical values, aesthetic and functional characteristics, environmental characteristics, operational costs, cost-effectiveness, post-sales services and technical assistance, delivery deadline or period of performance, etc. In that, all criteria must be related to the procurement subject and must be objective, proportional and non-discriminatory.

Hungary

Hungary is another country that has adopted completely new Law on Public Procurements in September 2015, as a response to the new EU Directive. Criteria on awarding public procurement contracts stipulated under this law are defined as the best quality-price ratio and lowest costs, thereby abandoning the previous concept on lowest price used as the selection criterion. According to the new law, the criterion on lowest price can be used only in limited number of cases. Greater significance is given to life-cycle costs.

Bulgaria

Bulgaria also adopted a completely new Law on Public Procurements in February 2016, in order to align its legislation with the new EU Directive. This law entered in effect in April 2016. As regards criteria on contract award, it should be noted that, although the law defines economically most favourable bid as the single criterion, it directly refers to lowest price as one of possible sub-criteria on contract award. In addition to lowest price, other two sub-criteria include: level of costs (cost-effectiveness and life-cycle costs) and optimal price-quality ratio (which is assessed on the basis of price or cost, as well as on the basis of indicators for qualitative, environmental or social aspects related to the procurement subject). This is one of the few laws aligned with the new EU Directives that decisively enlists "lowest price" as possible sub-criterion on awarding public procurement contracts, although the EU Directive leaves space for member-states to fully renounce use of this criterion. Several analyses related to the adoption of new public procurement rules in Bulgaria have assessed this as positive provision, having in mind that countries marked by high prevalence of corruption in public procurements are advised to refrain from setting too many selection criteria that might leave space for objective assessment.

Romania

In Romania, the set of new laws in the field of public procurement entered in effect in May 2016. It is a matter of four laws governing public procurements, sector contracts, concessions and appeals in these procedures. Manner in which the Romanian Law on Public Procurements stipulates criteria on contract award is rather specific. Single criterion enlisted therein implies "economically most favourable bid", without being in contradiction to legal and administrative prices of certain products. Nevertheless, when using this criterion contracting authorities are allowed to select one of the following four sub-criteria: lowest price, lowest costs, best value for money (or most cost-effective bid) and best value for costs. Furthermore, the law includes a list of factors used to determine quality of bids, as well as environmental and social aspects, as stipulated under the EU Directive. When lowest price is used as sub-criterion, the law suggest that due consideration should be made of cost effectiveness and life-cycle costs related to the procurement subject. Lowest price must not be used as selection criterion in following cases: procurement subjects with high degree of complexity and procurements related to construction of roads and trans-European transport infrastructure projects. Another interesting provision implies that when two bids are assessed as equal, contracting authorities may apply additional criteria from those enlisted by the law, such as fight against unemployment.

Conclusions and Recommendations

Comparative analysis of EU regulations and relevant legislation in countries from the region, both EU member-states and candidate countries, shows alignment of legal provisions governing criteria on contract award with the old and, in the case of EU member-states, with the new EU Directive. All countries use "economically most favourable bid" as the single criterion (with "lowest price" defined as sub-criterion) or both criteria in parallel.

Macedonia remains among the few, if not the only country in Europe that uses "lowest price" as the only criterion on awarding public procurement contracts, despite its non-alignment with EU Directives and numerous problems created by this concept, which was duly identified by monitoring of public procurements and indicated by both contracting authorities and economic operators.

Having in mind that new EU Directives stipulate "the most economically advantageous bid" as the single criterion, with the possibility for price to be taken into consideration together with quality and series of other sub-criteria, it is high time for relevant legal provisions under the Macedonian Law on Public Procurements to be revised. In that, except for alignment of national legislation with the EU Directives, due consideration should be made of in-country specificities and specificities of particular procurement subjects. Therefore, changes should be aimed towards use of lowest price in cases when it would yield the best results, but respect quality and other aspects where necessary. That would enable better respect for the basic principles underlying public procurements, including efficient use of funds spent in public procurements, i.e. obtaining the best value for money spent.

Moreover, future regulations in this field should be careful not to leave too many possibilities for contracting authorities to engage in subjective assessment of bids when selecting the most favourable bid. Therefore, combination of both criteria seems to be the best solution and serves the purpose of public procurements.