MONITORING THE IMPLEMENTATION OF CENTRAL LEVEL PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

QUARTERLY REPORT

ON MONITORING THE IMPLEMENTATION OF PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

2010

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Center for Civil Communications
Центар за граѓански комуникации

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MONITORING THE IMPLEMENTATION OF PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

Sixth Quarterly Report

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QUARTERLY REPORT
ON MONITORING
THE IMPLEMENTATION OF
PUBLIC PROCUREMENTS IN
THE REPUBLIC OF MACEDONIA

CONTENTS

ABBREVIATIONS

BPP	Bureau of Public Procurements
SAO	State Audit Office
SCPPA	State Commission on Public Procurement Appeals
CA	Contracting Authorities
EO	Economic Operators
EPPS	Electronic Public Procurement System
EU	European Union
PPL	Public Procurement Law
RM	Republic of Macedonia
CCC	Center for Civil Communications

KEY FINDINGS

Decreased interest on behalf of companies to participate in public procurements. Only one or two companies submitted bids in as high as 40% of procedures monitored. Thus, competition, which is one of the basic preconditions for efficient and cost-effective public spending, has been only seemingly secured.

Every fourth tender is annulled. Worrying is the fact that, in average, the number of companies participating in the procedures annulled is twice as high compared to the number of companies participating in the procedures where the selection of the most favourable bid was made.

Disputable elements are used in the selection of the most favourable bid. Despite all warnings and indications, in the selection of the most favourable bid the contracting authorities continue to use elements which often fail to secure cost-effective and efficient public spending, but rather provide the possibility to select the favoured bidder.

Certain bidders are favoured by means of tender document development. Some technical specifications from the monitoring sample provide open references to particular products or bidders by including detailed descriptions of products to be procured and by listing manufacturers' names.

Increased use of non-transparent procedures for signing direct public procurement contracts without published call for bids. In the second quarter of this year, a total of 172 such contracts were signed in the amount of 6.1 million EUR, which is by 49% more compared to the same period last year when 231 contracts of this type were signed in the total amount of 4.1 million EUR.

Only 4.2% of all procedures were fully implemented via the electronic system, while around 12% of procedures used e-auctions. The Electronic Public Procurement Sys-

tem (hereinafter: EPPS) which has a particularly important role in increasing the transparency of public procurements is still underutilized, while many contracting authorities are far from attaining the law-stipulated target of 30% e-auctions.

Detailed notifications on the selection of the most favourable bid are not submitted to companies. Despite their legal obligation to submit the companies detailed notification as regards the selection of the most favourable bid (within the legally stipulated deadline of 3 days), the said notification includes only the name of the economic operator whose bid was selected.

Decreased requirements for tender document fee payment. Significant progress was noted compared to the previous year when in the same monitoring period tender documents were distributed free-of-charge in only 12.5% of procedures, contrary to the present 55%.

Decreased requirements for bank guarantees. Bank guarantees were required in 42.5% of procedures included in the monitoring sample, which indicates a decreased, although insignificant, practice on behalf of contracting authorities to request bank guarantees from economic operators for the bids submitted.

Higher share of decisions taken by the State Commission on Public Procurement Appeals (hereinafter: SCPPA) on full annulment of procurement procedures. In the first half of 2010, SCPPA more frequently took decisions to fully annul public procurement procedures compared to the previous year, which indicates that contracting authorities continue to violate and abuse the Public Procurement Law.

GOALS AND METHODOLOGY

From November 2008, the Center for Civil Communications (hereinafter: CCC) from Skopje has continuously analysed the implementation of public procurements in the Republic of Macedonia as regulated under the Public Procurement Law. The analysis aimed to assess the implementation of public procurements in the light of the new Public Procurement Law and the application of basic principles of transparency, competitiveness, equal treatment of economic operators, non-discrimination, legal proceeding, cost-effectiveness, efficiency, effectiveness and cost-effective public spending, the commitment to obtain the best bid under most favourable terms and conditions, as well as accountability for the public procurements implemented.

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

The present analysis was performed based on monitoring of selected sample of 40 public procurement procedures implemented by central and local level contracting authorities, whose public opening was performed in the period April-June 2010. In this quarter, the monitoring included public procurement procedures implemented by local level contracting authorities, i.e., municipalities or authorities under their jurisdiction. Indeed, local level public procurement-performing entities by far outnumber the central level contracting authorities, although majority of them can be classified as small public procurement-performing entities in terms of funds at their disposal and

the number of procedures implemented. In the second quarter, in compliance with the stipulated methodology, monitoring was performed on 25 procedures implemented by central level contracting authorities and 15 procedures implemented by local level contracting authorities, notably by the municipalities Bitola, Prilep, Ohrid, Struga, Kicevo and by the public enterprises established by them. For each quarter, in addition to the monitoring findings, the report also includes an analysis of other public procurement-related issues. Thus, the present quarterly report also incorporates the findings from the analysis of the appeal process led in front of the State Commission on Public Procurement Appeals.

The present report on the monitoring of public procurement process was developed in cooperation with and the financial support from the Foundation Open Society Institute – Macedonia.

QUARTERLY PUBLIC PROCUREMENT MONITORING REPORT

- Decreased interest on behalf of companies to participate in public procurements. The analysis of the monitoring sample indicates that competition, which is one of the basic preconditions for efficient and cost-effective public spending, has been only seemingly secured.

Having in mind that one of the major goals of the Public Procurement Law is to secure competition among economic operators as a precondition for more cost-effective and efficient public spending, the number of bidders that participate in public procurement procedures is important. The analysis of the monitoring sample reveals negative trends in that regard. Notably, there is an average of 5 companies per public procurement procedure, which is by one company less than the annual average for 2009, as reported in the annual report of the Bureau of Public Procurements.

A thorough analysis indicates that in the period April-June 2010 in 40% of the public procurements monitored there were only one or two companies bidding. Comparison of findings with the situation recorded in the first quarter of 2010 provides evidence in support of the decreased competition in a significant number of open procedures, where any economic operator can participate provided it has met the eligibility criteria. In the period January-March 2010, one or two bidders participating in open procedures were identified in 20% of the procedures included in the monitoring sample. On annual level (taking into consideration the last 4 quarters, i.e., second half of 2009 and first half of 2010) the average share of procedures with small number of bidders accounts for significant 25% of the total of 160 procedures monitored.

The problem of decreased participation of companies in most public procurement procedures is disguised with the high number of bidders that regularly apply on open

calls for signing multiannual framework contracts and procurements divided into lots, where by means of several lots different products are purchased for the needs of the contracting authority, thereby increasing the average number of bidders in all procedures.

In terms of separate sectors, for the time being competition remains strong only in medicine and IT equipment procurements. Doubts that economic operators deliberately avoid competitions for signing contracts with state institutions were enhanced by the fact that in the monitoring sample for the period April-June 2010 there was a significantly smaller number of bids submitted in the sectors where many companies operate, those being: maintenance of district heating systems, procurement of kitchen equipment and furniture, construction of pedestrian pathways, procurement of dairy products, hotel services, advertising campaigns, central air-conditioning spare parts, automobile spare parts and servicing.

The identified decrease of bids submitted by companies must be seriously addressed, since it indicates the existence of barriers in public procurements which limit or distort the competition among suppliers. In that, small number of bids submitted is more common in procurements implemented by central level contracting authorities, although these procurements have greater value and therefore should be more attractive for the business sector.

This situation hinders the cost-effective and efficient public budget spending, whose amount is significant. Notably, in the monitoring sample for the second quarter of this year, 1.3 million EUR were spent under procedures with only one or two bids. Lack of competition among companies to submit more competitive bids is certainly reflected on the value and quality of goods and services purchased by state institutions.

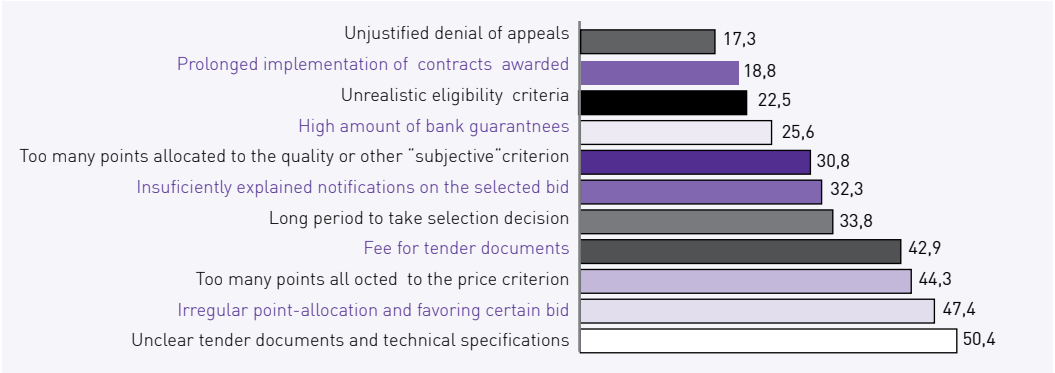
Reasons for the decreased interest may be sought in the tolerance of problems indicated by the business community in the survey conducted by CCC in the course of March and April 2010, which included 138 companies.

According to statements from economic operators given in the period following the survey, one of the major problems is identified in the difficulties to collect payment of

signed and realized public procurement contracts. This certainly discourages companies to participate in procedures, because it additionally deteriorates their financial capacity that has already been affected by the economic crisis.

It has been assessed that the negative image of public procurements, which discourages companies to participate in public procurements, also creates situations such as the one noted by CCC monitors. Notably, during the public opening of bids, a member of the public procurement committee, in the absence of a representative from the bidder concerned, declared himself a participant in the bid preparation and took it upon himself to explain the bid in question. This happened as part of a procedure, which later resulted in the signing of several annual framework contracts. Of course, a contract was also signed with the

On the question "What are the main problems you face in public procurement procedures? (more than one answer is possible)" the following answers were obtained:



company whose bid was explained by the member of the public procurements committee. The browsing of EPPS database showed that the same contracting authority signed public procurement contracts with the company in question in the past as well. Nevertheless, in addition to the flagrant violation of the Public Procurement Law and the indisputable conflict of interests on behalf of the member of the public procurements committee, worrying is also the fact that none of the representatives from the remaining 9 bidding companies that attended the public opening of bids did not react to the situation and failed to request that the minutes taken for the event should record such situation or to lodge an appeal on the grounds of this evident violation of the law. In order to understand the situation in question, it is important to note that the company close to the committee member was the single bidder for one of the 13 procurement lots (parts). Although representatives from other companies were not endangered by the favoured company, their decision to remain silent as regards the incident is indicative of the business community's low awareness of societal interests or fear from consequences should they object in public and point out the shortcomings in the legal proceedings.

Recommendation: The trend of decreased competition should be in the focus of a thorough research carried out by the BPP and aimed to determine the share of public procurement procedures with small number of bidders. In that, taking into account that stronger competition would result in lower prices and better quality of products and services purchased by contracting authorities, the competent institutions must eliminate the barriers that prevent greater participation in public procurements, as identified by the companies.

- Discriminating eligibility criteria for economic operators to participate on tenders.

Significant number of public procurement procedures included inappropriate eligibility criteria that enable favouring of certain big companies or the companies with whom the

contracting authorities have already signed similar cooperation contracts, notably by referring to high average annual assets turnover of companies, high number of contracts realized, specific number of employees and like.

For example, a service in the value of 80,000 EUR for cleaning portion of an irrigation canal requires the bidders to demonstrate three-year turnover of as much as 8 million EUR, to have employed at least 40 employees (4 of which civil engineers), to own 10 trucks, 3 excavation machines and other equipment as specified in the call for bids. Another public procurement contract in the value of 123,000 EUR required the companies to have had signed in the last year a construction works contract in the amount of at least 5 million EUR. Certain calls for bids from the monitoring sample set high criteria on the minimum number of employees that economic operators must dispose with, as well as the long working experience of the expert staff they employ.

Such eligibility criteria can unnecessarily limit competition. In that, one must have in mind that such eligibility criteria for bidding companies lead to concentration of state-run businesses with a group of companies, which results in creation of power centres that cannot be outbid by other companies and can affect the future decrease of companies' interest to participate in public procurement procedures.

Recommendation: Contracting authorities should refrain from using the perfidious manner of favouring certain bidders by setting high criteria as regards the economic operators' economic and financial status, which are disproportional to the procurement type and scope.

- Every fourth tender is annulled. Public procurement procedures where there are more companies that have submitted bids are more frequently annulled, which raises doubts that legal possibilities for annulment of procedures are misused for manipulative reasons.

The second quarter of 2010 was characterized by the escalation of the problem that concerns annulment of public procurement procedures. In this monitoring period, the

share of annulled procedures accounts for 25%. From the random sample comprised of 40 public procurements 10 were annulled, 9 of which were fully annulled and in one case only portion of the procedure was annulled. Frequent annulment of public procurement procedures is most often a result of the decisions taken by the contracting authorities. Notably, 7 of the 10 procedures annulled were annulled by means of decisions taken by the contracting authorities, while the remaining 3 procedures were annulled with a decision taken by the State Commission for Public Procurement Appeals. Most frequently used rationale for the annulment of public procurement procedures, as provided by the contracting authorities, is the failure to obtain a single acceptable bid. Disputable is the fact that such rationales are not accompanied with detailed explanation as to what was considered unacceptable in the bids submitted by the companies.

The fact that the average number of companies participating in the procedures annulled (7.7) is almost twice as high from the average number of companies participating in the procedures where the most favourable bid was selected (4.2) casts shadow over the justification of frequent annulments. Thus, it remains unclear how the contracting authorities were unable to select the most favourable bid in procedures where 2 to 16 companies submitted bids, but did not hesitate to select the most favourable bid in the procedures where they received only one bid (such was the case in 10% of procedures monitored).

All these raise serious doubts as regards the motives behind the annulment of procedures and enhances the assumptions that procedure annulment is used when the contracting authority, due to better bids received from the competitive companies, is unable to favour "its own bidder".

On the other hand, the analysis of annulment decisions taken by the SCPPA and concerning the monitoring sample provides the conclusion that such annulments are fully justified and grounded on severe violations to the

PPL made by the contracting authorities. These violations include illegal point-allocation, subjective assessment of bids' quality and selection of bids that are not considered the most favourable bid. Therefore, the contracting authorities have erroneously applied the provisions from the Public Procurement Law, which stipulate that the contracting authorities are obliged to secure competitiveness, equal treatment and non-discrimination of economic operators; transparency and integrity in the public procurement contract-awarding process and cost-effective and efficient public spending.

EPPS data also confirms the tendency of increased annulment of public procurements. 707 annulment decisions were taken in the first half of this year compared to 527 decisions taken in the same period last year, which provides an increase of 34%. Should the current trend on procedure annulment continue the possibility remains that the share of unsuccessful procedures at national level (including all procedure types) could approach the critical threshold of 20%. This situation reveals another problem. Namely, the total share of annulled procedures is smaller in the procedures with direct bid collection (which are used for small procurements – in the value of up to 20,000 EUR for purchase of goods and services and in the value of up to 50,000 EUR for works-related procurements). On the contrary, the share of annulled procedures is much higher in bigger procurements, which account for 90% of procurement funds allocated, thereby exacerbating the problem. The need for urgent amendments to the Public Procurement Law that would limit the possibility for annulment of procedures was underlined by the long-standing negative trend of annulled public procurement procedures. In 2008 the share of fully and partly annulled procedures accounted for 10.5%, and in 2009 it accounted for 17%. The business community already expressed its dissatisfaction with this trend. According to information obtained from economic operators, some of them have already submitted the BPP and the Ministry of Finance applications to revoke the paragraph from the Public Procurement Law which allows the contracting authorities to annul the public procurement contract-awarding procedure under the auspices that not a single acceptable bid

has been obtained. Nevertheless, even if this possibility was excluded from the Law, the contracting authorities would still have room for manoeuvres aimed to annul procedures in cases when they have not obtained a single acceptable bid, in cases when they have obtained acceptable bids but cannot be compared due to different approach pursued as regards the technical or financial part of bids, in cases when the number of bidders is lower than the law-stipulated minimum threshold for contract-awarding procedures; in cases of contingencies in the budget of the contracting authority, in cases when due to unanticipated and objective circumstances the needs of the contracting authority have changed and in cases when the selection cannot be made due to significant violations to the PPL pursuant to Article 210.

Recommendation: As the large number of annulled procedures raises serious doubts related to the misuse of legal possibilities due to unrealized expectations for the selection of the preferred bid, such events should be a signal for the competent institutions, in particular the Bureau of Public Procurements, to initiate amendments to the Public Procurement Law aimed to limit and strictly define the possibilities for procedure annulment, including sanctions in cases of misuse, thereby enforcing the law-stipulated principles of efficiency and cost-effectiveness of public procurements.

- Despite all warnings and indications, in the selection of the most favourable bid, the contracting authorities continue to use elements that often do no secure cost-effective and efficient public spending, but rather enable the selection of the preferred bidder.

Both, national and local level state institutions fail to abandon the frequent application of so-called manipulation-prone elements, such as performance/delivery deadline, payment deadline and manner. Worrying is also the tendency to allocate high number of points to these elements. There are even cases when the list of elements

for the selection of the most favourable bid, which are part of the call for bids, defines that companies will be allocated a total of 50 out of 100 points for two manipulation-prone elements – payment manner (30 points) and delivery deadline (20 points). Having in mind that these elements are most commonly used to manipulate the procurement procedure, it does not surprise that two public procurement procedures that used such selection elements received bids from one company or two companies, respectively. Evidence in support of the growing mistrust of companies as regards the application of such criteria provided the procedure where 40 out of 100 points were allocated to the payment manner and where only one company participated in the procedure and, of course, was awarded the contract.

By applying these elements, state institutions change the focus of competition between companies from the price and quality to payment manner and delivery deadline. In its previous reports, the Center for Civil Communication already indicated the practice under which contracting authorities use these elements for the selection of the most favourable bid, but later fail to abide them in the course of contract performance, hence the conclusion that such elements were misused for the purposes of favouring a particular bidder.

Despite the indications made by other relevant institutions, such as the State Audit Office (hereinafter: SAO) and the State Commission on Public Procurement Appeals, by means of their tender documents, the contracting authorities continue to fail to include specifications on the point-ranking manner of the "quality" element, i.e., do not set clear criteria for quality evaluation. Thus, contracting authorities subjectively rank the bids obtained and act in violation of Article 161 from the PPL, which strictly stipulates that in their tender documents contracting authorities are obliged to explain the manner in which they will evaluate and apply the elements of the criterion "economically most favourable bid".

Such illegal actions on behalf of contracting authorities provided reasonable grounds for the State Commission on Public Procurement Appeals to take three decisions on procedure annulment, all concerning procedures that

were part of the monitoring sample. Notably, the Commission established its decisions on the assessment that both, the point-ranking manner and the entity assessing the quality of bids obtained were not specified, i.e., that the element "quality" was poorly explained and was not covered with more sub-elements, which ultimately had led to subjective assessment thereof.

It is unclear whether due to tendentious reasons or ignorance, the contracting authorities continue to use elements in the criterion "economically most favourable bid" which are (should be) used for determining the bidder's technical and professional eligibility, and not for the bid selection. This includes criteria such as the list of references; experience/scope; knowledge of the procurement type and professional and expert ability. In this manner, state institutions - by allocating as much as 15 points to these elements - favour bids of big companies and thereby deprive the smaller companies of any chances to compete by means of their price and quality, although they have fulfilled the minimum requirements for technical and professional eligibility.

An example thereof is the case where in addition to the price as an element included under the criterion "economically most favourable bid", 20 points were anticipated to be allocated to the year of manufacture of portion of construction equipment, which can put the bidders in unequal position. In the said case, the company selected was the one that usually wins tenders in this field, which indicates that the company in question was also the favoured one.

Recommendation: Contracting authorities must refrain from using manipulative elements under the criterion "economically most favourable offer" which provide for favouring of particular bidders and discrimination of others. These elements should be included in the tender documents under the eligibility criteria for the economic operator or as part of the technical specifications setting the standard to be met by the goods or services. When applying the criterion "quality", the contracting authorities should list the sub-criteria thereof as part of the call for bids and provide detailed information on the man-

ner in which this criterion will be ranked. In that context, we recommend the Bureau of Public Procurements to develop recommendations and guidelines for the contracting authorities, for the purpose of harmonized and precise definition of criteria and adherent application thereof.

- Certain bidders are openly favoured by means of technical specifications defined.

Some technical specifications included in the monitoring sample provided open reference to a particular commodity or vendor. Disputable were the tender documents that provided detailed description of the packaging for dairy products to be procured, which provided reference to the particular producer; following were the documents that included specific names of producers of plaster wall panels, light bulbs, three-polar main switches, etc. Such actions on behalf of contracting authorities are in direct breach of Article 36, paragraph 1 from the Public Procurement Law, which stipulates that technical specifications must not provide reference to a specific production, manufacturing process or trade labels, patents, brands or specific origin of goods for the purpose of favouring or eliminating particular economic operators or particular goods.

Another case should be mentioned, where a minor breach of the Law was made. Notably, it is a matter of a procurement procedure where the warranty element was ranked and evaluated opposite to the stipulations made in the call for bids and tender documents. Despite the appeal lodged by one of companies participating in the procedure, nothing has been undertaken in that regard. Both the contracting authority and SCPPA estimated that it is a matter of technical error for which the economic operator should only ask for a clarification.

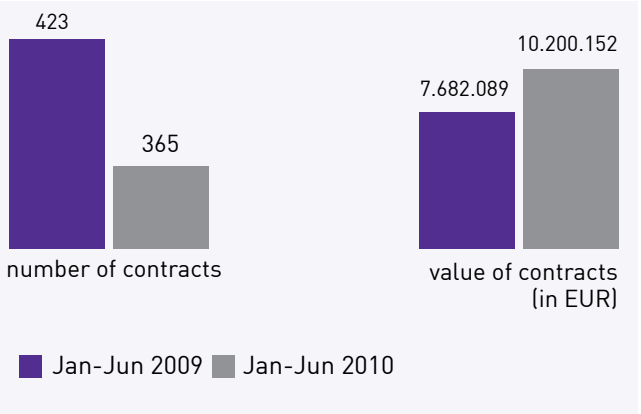
This example unambiguously shows that contracting authorities have different approach to the errors they make compared to the errors made by bidders which puts the economic operators in an inferior position and sends the wrong message on the inequality in the process.

Recommendation: Economic operators need to be encouraged to lodge appeals in front of SCPPA whenever they have determined that the technical specifications provide reference to a particular commodity or vendor. This is not a common practice at the moment and companies rarely lodge appeals on disputable tender documents.

- Trend on increased public spending by means of direct negotiations between state institutions and companies.

The increased use of non-transparent negotiation procedure for signing direct public procurement contracts without published call for bids is worrying. Only in the second quarter of this year, a total of 172 contracts that amount to 6.1 million EUR in total have been signed in this manner, which is by 49% more compared to the same period last year when a total of 231 contracts were signed accounting for 4.1 million EUR. The trend of the significant increase of so called face-to-face agreements was also confirmed with the comparison made between the value of contracts signed in the first six months of this year to the same period last year. Notably, although in the period January-June this year, the negotiation procedure without call for bids was used to sign less contracts, their value has increased by 33%, i.e., by 2.5 million EUR com-

Contracts signed and value of negotiation procedure without call for bids



pared to contracts signed in the first six months last year. If the current trend continues, meaning if contracting authorities continue to sign large number of such direct contracts in the last quarter of this year, it might be expected that by the end of 2010 the value of contracts signed under this utterly non-transparent procedure will exceed the annual amount of 23 million EUR, as recorded in 2008 and 2009. Consequences from the application of this procedure are more than clear, as it implies non-transparent public spending. The problem with these procedures lies in the fact that they are liable to multiple manipulations in public procurements, those being: artificial definition of "urgency" and no time to publish the open call for public procurement; justification of additional works/lots that cannot be technically or economically separated from the company with which the contract is signed or contingency and/or emergency costs that have emerged in the course of the contract implementation that enable signing of annex to the contract in the value of up to 30% of the basic contract. This eliminates the competition, but also raises questions whether the company selected offered the best bid, if later the same was given the opportunity to increase the contract value by one third.

Recommendation: BPP should analyse the scope, the legal justification, transparency and competitiveness, and should it determine that such contracts were made for lucrative purposes, to propose amendments to the legislation so as to reduce the flexible use of negotiation procedures without call for bids. At the same time, BPP should monitor these negotiations, while the contracting authorities should be obliged to report to BPP on the procedure's course leading to contract signing.

- Failure to attain the law-stipulated target of 30% e-auctions per year. Only 4.2% of all procedures have been fully implemented via the electronic system, while only 12% of the procedures used e-auctions.

The Electronic Public Procurement System, which plays a particularly important role in increasing the transparency of public procurements, is still not used for public procurement implementation and the law-stipulated target for e-procurements has not been attained. Unlike the obligation to publish calls and notifications via the EPPS, which is compiled to by contracting authorities, the utilization rate of electronic means for the implementation of the remaining stages of the procurement procedure remains low.

In the second quarter of this year, 96 procedures were fully implemented as e-procurements. They account for only 4.2% of all procedures implemented in this period. The share of e-auctions implemented in the same period accounts for around 12%. In that, consideration should be made that it is difficult to determine the exact relevant share of e-auctions in the total number of procedures, as (1) there are procedures with one procedure, but many e-auctions; (2) there are procedures that do not allow e-auctions; and (3) the law-stipulated target of 30% is not tied to the number of procedures but to the planned value of public procurements.

In the first half of the year, 167 procedures were implemented as e-procurements, which accounts for 4.6% of all procedures implemented (announced) in this period. In the same period a total of 339 e-auctions were implemented, which account for around 9%. Therefore, the share of e-procurements is still far from the law-stipulated target of at least 30% that refers to the estimated value of procurements rather than the number of calls published.

It remains unclear why after all training sessions delivered and information provided, the contracting authorities still fail to comply with the Law – to implement one third of procedures as e-auctions. In that, one must take into consideration the fact that the use of EPPS, in particular e-auctions, renders the procedures more cost-effective and reduces possibilities for rigged tenders and corruptive practices.

Pursuant to last amendments made to the PPL, the obligation to use EPPS becomes greater as the law antici-

pates that from 1 January 2011 the contracting authorities are to use e-auctions in at least 70% of the total number of procedures with open call for bids, procedures with limited call for bids, negotiation procedures with prior call for bids and procedures with announced call for bids. Hence the obligation, in particular for the Bureau of Public Procurements, to make more efforts aimed to adherent application of this legal decision, by instructing the contracting authorities to frequently use e-auctions in public procurement procedures. BPP's obligation to enforce this legal provision also stems from its defined competences, those being: to monitor and analyse the implementation of PPL, the operation of EPPS and to initiate changes for its improvement, to notify the contracting authorities on the irregularities detected, to provide training and education, etc.

Recommendation: Despite the increased efforts to enforce this legal obligation, notably by means of continuous reminders and warnings addressed to contracting authorities, BPP should also take technical measures against the inconsistent use of EPPS for implementation of public procurement procedures. At the same time, the Government must also make more efforts to ensure compliance with the legal obligation in question.
Contracting authorities must use e-auctions and e-procurements more often, since on one hand they enable greater efficiency of procedures and budget savings, but on the other hand, their use is stipulated by law.

- Decreased number of foreign companies which were awarded public procurement contracts in Macedonia, although the value of contracts signed has increased.

The second quarter of 2010 was marked by a record in terms of the value of public procurement contracts signed with foreign companies (goods and service vendors or work contractors). According to EPPS data, in the period April-June 2010, 9 contracts were signed in a total amount of 59,870,969 EUR. Nevertheless, as high as 70.5% thereof were spent on the procurement of public

transportation buses as part of the tender implemented by the Ministry of Transport and Communications. When these figures are compared with the number and value of public procurement contracts signed in the same period last year, it can be concluded that foreign companies' presence increased in terms of contract value, but decreased in terms of the number of contracts signed.

Public procurement contracts signed with foreign companies *

Period	Number of contracts signed	Total amount of contracts in EUR
April - June 2009	15	15,117,891
April - June 2010	9	59,870,969

* EPPS database was browsed in September 2010.

The first half of 2010 was also characterized by the same trend. Notably, although the contract value increased, the number of foreign companies awarded public procurement contracts was halved compared to 2009 figures.

Public procurement contracts signed with foreign companies **

Period	Number of contracts signed	Total amount of contracts in EUR
January-June 2009	26	31,666,667
January-June 2010	13	61,174,333

** EPPS database was browsed in September 2010.

The small number of foreign companies that participate in public procurement procedures in Macedonia remains a problem that requires immediate action aimed to improve the situation, moreover given the possible negative interpretation of the situation as foreign companies' distrust that fair competition is secured in the country.

Recommendation: As regards this trend, in-depth analysis is needed in order to avoid the discouraging effect of problems related to public procurements on foreign companies' willingness to participate therein and their preference of high value procurements.

- Contracting authorities continue to fail the legal obligation to submit to the companies detailed reports on the selection of the most favourable bid.

Notifications on the selection of the most favourable bid that the contracting authorities submit to companies (most frequently within the legally stipulated deadline of 3 days from the selection decision) include only the name of the economic operator whose bid was selected.
Contracting authorities persistently ignore their legal obligation referred to in Article 168, which clearly stipulates that they are obliged to submit these notifications and provide a rationale on the reasons for the selection of the most favourable bid, both to bidder(s) whose bid(s) were selected and bidders whose bids were rejected or deemed unfavourable, as follows:

- all bidders that were considered ineligible need to be notified on the reasons for the rejection of their applications;
- all bidders whose bids were rejected need to

be notified on the reasons for the rejection of their bids, accompanied with a detailed rationale thereof;

- all bidders whose bids were deemed acceptable, but were not selected as the most favourable one need to be notified on the name of the bidder(s) selected and the reasons for taking that selection decision.

In practice, this legal obligation is rarely enforced. Absence of detailed rationale on the selection decision makes the companies raise reasonable doubts as regards the subjective bid-evaluation and unequal treatment of bidders. Such behaviour on the part of contracting authorities significantly reduces transparency, i.e., economic operators are not provided with a clear image on the manner in which bids were evaluated and the manner in which the selection decision was taken. Lack of transparency and accountability raises doubts and allegations for corruptive practices. Worrying is also the fact that the absence of detailed rationale prevents the companies from developing and lodging grounded and argument-supported appeals.

Detailed rationale on the decisions taken is a must in cases when the criterion applied refers to "economically most favourable bid" and contains several bid-evaluation elements (elements that cannot be evaluated by point-allocation, such as the price). Lack of detailed rationale on the point-allocation method applied to criteria prone to subjective assessment provides sophisticated manners for selecting the bid of the company favoured. At the same time, in the absence of clear evaluation and point-allocation parameters for 'quality', such practices can only trigger speculations and assumptions on the malpractices of contracting authorities.

Recommendation: Contracting authorities to comply with Article 168 from the Public Procurement Law, which stipulates submission of detailed rationales on the reasons for the selection of the most favourable bid or the rejection of certain bidder.

BPP needs to make more efforts to instruct the contracting authorities as regards their compliance with this legal obligation, for the purpose of eliminating doubts related to subjective bid-assessment and favouring certain economic operators.

- Decisions on selection or annulment of procedures from the monitoring sample were taken within the scope of 1 to 60 days from the public opening of bids.

BPP made a serious positive step by setting the legally stipulated deadline for taking bid selection or procedure annulment decisions, which cannot be longer than the period from the announcement of calls to the public opening of bids. In fact, from the onset of the monitoring process, CCC reiterated the need for legally stipulated deadlines on decision-taking, as the long period for decision-taking by the contracting authorities undermines the purpose of public procurements, and also puts companies in unfavourable position of perpetual wait, prevents them from planning their business activities, ties their funds and stock to an uncertain outcome, and can also encourage them to attempt use of illegal means and methods aimed to accelerate the state authority's decision-taking.

Analysing the procedures from the monitoring sample for the period April-June 2010 in terms of the new legal obligation, in effect from August 2010, provides the conclusion that 15% of contracting authorities included in the sample failed to comply with it. The monitoring activities in the following quarters will show the extent of compliance with this legal obligation and whether the contracting authorities that demonstrate (permanent) disrespect for this obligation will be sanctioned.

Recommendation: BPP's adequate response to the request for setting a legally stipulated deadline on bid selection or procedure annulment decision-taking should be accompanied with greater vigilance on behalf of contracting authorities to accelerate decision-taking and prevent delays in public procurement procedures.

- The trend of decreased requirements for tender document fee payment continues.

Tender document fees ware imposed in 45% of procedures from the monitoring sample. The fee amounted from 500 to 3,000 MKD. It was noted that local contracting authorities tend to charge tender document fees more often, while central level contracting authorities gradually abandon such practices.

Evident is the difference in the amounts charged. Contrary to last year when economic operators were often forced to pay as much as 6,000 MKD for tender documents, in this period such cases are an exception rather than a rule.

The increased number of procedures that do not impose tender documents fees is important as it reduces economic operators' costs for participation and enables them free-of-charge insight in the documents, which is important for them in the light of deciding whether they will participate in the public procurement procedure or not. Therefore, the contracting authorities should frequently use this legal possibility and make tender documents available on the Internet or use the EPPS for that purpose.

Recommendation: The number of tender documents published via EPPS and tender documents that do not imply fees should be further increased. BPP should continue to supervise, guide and prevent those contracting authorities that tend to charge high tender document fees, which do not correspond to their actual costs incurred for the tender organization.

- Although slowly, the trend of decreased requirements for bank guarantee continues.

Bank guarantees were required under 42.5% of the procedures included in the monitoring sample, which implies insignificant, but continuing decrease of bank guarantee requirements imposed to the economic operators and needed as safeguard for bids submitted. Although there were fewer procedures that required bank guarantees, their amount remains high. Thus, two-thirds of proce-

dures that required bank guarantees set the amount at the maximum allowed 3%. In that, central level contracting authorities are more prone to requesting bank guarantees, compared to local level contracting authorities.

The trend of decreased requirements for bank guarantees should continue, as it makes it easier for companies to take decisions to participate in public procurements and prepare the relevant bids (in terms of less paperwork and administrative procedures), which can only have positive effects as regards increased competition in public procurements.

The contracting authorities should focus on requiring guarantees for quality contract performance and monitoring the companies' compliance with their obligations after the contract awarding, which is of greater public interest. In that, it is important to note that the State Audit Office on several occasions concluded that the contracting authorities tolerate the companies' failure to comply with the provisions from the public procurement contract signed and do not take actions to collect the guarantees obtained in order to cover financial damages incurred.

Recommendation: Bank guarantees should not be defined as a formal requirement for participation in public procurement procedures, while in cases when guarantees are required they should be set in a value lower than the law-stipulated threshold of 3%.

- Institutions show a positive trend of information disclosure.

The share of information disclosed upon FOI applications submitted by CCC to the contracting authorities remains at the same level of 70% in this quarter as well. Nevertheless, in the first six months of 2010 the institutions demonstrated higher transparency in relation to submission of records on so-called small procurements to the EPPS. PPL stipulates that the contracting authorities are obliged to provide six-months reports on the small procurement contracts signed, notably the bidding procurements in the amount of up to 5,000 EUR without announcement of call for bids and bidding procedures in the amount of up to 20,000 EUR for goods and services and up to 50,000 EUR

for works-related procurements with announcement of call for bids. Contrary to last year's practice, in the first half of this year, majority of contracting authorities complied with the legal obligation and submitted records on small procurements, although with certain delays. For comparison purposes, in the previous six-month period, only 40% of central level contracting authorities complied with this legal obligation. Nevertheless, the question whether these contracts were subjected to analysis and whether possible risks from signing small procurement contracts with same companies have been detected remains unanswered. Analysis of contracts awarded under such procedures, as carried out by CCC, inter alia, indicates procurement contract awarding based on ethnicity, depending on the ethnic background of institutions' managers – a problem that undoubtedly indicates favouring of certain companies.

Recommendation: The willingness of contracting authorities to provide public insight in the documents on public procurements implemented is a guarantee per se that procedures were organized in line with the regulations governing public procurements and that taxpayers money are spent for a particular purpose and in a cost-effective manner. Hence, continuous efforts to increase transparency of institutions by means of regular disclosure of information are essential. In that, competent authorities should also analyse the contents of documents related to small procurements, for the purpose of determining the need for public spending made under this type of public procurements.

ANALYSIS OF APPEALS LODGED IN FRONT OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS IN THE PERIOD JANUARY-JUNE 2010

- Higher share of decisions taken by the State Commission on Public Procurement Appeals on full annulment of procurement procedures, which indicates that contracting authorities continue to violate and abuse the Public Procurement Law.

The analysis of decisions taken by SCPPA in the first half of 2010 showed that 29.4% of appeals lodged by companies were approved and the SCPPA adopted decisions to revoke 69 selection decisions taken by contracting authorities and has fully annulled 68 public procurement procedures. Thus, in the first six months of 2010 the procedures annulled accounted for 49.6% of the approved appeals, whereas in 2009 they accounted for 39.8%. Considering the fact that decisions to revoke the procedure are taken in cases when the contracting authorities failed to provide proper bid-evaluation, and decisions to annul the procedure are taken in cases when other serious violations to the PPL have been determined, it seems that the contracting authorities are ignorant of the relevant regulations or purposefully engage in illegal operations.

In the period January-June 2010, the SCPPA reconsidered 503 appeals, and took 428 decisions (conclusions)[1], as follows:

[1] The number of decisions (conclusions) taken upon appeals lodged (428) is smaller compared to the number of appeals lodged (503) due to the fact that in certain procedures the single decision taken concerned several appeals for the same procedure. Notably, 75 decisions were taken for more than one appeal.

Type of decision	Number of decisions	%
Termination/discontinuation of appeal procedure	69	13.7
Rejected appeals	206	41.0
Denied appeals	70	13.9
Approved appeals	148[2]	29.4
Rejected applications to continue the procedure	4	0.8
Denied applications to continue the procedure	6	1.2
Total	**503**	**100**

The present analysis targeted SCPPA decisions to terminate/discontinue the appeal procedure, SCPPA decision to reject or approve appeals lodged by the economic operators, SCPPA decisions to deny the appeals, as well as the decisions by means of which SCPPA denied or rejected the applications to continue the procedure.

[2] SCPC revoked 69 decisions taken by the contracting authorities, and took 68 decisions by means of which it annulled the decision taken and/or procedure implemented by contracting authorities.

A total of 2,453 contracts were signed in the monitoring period. This figure does not imply that the same number of public procurement procedures were initiated/published, but serves the purpose of providing comparative background for the number of appeal procedures initiated compared to the number of contracts signed in the said period.

Decisions to terminate/discontinue the appeal procedure

Pursuant to provisions of Article 220, paragraph 1, line 1 from the PPL, SCPPA took decisions to terminate the appeal procedure on the grounds of appeals withdrawn by the plaintiff.

Although PPL does not explicitly provide that the appeal procedure can be terminated on other grounds as well, in reality SCPPA took decisions by means of which it terminated the appeal procedure in cases when upon the appeal's receipt the contracting authority, pursuant to the provisions of Article 221 from the PPL, has found that the appeal in question is partly or fully grounded. Paragraph

1 of the said Article stipulates that in such cases the contracting authorities could:

- waive the existing decision;
- take a new decision;
- annul the procedure;
- correct the action;
- take the action that was omitted; and
- implement a new procedure.

Regardless of the possibilities given to the contracting authorities in compliance with paragraph 1 of Article 221 from the PPL, in fact such cases indicate that the contracting authorities have corrected their "mistakes" by means of taking a new decision and have forwarded it to the SCPPA, pursuant to paragraph 3 of the same Article.
Decisions to terminate or discontinue the appeal procedure were taken in 13.7% of the total number of appeals lodged in the first half of this year.

Decisions to deny appeals

As regards these decisions, a thorough analysis was made aimed to identify the mistakes made by the economic operators in regard to lodging appeals, and on the grounds of which SCPPA did not endeavour material or essence reconsideration of appeal allegations, but denied the appeals on the grounds of formal shortcomings, as stipulated under the PPL. The analysis also aimed to identify the most common mistakes made by the economic operators when lodging appeals, i.e., to indicate the fact that economic operators are entitled to legal remedies (appeals) under all stages of public procurement procedures, starting from the announcement of the call for bids.
The incompleteness of appeals is the main reason for their denial. This means that although the economic operator lodged an appeal, it failed to comply with the obligation set forth in Article 212, paragraph 2 from the PPL, which stipulates that the economic operators must present evidence that they have settled the fee for the initiation of appeal procedure whose amount, depending on

the value of the public procurement contract in question, is stipulated under Article 229 from the PPL. Moreover, certain appeals that were denied on the grounds of incompleteness, were actually not developed in compliance with the PPL, which means that they did not contain data stipulated and were not amended even after the expiration of the deadline granted by SCPPA.

The fact that a number of appeals were denied on the grounds of incompleteness that implied unsettled fee for initiation of the appeal procedure cannot be considered "ignorance" on behalf of economic operators concerned, but rather implies their change of mind and decision not to initiate the appeal procedure. On the contrary, denial of appeals on the grounds of being inadmittable indicates the fact that some economic operators are not well informed on their rights related to legal remedies (appeals) available under all procedure stages and concerning the reasons set forth in Article 216 from the PPL. Ignorance of these rights, as stipulated in paragraph 4 of the said Article, provides grounds to deny the appeal's submission as being inadmittable.

In the first six months of this year, a total of 70 appeals were denied, which account for 13.9%.

Decisions to reject appeals

Decisions to reject appeals account for 41% of decisions taken by the SCPPA. Most common reason for appeal rejection is that the second-instance commission believed that the contracting authority in question has performed the bid-evaluation in an appropriate manner and that the appeal allegations that dispute the bid-selection decision or procedure annulment decision are not reasonably grounded. In that, appeals often concern shortcomings made by the contracting authority in the bid-evaluation process, or that the selected bid was not the most favourable or was deemed unacceptable.

Decisions to approve appeals

As was the case with denied appeals, this type of decisions was also subjected to in-depth analysis in order to inform the contracting authorities on the most common

reasons for approval of appeals lodged by economic operators, but also because of the high share of approved appeals.

When approving the appeals, SCPPA takes decisions by means of which:

- it revokes the decision taken by the contracting authority and orders re-evaluation of bids; and
- it annuls the decision for selection of the most favourable bid and thereby annuls the procurement procedure.

The provisions (Article 220, paragraph 1, line 4) from the PPL that govern the types of decision that SCPPA can take in regard to appeals lodged do not stipulate in detail the cases when decisions on the selection of the most favourable bid can be revoked. The "revoking" of public procurement procedures is not clearly stipulated under the Law on General Administrative Procedure, which in addition to the PPL also governs the procedures led by SCPPA. Due to lack of specific explanation in the relevant legislation, there is no clear distinction between cases when the decisions can be revoked and cases when they can be annulled.

Nevertheless, the analysis of decisions to approve appeals lodged by economic operators shows that SCPPA takes decisions to revoke the selection decision of the contracting authorities in cases when no significant violations to the PPL have been determined. In other words, decisions to revoke the decision of the contracting authorities are taken when the repeated bid-evaluation on behalf of the contracting authority can result in elimination of the shortcomings made in the course of first decision-taking by the contracting authority.

Reasons for revoking decisions taken by the contracting authorities are various, and include the following:

- the contracting authority has performed improper bid-evaluation;
- the contracting authority has made a procedure violation by excluding the entity that lodged the appeal from the bid-evaluation on unjustified grounds;

- the selected bidder has inappropriately filled the bid application;
- the selected bidder has not submitted evidence on the technical and professional eligibility as requested in the tender documents;
- the bid selected as the most favourable was deemed unacceptable, by means of which the contracting authority has violated the PPL; or
- the contracting authority has erroneously applied the material law, i.e., the PPL.

Decisions taken and procedures implemented by the contracting authorities are annulled in cases when it has been determined that the contracting authority in question violated the PPL, i.e., when it has been determined that the shortcomings identified in the procedure could not be eliminated in the second round of bid-evaluation. Decisions to annul procurement procedure and/or selection decisions are taken in cases when major violations of the rules governing the public procurement procedure implementation have been determined, when the actual situation was improperly and incompletely determined, and when the relevant material law was not applied properly. In general, these cases represent major violations of the law, as stipulated under Article 210 from the PPL.

It is interesting to note that, although Article 231 from the PPL stipulates that the procedures led by SCPC will also apply the provisions from the Law on General Administrative Procedure, SCPPA has never taken a decision to annul the decision appealed and thereby resolve the matter itself. This is particularly true in cases when the actual situation was improperly determined, for example the contracting authority performed an improper bid-evaluation.

Decisions to reject/deny applications to continue the procedure

As for applications to continue the procedure, which implies signing the public procurement contract despite the fact that the procurement procedure in question has been appealed, SCPPA has denied or rejected them.