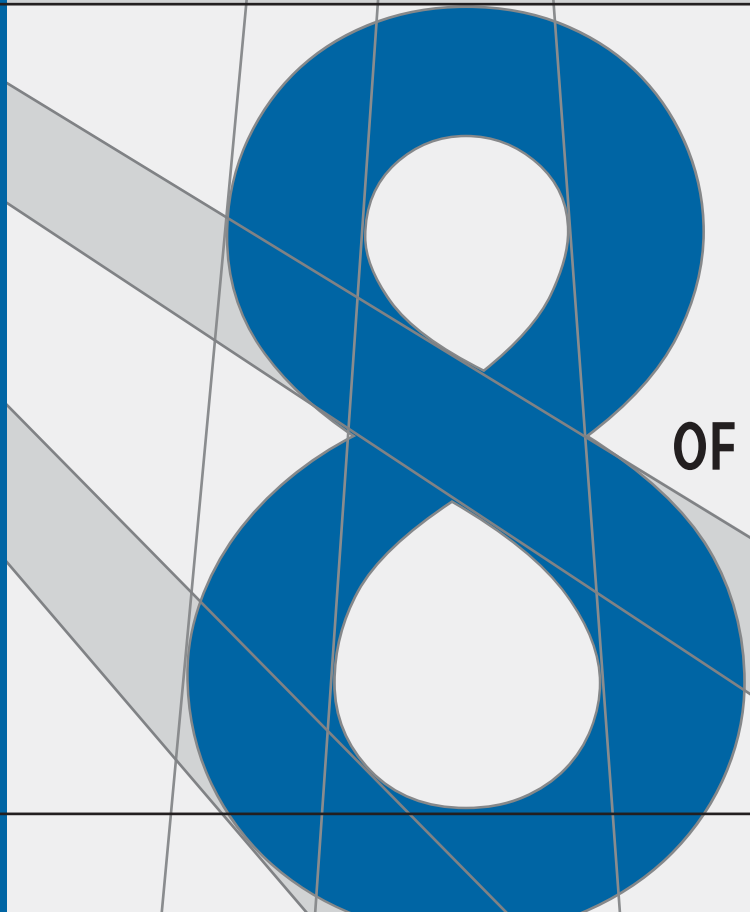

FOUNDATION OPEN SOCIETY INSTITUTE MACEDONIA
ФОНДАЦИЈА ОТВОРЕНО ОПШТЕСТВО МАКЕДОНИЈА

Center for Civil Communications
Центар за граѓански комуникации

MONITORING
THE IMPLEMENTATION OF PUBLIC PROCUREMENTS
IN THE REPUBLIC OF MACEDONIA

Eighth quarterly report

2010

Monitoring the implementation of the public procurement procedures in the Republic of Macedonia
Eighth quarterly report

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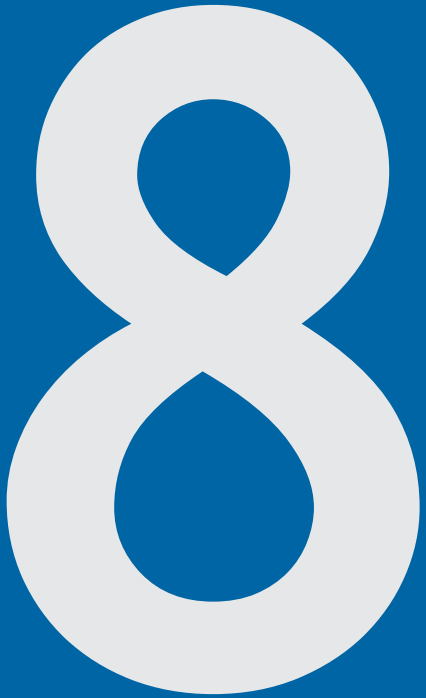


QUARTERLY REPORT
ON MONITORING THE IMPLEMENTATION
OF PUBLIC PROCUREMENTS
IN THE REPUBLIC OF MACEDONIA

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	Centre for Civil Communications

KEY FINDINGS

- Eligibility criteria for companies to participate in tender procedures limit competition and favour certain bidders.

- In almost half of the procedures monitored, only two companies submitted bids, which indicates continued trend on poor competition.

- Inappropriate elements are used to evaluate bids submitted. Bid-ranking on the basis of delivery and payment deadlines and application of assessment elements that pertain to eligibility criteria continue to raise concerns in the field of public procurements.

- In some cases, tender specifications are used to favour certain bidders. Some contracting authorities take actions in violation to Article 36 from the Public Procurement Law and by means of product requirements determine the procurement outcome in advance.

- Problem related to tender annulment is only apparently decreased. Although the monitoring sample was marked by reduced number of annulled procedures, according to the electronic system's data this number if is on the rise.

- Value of contracts signed under direct negotiations without announced call for bids continues to grow. Trend on increased public spending by means of direct negotiations was also noted in the fourth quarter of 2010, as was the case throughout the year, and includes contracts signed in the total value of 26.3 million EUR, which is by 3.4 million EUR higher compared to 2009 figures.
- Institutions failed to achieve the law-stipulated target on e-auctions. Instead of the law-stipulated

30%, in 2010 e-actions were implemented in only 14.8% of the total number of procurements.

- Transparency of institutions is raised. Number of public procurement notifications has increased, both in terms of procedures monitored and the EPPS. Nevertheless, some institutions prefer secrecy to transparency.

- Most contracting authorities complied with the law-stipulated deadline on taking the decision on the selection of the most favourable bid.

- Contracting authorities continue the practice of not submitting detailed notifications on selection decision to companies.

- Trend on reduced requirements for tender document fees.

- Bank guarantees for bid submission were required in 40% of procedures monitored, which is on the same level compared to the previous quarter.

- Number of appeals approved by the State Commission on Public Procurement Appeals increased from 25.9% in 2009 to 31.1% in 2010, as a share of the total number of appeals lodged. Increased is also the number of SCPPA decisions to fully annul the procedures, which suggests that contracting authorities acted in violation to PPL.

GOALS AND METHODOLOGY

From November 2008, the Centre for Civil Communications 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 the 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.

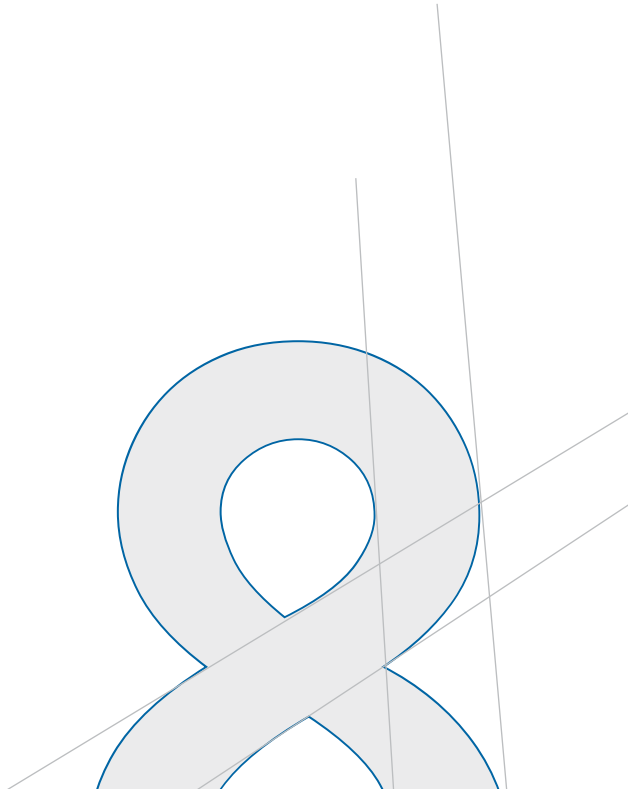
The analysis of the public procurement process in the Republic of Macedonia was performed based on the monitoring of randomly selected sample of public procurement procedures (40 per quarter). Monitoring activities start with the publication of calls for bids in the "Official Gazette of the Republic of Macedonia:, followed by attendance on public opening of bids and data collection on the procedure course, and use 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 of bids was performed in the period October -December 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 most 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 fourth 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 in the municipalities Kumanovo, Tetovo, Gostivar, Kriva Palanka, Veles, Tearce and by the public enterprises established by them.

For each quarter, in addition to the monitoring findings, the report also includes public procurement-related statistical data, analyses and findings covering the whole 2010, as well as findings from the analysis of appeals and procedures initiated in front of the State Commission on Public Procurement Appeals for 2010.

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

> **Eligibility criteria for companies to participate in tender procedures limit competition and favour certain bidders.**

Some calls for public procurements limit rather than encourage competition among companies. This problem was identified as part of the monitoring process and is based on the institutions frequent practice to define detailed eligibility criteria for the companies as part of their calls for bids and tender documents, which can be considered discriminatory. These are the assessment criteria for companies' economic and financial status, as well as their technical or professional ability. In general, they define the minimum annual revenue or profit that the company should have generated in order to participate in the tender procedure, as well as the number, education background and experience of the company's staff, the amount of previous contracts signed with other suppliers, standards for the quality assurance systems, and like. Such criteria are developed under the auspices that they assist institutions in selecting stable companies that are able to provide quality performance of public procurement contracts. Nevertheless, the monitoring process reveals that some contracting authorities misuse these criteria and apply them as mechanism to limit competition among companies and favour big suppliers, and even favour specific suppliers. The monitoring sample recorded several cases of such practice. One state educational institution procured fuels and motor oils, and as minimum criteria for assessing economic operators' technical and professional ability required them to dispose with more than 50 petrol stations throughout the Republic of Macedonia (and at least one in the following towns: Skopje, Kumanovo, Tetovo, Gostivar, Debar, Struga and Kicevo), as well as the possibility for electronic card payment. Quite understandably, only one oil distribution company submitted its bid for this procurement and the contract was signed with this company.

As part of another public procurement for developing irrigation systems study, one line ministry required the bidders to meet numerous requirements. The long list of eligibility requirements raises the question whether the criteria were defined with a view to assesses eligibility of bidders or provided description of a specific company. Notably, the call requires economic operators to have employed three civil engineers, at least two of them to have more than 10 years of service and "A" type certificate on project design in compliance with the Construction Law, two engineers profiled in hydro technology, at least one of them to hold "A" type certificate in compliance with the Construction Law. Moreover, the economic operators were required to have developed technical documents for at least one irrigation system covering an area of more than 3,000 hectares. The call for bids included detailed specification of the project team tasked to develop the study in question. Notably, the team should be composed of: one project coordinator, who holds a PhD in technical sciences; one engineer profiled in hydro technology; at least three civil engineers experienced in irrigation and water supply system design, two of them profiled in hydro technology and one in construction; at least one electrical engineer; at least one mechanical engineer specialized in pumps and pump distances; at least one geology engineer specialized in geology engineering or geo technology; at least one geodesy engineer; at least one agronomist and other team members as follows: environmental experts, IT engineer and like (at least two employees). The list of requirements that bidders were to fulfil stipulated that the project coordinator should be a full-time employee at the economic operator for at least 2 years and should have working experience of at least ten years. Individual experience of other expert team members must not be shorter than 3 years. Only one company met these requirements, and the ministry signed the contract with that company.

Also, only one company submitted a bid in the public procurement procedure for state building lighting project. The eligibility criteria required the bidders to have annual turnover of 40 million MKD, at least 3 contracts signed in the last 5 years in amount exceeding 5 million MKD,

declaration on the number of employees, their expert qualifications and CVs, at least 10 employees profiled in electricity engineering, 3 persons holding university degrees in the field of electricity engineering, at least one of them should hold "B" type certificate for construction engineer in compliance with the Construction Law; and "C" type license for contractors in compliance with the Construction Law.

In addition to the detailed description of the eligibility criteria for companies, the procedures monitored provided the conclusion that these criteria were also defined with a view to favour big companies. Notably, the minimum requirements that bidding companies should fulfil to participate in the service procurement for electricity installations for crossroad lights and signals include annual revenue in the amount of at least 700,000 EUR; the stipulation that the supervisor of works should hold university degree in electricity engineering and should have at least 8 years of working experience in the said field, while the deputy chief engineer should hold university degree in traffic engineering and have working experience of at least 6 years. These requirements raise the question on how did the procurement-making institution established the need for 8 or 6 years working experience respectively, and how it arrived to the conclusion that such experience is relevant for the quality performance of the given procurement. Given the requirements stipulated, only two big construction companies submitted bids for the procurement procedures, but not other companies that operate in the lighting and signalization business.

The fact that criteria on assessing companies' ability are of vital importance for competition was confirmed by another tender procedure, where companies were required to have implemented several ICT standards. In that two bids were submitted, and the company whose bid was by 35% cheaper was excluded from the bid-evaluation procedure on the grounds of non-accepting the certificates on implemented ICT standards for the subcontracting company. Following the appeal lodged by the disqualified company, the decision taken by the contracting authority was confirmed by the State Commission on Public Procurement Appeals. Therefore,

unclear remains how subcontracting companies can compensate shortcomings of bidding companies in regard to employees' working experience, capital requirements and other certificates and confirmations, but cannot do so in regard to implemented ICT standards.

All these examples of unreasonably defined eligibility criteria for companies to participate in tender procedures unambiguously answer the question on the small number of bidders under many public procurement procedures. Inadequate, tendentiously detailed, and – in some cases – high eligibility criteria for the companies to participate in tender procedures provide serious obstacles to greater competition among them.

Recommendation: Supervision should be established also in terms of call for bids and tender documents, in order to timely prevent contracting authorities to misuse eligibility criteria for companies to participate in tender procedures as mechanism to limit competition and favour certain bidders.

> **In almost half of the procedures monitored, only two companies submitted bids, which indicates continuous trend on poor competition.**

In 45% of procedures monitored in the fourth quarter of 2010 bids were submitted by two companies, one company or no bids were obtained. In that, only one bid was obtained in as high as 22.5% of procedures monitored. Poor competition was noted in procedures implemented by central and local level institutions. Annual average of procedures from the monitoring sample where there were small number of bidders accounts for 38% (in the first quarter, procedures with small number of bidders accounted for 20%, in the second quarter 40%, in the third

quarter 47.5% and in the fourth quarter 45%). This trend is worrying, given that competition in public procurement procedures is expected to result in lower prices and better quality of procured goods, services and works, i.e., to obtain the best value for the money spent.

The problem related to poor competition under many public procurement procedures is a serious issue whose identification requires a more detailed analysis. Notably, current practices include analysis of competition by determining the average number of bidders in tender procedures. If this concept was applied by the present monitoring, the problem related to poor competition in a number of public procurements would be undermined. Namely, the average number of submitted bids per procurement in the annual monitoring sample accounts for 5 and corresponds with the average share of participants in open calls for contract-awarding and in the calls for bids with prior announcement as calculated by the Bureau for Public Procurements and indicated in its 2009 Annual Report. Such unrealistic image is created by tenders with extremely high number of bidders. These tenders usually imply several procurements lots for purchase of different types of goods and services, in particular tenders related to medical procurements, as well as procurements pertaining to strong competition sectors such as IT equipment, office supplies and like.

Recommendation: This problem should be addressed with improvements to all critical points in the public procurement system that discourage the business sector and prevent competition.

- **Inappropriate elements are used to evaluate bids submitted. Bid-ranking on the basis of delivery and payment deadlines and application of assessment elements that pertain to eligibility criteria continue to raise concerns in the field of public procurements.**

This problem, as continuously reiterated in the monitoring findings, was also noted in the last quarter of 2010, when contracting authorities often used the elements "delivery

deadline", "payment deadline" and "payment manner" to evaluate bids submitted. The fact that these elements can be misused to favour certain bidders was confirmed by two examples given further in the text, which included the delivery deadline as bid-assessment criteria. Notably, the criterion "economically most favourable bid" was used in one of the procedures monitored and related to procurement of IT equipment, where the price criterion was allocated 70 points and the delivery deadline was allocated with as high as 30 points. In the bid-assessment process, the contracting authority selected the bid whose price was by 16% more expensive on the account of the fact that the company in question committed to deliver the computers "immediately", whereas the company that submitted the cheaper bide committed to deliver the procurement good within a deadline of "1 day". The key question raised here is whether the several-hour difference between "immediate delivery" and "delivery within 1 day" was a justified reason for additional public spending and whether members of the committee on public procurement would have taken the same course of action in case they purchased equipment for personal needs and paid from their own pocket.

In the second case, the delivery deadline for procurement of document-generating software was allocated a maximum of 5 points. Worrying is the fact that the contracting authority, which defined the maximum points for the criterion on delivery deadline, implied it does not have time to wait; however it took the selection decision beyond the legally-stipulated deadline, and waited for another month to sign the public procurement contract, although no appeals were lodged against the selection decision.

Despite the unambiguous legal solutions and instructions issued by the Bureau of Public Procurements to contracting authorities, continuous is the practice of bid-ranking pursuant to elements which should have been used to assess bidders' eligibility, instead of the bids submitted. These elements include technical equipment, staff requirements, reference lists and bidder's competence, and were in general allocated 10 to 20 points. By using these elements of bidders' eligibility, advantages are created for bigger companies, which per se do no guarantee quality and financially favourable bid, but rather endanger the

position of small and medium-sized enterprises whose products and services are of good quality.

The monitoring sample included procurement where not a single point was allocated to the price element of the bids submitted. It was a matter of air ticket procurement, where the criterion "economically most favourable bid" encompassed number of installed reservation lines in the AMADEUS system – 25 points, passenger transportation from Skopje to the Airport "Alexander the Great" and return – 25 points, payment deadline for tickets reserved and purchased – 25 points, number of employees authorized to use the global system of reservations AMADEUS – 25 points. The fact that this was not procurement where the price could not be determined because of the procurement's nature was confirmed by other procedures monitored where the criterion "lowest price" was used to purchase air tic ets.

All these examples unambiguously point to the fact that there is still room to improve the manner in which national and local level institutions use the criteria for the selection of the most favourable bid.

Recommendation: Bureau of Public Procurements should develop recommendations and guidelines for the contracting authorities in order to provide a unified and precise definition of selection criteria and secure their adherent application.

- **In some cases, tender specifications are used to favour certain bidders. Some contracting authorities take actions in violation to Article 36 from the Public Procurement Law and by means of product requirements determine the procurement outcome in advance.**

Contrary to Article 36 from the Public Procurement Law, some institutions define tender specifications in reference to specific products that can be purchased only from a specific company. In that, they directly violate the principle of equal treatment and non-discrimination of bidders.

Hence, a company that participated in the procurement procedure for sanitary vehicle indicated that vehicle

specifications were copy-pasted and included same expressions and terminology used by the favoured bidder. Concerns were raised that the procurement was agreed in advance, and the company that raised these concerns explained that delivery deadline of 15 days is too short for such specialized vehicles and that tender documents were taken by 13 companies, but bids were submitted only by two.

As part of a different procurement procedure, one company that participated therein stated that tender specifications favoured a particular bidder by defining the procurement lots and equipment specifications, which should otherwise be leased with a purpose to use purchased analysis agents and materials. The company claimed that specifications referred to a particular type of analysis agent which could be offered only by the favoured company.

This monitoring period was marked by the fact that companied started to lodge appeals in front of the State Commission for Public Procurement Appeals against tender documents, which was not the case before. Notably the monitoring activities indicated that as part of the interviews conducted with economic operators they complained on discriminatory tender documents and specifications, but rarely used these grounds to lodge appeals in front of SCPPA.

Recommendation: Further efforts are needed to encourage economic operators to lodge appeals in front of SCPPA whenever they identify that technical specifications refer to specific products or bidders. Timely and argument-based appeals can contribute to the development of a better public procurement system.

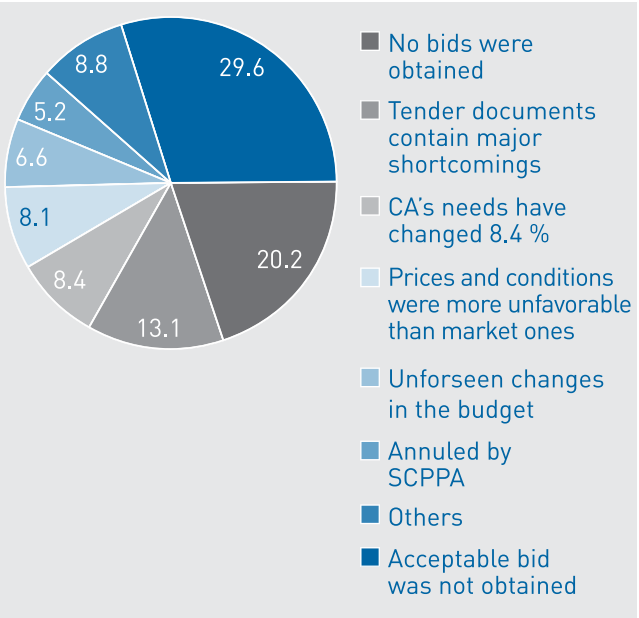
> **Problem related to tender annulment is only apparently decreased. Although the monitoring sample was marked by reduced number of annulled procedures, according to the electronic system's data this number is on the rise.**

17.5 % of procedures from the monitoring sample were annulled in the last quarter of 2010, which is the lowest

share of annulled procedures recorded compared to total number of procedures implemented throughout the year. In that, it should be noted that all annulment decisions were taken by the contracting authorities, i.e., there were no annulment decisions taken by SCPPA. The high number of annulled public procurements continues to raise concerns, which was confirmed by data from the Electronic Public Procurement System. EPPS data are analysed on quarterly basis, together with the analysis of the monitoring sample. Notably, in the fourth quarter of 2010 (EPPS browsing exercise ended on 01.02.2011), 594 decisions were adopted to annul public procurement procedures from 2010. (In the same period, as high as 884 decisions were submitted to the system, but majority of them are delayed notifications on annulled tenders from 2008 and 2009, but they were not taken into account by the present analysis in order to provide relevant data on annulled procedures for 2010 only.) The figure of 594 annulled procedures in the fourth quarter of 2010 represents an increase of 51.9% compared to figures from the same quarter in 2009, when a total of 391 decisions were taken to annul public procurement procedures.

Considering the gravity of the problem as regards the annulled procedures, the present monitoring pursued a more detailed statistical analysis on the reasons for annulling public procurements in the fourth quarter of 2010. It seems that most commonly referred legal grounds for procedure annulment, as used in 29.6% of cases, indicated that no acceptable bid was obtained. This implies that bids were submitted, but in the contracting authorities' opinion they did not meet the requirements stipulated by tender documents and technical specifications or that they did not meet all criteria, conditions and eligibility requirements for bidders. The second most commonly used reason for procedure annulment, as used in 20.2% of cases, indicated that no bids were obtained, while in 13.1% of annulled procedures it was assessed that tender documents contained major shortcomings, which is an exclusively subjective error on the part of contracting authorities.

Reasons for public procurement annulment in the fourth quarter of 2010
(as share of total number of 594 annulled procedures)



Annual statistics indicates that a total of 1347 procedures were annulled in 2010, whose share in the total number of announced open calls for public procurements (7091) accounts for 19%. Given the contracting authorities' late submission of notifications to EPPS, this share might be even higher. Therefore, it can be expected the share of annulled procedures to exceed 19.3% as recorded in 2009 and calculated on the basis of detailed and thorough EPPS browsing exercise. In that, one should note that the number of annulled procedures in 2009 (1329) include all procedures annulled in that year and published in the system in the period from 01.01.2009 to 01.02.2011.
As for monitoring data for whole of 2010, the average share of annulled procedures in all four quarters accounts for 21.25%.

Recommendation: Given that the problem related to procedure annulment has persisted for a longer period and raises concerns on the abuse of existing legal possibilities, the legislation should be more restrictive and rigorous in regard to grounds for procedure annulment,

including sanctions for cases of malpractice, and thereby would contribute to operationalization of stipulated legal principles on public procurement efficiency and cost-effectiveness.

- **Value of contracts signed under direct negotiations without announced call for bids continues to grow. Trend on increased public spending by means of direct negotiations was also noted in the fourth quarter of 2010, as was the case throughout the year, and includes contracts signed in the total value of 26.3 million EUR, which is by 3.4 million EUR higher compared to 2009 figures.**

Despite the fact that this type of procurement procedures do not secure minimum transparency and should be used in rare and exceptional cases, the value of contracts signed by means of direct negotiations without prior announced call for bids continues to increase. In the fourth quarter of 2010, the value of these so called direct contracts accounted for 424,564,737 MKD, i.e., around 7 million EUR, which is by 38.7% higher compared to the same period last year.

Contracts signed under direct negotiations without prior announcement of call for bids (in MKD)

	1.10.2009 - 31.12.2009	1.10.2010 - 31.12.2010	Difference
Number of contracts	205	171	-16,6%
Contract value	306.106.998	424.564.737	+38,7%

Source: Electronic Public Procurement System (01.02.2011).

Trend on increased signing of such contracts was also noted on annual level, although 2010 data might be not final yet, since contracting authorities submit contract notifications with major delays. Hence, the value of contracts signed by means of negotiations and without prior announcement of call for bids account for 1.6 billion MKD, or 26.3 million EUR in 2010, which is by 3.4 million EUR higher compared to 2009 figures.

Contracts signed under direct negotiations without prior announcement of call for bids (in MKD)

	1.1.2009 - 31.12.2009	1.1.2010 - 31.12.2010	Difference
Number of contracts	1015	697	-31,3%
Contract value	1.410.354.092	1.620.808.267	+14,9%

Source: Electronic System for Public Procurements (01.02.2011) and BPP's Annual Report

This comparative analysis provides the conclusion that in 2010 contracting authorities signed smaller number of such contracts, but in significantly higher value. This trend raises concerns due to the lack of transparency, the possibility for subjective behaviour on the part of main participants in the procedure, and absence of control mechanisms and opportunities for corruptive practices.

Recommendation: Serious reconsideration should be made with a view to limit the possibility on the use of negotiation procedures without prior announcement of call for bids by means of amendments to the Public Procurement Law.

> **Institutions failed to achieve the law-stipulated target on e-auctions. Instead of the law-stipulated 30%, in 2010 e-actions were implemented in only 14.8% of the total number of procurements.**

Public Procurement Law stipulates that in 2010 all institutions shall be obliged to use e-auctions for at least 30% of the estimated value of procurements. This is an IT-based process, as part of which companies compete in submitting the lowest price for better quality.

In quarterly terms, e-auctions were most frequently by the institutions in the fourth quarter of 2010. 411 procedures were implemented and ended in e-auctions, which account for 24.6% of public procurement procedures and indicate a major improvement compared to the previous period, but this share is insufficient to attain the law-stipulated minimum, even for a given quarter. On annual level, institutions implemented e-auctions as part of 1049 procedures, which account for 14.8% of total number of procurements. Given the fact that low threshold for e-auctions in 2011 is set at 70%, concerns are raised as to how will this target be attained knowing that the 30% target set for 2010 remained unattained.

Underperformance was noted in regard to application of e-procurements as well. On annual level, the number of procurements implemented via the electronic system was 431, or around 6.1 % of total number of procurements. It should be noted that the law currently does not impose obligations for contracting authorities to use e-procurements.

Recommendation: Given the advantages brought by the use of e-auctions and e-procurements, such as public saving and reduced risks of malpractices, the contracting authorities should not act contrary to the public interest. Failure to comply with legal obligations in this regard is not subject to sanctions, which should be immediately introduced in the legislation. At the same time, due to low utilization rate of e-procurements, law-stipulated targets should also be introduced. In that way, EPPS application will not depend on the contracting authorities' will, which is obviously lacking, despite the advantages provided by the system.

- **Transparency of institutions is raised. Number of public procurement notifications has increased, both in terms of procedures monitored and the**

EPPS. Nevertheless, some institutions prefer secrecy to transparency.

Contracting authorities demonstrated greater responsibility in regard to complying with their legal obligation on submitting data related to contracts signed. As part of the monitoring process, track record in transparency was particularly noticed among municipalities and local level public enterprises, given that they did not submit notifications only on decisions taken to select the best bid, but also submitted copies of bid-evaluations and tender documents.

At the same time, novelties introduced by the Bureau of Public Procurements in the electronic system with regard to prevent contracting authorities to announce new calls for bids if they have not submitted notifications on contracts signed for already completed public procurements, started generating results. In the last months, the Electronic Public Procurement System was burdened with notifications on contracts signed for procurements in 2008 and 2009. Hence, the number of announced notifications on contracts signed in the fourth quarter of 2010 accounts for 3905, which represents an increase by 79% compared to previous quarter, when a total of 2194 notifications were submitted.

This confirms the fact transparency is a process that should be pursued continuously and by all means available. The fact that the battle is not won yet is demonstrated by data indicating that most contracting authorities (line ministries that publish large number of calls for bids) fail to submit notifications on the procurement procedures' outcome. This primarily refers to the Ministry of Defence, the Ministry of Education and the Ministry of Health, which in 2010 announced more calls for public procurements compared to the number of notifications submitted on contracts signed or procedure annulments.

Additional concern related to the legally guaranteed transparency of public procurements is the fact that in the fourth quarter of 2010 three institutions prevented CCC monitors to attend public opening of bids. This is by far the biggest attempt to prevent monitoring of public procurements in the last two and half years, from

the project's onset. In that, the three institutions that prevented monitoring of public opening of bids provided different arguments for their decisions.

Representatives from the General Secretariat of the Government of the Republic of Macedonia claimed that confidential information will be disclosed as part of the public opening of bids. Explanations indicating that in compliance with the PPL opening of bids are public events and can be attended by random citizens and that confidential information are not disclosed were to no avail.

The Ministry of Environment and Spatial Planning referred to an old article from the PPL, according to which e-auctions do not imply public opening of bids, although this provision was revoked in late July 2010. Unclear is how representatives from this ministry are not informed on the amendments made to the law four months after they entered into effect.

In the third case, the State University in Tetovo, without making changes to the call for public procurements, informed the CCC monitor that its arrival to Tetovo will be to avail and that opening of bids was postponed for an unknown period. In expectation of the new date for the public opening of bids for this tender, calls and possible amendments thereto within the EPPS were continuously monitored. Nevertheless, such change to the call in question was not announced, and in the telephone conversation with the representatives from the University's committee on public procurements we were informed that the public opening of bids was organized in the meantime. This is contrary to the Public Procurement Law, which stipulates that any changes to the open call or to tender documents must be publicly announced not later than 6 days prior to the opening of bids. Therefore, the University cannot schedule and cancel scheduled opening of bids without prior changes to the tender call, and thereby avoid the presence of CCC's monitor.

Recommendation: Competent institutions should continue work on awareness rising among contracting authorities in regard to their obligation on transparent, accountable and responsible operation.

> **Most contracting authorities complied with the law-stipulated deadline on taking the decision on the selection of the most favourable bid.**

The period for decision-taking on the selection of the most favourable bid cannot exceed the period from the call announcement to the opening of bids, which was complied with by 77.5% of institutions from the monitoring sample. Other 22.5% continued to behave as if this obligation does not exist and continued practices on delaying decision-taking in the process. As part of the monitoring sample for the fourth quarter in 2010, deadline for decision-taking was breached from 2 to as high as 56 days. Undoubtedly, stipulating legal obligations whose non-compliance will not imply sanctions is not an efficient decision for some institutions in Macedonia. It should be reiterated that most contracting authorities form the monitoring sample that failed to comply with the legal solution include line ministries and governmental agencies, contrary to municipalities and local level public enterprises which complied with law-stipulated deadlines.

The importance of the deadline for decision-taking originates from the practice on delayed tender procedures which results in increased uncertainty for companies and provides possibilities for illegal actions in order to speed the decision-taking process on the selection of the most favourable bid.

Recommendation: Sanctions should be introduced for failure to comply with the deadlines on decision-taking for the selection of the most favourable bid. The need for such legal interventions is not raised only by the behaviour on the part of contracting authorities, but is also based on experiences from other European countries.

> **Contracting authorities continue the practice of not submitting detailed notifications on selection decision to companies.**

Despite all previous indications, the practice that implies violation of obligations stipulated under PPL and requires contracting authorities to explain the reasons for the

decision taken on the selection, on the rejection of certain bid, as well as explanations on why an acceptable bid was not selected as the most favourable bid continues. Companies often receive notifications that include only information on the bid selected as the most favourable one. It should be reiterated that absence of detailed rationale creates justified doubts with the companies in regard to subjective bid-assessment, and does not provide legal elements for unsatisfied tender participants to appeal the selection decision.

Recommendation: Violation of legal obligations on the part of contracting authorities, as well as tolerance for such occurrences on the part of competent institutions reiterates the need for relevant sanctions to be introduced in the legislation.

> **Trend on reduced requirements for tender document fees.**

Compared to the situation when the public procurement monitoring started in 2008, major progress was noted in regard to reduced trend on tender document fees. In the last quarter of 2010, fees for tender documents were imposed in only 27.5% of procedures monitored. In that, tender document fees were in the range of 500 to 2000 MKD, which implies reduction of fees as well. Nevertheless, considering the broad availability of electronic means, fact is that positive trends should end in total abandonment of fees for tender documents and securing access to documents on the Electronic Public Procurement System and websites of relevant contracting institutions. In cases where this is not possible, the rule applied by other countries should be pursued: companies should be given immediate insight in the documents so as to assess whether they want to participate in the tender prior to payment of tender document fee.

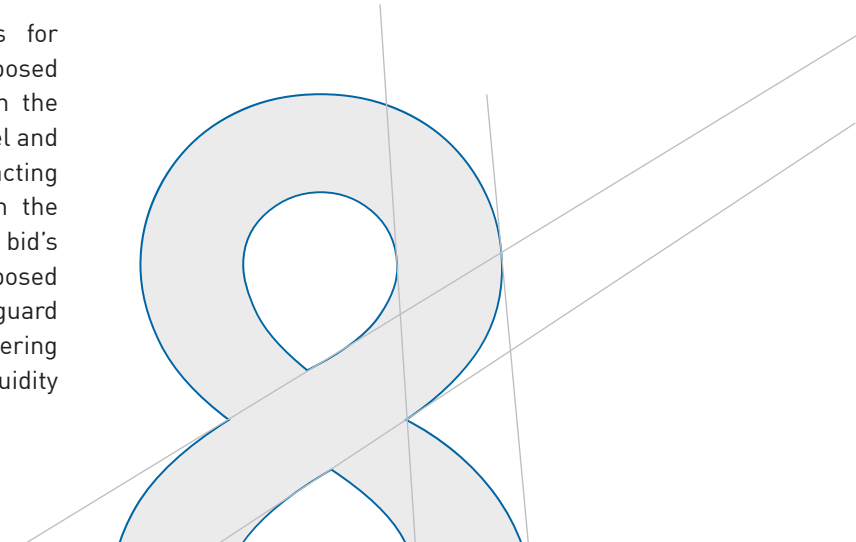
Recommendation: Number of tender documents published in the EPPS and tender documents for which fees are not imposed continues to increase. BPP should

continue with its practice on instructing and preventing contracting authorities that impose high fees for tender documents which are inproportionate to the actual costs incurred.

> **Bank guarantees for bud submission were required in 40% of procedures monitored, which is on the same level compared to the previous quarter.**

In the last quarter of 2010, bank guarantees for submitting bids in the monitoring sample were imposed in 40% of tender procedures, as was the case in the previous quarter. This share is higher on annual level and accounts for almost 42%. Considering that contracting authorities frequently require bank guarantees in the law-stipulated maximum threshold of 3% from the bid's value, there still a need to reduce these costs imposed to the companies. Although bank guarantees safeguard contracting authorities from unserious bids, considering the low competition in tenders and deteriorated liquidity indicated by the companies, the trend on reducing bank guarantee requirements is assessed as positive.

Recommendation: Bank guarantees should not be included as formal requirements for public procurement participation, whereas in the cases when they are required, efforts should be made to set the guarantees in lower value from the law-stipulated maximum of 3 %.



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

> **Number of appeals approved by the State Commission on Public Procurement Appeals increased from 25.9% in 2009 to 31.1% in 2010, as a share of the total number of appeals lodged. Increased is also the number of SCPPA decisions to fully annul the procedures, which suggests that contracting authorities acted in violation to PPL.**

The analysis of decisions taken by SCPPA in the period January - December 2010, showed that companies lodged a total of 951 appeals, which is almost identical almost equals with 2009 figures, when a total of 960 appeals were lodged. Decisions taken by SCPPA indicate that in 2010 the number of approved appeals has increased. Notably, SCPPA has approved 296 appeals lodged by companies, which accounts for 31.13% of the total number of appeals lodged.

In the period January-December 2010, SCPPA reconsidered 951 appeals, and took 860 decisions (conclusions)[1], as follows:

Type of decision	Number of decisions	%
Termination/ discontinuation of appeal procedure	123	12,93%
Rejected appeals	405	42,59%
Denied appeals	127	13,35%
Approved appeals	296	31,13%
Total in 2010	**951**	**100%**

[1] The number of decisions (conclusions) taken upon appeals lodged (860) is smaller compared to the number of appeals lodged (982) due to the fact that in certain procedures the single decision taken concerned several appeals for the same procedure. Notably, 122 decisions were taken for more than one appeal.

In 2010 the share of appeals approved is by 5.19% higher compared to 2009 figures, when SCPPA approved 249 appeals lodged by economic operators which accounted for 25.94% of the total number of appeals lodged.

In that, the analysis also showed an increasing trend of annulled procedures. In 2010, the procedures annulled accounted for 47.29% (140 procedures annulled) of the approved appeals, whereas in 2009 they accounted for 39.76% (99 procedures annulled). In 2010, the procedures revoked accounted for 52.71% (156 procedures revoked) of the approved appeals, and in 2009 they accounted for 60.24% (150 revoked procedures).

Considering the fact that decisions to annul the procedure 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, when the relevant material law was not applied properly, and when major violations to the PPL (Article 210) have been determined, the increase of 7.53% implies that contracting authorities still make failures and other major violations to PPL.

	Decisions to approve the appeals taken in 2010	
	Number of decisions	%
Revoked decision	156	52,71
Annulled procedure	140	47,29
Total approved appeals	**296**	**100,00**

	Decisions to approve the appeals taken in 2009	
	Number of decisions	%
Revoked decision	150	60,24
Annulled procedure	99	39,76
Total approved appeals	**249**	**100,00**

The present analysis targeted SCPPA decisions to terminate/discontinue the appeal procedure, SCPPA

decisions to reject the appeals lodged by the economic operators, SCPPA decisions to deny the appeals, SCPPA decisions to approve the appeals, as well as the decisions by means of which SCPPA denied or rejected the applications to continue the procedure.

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.

In 2010, decisions to terminate or discontinue the appeal procedure were taken in 12.93% of the total number of appeals lodged.

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 inadmissible 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 inadmissible.

In 2010, a total of 127 appeals were denied, which accounts for 13.35% of total appeals lodged.

Decisions to reject appeals

Decisions to reject appeals account for 42.59% 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 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 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.

Decisions to approve/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, in 2010 SCPPA has either denied or rejected them.

	Decisions taken as regards the applications to continue the procedure in 2010	
	Number of decisions	%
Approved appeals	0	0
Rejected appeals	24	77,41
Denied appeals	7	22,59
Total of appeals lodged	**31**	**100,00**

	Decisions taken as regards the applications to continue the procedure in 2009	
	Number of decisions	%
Approved appeals	3	8,82
Rejected appeals	20	58,83
Denied appeals	11	32,35
Total of appeals lodged	**34**	**100,00**