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

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ABBREVIATIONS

BPP – Bureau of Public Procurements

SAO – State Audit Office

SCPPA – State Commission on Public Procurement Appeals

CA – contracting authorities

EO – economic operators

EPPS – Electronic Public Procurement System

EU – European Union

LPP – Law on Public Procurements

RM – Republic of Macedonia

CCC – Centre for Civil Communications

KEY FINDINGS AND RECOMMENDATIONS

- **In 2013, competition in public procurements remained low. Average number of bids submitted in 2013 tender procedures monitored (total of 160) is 2.6 and more than one third of tender procedures received only one bid.**

Recommendation: Increasing competition in tender procedures should be a priority of all actors involved in public procurements, i.e. the competent institutions and the business sector.

- **Six years have passed from the entry in effect of the Law on Public Procurements (LPP), but some institutions continue to act contrary to the legal provisions contained therein and companies are still unaware of their rights related to legal remedies.**

Recommendation*:* Greater oversight and control is needed in terms of LPP's implementation by the contracting authorities.

- **Transparency in public spending is not a priority for some institutions. Cases have been recorded of failure to disclose the requested tender documents, failure to publish notifications on procurement contracts signed and late submission of public procurement records in the EPPS concerning the so-called small-scale public procurements.**

Recommendation*:* Starting from the premise that transparency is a key precondition for fighting corruption in public procurements, it is necessary for the institutions to make further efforts aimed at increasing availability of data and documents related to implementation of public procurements.

- **In the fourth quarter of 2013, a total of 388 contracts in accumulative value of around 33 million EUR have been signed by means of**

negotiation procedures without previously announced calls for bids. On annual level, the total value of procurement contracts signed in this manner reached around 81 million EUR.

***Recommendation**:* A control mechanism should be in place for procurement contracts signed by means of negotiation procedures without previously announced calls for bids, especially in cases when this procedure is used for signing annex contracts, due to urgency reasons or due to technical and artistic reasons.

- **In 2013, 22.7% of all tender procedures were annulled. Moreover, most frequently annulled are tender procedures whose value exceeds 20,000 EUR.**

***Recommendation**:* It is of outmost importance to stipulate a legal obligation for competent institutions to monitor annulments of tender procedures and impose sanctions to contracting authorities that frequently annul their tender procedures.

- **Monitoring activities noted a trend of decreased number of requirements for bank guarantees related to quality performance of contracts. Such practices are contrary to the principle of cost-effective and frugal public spending.**

***Recommendation**:* Bank guarantees for quality performance of contracts should be more frequently used in cases when exceptionally low prices have been offered, which puts under question the quality performance of contracts.

- **In the last three months of 2013, a total of 11 negative references were issued. Therefore, by December 2013, a total of 37 companies have been blacklisted and are prohibited to participate in tender procedures for a period of 1 to 5 years.**

***Recommendation**:* Purposefulness and effects of this mechanism for sanctioning bidding companies should be thoroughly examined and analysed.

- **The multiannual trend of decreasing number of appeals lodged by the companies in front of the State Commission on Public Procurement Appeals (SCPPA) continues. In 2013, SCPPA was presented with a total of 569 motions for appeals related to public procurements. Most appeal allegations concern the fact that the companies have been unlawfully exempted from the bid-evaluation process due to their failure to meet eligibility criteria for tender participation or terms and conditions defined in the technical specifications. SCPPA approved every third motion for appeal and most of its decisions taken in the appeal procedure concern complete annulment of tender procedures in question.**

***Recommendation**:* Enhanced efforts are needed to educate the companies about the legal remedies available in public procurements.

- **Analysis of decisions taken by SCPPA shows that one of the most important positions taken by this commission concerns the significance and implications of the statement of serious intent. As part of its decisions, SCPPA assessed that the statement of serious intent can be activated and that the company acting in violation of the procurement contract should be issued a negative reference. However, according to the LPP, statements of serious intent are an instrument whose validity corresponds with the validity of the bid, which means that the effect of the statement of serious intent expires on the same day the bid's validity expires.**

***Recommendation**:* Having in mind the above indicated, SCPPA should align its position with the one upheld by the BPP for the purpose of defining a clear position on the validity of statements of serious intent.

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 Law on Public Procurement. The analysis aims to assess the implementation of public procurements in the light of the new Law on Public Procurements and the application of the underlying principles of transparency, competitiveness, equal treatment of economic operators, non-discrimination, legal proceeding, cost-effectiveness, efficiency, effectiveness and cost-effective public spending, commitment to obtain the best bid under the most favourable terms and conditions, as well as accountability for public spending in procurements.

Analysis of the public procurement process in the Republic of Macedonia is performed on the basis of monitoring a 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*" and in the Electronic Public Procurement System (EPPS), followed by attendance at public opening of bids and data collection on the procedure course, and use in-depth interviews and structured questionnaires submitted to economic operators, as well as data collected from contracting authorities through EPPS and by means of Freedom of Information (FOI) applications.

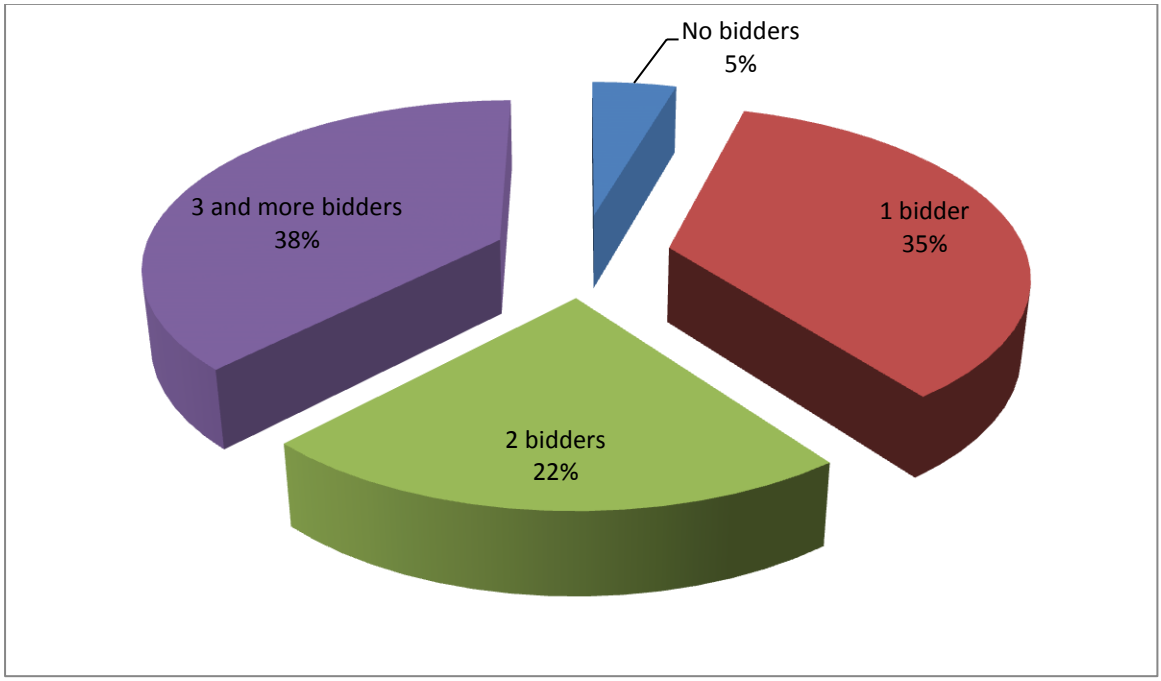
The present analysis was performed on the basis of monitoring a selected sample comprised of 40 public procurement procedures implemented by central level contracting authorities, whose public opening of bids took place in the period October–December 2013. This report includes an overview of trends in public procurements in the last several years.

In addition, the report summarizes the monitoring findings for 2013 and includes an analysis of appeal procedures led in front of the State Commission on Public Procurement Appeals in the period January–December 2013.

- **In 2013, competition in public procurements remained low. Average number of bids submitted in 2013 tender procedures monitored (total of 160) is 2.6 and more than one third of tender procedures received only one bid.**

As high as 35% of tender procedures monitored in the course of 2013 were presented with only one bid, which ultimately results in extremely low competition in public procurements.

Overview of competition in 2013 tender procedures monitored

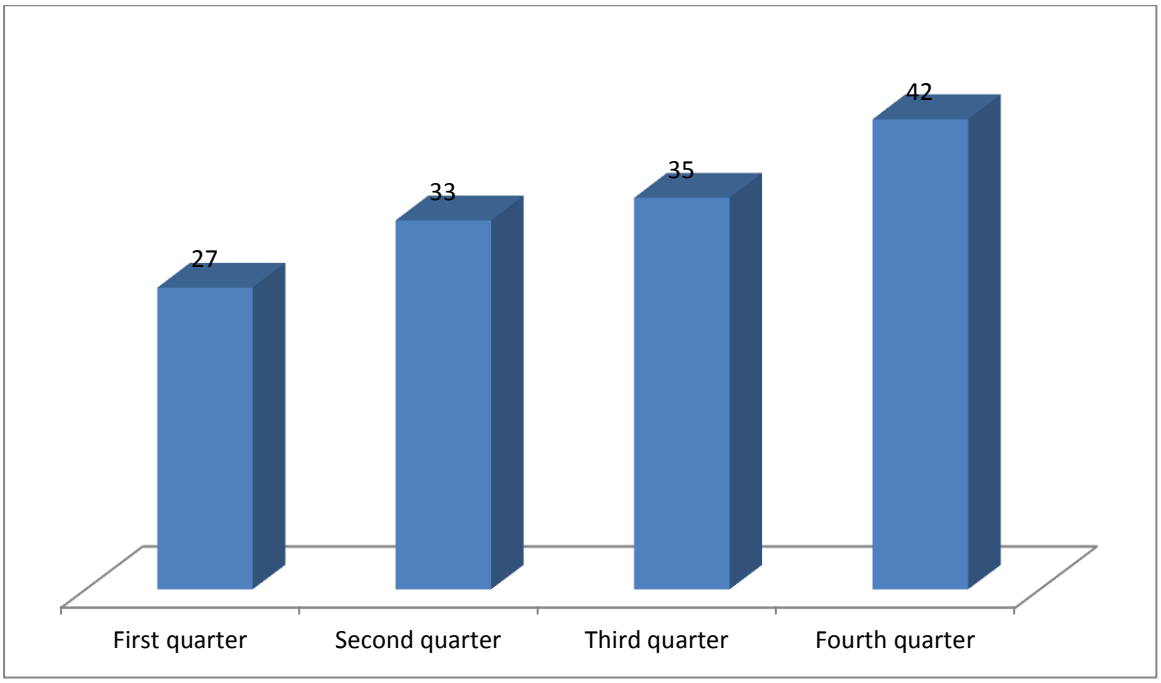


The situation observed is unfavourable because tender procedures marked by low competition imply a high risk of signing procurement contracts at prices that are less favourable than actual market prices. Initially, bidding companies offer higher prices in expectation of having these prices reduced during the e-auction, i.e. the downward bidding. In cases when only one bidding company has submitted a bid and there are no conditions for scheduling and organizing the e-auction, the contracting authority is

competent to decide whether it will annul the tender procedure due to the higher prices bided or it will accept the only bid submitted, despite the fact that the price bided is higher than the procurement's estimated value. On the basis of monitoring findings, the conclusion is inferred that higher share of institutions pursue the second option, i.e. they sign the contract with the only bidding company.

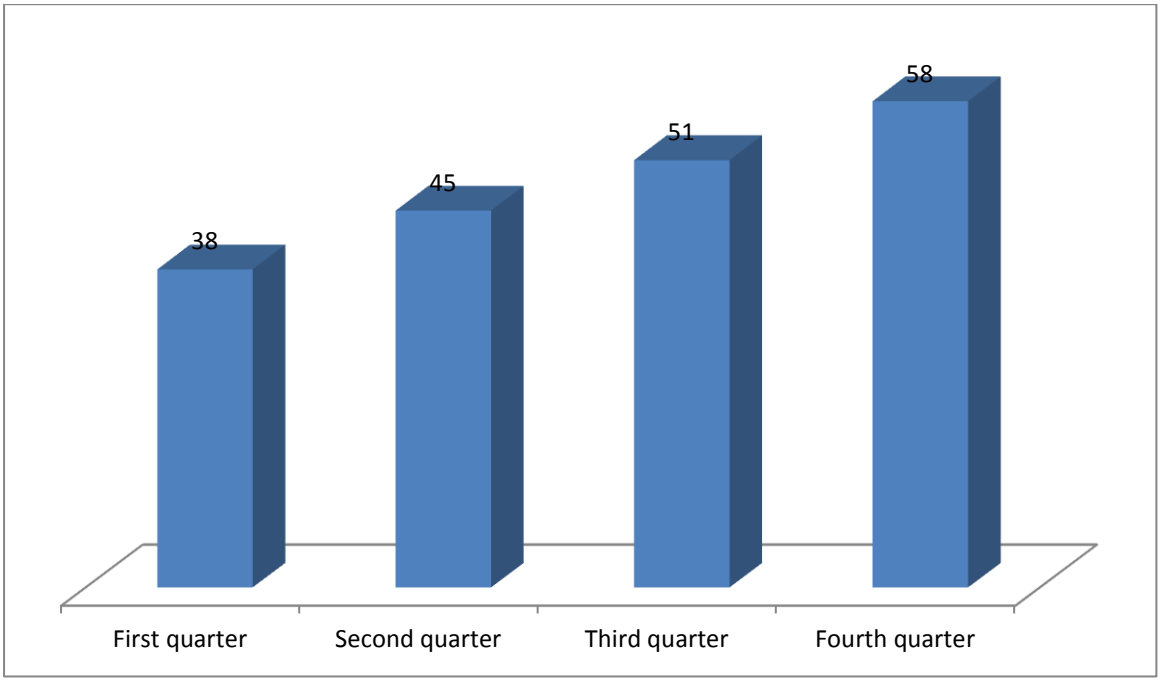
The trend of decreasing competition in public procurements is supported by the fact that the number of tender procedures with only one bid is continuously increasing from one to another monitoring period (quarter).

Share of tender procedures from the monitoring sample with only one bid submitted



In the course of 2013, primarily as a consequence of low competition in public procurements, e-auctions were not scheduled in 48% of tender procedures monitored. In that, it should be noted that e-auctions were not organized only in cases of tender procedures with only one bid, but also in cases where a number of bidding companies have been exempted from the bid-evaluation process due to their failure to meet the eligibility criteria for tender participation or failure to meet the terms and conditions defined in the technical specifications, as well as in cases when tender procedures have been annulled prior to the organization of e-auctions.

Share of tender procedures from the monitoring sample that were not completed with e-auctions



Reasons for the unfavourable situation related to competition in public procurements, which ultimately results in non-organization of e-auctions, should be sought in the disproportional and unattainable eligibility criteria for tender participation (required annual turnover in the previous years, reference lists, staff number and qualifications, equipment requirements, etc.). After a series of monitoring findings reiterated this problem, the last round of amendments to the Law on Public Procurements (*Official Gazette of the Republic of Macedonia no.* 148/2013) introduced a legal provision, with effect from May 2014, whereby all contracting authorities are obliged to present the newly established Council of Public Procurements with their tender documents in cases they are concerned whether the eligibility criteria will be met by a sufficient number of companies. Actually, pursuant to Article 36-a of the LPP, institutions are obliged to obtain the Council's consent in cases they have defined eligibility criteria that can be fulfilled by: three or less than three bidding companies, for procurement procedures whose value does not exceed 5,000 EUR; four or less than four bidding companies, for procurement procedures whose value exceeds 5,000 EUR; and five or less than five bidding companies for procurement procedures for goods and services whose value exceeds 20,000 EUR

and procurement procedures for construction works whose value exceeds 50,000 EUR. On this account, monitoring activities in the second half of 2014 are expected to show the extent to which these solutions will yield results and mitigate one of the key problems affecting the public procurement system in the country.

Recommendation: Increasing competition in tender procedures should be a priority of all actors involved in public procurements, i.e. the competent institutions and the business sector. Competition should become the key factor for attainment of the overall goal of public procurements, i.e. to obtain the best value for the public funds spent.

- **It seems that six years of implementing the Law on Public Procurements (LPP) did not suffice for both sides in tender procedures to comprehend the ground rules. Some institutions continue to act contrary to the legal provisions contained in the LPP and companies are still unaware of their rights related to legal remedies.**

As regards the institutions, one of the most common mistakes concern tender annulments. Some institutions annul tender procedures implemented as bid-collection procedures or open procedures with the explanation that "*the number of bidding companies is lower than the law-stipulated minimum number of bidding companies for the type of public procurement awarding procedure in question*", i.e. they refer to Article 169, paragraph 1, line 1 of the LPP. Problems arise from the fact that the LPP does not specify the minimum number of bidding companies for these types of procurement procedures, whereby one bid is sufficient for the tender procedure to be considered successful. At the same time, if the only bidding company submits a bid which meets the terms and conditions defined in the tender documents and its price falls within the procurement's estimated value, the contracting authority can sign the procurement contract with the company in question.

In this manner, all cases in which tender procedures have been annulled by referring to the legal ground that is actually not applicable to the type of procurement procedure organized raise concerns about contracting authorities' malpractices or

their ignorance of legal provisions contained in the LPP. Such practices are inadmissible, especially given the fact that all institutions have appointed officers responsible for public procurements that are required to take an exam verifying their knowledge about the legislation in effect and are awarded a certificate by the Bureau of Public Procurements.

In the procurement procedure for flowers and floral landscaping, the contracting authority was presented with one bid, but it annulled the tender procedure indicating that the number of bidding companies is lower than the law-stipulated minimum. By doing so, the contracting authority in question violated the LPP twice: in the first tender procedure and in the follow-up procedure. Namely, once it had annulled the tender procedure, the institution moved to negotiations and signed the contract with the only bidding company. However, in its notification on the contract signed and as part of relevant records on bid-collection procedures organized, the contracting authority made a reference to the number of the tender procedure annulled. Therefore, this call for public procurement is present both in the list of tender procedures annulled and in the list of successfully completed tender procedures completed with contract signing, which is absolutely illogical and impossible.

On the other hand, bidding companies also face problems in complying with the legal obligations, most often those related to legal remedies in public procurements. Most evident example thereof was noted in the monitoring sample for the period October-December 2013, where one of the few companies that decided to lodge an appeal was unsuccessful due to its ignorance of available legal remedies. Namely, the appealing party contested the tender documents that required the bidding companies to dispose with 5 vehicles for student transportation, 4 of which were intended to transport only 1 student each. Although it submitted two appeals, the bidding company did not achieve the desired effect because the first appeal was lodged prematurely and the second appeal was lodged beyond the law-stipulated deadline. Ultimately, certain allegations enlisted in the appeals were reconsidered by SCPPA, but not the crucial elements concerning the contested tender documents. Undoubtedly, this case shows that companies need greater knowledge and education or the rules governing legal remedies in public procurements should be simplified.

Recommendation: Greater oversight and control is needed in terms of LPP's implementation by the contracting authorities. At the same time, companies need more education on the legal remedies available for the purpose of familiarizing them with their rights in public procurement procedures.

- **Some institutions do not comply with the legal obligations on publishing relevant data and records on public procurements. Monitoring activities recorded cases of failure to disclose the requested tender documents, failure to publish notifications on procurement contracts signed and late submission of public procurement records in the EPPS concerning the so-called small-scale public procurements.**

In the course of 2013, some institutions from the monitoring sample did not only fail to publish their tender documents in the EPPS, but also refused to disclose these documents after they were presented with information requests in compliance with the Law on Free Access to Public Information. Such behaviour on the part of contracting authorities is indicative of the fact that some central level institutions are unaware of their obligation related to transparency and accountability in public spending. Last amendments to the LPP stipulate that, as of January 2014, contracting authorities are obliged to publish all tender documents in the EPPS, which is in line with proposals put forward by our monitoring reports.

In terms of transparency, it should be noted that some institutions did not submit their notifications on procurement contracts signed, although several months have passed from the assumed day when these contracts have been signed. By doing so, these contracting authorities are violating the LPP, as Article 55 thereof obliges them to present the EPPS with their notifications on procurement contracts within a period of 30 days from their signing.

As regards the records on so-called small-scale procurements that should be submitted twice a year, significant share of contracting authorities are late in complying with this legal obligation. One month from the expiration of the law-stipulated deadline (31 January) for submission of records on procurement procedures organized in the second half of the year, 793 of the total of 1,300

registered contracting authorities complied with this obligation. The list of contracting authorities that did not comply with the law-stipulated deadline includes a number of ministries and municipalities.

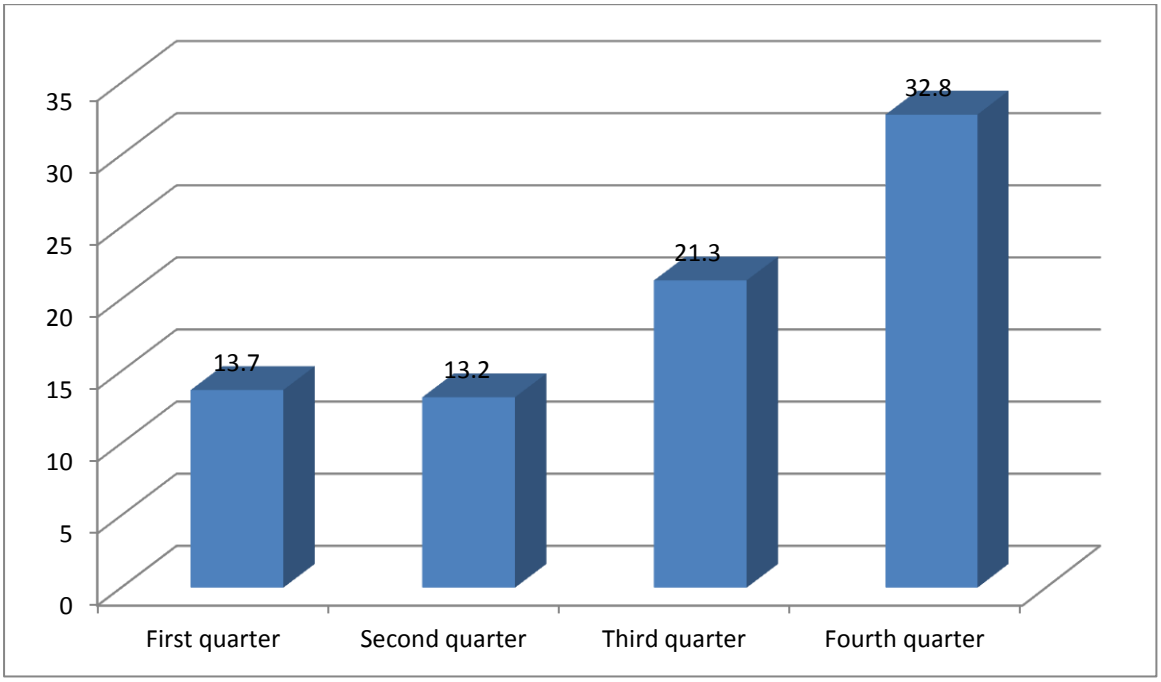
Furthermore, institutions are reluctant to utilize EPPS' new feature introduced in May 2013 and intended to increase the transparency in public procurements by means of submission of notifications on procurement contracts signed. To make matters worse, in the course of 2013, the EPPS was presented with only 6 notifications on procurement contract signed, which is incomprehensible given the fact that more than 18,000 tender procedures were implemented throughout the year. Otherwise, at the time when this possibility was introduced in the EPPS, it was emphasized that this feature should contribute to increased transparency in public procurement contract awarding and would enable more realistic data on public spending.

***Recommendation*:** Starting from the premise that transparency is a key precondition for fighting corruption in public procurements, it is necessary for the institutions to make further efforts aimed at increasing availability of data and documents related to implementation of public procurements.

- **In the fourth quarter of 2013, a total of 388 contracts in the value of around 33 million EUR have been signed by means of the negotiation procedure without previously announced call for bids. On annual level, the value of procurement contracts signed in this manner reached around 81 million EUR.**

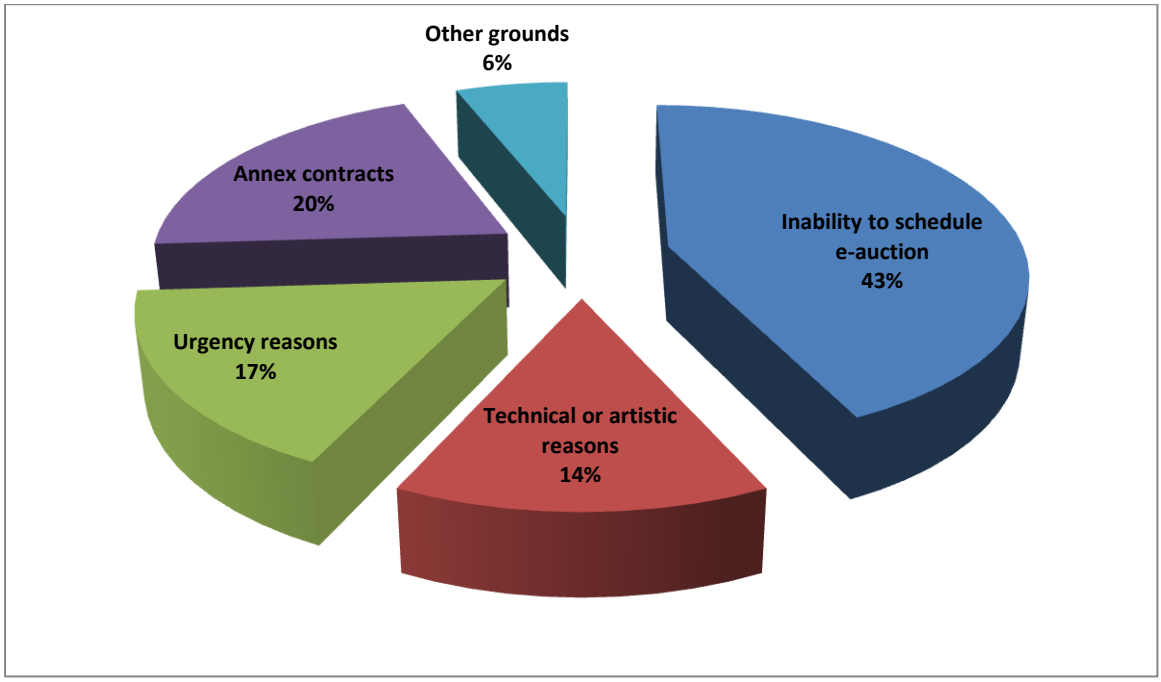
In the period October-December 2013, a total of 388 contracts in the value of around 33 million EUR have been signed by means of negotiation procedures without previously announced call for bids. As was the situation observed in the previous monitoring years, high number of procurement contracts announced in this monitoring period was signed by means of this procedure and its application is marked by an increased intensity throughout the year.

Value of contracts signed by means of negotiation procedures without previously announced call for bids in 2013



In 2013, a total of 1,368 contracts in accumulative value of 81 million EUR were signed by means of this non-transparent procedure.

Overview of reasons indicated for contract awarding by means of negotiation procedures without previously announced calls for bids in 2013



As shown in the diagram above, tender procedures organized without previously announced calls for bids are most commonly a consequence of public procurement procedures in which only one company has submitted a bid to the first call announced, where the bid includes higher prices for the good and services or works compared to the funds disposed by the contracting authority for that purpose. In such cases, negotiations are pursued for the purpose of aligning the price bided with the procurement's estimated value or the contracting authority's budget funds available. As high as 43% (34.4 million EUR) of the total amount of funds spend by means of negotiation procedures without previously announced calls for bids have been contracted on this legal ground. In 2013, a total of 144 annex contracts were signed in accumulative value of 16 million EUR. Third most commonly indicated reason for this type of contract awarding procedures is urgency, which was used as legal ground for signing 302 contracts in accumulative value of around 14 million EUR. Significant share of contracts signed without previously announced calls for bids accounting for 11.5 million EUR were organized on the grounds of technical or artistic reasons, i.e. reasons related to copyright protection (patents, etc.), which can be performed only by a given economic operator.

Compared against previous years, the value of contracts signed in 2013 by means of negotiation procedures without previously announced calls for bids is marked by an increase of around 9 million EUR, i.e. an increase by 12.41%.

Overview of procurement contracts signed by means of negotiation procedures without previously announced calls for bids

Year	No. of contracts signed	Value of contracts (in million EUR)	Difference
2011	904	41.4	18.96%
2012	1,162	71.7	73.19%
2013	**1,368**	**80.6**	**12.41%**

Calculations include data available by 27.2.2014

Having in mind the structure of the contracts signed by means of negotiation procedures without previously announced calls for bids, as well as the continuously increasing number of such procedures, due consideration should be made of two novelties introduced with the last amendments to the Law on Public Procurements (*Official Gazette of the Republic of Macedonia* no. 148/2013 and *Official Gazette of the Republic of Macedonia* no. 28/2014). First, as of January 2014, in cases where there is only one bid submitted in the tender procedure, contracting authorities are obliged to call the bidding company to submit a lower price without organizing a negotiation procedure. Second, as of May 2014, in cases of annex contracts concerning construction works, contracting authorities must obtain consent from the newly established Council of Public Procurements at the Bureau of Public Procurements.

Recommendation: A control mechanism should be in place for procurement contracts signed by means of negotiation procedures without previously announced calls for bids, especially in cases when this procedure is used for signing annex contracts, due to urgency reasons caused by events that are beyond the contracting authority's control and therefore cannot be attributed to its fault (Article 99, paragraph 1, line 3 of the LPP), as well as due to technical and artistic reasons, i.e.

reasons related to copyright protection, i.e. when the contract can be performed only by a certain economic operator (Article 99, paragraph 1, line 2 of the LPP).

- **In 2013, 22.7% of all tender procedures were annulled. Moreover, most frequently annulled are tender procedures whose value exceeds 20,000 EUR. As regards the reasons indicated for tender annulment, dominant is the rationale whereby the contracting authority did not receive any acceptable or adequate bids.**

In the last quarter of 2013, 22.5% of all tender procedures were annulled. On annual basis, according to official data kept by the EPPS, 4,236 of the total of 18,654 tender procedures announced in 2013 were annulled, accounting for 22.7%. Compared against 2012 figures, the number of tender procedures annulled in 2013 is marked by a moderate decrease by 1.3 percentile points.

Trend on tender annulments, per years

Year	No. of calls announced	No. of decisions taken on tender annulment	Share of annulled procedures
2011	7,801	1,431	18.3%
2012	11,726	2,818	24.0%
2013	**18,654**	**4,236**	**22.7%**

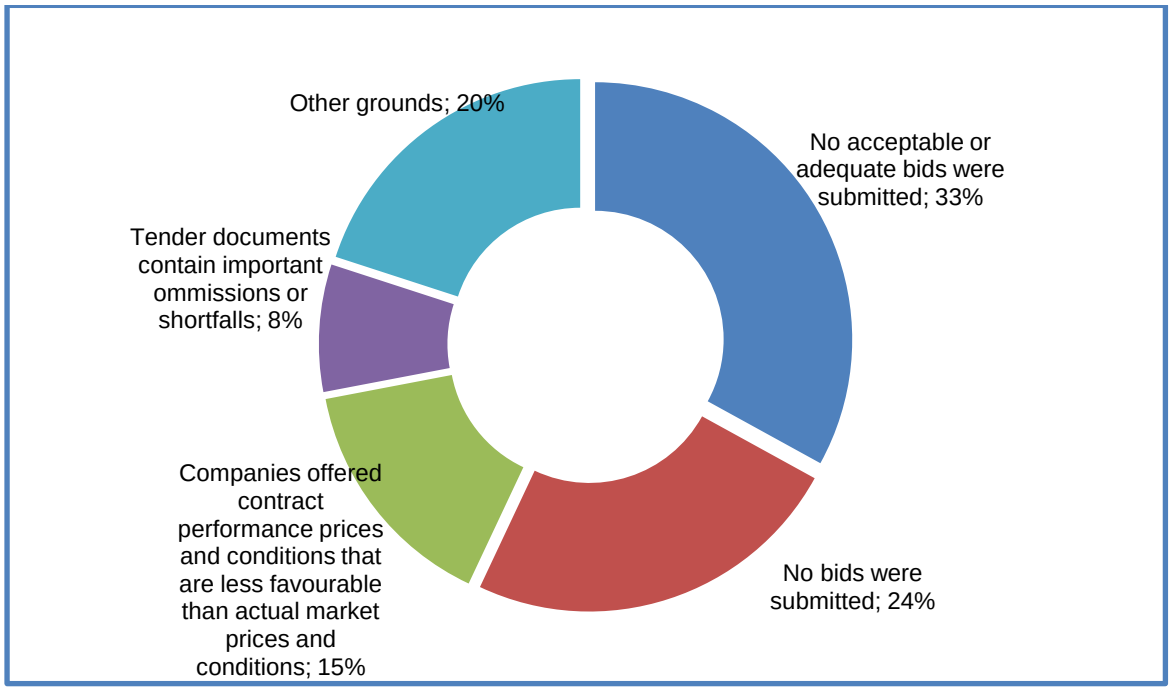
Calculations include data available by 3.2.2014

Analysis of the structure of tender annulments in terms of the type of procurement procedures provides the conclusion that large-scale tender procedures are more often annulled. Namely, the share of open procedures organized for procurement of goods and services whose value exceeds 20,000 EUR and for procurement of works whose value exceeds 50,000 EUR accounts for as high as 31.3% of all tender procedures annulled compared to the share of bid-collection procedures organized

for procurement of goods and services whose value does not exceed 20,000 EUR and for procurement of works whose value does not exceed 50,000 EUR, which accounts for 19.6% of all tender procedures annulled.

As regards the reasons indicated for tender annulment, 33% of tender procedures announced in 2013 were unsuccessful due to the fact that none of the bids submitted was considered acceptable (companies did not meet the eligibility criteria or their bids did not comply with the technical specifications) or adequate (the bids included prices that are higher than the procurement's estimated value), and due to the fact that no bids were submitted, as was the case in 24% of tender procedures.

Overview of reasons indicated for tender annulment in 2013



The situation observed is indicative of the fact that the reasons for the high share of tender annulments in 2013 should be sought in the relevant tender documents, which obviously did not allow the companies to meet the eligibility criteria (annual turnover, reference lists, staff number and qualifications, equipment requirements) or to offer goods and services as described in the technical specifications.

Recommendation: Frequent annulment of large-scale tender procedures implying higher value and led as open procedures compared to the so-called small-scale procurements is indicative of the increased risk of tender annulment due to speculative reasons. On this account, competent institutions must start monitoring the trends in tender annulments and impose sanctions to contracting authorities that often annul their tender procedures.

- **Bank guarantees for bids are still broadly present in public procurements, while the use of bank guarantees for quality performance of procurement contracts is marked by a decrease. Such practices are contrary to the obligation of contracting authorities related to cost-effective and frugal public spending.**

In 2013 as well, contracting authorities continued to request the companies to submit bank guarantees for their bids, although they have the possibility to secure bidding companies' serious intent by means of statements and thereby relieve them of additional financial and administrative burdens.

Although marked by a decline, significant share (32.5%) of tender procedures organized in the fourth quarter of 2013 requested the companies to submit bank guarantees for their bids. On annual level, bank guarantees were requested in 39.4% of tender procedures monitored. By doing so, institutions discourage the companies instead of using the statement of serious intent to secure greater competition in tender procedures as the ultimate guarantee that they will obtain the best value for the money. Actually, that was the ultimate goal for the introduction of statements of serious intent in effect from 1 July 2012, which was a result of recommendations put forward in the monitoring reports and findings on public procurements. Some institutions are still of the standings that they should not request the companies with which they sign procurement contracts to provide them with this type of guarantees. In the last quarter of 2013, bank guarantees for quality performance of contracts were requested in only 37.5% of tender procedures. On annual level, this type of guarantees was requested in 52.5% of tender procedures monitored.

Given the fact that companies are more frequently requested to provide bank guarantees for their bids instead of bank guarantees for quality performance of contracts, the conclusion is inferred that institutions have much greater possibility to sanction the companies when they withdraw their bids rather than for failing to perform the procurement contract signed. Such actions on the part of contracting authorities are contrary to their obligation related to cost-effective and frugal public spending. Actually, in the stage of bid submission, companies can be issued negative references (prohibition to participate in all tender procedures for a period of 1 to 5 years) if they withdraw their bids, irrespective of the fact whether they have provided a bank guarantee or a statement of serious intent. On the other hand, in the course of contract performance, negative references can be issued only to companies that have been requested to provide bank guarantees for quality performance of contracts. This situation is unacceptable, especially in the view of the fact that some e-auctions result in attainment of unreasonably low prices, which should inevitably alert the contracting authorities about the quality performance of these contracts.

Recommendation: Additional measures are needed to dissuade contracting authorities from requesting the companies to provide bank guarantees for their bids that ultimately discourage them to participate in tender procedures. On the other hand, bank guarantees for quality performance of contracts should be more frequently requested, especially given the fact that some tender procedures receive exceptionally low prices that might bring under question the quality performance of contracts.

- **In the last three months of 2013, a total of 11 negative references were issued. Therefore, by December 2013, a total of 37 companies have been blacklisted and are prohibited to participate in tender procedures for a period of 1 to 5 years.**

30 of the total of 37 companies blacklisted by December 2013 were prohibited to participate in tender procedures for a period of 1 year, two companies were prohibited to participate in tender procedures for a period of 5 years, and another 5 companies were blacklisted for a period of 2, 3 and 4 years. According to the Law on

Public Procurements, as of 1 July 2012, state institutions are entitled to ban companies from tender participation by issuing so-called negative references. Negative references published in the Electronic Public Procurement System are issued to companies that have withdrawn their bids from the tender procedures, have declined to sign the public procurement contract or whose bank guarantees have been activated due to failure to secure quality performance of contracts.

Recommendation: Purposefulness and effects of this mechanism for sanctioning biding companies should be thoroughly examined and analysed. At the same time, analysis is needed of the great scope of sanctions being imposed, both in terms of the stages in procurement procedures when negative references can be issued (from bid submission to contract performance) and in terms of the institutions competent to issue them (all contracting authorities are entitled to issue these negative references).

ANALYSIS OF PROCEDURES LED IN FRONT OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS IN THE PERIOD JANUARY-DECEMBER 2013

- **The multiannual trend of decreasing number of appeals lodged by the companies in front of the State Commission on Public Procurement Appeals (SCPPA) continues. In 2013, SCPPA was presented with a total of 569 motions for appeals related to public procurements. Most appeal allegations concern the fact that the companies have been unlawfully exempted from the bid-evaluation process due to their failure to meet the eligibility criteria or terms and conditions defined in the tender specifications. SCPPA approved every third motion for appeal and most of its decisions taken in the appeal procedure concern complete annulment of tender procedures in question.**

The trend of decreasing number of motions for appeal overlaps with the dramatic increase of the number of tender procedures implemented. Hence, the total of 7,801 tender procedures announced in 2011 were contested by means of 856 appeals lodged by the companies, while the number of calls for public procurements announced in 2013 is 18,654, but the number of appeals was decreased to 569.

Overview of public procurements announced and number of appeals lodged in front of SCPPA

Year	Number of tender procedures	Difference (%)	Number of appeals lodged in front of SCPPA	Difference (%)
2011	7,801	+10.0	856	+0.1
2012	11,726	+50.3	633	-26.1
2013	18,654	+59.1	569	-10.1

As shown in the table above, 41.7% of decisions taken by SCPPA in the course of 2013 concern denial of appeals, 31.6% concern approval of appeals submitted by the companies and 17.8% of them concern rejection of appeals as unfounded or untimely.

Structure of decisions taken by SCPPA in 2013

Type of decisions	No. of appeals	Share (%)
Denying an appeal	237	41.7%
Approving an appeal	180	31.6%
Rejecting an appeal	101	17.8%
Withdrawing an appeal (procedure is cancelled)	31	5.4%
Appeal approved by the contracting authorities (procedure is discontinued)	20	3.5%
Total	569	100

Comparison of statistical data for the previous monitoring years shows that there are no significant deviations in the structure of decisions taken by SCPPA. Nevertheless, compared to 2012 data, there is a trend of increased number of rejected appeals by 4.3 percentile points at the detriment of decreased number of approved appeals by 1.9 percentile points. The share of denied appeals remains high throughout the monitoring period (2011-2013). It is a matter of appeals submitted prior to the law-stipulated deadline that have been assessed as inadmissible or appeals submitted after the deadline's expiration that have been assessed as untimely. The high share of denied appeals six years into the implementation of the Law on Public Procurements is indicative of the fact that companies are still insufficiently familiarized with their rights and obligations in the public procurement process.

Comparison of types of decision taken in the appeal procedure

Type of decisions	2011	2012	2013
Denying an appeal	42.0%	37.4%	**41.7%**
Approving an appeal	25.4%	33.5%	**31.6%**
Rejecting an appeal	17.6%	18.8%	**17.8%**
Termination/discontinuation of the appeal procedure	15.0%	10.3%	**8.9%**
Total	100%	100%	**100%**

Analysis of decisions taken by SCPPA in procedures led for approved appeals provides the conclusion that a dominant share of these decisions concerns complete annulment of tender procedures (55%) compared to decisions on revoking the selection decision and tasking the contracting authority to repeat the bid-evaluation process (45%). This ratio is indicative of the growing number of essential violations made to the LPP. Most often, it is a matter of cases in which the institutions did not comply with the provisions contained in the LPP concerning development of tender documents and did not create conditions for legal and objective selection of the most favourable bid.

Comparison of annual data related to decisions taken in appeal procedure

Type of decisions taken in the appeal procedure	Share of admitted appeals		
	2011	**2012**	**2013**
Revoking the contracting authority's selection decision	68%	53%	**45%**
Annulling the tender procedure	32%	47%	**55%**
Total	100%	100%	**100%**

As shown in the table above, the number of decisions on annulling the tender procedure taken in 2013 has increased by 8 percentile points compared to 2012 data and by 23 percentile points compared to 2011 data.

Monitoring activities included a detailed analysis of all decisions taken by SCPPA in the course of 2013 in order to provide an objective overview of the situation related to public procurement appeals. Analysis of decisions taken by SCPPA shows that majority of appeals lodged by companies concern their exemption from the bid-evaluation processes due their failure to meet eligibility criteria or failure to comply with terms and conditions defined in the technical specifications. As part of their appeals, bidding companies alleged that the contracting authorities have acted unlawfully when they have excluded them from the bid-evaluation process.

As regards decisions taken by SCPPA, one of the most important positions taken by this commission concerns the significance and implications of the

statement of serious intent. Namely, in several appeals lodged, the relevant economic operators requested the SCPPA to annul the decision on the selection of the most favourable bid on the grounds that the selected bid includes an extremely low price and is therefore considered economically unjustified. Several appeals lodged concern the selection of the most favourable bid submitted by law companies that imply monthly charges for their services in the amount of only 0.1 MKD. Reasoning that the low prices offered do not guarantee quality performance of contracted services, the appealing parties requested SCPPA to revoke the decisions in question. In all cases, the State Commission did not approve the appeal allegations and indicated that if the winning company is unable to perform the procurement contract due to the low prices offered, it will be sanctioned by having its statement of serious intent activated and will be issued a negative reference.

More specifically, the State Commission assumed the following position:
"Having in mind that the contracting authority has requested the economic operators to submit a statement of serious intent for their bids, in case the contract terms and conditions are not complied with, the contracting authority has the right to activate the statement of serious intent submitted by the selected favourable bidder, i.e., to act in compliance with Article 47, paragraphs 6 and 7 of the LPP, which stipulate that: „(6) In case of activation of bank guarantees for the bid, collection of funds deposited or violation of the statement of serious intent, the contracting authority shall publish a negative reference in the EPPS, which results in exemption of the bidding company in question from participation in all future procedures on public procurement contract awarding for a period of one year from the day the first negative reference has been issued and shall notify the bidding company thereof. The period of exemption referred to in this paragraph shall be increased by an additional year for every new negative reference issued for the same bidding company, but shall not be longer than 5 years. (7) The prohibition to participate in procedures on public procurement contract awarding in compliance with the terms and conditions referred to in paragraph (6) of this article shall also apply to a group of economic operators that includes a member (economic operator) that has been issued the negative reference, as well as to any economic operator that is related to the company that has been issued the negative reference, whereby the economic

operators shall bear the consequences and shall be liable to sanctions in compliance with the provisions contained in the Law."

Stressing the above-indicated position assumed by SCPPA is important in the view of the fact that the statement of serious intent was introduced in the Law on Public Procurements as an alternative to bank guarantees for economic operators' bids. Namely, it is a matter of an instrument whose validity corresponds with the validity of the bid, which means that the effect of the statement of serious intent expires on the same day the bid's validity expires. These statements were introduced to prevent the companies from withdrawing their bids in the course of the public procurement procedure, but should not be considered as guarantees for contract performance. The relevant instrument used to guarantee contract performance is the so-called guarantee for quality performance of contracts, which was not requested in majority of tender procedures appealed. Having in mind the above indicated, SCPPA should align its position with the one upheld by the BPP for the purpose of defining a clear position on the importance of statements of serious intent.

Furthermore, as part of its decisions taken in the course of 2013, SCPPA confirmed the position that quality system standards, such as ISO standards, cannot be used as bid-assessment and evaluation elements. According to the Commission, these quality standards can only be used as eligibility criteria for the companies, i.e. as criteria on demonstrating companies' ability to perform the business activity in question, their economic and financial, as well as their technical capacity.

Analysis of SCPPA decisions identified cases of tender annulments where it has been determined that prior to the initiation of the procedure on public procurement contract awarding the contracting authority did not organize technical dialogue in compliance with Article 43, paragraph 2 of the Law on Public Procurements. This concerns the legal obligation related to open and limited procurement procedures for goods and services whose estimated value exceeds 130.000 EUR, whereby the contracting authority must organize a so-called technical dialogue. The State Commission has determined that non-implementation of the technical dialogue in the cases stipulated in Article 43 represents a major violation of the Law on Public Procurements pursuant to Article 210 thereof. This position is important, having in mind that the amendments to the LPP adopted in January 2014 oblige contracting

authorities, prior to the announcement of the call for procurement of goods and services whose value exceeds 130,000 EUR, to allow the possible bidding companies insight not only in the technical specifications, but in the entire tender documents. This means that terms and conditions defined in the tender documents can also be subject to comments and changes in the stage of technical dialogue, not only the parameters that define the procurement subject.

In several decisions adopted in 2013, SCPPA acknowledged the discretionary right of contracting authorities to make their own decisions when to request the bidding companies to complete and supplement their documents and when to reject their bids, assessing them as incomplete. SCPPA assessed that contracting authorities have the right, but are not obliged to request bidding companies to complete their bid documents. SCPPA is of the standing that in the course of verifying the validity and completeness of documents used to determine the bidding company's ability and in the course of evaluating their bids, the public procurement committee can request the bidding companies to clarify or submit additional documents, provided it is not a matter of significant deviations from the required documents. In that, it has been stressed that the contracting authority is not allowed, by requesting additional clarifications or supplements, to create any advantage for the benefit of certain economic operators. The State Commission believes that, in compliance with the LPP, the contracting authorities enjoy this right, but are not obliged by it.

Companies cannot be exempted from the bid-evaluation process if at the public opening of bids it has been established that the prices they have offered are higher than the public procurement's estimated value. Assessments whether the prices bided are within the estimated value of the procurement should be made after the organization of an e-auction, and not at the initial opening of bids. As part of its decisions, SCPPA assessed that the contracting authority must not exempt economic operators' bids only on this basis, because the final stage in the procurement procedure implies downward bidding from the lowest price offered. Therefore, the Commission suggested the contracting authority, as part of the repeated bid-evaluation process, to make due consideration of comments and guidelines provided by SCPPA and to strictly adhere to provisions contained in the LPP and terms and conditions defined in the tender documents. In that, the

contracting authority should again verify the validity and completeness of bids and assess as acceptable only the bids that have been evaluated as eligible, including their initially bided prices and, on the basis of the new report from the repeated bid-evaluation, determine the eligible parties in the framework agreement, which will be invited to participate in the scheduled e-action, as the final stage of the procurement procedure.

SCPPA adopted a series of decisions on tender annulment in cases when the institutions have requested the companies to dispose with business premises in pre-defined locations (for example, business premises in Ohrid, office in Gevgelija, distance from the contracting authority to the petrol station to be 5 km…). In the opinion of the State Commission, these terms and conditions imposed to the companies represent a violation to Article 2 of the Law on Public Procurements, which enables equal treatment and non-discrimination of economic operators.

As regards protection of public procurement-related rights of small companies, it should be noted that, in the course of 2013, the State Commission adopted decisions in favour of the legal position whereby tender procedures whose value does not exceed 5,000 EUR should request the companies to only present a document on registered activity and should not impose other requirements. Requesting other documents is a serious violation to Article 102, paragraph 2 of the LPP, which stipulates that: *(2) As part of bid-collection procedures whose estimated value does not exceed 5,000 EUR in MKD counter value, VAT excluded, the contracting authority shall only determine the ability of economic operators to perform the business activity in question*.

In one of its decisions, SCPPA contested the institutions' right to implement an e-auction scheduled on 31st December. This position assumed by the Commission is given in the decision on revoking the contracting authority's decision on selection of the most favourable bid, not only due to the fact that one of the companies that participated in the tender procedure had not been timely informed about the scheduled e-auction, but also due to the fact that the said e-auction took place on 31st December. In this decision, the State Commission deliberated that it is a matter of a day in the year when the bidding companies cannot be expected to take part in e-auctions. This position assumed by SCPPA deserves to be stressed

because neither the LPP nor the relevant bylaws stipulate exemptions of particular working days as "unfavourable" for organization of e-auctions. In addition, as noted in the official data kept at the EPPS, e-auctions were held not only on 31.12.2012 (which is the case with the annulled tender procedure), but also on 31.12.2013, after SCPPA adopted the above-referred decision. On this account, it is necessary to either formalize SCPPA's position or terminate its effect.

In the course of 2013, bidding companies addressed SCPPA with several appeals related to the negative references they have been issued. In most cases, SCPPA approved the appeals lodged by the companies and stated that the contracting authority did not comply with the legal obligation to inform the companies that they will be issued negative references and advise them about their right to appeal the references within the law-stipulated deadline. SCPPA noted: "*The contracting authority should have acted in compliance with the provisions contained in Article 47, paragraph 5, line 3 of the Law on Public Procurements, i.e. the contracting authority should have adopted an individual legal act which will serve as basis for activation of the statement of serious intent submitted by the company that was initially selected as the most favourable bidder, i.e. the appealing party in this procedure, while in the second paragraph of the legal act, the contracting authority should have decided to sign the contract with the next most favourable bidder and the third paragraph thereof should include the contracting authority's intent to issue a negative reference for the company that was initially selected as the most favourable bidder, i.e. the appealing party in this procedure. The contracting authority should have delivered the said legal act in person to all parties participating in the procedure and should have provided them the possibility to contest the legal act within the law-stipulated deadline in front of the State Commission on Public Procurement Appeals. Only after the law-stipulated deadlines for lodging appeals or after the completion of the appeal procedure, the contracting authority can act pursuant to Article 47, paragraph 6 of the LPP and can publish the negative reference in the EPPS.*"

In terms of the negative references, another important position assumed by SCPPA concerns the rights and obligations of the second ranked company in the procurement procedures. Namely, in the course of 2013, SCPPA was addressed with an appeal lodged by a company which, after the organized e-auction, was second ranked and was offered to sign the public procurement contract as the first ranked company refused to sign the procurement contract. When the second ranked

company also refused to sign the contract, the contracting authority issued negative references to both companies. However, SCPPA's decision contested the right of contracting authorities to issue negative references to second ranked companies in cases they have refused to sign the contract.

"State Commission on Public Procurement Appeals is of the standing that the contracting authority has acted erroneously when issuing the negative reference to the second ranked company. The appealing party was the second ranked bidder and in compliance with the LPP, the contracting authority could, but was not obliged by the Law, sign the contract with the company in question. On this account, the appealing party is entitled to refuse the signing of the procurement contract and should not have been issued a negative reference."

Obvious is that the analysis of specific decisions taken by SCPPA does not only provide details about the positions assumed by this second instance body, but also insight in certain more specific interpretations of provisions contained in the LPP which indicate the need for alignment of positions upheld by different competent institutions and for opening dialogue with the business sector for the purpose of promoting legal remedies in the field of public procurements.