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PROPOSALS

ON IMPROVING LEGAL AND INSTITUTIONAL FRAMEWORK AND PRACTICES IN IMPLEMENTATION OF PUBLIC PROCUREMENTS IN MACEDONIA

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INTRODUCTION

Public procurements in Macedonia are regulated under the Law on Public Procurements, which was adopted in 2007 and started its enforcement in 2008, developed in line with then valid EU Directives. Since its adoption, the law was subject of ten rounds of significant amendments, each with variable effect in terms of guaranteeing basic principles in public procurements: competition among companies, equal treatment and non-discrimination of companies, transparency and integrity of the process on awarding public procurement contract, rational and efficient use of public funds in procedures on awarding public procurement contracts.

After series of law amendments without broader public consultations and introduction of several solutions that are unique only for Macedonia, it seems that legal and institutional frameworks on public procurements are inadequate to ensure their efficient and purposeful implementation. In particular, amendments have distanced the national legislation in this field from both previously valid and new EU Directives on Public Procurements.

Therefore, thorough changes are needed, with a view to align the national law with the EU acquis and create conditions for exercise of basic principles in public procurements.

Importance of public procurements is especially prominent in small countries, like the Republic of Macedonia, because in these countries they comprise significant part of potentials for doing business. Hence, it is important for public procurements to be fair, transparent and predictable.

In Macedonia, scope of public procurements is significant and on annual level they account for around one billion EUR, representing around 12% of GDP in the country (gross production of goods and services). One third of state budget funds are spent by means of public procurements. Almost 1,400 state institutions on central and local level are obliged to implement the Law on Public Procurements, with around 4,800 companies involved in this business. On annual level, more than 20,000 public procurement contracts are signed.

Monitoring of implementation of public procurements in the country, reports from competent and relevant domestic and international institutions and organizations, as well as consultations with stakeholders in these procedures (contracting authorities, officers responsible for public procurements, economic operators and their associations, etc.), indicate numerous remarks and arguments about problems in implementation of public

procurements and negative effects created by certain legal and institutional solutions in place.

Below we enlist problems and situations in public procurements that have been assessed as most significant, although previous reports and documents published by the Center for Civil Communications and other institutions elaborate in greater details these and other problems affecting public procurements:

- applications for approval issued by the newly established institution, i.e. the Council of Public Procurements, makes public procurements more expensive, slower and less efficient;
- use of "lowest price" as single criterion on awarding public procurement contracts greatly undermines the quality of what is being procured;
- mandatory organization character of e-auctions for all tender procedures makes certain procurements more expensive, while in other cases the unrealistically low prices attained bring under question overall performance of procurement contacts;
- voluminous documents required from companies to participate in public procurement procedures;
- easiness of black-listing companies that implies prohibition for tender participation in the country for period of up to five years, which increases insecurity of companies for participation in public procurements;
- low competition in tender procedures, as result of above-enlisted problems, leads to restricted possibility of selecting what is most cost-effective on the market;
- high number of tender annulments results in prolonged procedures and insecurity of companies in making business decisions;
- small number of appeals against the increased number of tender procedures, despite continuous indications made by stakeholders about frequent violations to the law;
- anticipated imprisonment sanctions in duration of six months to five years for officers responsible for implementation of public procurements, mainly on the grounds of non-compliance with their law-stipulated obligations on obtaining necessary approval for public procurements, represent an unbefitting solution for the legal framework in the Republic of Macedonia;
- absence of efficient supervision and control in the course of implementing public procurement procedures and performance of signed contracts;
- absence of more precise provisions on prevention of conflict of interests;

- insufficient level of transparency related to plans on public procurements, contracts and annexes signed, contract performance, etc.

On this account and having in mind the assessment that public procurements in the country are at critical crossroad, the Center for Civil Communications organized series of broad consultations with stakeholders, building up on already identified problems and shortfalls in the system of public procurements as part of long years of monitoring public procurements, for the purpose of drafting proposals aimed to improve state-of-play in this field. Moreover, due consideration was made of numerous assessments of state-of-affairs made by competent and relevant domestic institutions and international organizations.

In addition to current situations, basis for improvements in the field of public procurements also provide new EU Directives, which are in effect from April 2016, as well as experiences and good practices from neighbouring countries and other EU member-states.

Moreover, it should be noted that proposed solutions concern main problems in public procurements that have serious consequences or continue to cause other problems.

At the same time, given the multitude of interventions made to the Law on Public Procurements, and the need to address existing problems and align the national legislation with EU Directives adopted in 2014, the overall proposal implies adoption of completely new law, following the example of other European countries.

PROPOSALS TO IMPROVE INSTITUTIONAL FRAMEWORK ON PUBLIC PROCUREMENTS

To introduce supervision and control in implementation of public procurements

Supervision and control on overall process of public procurements should be introduced, for the purpose of preventing and combating illegal spending of public funds, to ensure implementation of procurement procedures in compliance with the Law on Public Procurements, and to guarantee performance of public procurements according to contracts signed.

In that, supervision and control functions should be entrusted to the Bureau of Public Procurements, by expanding its competences. Hence, this Bureau should establish separate organization unit on supervision and control, with following tasks and duties:

- to control on-going public procurement procedures and contract performance, on the basis of risk-analysis system, on own initiative or after being presented with information;
- in cases of established irregularities, to issue decisions on elimination thereof and when contracting authorities fail to eliminate them, to motion misdemeanour procedure in front of competent body;
- in cases of reasonable doubts about possible criminal offences, to notify the competent prosecution office.

Moreover, the Bureau of Public Procurements should present the Government of Republic of Macedonia with reports on established systemic problems, and should make them publicly available.

Individual secondary legislative act should be developed, for the purpose of defining subject and scope of supervision and method of implementation.

Introduction of supervision and control in implementation of public procurements will ensure LPP's alignment with Article 83 of EU Directive on Public Procurements, which anticipates monitoring of application of public procurement rules.

Problems addressed: the current legal solution does not anticipate control of on-

going public procurement procedures and contract performance, and therefore there are no competent bodies responsible for monitoring and control of public procurements that would ensure proper and efficient implementation thereof. The Council of Public Procurements, although represented as control mechanism that should narrow the space for abuses and manipulations, is actually focused only on the procedure stage prior to announcement of procurement notices, i.e. development of tender documents. On the other hand, the State Audit Office controls legality of public spending in public procurements, but several years after contract performance and only for limited number of state institutions. This situation negatively affects legal and purposeful spending of funds in public procurements.

The Law on Public Procurements anticipates series of obligations for contracting authorities, but there is no institution in place competent to monitor public procurement procedures and take measures in cases of established non-compliance with them. Hence, increased competences of the Bureau of Public Procurement should ensure monitoring and sanctioning of violations to the Law on Public Procurements, as well as abuse of public funds. In that, supervision and control should also cover the stage on contract performance, with a view to check contract performance against terms and conditions and technical specifications that provided basis for signing of contracts, which has been indicated as good practice by the United Nations Office on Drugs and Crime (UNODC).

The need for such mechanism arises from several reasons. Practices show that many contracting authorities, in the absence of consequences and sanctions, for many years now have violated provisions from the Law on Public Procurements, whereas bidding companies continuously indicated to existence of corruption in this field. At the same time, there were no investigations and adequate sanctions, which results in distrust of bidding companies in the system of public procurements.

In that, doubts about corruption are recognized in indications such as:

- great concentration of high value share of public procurements with small number of companies;
- small number of bids in public procurement procedures;
- signing public procurement contracts with same suppliers year after year;
- favouring conditions for tender participation;
- high number of annulled tender procedures, etc.

Susceptibility of public procurements to corruption was duly noted by the European Commission in its Progress Reports for the Republic of Macedonia, which adopted new directives that require member-states to monitor and control public procurements.

To re-examine the need for existence of the Council of Public Procurements

Recommendations put forward by the European Union and SIGMA[1] should be implemented, especially those concerning the need to analyse benefits from the existence of the Council of Public Procurements, its cancellation and re-allocation of activities that generate benefits to other existing institutions. The purpose is to free the system of public procurements from an inefficient and expensive bureaucratic mechanism that imposes obligation on obtaining previous approval from the Council for series of legal grounds, established by the law, in cases when market competition cannot be demonstrated.

Problems addressed: the Council of Public Procurements started its operation in May 2014, first as body within the Bureau of Public Procurements, and from January 2016 as independent state body holding the status of legal entity. Primary reason for its establishment was to increase competition in public procurements, and thereby ensure budget savings. Nevertheless, in practice the established mechanism on obtaining approval prior to implementation of tender procedures has been turned into unnecessary administrative and financial burden in the system of public procurements. According to official data from annual reports of the Bureau of Public Procurements, the average number of bids per tender procedure accounted for 2.9 bids in 2015, 2.8 bids in 2014, 2.5 bids in 2013, 4 bids in 2012 and 5 bids in 2011. Moreover, the high level of tender procedures that have been presented with only one bid continues to raise concerns. According to findings from monitoring of public procurements in the last several years, almost every fourth tender procedure is presented with only one bid. High share of them have previously obtained approval from the Council of Public Procurements, which is indicative of absence of guarantees that technical specifications approved by the Council ensure competition in this process.

On annual basis, contracting authorities address the Council with more than 16,000 applications for approval and have paid around 2 million EUR for experts contracted by the Council,[2] while the overall procedure on issuing approvals significantly prolonged duration of public procurement procedures. Such high number of applications for approval, which is almost equal to the number of announced procurement notices, is a result of inefficient, inconsistent and discretionary decision-making by the Council of Public Procurements, which often issues its approval only after submission of second application, and sometimes even after third application for approval. At the same time, in spite of the established mechanisms on market research and obtaining approval from the Council of

1 SIGMA is the joint initiative of OECD and the European Union, which works with the countries on improving the systems of public governance and increasing the capacity of public administration.

2 According to official data from the Council of Public Procurements, in 2016 it was presented with total of 16,067 applications for approval, for which contracting authorities paid 1.8 million EUR, while in 2015 it was presented with 19,475 applications for approval, for which contracting authorities paid a total of 2.2 million EUR.

Public Procurements, as part of their tender documents some institutions continued to define discriminatory technical specifications and eligibility criteria for bidding companies that are both irrelevant and disproportional to what is being procured.

The register of experts engaged by the Council is not publicly available. At the same time, there is no public information about the manner in which conflict of interests is prevented in cases when employees from state institutions or from companies that might appear as tender participants are engaged. In addition, the current institutional set-up does not provide guarantees that all institutions which, in compliance with the law, should obtain approval from the Council of Public Procurements have actually done that. At the same time, there are no checks in place about adequacy and credibility of conducted market research.

In its most recent Progress Report, the European Commission assessed that the system on obtaining approval from the Council of Public Procurements represents unnecessary administrative and financial burden that makes procurement procedures more complex, expensive and time consuming.

On the other hand, SIGMA's last report for Macedonia from 2016 recommends cancellation of the Council of Public Procurements and reallocation of benefits from its operation to another existing institution. Hence, one benefit whose reallocation should be taken into account is reduced use of non-transparent negotiation procedures without previously announced call for bids. Namely, in 2013 this type of procurement procedures was used to sign contracts in total value of 97.3 million EUR, in 2014 their value accounted for 56.4 million EUR, and in 2016 the value of contracts signed by means of negotiation procedures without previously announced call for bids accounted for 33.5 million EUR. This, of course, is indicative of the need for continued control of this type of procurement procedures.

In comparative terms, there are no countries in Europe that have established similar national authority within their systems of public procurements with such competences. Having in mind all these arguments, there is a need for serous redefinition of the institutional framework for the system of public procurements in the country.

PROPOSALS TO IMPROVE LEGAL FRAMEWORK ON PUBLIC PROCUREMENTS

To revoke mandatory organization of e-auctions and to change their method of implementation

The current legal solution on mandatory organization of e-auctions in almost all public procurement procedures and for almost all procurement subjects should be cancelled, which is also anticipated by the EU Directive from 2014. Nevertheless, on the grounds of almost ten-year experience in application of e-auction and certain positive effects thereof (budget savings), due consideration should be made whether e-auctions could be mandatory only for procurement subjects of homogenized character (conductive to definition of precise technical specifications) and for procurement subjects marked by actual market competition. These procurement subjects will be determined by the Bureau of Public Procurements, by means of secondary legislative act and should be subject of annual revision. (Similar solution is anticipated in the Slovenian Public Procurement Act: *"Where necessary, the Government shall decide that certain categories of contracting authorities shall award certain contracts via an electronic auction"*).

New technique (or techniques) should be introduced for implementation of e-auctions, in order to address current anomalies identified in irrational reduction of prices. Possible techniques include:

- establishment of low threshold for price reduction or limiting the number and manner of price reduction. In the case of procurement procedures for which e-auctions are organized, relevant procurement notices should not include the procurement's estimated value. Non-publication of estimated values would prevent "inflation" of initial prices that are later taken as opening price for downward bidding, thereby providing false image about savings achieved.

- The module on submission of final price should also be abandoned, in particular because its current effect in terms of budget savings is insignificant and contributes to undue delay of public procurement procedures.

Problem addressed: from 2012 onwards, e-auctions - as additional phase in bid-evaluation - have become mandatory for almost all public procurement procedures and for almost all procurement subjects (in 2015, e-auctions were anticipated in 99.85% of the total number of procurement notices). It was expected that e-auctions would contribute to significant budget savings. However, generalized and insufficiently precise technical

specifications, in combination with easily fulfilled eligibility criteria for economic operators, have led to attainment of exceptionally low prices at e-auctions, thus raising questions about the quality of goods and services delivered or works performed.

All these have deterred many companied from participation in public procurements and have resulted in absence of actual competition. Finally, in the case of small procurements e-auctions have prevented micro and small enterprises from earning any profit.

In parallel, due to non-existing conditions for organization of e-auction, tender procedures with only one bid (accounting for up to 1/3 of all procurement procedures) are presented with higher initial prices, in expectation of planned downward bidding. Hence, these procedures imply high risk of signing contracts at prices that are higher than market or average prices.

According to available information, there are no countries, at least not among EU member-states and candidate countries, where e-auctions are mandatory for all public procurements. EU Directives, both those adopted in 2004 and the recent ones from 2014, anticipate organization of e-auctions as option, emphasizing that they are organized for procurement subjects for which precise technical specifications can be developed and for procurement subjects marked by actual market competition. Only in these cases, organization of e-auctions could lead to attainment of two important objectives: selection of quality bid (that meets minimum standards and needs of the contracting authority) and price reduction. In its recent Progress Reports for the Republic of Macedonia, under Chapter 5: Public Procurements, the European Commission regularly remarked mandatory organization of e-auctions and referred to the need for this legal solution to be cancelled.

To define "economically most favourable bid" as the single criterion on awarding public procurement contracts

Public procurement contracts should be awarded to the economically most favourable bid, by applying criteria on best price-quality ratio and life-cycle costs. The current legal solution whereby "lowest price" is defined as the single criterion on awarding public procurement contracts (use of "economically most favourable bid" is exception in current practice) needs to be cancelled, with a view to align the national legislation with the new EU Directive from 2014. The new legal solution should be based on the concept of "economically most favourable bid" for contract award, as stipulated in the EU Directive. Contracting authorities should select the economically most favourable bid by applying one of following criteria:

- **best price-quality ratio:** this criterion allows rational and efficient use of funds (best value for the money). In that, definition of this criterion should take into consideration:
  - precise specification of the manner in which the bid will be selected, by evaluating (point-ranking) elements related to quality;
  - selected elements for point-ranking of quality to be measurable and to enable objective comparison of bids;
  - list of other point-ranking elements not to be limited by law and to include environmental (benefits for the environment) and social elements, as well as: delivery of goods or performance of services or works within minimally acceptable period that does not endanger quality and maximally acceptable period; operating costs; efficiency; technical and technology advancement; post-sales services and technical assistance; warranty period and type of warranty; obligations related to spare parts; post-warranty period; number and quality of staff involved; functional characteristics; life-cycle costs, etc.
- **life-cycle costs:** these costs cover interrelated stages, including research and development, production, trading and sales conditions, transport, use and maintenance during use of goods, services or works, provision of raw-materials, until completion of services or use of goods and their removal by means of collection and recycling.
- **lowest price:** this criterion should be used only for certain procurement subjects such as, for example, those from the list of procurement subjects that imply mandatory organization of e-auctions.

In order to avoid misunderstanding and malpractices in use of criteria defined as "best price-quality ratio" and "life-cycle costs", especially in terms of their elements and point-ranking, the following acts need to be adopted:

- **methodology on point-ranking** elements that comprise quality, in order to avoid subjective assessment and introduce measurability (method on point-ranking consultancy and similar services used in projects financed by IPA and used by some domestic contracting authorities could be taken as model).

- **guidelines** to clarify the element "life-cycle costs" for goods/services/works, based on provisions from the EU Directive from 2014.

Problems addressed: In its recent Progress Reports for the Republic of Macedonia, under Chapter 5: Public Procurements, the European Commission remarked definition of "lowest price" as the single criterion on contract awarding and clearly indicated that such solution from the Law on Public Procurements must be changed. Evidence in support of this position is found in the EU Directive from 2014, which contains completely different solution whereby the classical criterion "lowest price" is no longer recommended for use by EU member-states.

In practice, use of "lowest price" as the single criterion for selection of the most favourable bid, combined with limited possibility for definition of more rigid eligibility criteria for bidding companies, and especially with insufficiently precise technical specifications, often leads to selection of bids whose quality is below any standard, i.e. procured goods/services do not meet the needs of contracting authorities. Thereby, these procurements do not exercise the principle defined as "best value for the money". Nevertheless, the EU Directive from 2014 allows member-states to decide on their own whether they will fully abandon use of "lowest price" as criterion or will limit its use to certain procurement subjects.

To engage in mandatory market research for establishment of procurements' estimated values prior to adoption of the annual plan on public procurements

Prior to developing their annual plans on public procurements, contracting authorities should establish estimates values for all procurements anticipated in the current year, by means of mandatory market research and based on draft specifications for each procurement planned. In this preparatory stage, contracting authorities should engage in market research for the purpose of gaining insight and knowledge about market prices and market state-of-play, price fluctuations, market competition, potential bidding companies, market structure, etc.

Each market research should be accompanied with composition of relevant minutes, including data on research methods, knowledge gained in terms of price setting, and aspects that might affect them.

Problems addressed: this proposal arises from the need to reduce risk of unrealistic underestimation of procurements' values, which is later reflected on the overall procedure, because estimated values are mandatorily published as part of procurement notices. Unrealistic or inadequate establishment of estimated values results in annulment of tender procedures (when the estimated value is lower than actual market prices) or signing of contracts at prices that are higher than market prices (when the estimated value, taken by companies as reference for their bids, is higher than market prices).

To make additions in terms of contents and development method for annual plans on public procurements

Annual plans on public procurements should include a rationale of the need for specific public procurement planned (especially in cases of large-scale procurements and procurement of luxury goods), expected date for contract signing, and planned duration of contact performance.

The process on procurement planning is of exceptional importance for proper enforcement of the law and timely fulfilment of contracting authority's needs throughout the year, on one side, and increased interest of economic operators to participate in tender procedures, on the other side.

Problems addressed: provision of rationale for procurement needs (in terms of procurement subject, type, quantity, quality, etc.) will increase purposefulness of public procurements and earmarked use of public funds. The need for specific procurement should be based on previously conducted market research, previous experiences, and assessment of contracting authority's internal needs and available capacity.

In that, decisions on large-scale procurements (above certain amount that could be defined by law or bylaw) and procurement of luxury goods should be taken by commissions at contracting authorities, not by individuals. This proposal arises from the need to prevent subjectivity (existence of personal financial or other interest) and unproductive spending of public funds, i.e. procurement of goods/services that are not needed, with exaggerated estimated values, of low quality or of luxurious nature. Moreover, this increases understanding of the market and team work.

Publication of information related to expected date for contract signing and planned duration of contract performance allows economic operators to engage in rational and reasonable planning, utilization or engagement of technical and human resources, for the purpose of attaining their commercial interests and successful contract performance.

In case of divisible procurements, to establish estimated values of individual lots

In the case of divisible procurements, the decision on public procurement should establish amounts and sources of funds necessary for contract performance for the overall procurement subject and for individual lots. At the same time, EPPS should include a tool on enlistment of estimated value for each procurement lot.

Problems addressed: although the last several years were marked by more frequent announcement of divisible procurements and individual bids were collected for each lot, followed by signing of individual contracts, institutions tend to publish the estimated value only for the overall procurement. The proposal for publication of estimated values for all individual lots arises from the need for economic operators to be able to accurately anticipate their competitiveness in cases of procurements comprised of several lots. Reconsiderations on submission of bids for one, two or more lots, and information about the share of funds from the total amount planned for performance of individual lots, increase competition on the market, equal treatment and non-discrimination of economic operators, and will facilitate independent participation of microenterprises that do not supply all goods/services/works required, but only some of them. This approach will allow participation in tender procedures of microenterprises that offer more specific goods, services and works.

Bidding companies to demonstrate their eligibility for tender participation by means of statements, while the company whose bid has been assessed as the most favourable to be obliged to submit all documents related to fulfilment of eligibility criteria

Fulfilment of eligibility criteria for economic operators, in addition to their legal status and ability to perform the business activity (which contracting authorities should be able to secure automatically from economic operators' profiles in EPPS) should be confirmed by means of statement. This statement should be designed as standard template and must be submitted together with the bid for participation in public procurement procedures.

This method on establishing economic operators' eligibility should be mandatory for all open procedures and bid-collection procedures, and for other types of procurement procedures, provided their method of implementation allows that.

Problems addressed: this proposal arises from the need to reduce administrative and financial burden of economic operators for participation in public procurements, which companies have assessed as the second biggest problem they face when participating in public procurements.[3]

In addition to multitude of documents required by the law, contracting authorities have the possibility to request series of other documents issued by different institutions, whose obtaining consumes time and funds. This represents a particular burden and factor of deferral for smaller companies, which dispose with limited human and financial resources and which do not have possibilities to participate in large number of tender procedures throughout the year due to their limited business potentials.

Reduction of this administrative burden is also aimed at alignment with the EU Directives and good international practices.

Deadline for bid submission in procedures whose value does not exceed 5,000 EUR to be set in duration of at least 8 days

The current deadline of five days for bid submission in bid-collection procedures whose estimated value does not exceed 5,000 EUR in MKD counter value, VAT excluded, should be increased to at least eight days from publication of procurement notices in EPPS.

[3] From 230 companies surveyed in the period November-December 2016, as many as 41.7% answered that requirements on voluminous documents for tender participation is the main problem they are facing in public procurements. Complete survey results are available at: http://www.ccc.org.mk/images/stories/af2016.pdf

In that, bidding companies will be given more reasonable deadline for preparation of their bids, which is especially important having in mind the fact that it is a matter of small procurements which commonly imply participation of small companies with limited human resources for preparation of bids.

This proposal will enable greater number of small- and microenterprises to participate in public procurement procedures, thereby improving the quality of bids.

Problems addressed: in significant portion of public procurements whose estimated value does not exceed 5,000 EUR, companies have two to four days to prepare their bids, depending on the weekday when the procurement notice is published.

The current law-stipulated deadline results in unfavourable practices whereby certain contracting authorities announce their procurement notices on Thursdays or Fridays, which results in loss of as many as two non-working days over the weekend.

In most cases, it is a matter of simple procurement subjects that do not necessitate long preparation of relevant bids, but equally significant is the share of procurement procedures in which, due to specificity of the procurement in question, bidding companies need more time that the minimum law-stipulated deadline to prepare and submit their bids.

In addition to the fact that this proposal on setting longer deadlines is favourable for companies, as they would have more time to prepare their bids and the possibility to submit bids of better quality, it also brings benefits for contracting authorities, given that their commissions on public procurements are given additional time for bid evaluation because, according to the Law on Public Procurements, deadline for taking decision on the most favourable bid should not be longer than the deadline for bid submission. Moreover, contracting authorities will have the possibility to increase competition in their public procurements which, in turn, will allow them to select the best, most qualitative and most cost-effective bid.

To cap the maximum amount of annual turnover required as condition for tender participation to twice the amount of the procurement's estimated value

This proposal implies introduction of law-stipulated upper threshold for annual turnover required from bidding companies in order to demonstrate economic and financial ability, to twice the amount of the procurement's estimated value, VAT excluded.

This provision is contained in new EU Directives on Public Procurements, as one of the measures aimed to facilitate access to the market of public procurements for small- and microenterprises.

Problems addressed: in spite of lowered eligibility criteria for tender participation defined by contracting authorities, there are still numerous examples in which bidding companies are required to demonstrate pre-defined annual turnover in the last three years. In that, these amounts are often several times higher than the procurement's estimated value, which could imply limiting factor for many companies that prevents them from participation in tender procedures.

Monitoring of public procurements in the last years identified examples in which companies had been required to demonstrate annual turnover in amount that is by 98 times higher than the procurement's value. Most commonly, these tender procedures implied participation of one company that meets this requirement and was awarded the procurement contract.

Although definition of such requirements had been reduced in recent times, this proposal will gain in importance in the forthcoming period, after legal provisions related to the Council of Public Procurements are cancelled.

To introduce and apply new e-procurement techniques (e-catalogues and dynamic purchasing systems) and to connect EPPS with other electronic systems, for the purpose of more efficient implementation of e-procurements

In order to keep the pace with global, but primarily EU trends, and in order to increase efficiency in implementation of e-procurements, it is necessary to introduce and apply new techniques for e-procurements and technical solutions such as:

- **e-catalogues:** these catalogues imply electronic presentation of information about products in a structured manner that is generally known and applicable for bidding companies. In essence, introduction of e-catalogues aims to standardize the format in which bidding companies present information about their products. In that regard, efforts are needed to transpose Article 36 of the EU Directive in the Law on Public Procurements, with due care for provisions that provide clear and firm obligations to be adherently transposed, while those implying a possibility (option) to be reconsidered against relevant legislation in other states, and in particular their practices, in order to select the most adequate solution.

- **dynamic purchasing systems:** contracting authorities can use dynamic purchasing system for frequent procurement subjects whose characteristics meet their requirements and needs. Dynamic purchasing systems should be fully electronic and should be open throughout their validity period for all economic operators that meet the selection criteria. In that regard, Article 34 of the EU Directive needs to be transposed in the Law on Public Procurements, with due consideration of experiences in other states concerning application of these systems and use these experiences to define detailed rules.

- **EPPS's interoperability:** EPPS should join the national platform on interoperability, thus establishing links and communications with other electronic systems and databases. This will imply major facilitation in implementation of e-procurements, because bidding companies would no longer need to obtain and submit documents in attachment to their bids, as contracting authorities will be able to verify their capacity and ability in real time. Introduction of e-catalogues, dynamic purchasing systems and establishment of EPPS's interoperability should be pursued as medium term goals (2-3 years), in the following manner:

  - anticipating these techniques and technical solution in the Strategy on Development of e-Procurements which should be subject of broad public consultations prior to its adoption; Bureau of Public Procurements should develop and publish annual reports on the strategy's implementation;

  - additions to the Law on Public Procurements with rules on application of special techniques for e-procurements;

  - technical upgrading of EPPS with modules for new e-procurement techniques and its connections with other electronic systems.

Problems addressed: although draft version of the Strategy on Development of e-Procurements, developed by the Bureau of Public Procurements in late 2015, anticipated series of innovative solutions in this regard, they no longer fully correspond with the most recent developments and trends in the country and the EU. The strategy should have covered the period 2016-2020, but almost 15 months have passed from anticipated start of its implementation. Lack of strategy should not prevent development of e-procurements, but in the absence of official document, i.e. roadmap, this process could be slower and sporadic.

One of more bureaucratic aspects of e-procurements implies submission of documents by means of which bidding companies demonstrate their ability. Although this process was streamlined in the last year, there is still large space and need expressed by companies for further streamlining of this important aspect of public procurement procedures.

To lower the threshold for mandatory organization of technical dialogue with economic operators for procurement of goods and services

The law-stipulated threshold of 130,000 EUR for mandatory organization of technical dialogue with economic operators in procurement procedures for goods and services should be lowered in consultations with stakeholders. In that, technical dialogue should be announced and implemented through EPPS, and should enable possibility for participation of potential bidding companies that are not registered in the system.

This will enable more frequent and regular consultations of contracting authorities with the business community on draft tender documents that define certain criteria on establishment of economic operators' ability, technical specifications for the procurement subject, as well as conditions that should be fulfilled for participation in the procurement procedure. Technical dialogue is a balancing mechanism for control over tender documents developed and defined by contracting authorities.

Problems addressed: this proposal allows insight for all interested persons or stakeholders in draft tender documents for higher number of procedures, as well as the right to make remarks, comments and proposals. On the other hand, contracting authorities are enabled to define procurement conditions and specifications in more righteous and adequate manner, and they have an opportunity for timely elimination of possible shortcomings and irregularities. Moreover, this will reduce possibilities for abuse in development of tender documents, while increasing transparency of public procurements.

Framework agreements to be signed with minimum three economic operators

Reducing the minimum number of economic operators for signing of framework agreements from seven to at least three does not prevent, limit or hinder competition. Three economic operators is a sufficient number to ensure protection of competition and non-discrimination, as well as to reassure parties in procurement procedures that they could be potential holders of at least one separate contract signed within duration of the framework agreement, especially in the case of framework agreements with previously established shares (expressed as percentages) for all parties thereto.

Three economic operators is sufficient number to follow frequently changing market conditions, technology advancements or price fluctuations. Therefore, it could be considered that this number of minimum economic operators would not prevent implementation of laws and signing of such agreements would not be contrary to the public interest.

In practical terms, framework agreement with more economic operators would be more adequate in cases of procurements marked by broad market consumption which are available for a relatively broad spectrum of procurement holders and which have successive delivery.

Also, price fluctuations throughout duration of framework agreements create possibilities for greater participation of small- and microenterprises, because prices throughout duration of framework agreements could be variable and to reflect market conditions at the moment of procurement.

In order to ensure the principle of transparency, EPPS needs to integrate a tool for notifications on special contracts signed within framework agreements.

Problems addressed: the existing provision whereby framework agreement with several economic operators can be signed only if their minimum number is seven is practically non-enforceable[4] and causes an additional barrier for contracting authorities to use framework agreement as special manner on awarding public procurement contracts.

Signing framework agreement with seven economic operators defies the main logic behind use of this technique because the legal solution whereby framework agreement signed with less than seven economic operators is considered null and void does not imply minimization of costs and does not guarantee supply of goods or services in the public sector. The law-stipulated number hinders application of this provision in so-called centralized procurements, where there are no professional staff members on public procurements, so the public procurement is organized on their behalf and on their account by another contracting authority, by means of summing joint needs.

Economic operators to have the right to insight in all documents related to public procurement procedure

Contracting authorities, on the request from economic operator that participated in the procurement procedure, must ensure safe insight in overall documents related to the procedure, with the exception of information that might be classified by bidding companies as business secret. In that, bid price, calculations, data related to selection criteria for the most favourable bid, bid evaluation, public documents, documents from public registers and all other data which, in compliance with applicable laws, must be made publicly available or should not be labelled as secret, shall not be considered confidential.

Problems addressed: under the current legal solution, economic operators that participated in the public procurement procedure have the right to insight only in reports on implemented procurement procedures. Although contents of this report is regulated by rulebook, in practice contracting authorities do not complete all data anticipated, whereby the report does not allow sufficient information/knowledge for economic operators to decide whether to seek legal protection in front of the State Commission on Public Procurement Appeals.

According to the current legal solution, the right to insight in procurement-related records, with the exception of bid data and documents that contain confidential information established by law, is given only to bidding companies that have already lodged an appeal in front of the State Commission on Public Procurement Appeals. It seems that such possibility is belated and bidding companies are not allowed adequate protection.

This proposal will reduce costs of economic operators related to fees charged for initiation of appeal procedure, provided that – in the period from reception of the decision

[4] Only 24 or 0.29% from the total of 8,329 applications for approval submitted to the Council of Public Procurements in the period January-June 2016 concerned signing of framework agreement with less than seven economic operators.

on selection of the most favourable bid or the decision on tender annulment until expiration of the deadline for submission of appeals – they have established there are no grounds for lodging appeal.

The proposal also arises from the need to increase control in all stages of public procurement procedures on the part of economic operators that participate therein, thus ensuring equal treatment and non-discrimination of economic operators that would result in increased trust in the system of public procurements.

To allow direct payment to subcontractors

On the request from subcontractors and when allowed by the contract nature, contracting authorities must be obliged to settle matured liabilities directly to subcontractors in cases when the bidding company has enlisted that parts of its bid will be performed by subcontractors and has enlisted the names of proposed subcontractors.

If subcontractors are enlisted in the bid, contracting authorities should be obliged to enlist them in the public procurement contact signed between them and procurement holders.

Problems addressed: this proposal arises from the need for facilitated access to the market of public procurements for small- and microenterprises. Although, according to the current legal solution, bidding companies must provide data about parts of the contract they intend to give to subcontractors, as well as the names of all proposed subcontractors, in practice this provision has not been enforced. Practices show that bidding companies do not enlist these data, although they frequently engage subcontractors for performance of public procurement contracts, especially in cases of construction works.

Subcontractors are usually smaller economic operators that cannot independently participate in tender procedures, but are faced with the problem of non-settlement of matured liabilities by procurement holders, despite the fact that contracting authorities have duly settled their liabilities in timely manner. Moreover, many small enterprises that work as “undeclared” subcontractors cannot obtain written evidence on successful performance of public procurement contracts which could serve them as references for independent participation in tender procedures.

On the other hand, contracting authorities will gain much clearer image about the bid and entities that will be involved in contract performance, which would increase the feeling of responsibility with procurement holders in regard to attainment of higher quality in performance of public procurement contracts. This will impose an obligation for bidding companies to have a more serious and more responsible approach towards the profile of subcontractors they engage.

Instead of negative references, to introduce the possibility for individual contracting authorities to exclude certain economic operator from participation in their future public procurements for pre-defined period of time, on the grounds of unsatisfactory performance of previous contracts

This proposal implies cancellation of "negative references" and allowing contracting authorities to prohibit economic operators from tender participation only in cases of duly documented significant or consequent underperformance in previously awarded contracts.

This prohibition could concern only participation in tender procedures organized by the contracting authority that has issued it. Time period for exemption could be in duration from one to five years, depending on repetitiveness of unsatisfactory behaviour/performance.

Problems addressed: issuance of so-called negative references or creation of certain "black list" of economic operators prohibited to participate in all tender procedures in the country for a period of one to five years on the basis of broad scope of groups, including bid withdrawal, has been assessed by the EU as rigid solution and contrary to jurisprudence of the European Court of Justice.

Problem-raising aspects of the current legal solution include: (1) the right of each from around 1,400 contracting authorities to prohibit any economic operator to participate in public procurements in the country for a period of one to five years; (2) long list of legal grounds for issuing this prohibition, majority of which are unrelated to what other countries consider to be single legitimate reason for exemption, i.e. unsatisfactory performance of public procurement contracts; and (3) keeping public records of companies excluded from participation in public procurements (black list).

Grounds for this prohibition anticipated in the Macedonian Law on Public Procurements include bid withdrawal prior to expiration of its validity period, refusal to sign the contract, etc.

To reduce fees charged from small- and microenterprise for use of EPPS

The tariff list establishing the amount of fees charged for use of EPPS should be revised with a view to reduce fees for small- and microenterprise, and increase fees charged from medium-sized and big companies. Setting this fee in amount that is affordable for small- and microenterprises will increase possibilities for greater competition in public procurements and implies a measure for facilitated operation of these business entities in a country like the Republic of Macedonia.

The specific proposal on gradated fees for economic operators is:

- fee charged from micro companies: 1,000 MKD + 18%
- fee charged from small companies: 3,000 MKD + 18%
- fee charged from medium-size companies: 8,000 MKD + 18%
- fee charged from big and foreign companies: 12,000 MKD + 18%

Implementation of this proposal will ensure fair financial burden for economic operators, without reducing overall funds collected by the Bureau of Public Procurements for maintenance and upgrading of EPPS

Problems addressed: according to the research conducted and knowledge from the field, microenterprises believe that the fee set in the amount of 2,360 MKD, VAT included, for registration/use of EPPS is too high. Many of them operate on the margins of profitability, primarily due to large number of fees and charges they are burdened with. When combined with the fact that large portion of them participate in very small number of tender procedures throughout the year, with even smaller number of contracts awarded, this fee seems truly burdening. On the other hand, large companies pay fees in the amount of 8,720 MKD, VAT included, which - compared to income and profit they realize, and especially compared to value of public procurement contracts awarded - is exceptionally low.

To organize free cycle of training for microenterprises across the country in the period 2017-2018, with a view to facilitate their participation in mandatory e-procurements

In compliance with its law-stipulated competences, the Bureau of Public Procurements should organize free cycle of training for microenterprises. Training should be delivered on regional level (in several different towns across the country), in order to be more accessible to companies operating on local and regional level. These training sessions imply realization of requirements from 2014 EU Directive on ensuring free-of-charge assistance for proper implementation of rules that should be provided by the competent authority for participants in public procurements.

Implementation of this measure is in line with competences of the Bureau of Public Procurements stipulated in the current Law on Public Procurements and does not imply adoption of law amendments.

Problems addressed: some economic operators are well informed about the method for participation in e-procurements, primarily big business entities and those that participate in frequent procurement subjects and procedures organized by bigger contracting authorities. Knowledge from the field shows that participation of microenterprises in e-procurements implemented by small and local contracting authorities is still a major challenge they are facing. Probably, this will be the case in the next several years until e-procurements become routine for all participants in public procurement procedures. In order to avoid frequent errors due to lack of knowledge about specificities of e-procurements and possible negative consequences (rejection of bids due to technical errors, decreased competition, and annulment of tender procedures), these entities need to be provided adequate form of support. This approach would ensure continuity in provision of free technical assistance to microenterprises which, in the last several years, was secured under USAID's Project on Facilitating Access to Public Procurements for Microenterprises, and has been proved as much needed. In the future, microenterprises are left to rely on assistance in the field of e-procurements only on commercial basis. For many of them, this is significant burden, having in mind that they have other mandatory costs for participation in tender procedures (registration in EPPS, securing documents and electronic certificates, etc.) which, on the other hand, are disproportional to the number of tender procedures in which they participate.

PROPOSALS TO IMPROVE TRANSPARENCY AND TO PREVENT CONFLICT OF INTERESTS

To introduce anti-corruption measures, by means of regulating conflict of interests

There is an inevitable need for the new law to anticipate anti-corruption measures on prevention, recognition and elimination of conflict of interests in public procurement procedures aimed at aligning the national legislation with relevant provisions from the EU Directive, in order to avoid distortion of market competition and ensure fair and equal treatment of all economic operators, and in order to prevent abuses in public procurements.

The Law on Public Procurements should precisely regulate prevention and sanctioning of conflict of interests for all persons involved in public procurements, those being: responsible persons at contracting authorities, members of committees on public procurements, members of the State Commission on Public Procurement Appeals, outsourced experts, judges at the Administrative Court deciding on appeals, as well as persons who, on the basis of ownership, were related to or were employed at economic operators.

Conflict of interests should also cover relatives of direct and collateral lineage several times removed, in-laws, marital and out-of-wedlock partners, irrespective of the fact whether the marriage has ceased or not, guardians and foster children (or so-called related persons).

Declarations on existence or non-existence of conflict of interests should be published on the contracting authorities' official websites.

Previously signed declarations on existence or non-existence of conflict of interests for all persons involved in public procurement procedures should be duly updated when changes thereto had occurred.

Persons with conflict of interests are obliged to be recused from participation in public procurement procedures in any capacity, and economic operators should be informed thereof.

In cases when conflict of interests is established with certain economic operator, its bid will be rejected.

Problems addressed: unlike the situation observed in all countries from the region, the Macedonian Law on Public Procurements does not include more specific provisions that regulate prevention and sanctions for conflict of interests. In that, the Law on Public Procurements makes references to provisions on prevention of conflict of interests in

public procurements featured in the Law on Prevention of Conflict of Interests, but they are overly general and insufficient to prevent situations of conflict of interests in public procurements, and thereby prevent abuses in terms of contract signing, while practices have shown that these situations are neither monitored nor prevented and resolved. Reasons thereof could be identified in the absence of more specific and precise legal solutions, as well as in the absence of sanctions.

Article 24 of the EU Directive from 2014 requires member-states to take appropriate measures to effectively prevent, identify and remedy conflict of interests that arise in implementation of public procurement procedures, in order to avoid any distortion of competition and to ensure equal treatment of all economic operators. In that, the EU Directive features specific definition of the concept of conflict of interests.

The grounds for exemption of economic operators from participation in procedures on awarding public procurements enlisted under Article 57 of the EU Directive, inter alia, include cases in which conflict of interests could not be effectively remedied by other, less intrusive measures.

To increase transparency in public procurements, by establishing an obligation for publication of all information and documents related to public procurement procedures, contract signing and performance

With a view to increase transparency in public procurements, legal obligation needs to be introduced on mandatory publication in EPPS for following documents:

- annual plans on public procurements and changes thereto, with due consideration of ensuring comparability of changes made;
- report on implementation of the annual plan on public procurements (with an overview of estimated values, values of contracts signed and amounts paid);
- signed contracts on public procurements, together with annexes to the contracts;
- report on contract performance.

Following documents and information must be mandatory published on the institutions' official websites:

- annual plan on public procurements and amendments thereto, as well as report on implementation of the annual plan;
- procurement notices, accompanied by links to the relevant call for bids published in EPPS;

- notifications on contracts signed, accompanied by links to the relevant call for bids published in EPPS;
- notifications on performed contracts, accompanied by links to the relevant call for bids published in EPPS

An obligation should be introduced for the Bureau of Public Procurements to develop and publish, at least once a year, the following documents:

- analysis of contracts signed by means of negotiation procedures without previously announced call for bids, with indication of economic operators that have been awarded said contracts;
- analysis of annulled tender procedures, with indication of contracting authorities that are marked by high number of annulled tender procedures;
- analysis of contracts signed in terms of ownership relations between economic operators and between economic operators and contracting authorities, as well as in terms of concentration of contracts with certain economic operators.

Problems addressed: although transparency in public procurement procedures is defined as one of key principles in public procurements, practical experiences show that economic operators, especially those on local level, are not sufficiently familiar with potentials offered by the market of public procurements. In addition, non-publication of plans on public procurements prevents companies that want to participate in tender procedures to engage in better business planning. In return, this prevents timely and solid development of their bids. Making this information publicly available is expected to result in greater number of bidding companies and bids of better quality.

Moreover, publication of important information on public spending only in EPPS prevents broader availability and understanding of such information by broader circle of citizens. EPPS portal is primarily intended for implementation of public procurements, and not for broader dissemination of information and familiarization of citizens with the manner in which public funds are spent. Limited transparency opens broad space for corruption. Hence, there is need for portion of this information to be published elsewhere, as well as publication of entire set of additional information, especially in relation to implementation of public procurement plans and contracts.

In the case of some documents for which the current proposal implies mandatory publication, were already covered by the recommendation issued by the Bureau of Public Procurements, as part of commitments assumed under the Open Government Partnership Action Plan 2014-2016. Nevertheless, only insignificant number of contracting authorities has complied with the recommendation on voluntary publication of said information. Therefore, their publication needs to be made mandatory, as anticipated in the new Open Government Partnership Action Plan 2016-2018 and arises from the international initiative Open Contracting Partnership.

In that, transparency and accountability of contracting authorities would not dependent on the will of individuals, but will become legal obligation. Availability of this information in a manner and in places where citizens could easily find and understand them will increase transparency and accountability of public institutions in relation to public spending, level of information for citizens about public spending, integrity and trust in institutions and efficiency in disposing and managing public funds.

To amend the Code of Conduct in implementation of public procurements

The Code of Conduct should apply to both public and private sector, in order to ensure that only professional, honest, responsible and trained persons that demonstrate integrity will be involved in public procurement procedures.

Persons involved in public procurements must be adequately informed about anti-corruption rules and laws in implementation of public procurements.

The Code of Conduct should be made publicly available and distributed to persons responsible for implementation of public procurements.

Ethical provisions could also be integrated in contracts on consultancy services, for the purpose of strengthening integrity of persons engaged by means of these services.

Problems addressed: the existing Code of Conduct is not enforced in practice, while persons involved in public procurements are not even aware of its existence. That prevents strengthened integrity in public procurements, increased accountability of all persons involved in public procurements and, in turn, prevention of corruptive practices.

On the other hand, there are numerous and continuous remarks about unethical behaviour demonstrated by representatives from contracting authorities involved in public procurements.

PROPOSALS TO IMPROVE LEGAL PROTECTION

To regulate start of deadline for submission of appeals contesting tender documents from the day when the procurement notice is announced

Under existing legal regulations, appeals concerning actions or failure to take actions in relation to tender documents can be lodged from the day of public opening of bids.

Instead, it is proposed for appeals to be lodged within a deadline of 8 days from publication of the procurement notice in cases concerning data, actions or failure to take actions related to the procurement notice, as well as cases concerning actions or failure to take actions related to tender documents.

Problems addressed: the current legal solution creates legal insecurity in terms of the right to appeal concerning tender documents and deviates from general rules applied in other countries. In Croatia, for example, appeals contesting tender documents are lodged from the moment when the procurement notice is announced, on the grounds of contents or tender documents for the procurement. In Serbia, appeals contesting tender documents are lodged within a period of 7 days prior to expiration of the deadline for bid submission, while in the case of small public procurements and qualification procedures appeals are lodged within a period of 3 days prior to expiration of the deadline for bid submission. In Montenegro, appeals contesting tender documents are lodged from the day when invitation to tender participation is published, when tender documents are bought or downloaded/obtained.

There are no valid arguments in defence of the legal solution adopted in Macedonia whereby the deadline for submission of appeals contesting tender documents starts on the day of public opening of bids.

Introducing legal possibility for submission of appeals contesting the conditions defined in tender documents immediately after the procurement notice is published will stimulate the business sector to defend their rights that have been restricted by means of favouring tender documents. Hence, companies will be able to timely intervene in terms of tender documents, by lodging appeals to the State Commission on Public Procurement Appeals. Analysis of decisions taken by the State Commission on Public Procurement Appeals shows that, in the last years, many appeals have been rejected as inadmissible on the grounds of being prematurely lodged. Most often, this happens when bidding companies that have remarks about tender documents lodge their appeals immediately after they have been given insight thereto. Errors are made because economic operators start from the logical premise that the right to ap-

peal concerning tender documents is acquired by the mere act of publishing the procurement notice, which also implies publication of tender documents. Nevertheless, according to the Law on Public Procurements, when potential bidding companies have remarks about certain conditions enlisted in tender documents, they need to first submit their bids and wait for the public opening of bids, and only then lodge their appeal to the State Commission on Public Procurement Appeals within a deadline of 8 days, i.e. within a deadline of 3 days.

To unify deadlines for submission of appeals to 8 days and deadlines for holding the procurement procedure to 12 days

With a view to improve legal protection and enable participants in public procurements more efficient protection of their rights, one general deadline of 8 days should be introduced for submission of appeals in all stages and for all public procurement procedures.

Moreover, it is proposed to unify the deadline for holding the procurement procedure (i.e. period in which contracting authorities cannot sign the public procurement contract and start its performance) to 12 days.

The current legal solution anticipates submission of appeals within a deadline of 8 days, i.e. within a deadline of 3 days in the case of bid-collection procedures, while contracting authorities are not allowed to sign the contract and start its performance for a period of 12 days, i.e. period of 5 days in the case of bid-collection procedures, starting from the day of decision receipt.

Problems addressed: importance of this proposal arises from the need to extend current deadline of only 3 days for the most dominant type of procedures, i.e. bid-collection procedures.[5]

As part of the research targeting their experiences from participation in public procurements, surveyed companies indicated that the deadline of 3 days is too short for development of appeals on the basis of substantiated documents.

This proposal is expected to improve efficiency of the legal protection mechanism and to address the problem related to small number of appeals contesting tender procedures, given the increasing number of tender procedures and remarks of participants therein.

Notably, contrary to the average annual increase of the number of tender procedures by 30% in the period 2011-2015, the number of appeals in the same period is marked by average annual decrease by 9%, while the share of appeals in total number of tender procedures accounts for less than 3%.

[5] In 2016, bid-collection procedures accounted for 75% of all public procurements announced.

To introduce new value threshold of fees charged for legal protection

According to the current legal solution, in addition to administrative taxes, appealing parties are also required to settle fees for leading procedure in front of the State Commission on Public Procurement Appeals, depending on the procurement's value, as follows: 100 EUR (for procurements whose value does not exceed 20,000 EUR); 200 EUR (for procurements whose value ranges from 20,000 to 100,000 EUR); 300 EUR (for procurements whose value ranges from 100,000 to 200,000 EUR); and 400 EUR (for procurements whose value exceeds 200,000 EUR).

The proposed change implies division of the first threshold group, i.e. procurements whose value does not exceed 20,000 EUR that are liable to payment of fees in the amount of 100 EUR, to be divided into two groups, which corresponds to other provisions from the Law on Public Procurements, whereby the first group will include procurements whose value ranges from 500 to 5,000 EUR, and the second group will include those in the value from 5,000 to 20,000 EUR. Current fee in the amount of 100 EUR will continue to be charged for tender procedures in the value from 5,000 to 20,000 EUR, while the fee charged for the first group, i.e. procurements in the value of 500 to 5,000 EUR, is proposed to be set in the amount of 50 EUR.

In particular, the proposal includes the following gradation of fees:

- 500 to 5,000 EUR in MKD counter value, appeal fee in the amount of 50 EUR in MKD counter value;
- 5,000 to 20,000 EUR in MKD counter value, appeal fee in the amount of 100 EUR in MKD counter value;
- 20,000 to 100,000 EUR in MKD counter value, appeal fee in the amount of 200 EUR in MKD counter value;
- 100,000 to 200,000 EUR in MKD counter value, appeal fee in the amount of 300 EUR in MKD counter value; and
- above 200,000 EUR in MKD counter value, appeal fee in the amount of 400 EUR in MKD counter value. .

Proposed changes will enable a more equitable gradation of fees for initiation of appeal procedures in proportion to the value of tender procedures, as well as fair treatment of smaller companies that participate in tender procedures of lower value, which are currently charged the highest fee for appeal procedures compared to the value of tender procedures. At the same time, this type of tender procedures is the most numerous.

Although in comparison to other national legislations, the Republic of Macedonia has

lower fee for initiation of appeal procedures, introduction of new value threshold for procurements in the value from 500 to 5,000 EUR and appeal fee in the amount of 50 EUR will open the possibility for equal access and treatment of all participants in legal protection procedures led before the State Commission on Public Procurement Appeals..

Problems addressed: the current legal solution raises questions about cost-effectiveness of initiating appeal procedures in the case of small procurements, as well as exercise of the principle of equal access and treatment of all participants in legal protection procedures. In particular, it seems that economic operators have to pay fees in the amount of 100 EUR to appeal procurement procedures in the value from 500 to 5,000 EUR, representing 2% to 20% of the procurement's value, while in the case of tender procedures whose value exceeds 200,000 EUR, this fee represents up to 0.2% of the procurement's value. As regards the remaining value thresholds in between, appeal fees represent 0.15% to 1% of the procurement's value. Of course, this greatly affects small- and microenterprises that predominantly participate in procurements of lower values.

Here, it should be noted that this situation contributes to the small number of appeals lodged in public procurements in absolute terms (around 600 appeals annually) and in terms of the total number of tender procedures (around 3%). Moreover, this happens against the increasing number of tender procedures and remarks from companies concerning irregularities in implementation of public procurements.

PROPOSALS TO INTRODUCE MISDEMEANOUR PROVISIONS

To revoke incriminations from the Law on Public Procurements and to introduce misdemeanour provisions

Changes proposed in the section on misdemeanour and penal provisions are:

- to fully revoke existing incriminations in the Law on Public Procurements, following the examples of contemporary European legislations;
- to introduce misdemeanour provisions aimed at sanctioning violations to the Law on Public Procurements;
- to precisely define provisions from the Criminal Code that concern this subject matter (legal actions against existing criminal offences defined in Article 353, paragraph 5 and Article 275-d) and to re-examine the penal policy in order to adjust the amount of stipulated fines according to the gradation of individual criminal offences.

Following misdemeanour provisions are proposed:

- Fine in the amount of 500 to 20,000 EUR in MKD counter value shall be issued to the contracting authority when:
  - it has signed public procurement contract or framework agreement without previously organized procedures on awarding public procurement contract, contrary to the provisions from this law;
  - it has signed public procurement contract or framework agreement in breach of the period on holding the procurement procedure and the suspensive effect of appeals lodged;
  - it has limited competition in public procurements, contrary to the provisions from this law;
  - it has committed significant violations to the law as part of procedures on awarding public procurement contract (Article 210, paragraphs 1, 2, 3, 6, 7, 8, 10, 11 and 12);

- it has implemented procedure for the same procurement subject within a period of six months from the day when the same procurement procedure was annulled, contrary to Article 169, paragraph 2 of this law;
- it has implemented negotiation procedure without prior announcement of call for bids, contrary to the provisions from this law.

- Fine in the amount of 100 to 1,000 EUR in MKD counter value shall be issued for violations referred to under paragraph 1 of this article to the responsible person at the contracting authority.
- Fine in the amount from 200 to 10,000 EUR in MKD counter value shall be issued to the contracting authority when
  - it has failed to adopt and publish the plan on public procurements in compliance with this law;
  - it has failed to respond to questions raised by economic operators in relation to tender documents;
  - it has failed to publish notification on contract signed and notification on tender annulment in EPPS within the anticipated deadline in compliance with this law;
  - it has failed to keep and submit records on bid-collection procedures by 31st July and by 31st January in the year the latest;
  - it has failed to take decision on selection or decision on tender annulment within the stipulated deadline (Article 162);
  - it has committed significant violation to the law as part of procedures on awarding public procurement contract (Article 210, paragraphs 4 and 5 of this law);
  - it has failed to take decision within deadlines stipulated in this law, contrary to Article 224.;
- Fine in the amount from 50 to 500 EUR in MKD counter value shall be issued for violations referred to under paragraph 3 of this article for the responsible person at the contracting authority.

Problems addressed: the current legal solution anticipates misdemeanour provisions only for the State Commission on Public Procurement Appeals (Article 231-a from LPP) and series of penal provisions for contracting authorities (Articles 232-a to 232-u from LPP).

Therefore, Macedonia is one of the rare countries where the primary regulatory framework on public procurements does not anticipate misdemeanour prohibitions, i.e. sanctions for certain (lesser) violations to provisions from the Law on Public Procurements, despite the fact that in the last period numerous cases of such violations have been established and are marked by continuous trend of increasing. It is recommended and urgently needed to intervene in this regard and to carefully re-examine the phenomenon of punitive behaviours demonstrated in public procurements.

It is indisputable that interventions made and introduction of incriminations in the Law on Public Procurements have, to certain extent, demonstrated readiness to deal with crime in this field. However, what has emerged as critical point is the selected method of re-composing, which represents another unique feature of Macedonian legislation in terms of formulating certain penal solutions/provisions. Evidence in support of the inadequacy of existing penal provisions is identified in several arguments. First, it is illogical to copy-paste provisions from comparative criminal legislation, by means of stipulating new criminal offences, without making due consideration of legal descriptions of said offences already incorporated in the Criminal Code. Second, new prohibitions have been stipulated in continuation, and they cannot be fully followed and even correlated to general pillars of the criminal law and legal descriptions of offences from the relevant chapter in the Criminal Code. Third, the idea of codification has been gradually resurrected in the tendency on separation of criminal law, while the intention for specification has moved towards exaggerated, meticulous regulation. Therefore, such efforts could be assessed as failed attempt for modernization, which imposes the need to return to the essential starting point of a legal system, i.e. its operation as harmonized and harmonic legal unit. Fourth, current practices show that penal provisions are inapplicable in almost all cases (according to information from the Public Prosecution).

Therefore, it is proposed for the new law to exclude existing penal provisions and to introduce misdemeanour provisions with gradated illegal behaviours and practices. Experiences from other countries (for example, Croatia, Serbia and Montenegro) also refer to this solution.