The project is funded by European Union

BALKAN TENDER WATCH

Center for Civil Communications
Центар за грађански комуникации

Preventing Corruption in Public Procurements: What can the contracting authorities do?

November 2021

Title: Preventing Corruption in Public Procurements: What can the contracting authorities do? – Спречување на корупцијата во јавните набавки: Што може да сторат договорните органи?

Publisher: Center for Civil Communications

Translation from Macedonian to English: Katerina Dimishkovska

Print: Digi Print

Circulation: 50 copies

Free/non-commercial circulation

This publication is developed with financial assistance from the European Union, as part of the project “Balkan Tender Watch”. The content thereof is sole responsibility of the Center for Civil Communications and cannot be taken to represent the views of the European Union.

Introduction

Relevant legal grounds and mechanisms available to institutions involved in the fight against corruption in public procurements at the so-called systemic level have been discussed on many occasions, including competences and powers entrusted to different authorities, how are these powers enforced, level of cooperation and coordination among these authorities, etc. However, it seems that all these authorities have a merely secondary role in preventing corruption and conflict of interests in public procurements.

In reality, the primary, i.e. basic role in anticorruption efforts is entrusted to persons involved in public procurements and institutions implementing public procurements, i.e. contracting authorities. In the recent period, there are increasingly frequent attempts and measures taken to introduce 'systemic solutions' aimed at regulation and integration of internal mechanisms within institutions for managing corruption risks and promoting integrity in this field.

Therefore, this policy brief is focused on addressing corruption and conflict of interests in public procurements at institutional level, i.e. what can and should be done in this regard.

Legal and other anticorruption measures in public procurements at institutional level?

The general framework on protection against corruption in public procurements at institutional level is provided under the Law on Public Procurements (Official Gazette of RM no. 24/2019). Specific provisions in this regard are also featured in the Law on Prevention of Corruption and Conflict of Interests (Official Gazette of RM no. 12/2019), and the Law on Public Internal Financial Control (Official Gazette of RM no. 90/2009, 188/2013 and 192/2015).

The relatively new Law on Public Procurements includes an array of provisions aimed at increasing transparency and accountability of institutions in respect to public procurements, as well as specific anticorruption provisions. However, in spite of its extensive procedural nature, this law does not describe in detail all steps in public procurement procedures, leaving space for discretionary decision-making, corruptive behaviour and wrongdoings in all stages of public procurements, starting with needs assessment and planning of public procurements, through implementing public procurement procedures, to performance of contracts awarded.

Most importantly, the Law on Public Procurements (LPP) stipulates an obligation for public procurements to be based on several **principles**, including the principle of cost-effectiveness, efficiency and effectiveness, the principle of competition, the principle of transparency, the principle of equal treatment and non-discrimination of economic operators, and the principle of proportionality.

Hence, LPP provisions enlisted below are intended to promote **transparency, accountability and responsibility** of institutions and persons involved in public procurements:

- public procurements are fully implemented in electronic from, i.e. overall communication, exchange of information and submission of bids is pursued via the Electronic Public Procurement System (EPPS), which serves as the single online information system for public procurements.
- All documents pertaining to public procurement procedures are considered information of public character (except for data designated as business secret, classified information or personal data). In that, information such as bid prices, costs, procurement subject specifications, quantity, data related to bid selection and the like must not be designated as business secret or classified information.
- Procurement notices, together with tender documents, technical specifications and notifications on amendments thereto are also made publicly available in EPPS.
- Annual plans for public procurements, contracts signed and annexes thereto must be made publicly available.
- Notifications on contract signed and amendments thereto, notifications on tender annulment and notifications on contract performance must be published in EPPS.
- All institutions are obliged to control performance of their procurement contracts to check whether performance corresponds to terms and conditions defined in relevant contracts.

Next, in respect to specific **anticorruption provisions,** the law stipulates:

- An obligation for institutions to take all measures necessary for timely detection of corruption and elimination or mitigation of harmful consequences thereof, which is valid for the entire cycle of public procurement, from procurement planning, through implementing procurement procedures, to performance of procurement contracts.
- An obligation for responsible persons and other management staff to provide instructions and guidance to persons working on public procurements in written or via e-mail.
- An obligation for persons working on public procurements to reject, in written, enforcement of instructions and guidelines from responsible persons or other management staff in case these are contrary to the Law on Public Procurements.
- A prohibition for persons who have refused to perform unlawful activity to be reassigned to another job position or to be dismissed for a period of one year.
- An obligation for persons working on public procurements or other persons engaged at the contracting authority, as well as interested persons who have learned information about corruptive acts, to inform the State Commission for Prevention of Corruption or the Public Prosecution Office.
- A prohibition for persons who, consciously and in good faith, have reported corruption in public procurements to be reassigned to another job position or to be dismissed.

- A prohibition for persons at contracting authorities who have worked on public procurements to be employed or engaged by contractor that was awarded public procurements in the last year prior to the person's termination of office or employment in a value that exceeds 5% of the total value of all contracts awarded by the contracting authority in the same period.
- An obligation for institutions to notify the State Commission for Prevention of Corruption and the Public Prosecution Office in cases where the prohibition for engagement/employment with contractors has been violated.
- A prohibition for persons who participated in development of tender documents to participate in relevant public procurements as bidding companies or members of bidding consortium.

The Law on Prevention of Corruption and Conflict of Interests features a specific provision prohibiting officials to exert unlawful influence on public procurement procedures.

As regards **conflict of interests,** the Law on Public Procurements refers to enforcement of provisions under the Law on Prevention of Corruption and Conflict of Interests, and stipulates several specific obligations:

- Persons acting as chairs, deputy chairs, members and deputy members of public procurement committees, as well as responsible persons, should deposit statements on absence of conflict of interests for each individual public procurement procedure.
- Responsible persons should be notified when some of above indicated committee members have conflict of interests, followed by their recusal in the relevant procurement and replacement by another member.

The Law on Prevention of Corruption and Conflict of Interests defines conflict of interest as situation in which an officer has private interest that affects or could affect his/her objective performance of public tasks and duties. Moreover, the law decisively stipulates that, when performing their public office, public tasks and duties, all persons must respect the principle of lawfulness, the principle of equality, the principle of publicity, ethnical norms and professional standards, without any discrimination or favouritism and with full respect of public interest, and they should not be guided by personal, family, party or ethnic interests, or subside to pressures and promises from their superiors or other persons.

Following provisions from the Law on Public Procurements may also be counted as anticorruption in nature:

- take into account market conditions when setting the procurement's estimated value;
- obligation to elaborate the procurement need as part of the decision on public procurement;
- obligation to elaborate/justify use of negotiation procedure;
- obligation to elaborate reasons for non-division of procurements into lots;
- seek opinion from the Bureau of Public Procurements on fulfilment of conditions for organization of negotiation procedures without previously announced call for bids in the case of procurements that could be provided by single operator or due to urgent needs;
- abolishment of the obligation for mandatory organization of electronic auction;
- possibility for previous market consultations by organizing the so-called technical dialogue, i.e. advance publication in EPPS of tender documents planned to be used in the procurement procedure, in order to collect proposal and comments from interested companies;
- allowing voluntary publication of the procurement's estimated value in the procurement notice;
- possibility for contracting authorities to publish so-called informative notice that informs the public of their intention for organization of public procurements in the forthcoming period;
- possibility for contracting authorities to publish the so-called notice on voluntary prior transparency in the case of negotiation procedures without previously announced call for bids, which provides information on the selected bidder, reasons for engaging in negotiations, and to publish the decision on selection of the most favourable bid;
- obligation to enlist all sub-contractors and respective procurement lots they will implement as part of the procurement bid;
- right of companies that participated in procurement procedures to perform insight into overall documents pertaining to said procurement after selection of the most favourable bid or after tender annulment;
- possibility for institutions whose procurement procedures have been subject of the so-called administrative control by the Bureau of Public Procurements to eliminate identified irregularities or to annul the tender procedure upon instructions provided by the Bureau.

Notwithstanding its procedural nature, the Law on Public Procurements provides a regulatory framework for procurements and leaves space for discretionary action on the part of institutions. Hence, in order to prevent any irregularities and wrongdoings, institutions may develop internal rules and procedures for implementation of public procurements, analyse corruption risks in public procurements and integrate them in their strategies on corruption risk management.

A useful instrument in this respect is the Anticorruption Plan "Action 21" adopted by the Government in March 2021 which, inter alia, tasks all institutions with development of internal procedures for implementation of public procurements and performance of public procurement contracts. Moreover, institutions are tasked with development and publication of annual anticorruption programs with efficient system of measures for prevention and fight against corruption at institutional level.

The Law on Public Internal Financial Control features a series of provisions that carry obligations for institutions in respect to prevention of irregularities and corruption in public procurements. Individual institutions are not only required to manage public funds in lawful, cost-effective, efficient and effective manner, but they also need to establish a comprehensive system of financial management and control. Moreover, institutions must adopt three-year strategies on risk management and appoint persons responsible to deal with irregularities and concerns about fraud or corruption. Public procurements are subject of and can be covered under internal audits.

What happens in the practice?

As it could be concluded, there is a multitude of provisions and measures with clear rules, obligations and possibilities for institutions and persons involved in public procurements aimed at prevention, detection and reporting corruption in public procurements.

However, the practice, i.e. enforcement of these rules, is indicative of a rather different reality. First, there are almost no cases (at least not known in the public) of corruption in public procurement being reported within any institution, and there are no cases of persons rejecting to act upon unlawful instruction or guidance issued by responsible persona or other management staff.

Although, for many years, public procurements are fully implemented in electronic form, which is believed to be one of methods for reducing possibilities for tender rigging and corruption, there are still numerous reports by the civil society and the media on irregularities and wrongdoings in public procurements, and almost 50% of surveyed companies that participate in tender procedures have stated that corruption is present in public procurements. In truth, findings and concerns about malpractices in tender procedures are not related to the electronic system, but to other aspects that are unrelated to electronic implementation of public procurement procedures.

Increased transparency in public procurements by means of public availability of more information and documents in the Electronic Public Procurement System and on official websites of institutions was not and is still not sufficient in order to account for significant improvement of state-of-affairs in this field. Actually, only a handful of institutions had adopted internal procedures on public procurements before development of such procedures was introduced as obligation for all institutions in 2021. Moreover, institutions that do have such procedures in place had oftentimes copy-pasted law provisions and had failed to cover public procurement aspects and processes that are not regulated by law, leaving space for malpractices in respect to, for example, decision on what, how much and under what quality will be procured; decisions on members of public procurement committees; setting eligibility criteria for companies to participate in tender procedures; development of technical specifications; setting priorities in respect to procurements enlisted in annual plans; decisions whether to publish the procurement's estimated value; a series of decisions and actions related to the bid-evaluation process; drafting public procurement contracts; monitoring contract performance, etc.

Similar to the situation in respect to internal procedures for public procurements, institutions rarely address corruption risks in development of strategies, plans and similar documents on risks management, less so in respect to public procurements. As indicated above, corruption risks are present in all three main stages of public procurement. A series of analyses have been developed by the civil society, but also by competent institutions (BPP, SAO, SCPC), which could be used as baseline for defining indicators and detecting corruption risks in public procurements. In that regard, most frequent risks observed in the practice concern procurement of goods, services and works that are not actually needed, either in terms of procurement subject or in terms of quantity, quality, etc.; low implementation rate and frequent changes to public procurement plans; changes to estimated value immediately before organization of tender procedures; procedures in which prices bided are identical or very close to the procurement's estimated value that has not been published and procedures marked by participation of one bidder; permanent composition of public procurement committees; high share of bids rejected in the bid-evaluation stage; high share of annulled tender procedures; high share of negotiation procedures without publication of call for bids; high share of procedures presented with only one bid; high share of approved appeals challenging public procurement procedures; absence of any rules, record keeping and monitoring contract performance; absence of procurement details in the contract signed; high share of annexes to public procurement contracts, etc.

As regards conflict of interests, it seems that statements on absence of conflict of interests are signed only pro forma. There are cases in which these statements are deposited immediately before the public opening of bids, i.e. before bidding companies in the tender procedure are known. There are no regulations in place concerning use of outsourced services in public procurement procedures organized by institutions. There is rarely any knowledge of persons recusing themselves from decision-making in public procurements due to existence of conflict of interests.

Other aspects that could be described as liable to corruption risks account for numerous examples on non-enforcement, poor implementation and even manipulation of anticorruption mechanisms. Hence, market conditions are rarely taken into account when setting the estimated value of procurements; detailed elaboration of procurement needs is not provided and reasons for non-division of procurements into lots are not justified; electronic auctions are organized in absolutely all tender procedures, even in cases where it is evident that they will not yield positive results in terms of procurement prices; technical dialogue is rarely organized as form of previous market consultation for planned procurements, etc.

What could be done?

Based on the above present, except for adherent enforcement of the multitude of legal provisions in effect, institutions have other instruments and tools at their disposal to enhance transparency, accountability and integrity in implementation of public procurements, i.e. prevention, detection and reporting on irregularities and corruption.

Development of comprehensive and meaningful internal procedures for all stages of public procurements is of crucial importance for the fight against corruption at institutional level, as well as corruption risk analysis, assessment and integration in relevant internal strategies and plans for risk management at institutions.

As mentioned earlier, internal rules for public procurements should cover the entire cycle, from procurement idea and needs assessment, to meeting procurement needs and analysis of contract performance. In particular, these rules should "cover" stages, processes and steps that imply inherently discretionary actions and great influence from the human factor. Not only do these need to anticipate mandatory elaboration of decisions, but also who, why and how will participate in decision-making. For

example, who can request something to be procured; who and how many persons should be involved in drafting technical specifications and who checks certain technical characteristics of procurement subjects; who is involved in development of tender documents and who is involved in checking fulfilment of eligibility criteria for companies; who and how is the procurement's estimated value calculated; which criterion is used for selection of the most favourable bids and why; in which cases can bidders be asked to submit additional documents missing from their bids; whether and why the procurement's estimated value is not published; who checks fulfilment of contract terms and conditions to ensure that procurement is performed according to anticipated characteristics; payment schedule to contractors that have performed their respective procurement contracts; internal communication and intersectoral cooperation in respect to tender procedures, etc.

All these steps, stages and processes need to be covered by clear and unbiased rules that are known in advance, are applicable to all procedures, in all situations, and that eliminate, to the highest extent possible, exceptional impact of the human factor on public procurements.

Having in mind that public procurements are among areas that are most liable to corruption, corruption risks in public procurements must form part of operation risks at institutions in respect to developing internal documents on risk assessment and management, irrespective of the form of such documents, i.e. risk management strategy/plan, integrity plan, anticorruption plan/strategy, etc.

Such documents should promote transparency of operating processes and public procurement procedures, to improve the system of efficient supervision over performance of such processes, to reduce and regulate discretionary decision-making, to increase accountability, and to enhance lawful and profession behaviour and action on the part of individuals and institutions.

The first step in that regard is identification of weaknesses in implementation of public procurements, i.e. identification of aspects that are liable to corruption risks, followed by assessment of their intensity (i.e. degree of negative impact) and frequency (likelihood for occurrence). Next step is to identify methods for elimination of such aspects, i.e. to identify measures for prevention of such risks. Finally, in parallel with implementation of risk mitigation measures (as part of organizational rules, procedures, practices, employees, etc.), institutions should monitor and evaluate effects of these measures.

In this regard, the Government's Anticorruption Plan "Action 21" implies an obligation for all institutions to develop internal procedures for implementation of public procurements and performance of public procurement contracts, as well as annual anticorruption program based on previous analysis and assessment of corruption risks, reasons, as well as conditions and factors that facilitate corruption. Hence, institutions are required to strengthen control over their public procurements.

However, additional information are needed on the institutions' compliance with obligations arising from the Government's Anticorruption Plan, as well as effects from activities and measures implemented. Institutions need to draft reports on measures and activities implemented, while the government needs to monitor and analyse their performance and adequately inform the public.

Finally, advised by previous poor track record of institutions in terms of continuous performance of their obligations, due care should be made for institutions to continue the practice for developing annual anticorruption programs in the next year, 2022, and to regularly monitor and update these documents.

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CIP - Каталогизација во публикација
Национална и универзитетска библиотека "Св. Климент Охридски", Скопје