BALKAN TENDER WATCH

Center for Civil Communications
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(NON)PERFORMANCE OF THE SYSTEM FOR PREVENTION OF CORRUPTION IN PUBLIC PROCUREMENTS IN MACEDONIA

(Non)Performance of the System for Prevention of Corruption in Public Procurements in Macedonia

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TABLE OF CONTENTS

1. INTRODUCTION

Tender procedures, a term popularly used for public procurements, are yet another area prone to corruption, if not the area most susceptible to corruption. According to global estimates, corruption accounts for 10% to 30% of the total value of all procurements. A simple math exercise shows that if public procurements in Macedonia account for up to one billion euros on annual level, then corruption "devours" 100 to 300 million euros of taxpayers money in Macedonia every year. For these reasons, Macedonia – as many other countries – has established a multitude of system institutions and has assigned them a particular role in the fight against corruption in public procurements, at least according to regulations and laws in effect. As is the case in to many other areas, the system in place has grossly underperformed.

One of key generators behind the lukewarm efforts to fight corruption and, in general, abuses/malpractices of any type in public procurements concerns lack of any control or oversight whatsoever over implementation of public procurements. No control mechanisms are in place about which entity, for which purpose and how much plans to procure, how that is procured and, finally, whether what has been procured is worth the money spent and guarantees complete and purposeful fulfilment of procurement needs.

In the course of years, it has become more than obvious that the lack of control over implementation of public procurement procedures has been deliberate. There are numerous examples of violations to the Law on Public Procurements, both insignificant and significant. On the other hand, there are only a handful of examples for adequate sanctions imposed to perpetrators thereof.

It seems that particular benefits had been reaped in this area due to the "capture state". Defeating is the fact that, in spite of evidently more frequent investigations in this area, including those pursued by the so-called Special Prosecution Office whose mandate is exclusively related to crimes arising from wiretapped conversations, and those pursued by the Public Prosecution Office, there is still no significant turn of direction towards better implementation of tender procedures.

The widespread corruption in public procurements has been duly and adherently noted by the European Commission in its annual country reports, wherein it urged competent authorities to take measures aimed to prevent unlawful action and corruption throughout the cycle of public procurements.

The drop in total value of public procurements from one billion euros in 2016 to slightly above 600 million euros in 2017 could be considered as indicator that corruption has been reduced as well. Accordingly, at least following the simple math logic, decreased value of public procurements also means less money that could be stolen. Aside from such reasoning, no significant measures have been taken (with the exception of termination of the Council of Public Procurements, a body that was tasked to issue previous approval for all procurements for which contracting authorities could not provide evidence for sufficient market competition) aimed to reduce abuses and malpractices in public procurements.

Primarily, this refers to the slow pace of amending the Law on Public Procurements which, according to many provisions contained therein, leaves broad space for such abuses.

It has been more than one and half year since the new government took office, but the law is still not amended. The proposed new law has finally entered parliamentary procedure in late November 2018. At the same time, problems plague two of the most important institutions responsible for prevention of corruption in public procurements, which are duly analysed in this policy brief, those

being: the State Commission for Prevention of Corruption (hereinafter: the Commission or SCPC) and the State Audit Office (hereinafter: the Office or SAO). SCPC has not been functional and has not acted upon complaints for almost the entire duration of 2018, i.e. after five of its seven members were dismissed from office, but new members were not appointed. On the other hand, SAO operates without chief management officer, i.e. chief state auditor, for an even longer period of time. It seems that for more than one year, both ruling parties from the parliamentary majority (SDSM and DUI) are unable to reach an agreement to recruit this office, which is deemed one of the most powerful public offices in the state.

As indicated above, state-of-affairs have been slightly improved by both prosecution authorities, i.e. special and public prosecution offices. As regards the special prosecution, significant portion of its court cases and investigations concern abuses of public procurements, with several enforceable court rulings already taken for this criminal offence. On the other hand, the public prosecution demonstrates a reinvigorated effort in this regard and, according to information provided in the public, only in the course of this calendar year, they have initiated 39 cases related to criminal offence defined as abuse of public office in performance of public procurements and has filed indictments in two cases.

On the other hand, remaining actors within this system have not demonstrated any significant results in terms of prevention of corruption in public procurements, such as: State Commission on Public Procurement Appeals, Commission for Protection of Competition, State Attorney Office and Public Internal Financial Control.

Although all institutions named in this document have, to greater or lesser extent, clearly defined roles within the system for prevention of corruption, they do not only fail to fully exercise their public authorizations, but also underperform in terms of their mutual cooperation. Given that institutions fail to perform their law-stipulated mandates, they cannot be expected to cooperate, given that their mutual cooperation is loosely regulated and heavily depends on commitment and integrity of individuals at these institutions, first and foremost, their top management structures.

2. TOO MANY ANTI-CORRUPTION FIGHTERS, TOO LITTLE VICTIMS

Although it does not hold any significant role in this regard, the institution competent to monitor and analyse implementation of the Law on Public Procurements and overall performance of the system of public procurements, i.e. Bureau of Public Procurements (hereinafter: the Bureau or BPP), seems to be the frontrunner in terms of competences related to prevention of corruption. Notably, BPP should duly inform competent authorities in cases it has established certain irregularities. Nevertheless, the Law on Public Procurements does not provide clear indications which are these competent authorities, not only in this context, but also in the context of provisions that govern reporting corruption and abuses, which should be the State Commission for Prevention of Corruption and the Public Prosecution Office. Be that as it may, BPP's reports do not include information on having made such submissions, although in the course of its operation it learns of abuses in public procurements on the part of contracting authorities.

The next instance that should serve as deterrent for corruption in public procurements is appeal procedure led before the State Commission on Public Procurement Appeals (SCPPA). In 2007, when the new law was adopted, the absence of any misdemeanour or criminal sanctions therein was justified with

the role played by the right to lodge appeal in any stage of public procurement procedures. It was believed that this possibility would have the role of checks-and-balances, inter alia, in terms of curbing corruption in public procurements. In practice, however, this did not take place and there were no new measures taken in that regard.

Notably, the number of appeals lodged by companies including allegations on irregularities in tender procedures has remained very low (accounting for barely 3% of announced procurement notices). In spite of day-to-day accusations about abuses in public procurements, the number of appeals was not in locked step with the increased number of tender procedures and contracts signed. Companies reported that they are deferred from lodging appeals mainly due to high fees charged, distrust in SCPPA and fear of retaliation on the part of contracting authorities whose public procurements they have contested/appealed. On the other hand, the number of admitted/approved appeals by SCPPA is increasing, which further confirms that companies had been right to lodge appeals.

Another important link in the chain in fighting corruption that fails to duly perform its role is the system on public internal financial control at the institutions, including the internal auditors as well. It seems that this mechanism has failed to live up to its role as deterrent of abuses at the institutions in general, assuming the role of safeguarding (if such role is ever legitimate) management staff from abuses perpetrated by other employees. The fact that this control system does not detect problems in public procurements at the institutions is indicative of abuses being pursued with approval from top management structures.

It would be irrelevant to analyse the role played by whistleblowing mechanism in the context of preventing corruption as the Law on Protection of Whistleblowers, albeit in effect since 2016, is simply non-functional in Macedonia. Main reasons thereof include non-adherent law enforcement on the part of the institutions, lack of knowledge about the manner in which whistleblowing reports are made and general lack of knowledge about provisions from this law among citizens, as well as their uncertainty and fear that they will be protected in cases when they blow the whistle on somebody. Macedonia has a very brief and poor track record in whistleblowing and it seems that reinvigoration of this mechanism would require a long string of years.

While staying within the realm of the Law on Public Procurements, but looking outwards to system institutions, it could be concluded that one of the more significant actors in prevention of corruption and abuses in public procurements is the State Audit Office. In spite of the fact that competences of this institution are governed under a separate law, the Law on Public Procurements also determines it as responsible to audit the manner in which contracting authorities use and spend funds for public procurements.

For many years, SAO has been the single institution that regularly remarks irregularities in implementation of tender procedures identified as a result of audits performed at state institutions. Nevertheless, one must have in mind that these audits and irregularities in public procurements concern the past period of at least one year, i.e. once the damage has already been caused.

The broken link in this chain concerns the fact that no adequate follow-up actions were taken upon findings from audits performed and the fact that, in the course of time, SAO resorted to use of moderate criticism in its findings, while generalizing recommendations addressed to institutions and aimed to correct irregularities in the future. Nevertheless, in 2017, SAO conducted an overall performance audit to check "whether policies and instruments within the system of public procurements guarantee transparency, competition and equal treatment of economic operators, as well cost-effective and efficient use of public funds in procedures on awarding public procurement contracts", which is the first such audit in the state. SAO's general

EXCERPT FROM SAO'S REPORT, CHAPTER V: CONCLUSIONS

Namely, in spite of results achieved in terms of greater transparency and facilitation of greater efficiency in the system of public procurements with the use of the Electronic Public Procurement System and implementation of the Bureau's Education Programme, current policies and instruments within the system of public procurements do not always ensure satisfactory level of competition, equal treatment of economic operators, and cost-effective and efficient use of public funds in procedures on awarding public procurement contracts, thereby leading to lower quality of procurements and disrupting the principle on ensuring adequate value for the funds spent.

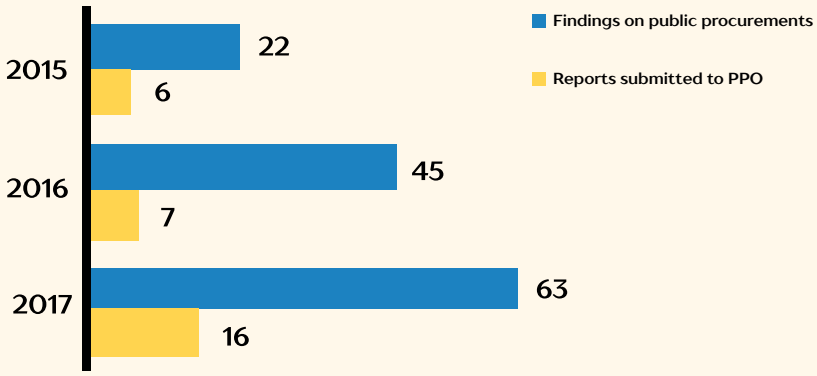
conclusion from this audit implied that the principle on ensuring adequate value for the money spent had been disrupted. Otherwise, in the course of its regular audits performed at state institutions in 2017, SAO has established 63 findings (with 103 secondary findings) related to irregularities in public procurements at entities that were subject to auditing. In the same year, SAO presented the Public Prosecution Office with 16 audit reports for a total of 12 entities audited for which the chartered state auditor has assessed that they committed criminal offence/misdemeanour.

In 2018, the prosecution office was presented with 12 reports, of which two reports were forwarded due to assessments that criminal offence/misdemeanour has been committed as part of public procurement procedures.

According to information from this prosecution office, one of these two reports is followed up with pre-investigation proceedings, while the second is undergoing verification of findings presented therein.

Information obtained from SAO indicates that key feedback received from the prosecution office in relation to (non)acting upon findings from their reports implies that "there are no grounds to initiate any proceedings on the basis of your report". Past practices whereby the auditor, as part of its communication letter to the prosecution office, describes the criminal offence for which it has been assessed was committed by the audited entity have not been of any assistance in this context, as they were discontinued in the meantime.

SAO's findings on irregularities in public procurements and reports submitted to PPO



It seems that, in the recent time, public prosecution authorities have woken up from their winter hibernation, either because of the change of government or because of the tacit rivalry with the special prosecution office.

In the course of 2018 alone, this prosecution office has initiated 39 cases that cover a total of 113 entities, on the grounds of criminal offence defined as abuse of public office in implementation of public procurements or inflicting damages to the Budget of the Republic of Macedonia, public funds or any other funds disposed by the state. Indictments have been raised in two cases; competent prosecutors issued orders for initiation of investigation proceeding for six cases, while 31 cases are in the stage of pre-investigation proceedings.

At least for the time being, it seems that the Special Prosecution Office has assumed the leading role in the fight against corruption in public procurements. Among the total of 24 cases established by this prosecution office six cases concern abuses in public procurements, of which three are currently in the stage of court proceedings, and court rulings have been taken in the remaining three cases. Six new investigations are underway and concern doubts related to abuse of public office and duty in public procurements.

Purposefully, last in the group of institutions that should have a leading role in prevention of corruption in public procurements is the State Anti-Corruption Commission. Aside from the fact that this Commission is not operational for almost the entire 2018, it had failed to perform its role in satisfactory manner in the past years as well.

While at one point (for example, 2010) the Commission had up to 14 cases per year referred to the public prosecution for further proceedings and based on suspicions of criminal offences committed, in the last years, this figure has dropped to zero. This also implies non-performance in the fight against corruption in public procurements, as significant portion of previous reports made to the prosecution office concerned abuses in public procurements which are the most common subject of abuses indicated in submissions made by citizens and other entities to the Commission.

Aside from submissions, the Commission's competences related to the fight against corruption in public procurements arise from the State Programme on Prevention and Suppression of Corruption and Prevention of Conflict of Interests (2016-2019)[1] wherein an entire section is dedicated to activities that should be taken in that regard. Nevertheless, multitude of these activities remains letter on paper with the expiration date of this programme. Some of them include: failure to expanded competences of the Bureau of Public Procurements to include supervision and oversight; failure to stipulate an obligation for mandatory publication of annual public procurement plans on contracting authorities' websites, including amendments thereto; failure to stipulate limits for amendments to public procurement plans; failure to stipulate an obligation for mandatory alignment of public procurement plans with actual needs of the contracting authority; failure to adopt procedure on justification of public procurements; failure of other state authorities to initiate procedures upon audits performed, etc. Some of these activities are anticipated under the proposal for the new Law on Public Procurements, but they are not a result of efforts made by SCPC, but rather of other stakeholders. Evidence for incomplete recognition of the need to develop systems and accompanying elements is found in the fact that the proposal for the new Anti-Corruption Law grants the Commission access to different registries and databases, but not a single state institution had thought of including the Electronic Public Procurement System to this list as database that hosts all data and documents related to tender procedures in the country.

Another institution holding a decisive role in prevention of corruption, but on the side of companies, i.e. economic operators, is the Commission for Protection of Competition which holds law-stipulated competences[2] to prevent and sanction illegal arrangements among companies participating in tender

[1] https://www.dksk.mk/fileadmin/Drzavni_programi/Drzavna_programa_2016-2019.pdf

[2] http://www.kzk.gov.mk/images/ZakonZaZastitaNaKonkSlves%20Konsolid%20Jun2016.pdf

procedures. While the Commission and the Bureau of Public Procurements have jointly designed the Manual on Detection of Illegal Arrangements in Procedures on Awarding Public ProcurementContracts[3] back in 2014 and, at one point in time, the Commission's role in this regard was publicly promoted, that effort has not yielded any results. This happened in spite of daily suspicious about arrangements between companies participating in tender procedures. In the course of 2015 and 2016, acting in misdemeanour procedure, this commission has not established existence of illegal arrangements among companies when submitting bids in procedures on awarding public procurement contacts, and has established one such case in the course of 2017.

Similar is the effect from actions taken to combat corruption in public procurements by the remaining two institutions, i.e. Financial Police and State Attorney Office.

According to data they have provided, in 2018, the Financial Police has not motioned any criminal charges on the grounds of the criminal offence defined as abuse of open call procedure ,on awarding public procurement contacts or public-private partnership. In the last year, i.e. 2017, the Financial Police has motioned a total of six criminal charges for this criminal offence, but there is no feedback from competent prosecution authorities about follow-up activities taken upon these motions.

State Attorney Office of the Republic of Macedonia is yet another institution that is decisively mentioned in the Law on Public Procurements, but has definitely failed to perform its intended role. In particular, the law grants this institution the right to seek legal protection and to motion initiation of procedure to declare public procurement contracts null and void in order to protect interests of the state or the public interest. Inspite of numerous and frequent examples for violation of the public interest or the state interests in public procurements, this institution has not initiated any such procedure.

3. ENHANCING COOPERATION AND OILING THE WHEELS OF THE SYSTEM: MOST IMPORTANT ELEMENTS FOR SUCCESSFUL ANTI-CORRUPTION

Although it was not mentioned previously in this document, the institution that should be the first to roll up its sleeves and "fix" the system for fight against corruption in public procurements is most certainly the Government. In this regard, some measures had already been taken, like drafts of the Laws on Prevention of Corruption and Conflict of Interests and the Law on Public Procurements, which have entered parliamentary procedure. Relevant contents of these draft laws, at least on paper, seem prospective in terms of improving the current state-of-affairs.

Hence, necessary improvements remain to be made in other segments, not only as part of legislative frameworks, but also in practice. Primarily, this concerns the state audit and further advancement of its previous, relatively positive role.

Some are of the standing that long-awaited constitutional guarantees for this institu-

[3] http://bjn.gov.mk/content/documents/Vodic-za-zastita-na-konkurencijata-za-web.pdf

tion's independence would improve matters in all spheres, including in prevention of corruption in public procurements. Irrespective of this endeavour, there is a series of other measures that could be taken and that do not require legislative changes. They include the need for a more serious treatment by public prosecution authorities of reports with suspicions about criminal offences that are forwarded to them by SAO. Auditors stand behind and have documented each and every finding from their reports. There is an entire system of control and verification of audit findings prior to publication of their reports as final. Hence, deeper and comprehensive cooperation between investigators and auditors could more easily find and unearth evidence that corroborate the auditors' suspicions. This is deemed particularly important as any refusal to verify suspicions from audit reports raise concerns about reasons behind such behaviour. In order to avoid leaving this matter to the discretion of individuals, this cooperation could be regulated in procedural manner, at least with some form of inter-institutional document, if not by means of law.

Having in mind that the new State Programme on Prevention of Corruption will be developed in 2019 and its application will start in 2020, it would be of great importance to closely monitor implementation of the new Law on Public Procurements (expected to enter in effect sometime in the spring of 2019) in order to immediately "attack" points that would be assessed as vulnerable to corruption.

Furthermore, the Parliament will definitely have to reinstate its oversight role on the executive branch of government. And finally, Members of Parliament will have to give high priority to the fact whether somebody has abused public funds, as indicated by auditors in their reports. More specifically, the Parliament must find ways to not only reconsider reports with negative findings (at least in the beginning), but to also hold hearings with managers whose performance has been remarked in these reports. Experiences show that, ultimately, such actions would have strong deterring effect on other people entrusted with management of public funds, so they would pursue their operations in responsible and law-abiding manner.

In this regard, the role of internal auditors should be adequately strengthened, especially in terms of monitoring implementation of public procurements and performance of procurement contracts.

Roles of all other institutions that are part of the system for fight against corruption in public procurements should be re-examined as well. Such efforts should include their position and competences and assessment thereof in the context of results achieved, with the ultimate goal of taking measures, both in terms of legislation and practices, for more efficient fight against corruption. Also, it seems there is a great need for measures related to issuance of adequate sanctions for non-performance on the part of many institutions in cases when sufficient grounds for such actions exist.

Joint recommendation for all these institution, which does not exclude previous indications, concerns increased transparency of their operations and bringing their work closer to the citizens. These institutions should bear in mind that they might not have at their side those engaging in corruptive practices, but that their biggest ally is the most numerous category in society, i.e. citizens, and that they should capitalize on their support.

Due consideration should be made of the fact that corruption is an enemy against which, especially in public procurements, chances of victory are slim when the battle is led by a single institution, irrespective of how powerful and independent it might be. Hence, this fight necessitates joint action on the part of the entire system, by assigning adequate and precise roles to each and every actor concerned, and by avoiding overlap of competences or leaving any area unaddressed. Only by doing so, corruption could be stopped at its track, while perpetrators thereof could be detected and adequately sanctioned.

The new government is yet to demonstrate uncompromised fight against corruption and, should it wish to pursue that path, it must

start with corruption in public procurements. More so because they have become a daily feature and "tender procedures" are no longer taboo. People understand them and, thereby, they understand corruption. Decreasing corruption in public procurements would mean more efficient state, better quality of public services, increased trust in institutions and, ultimately, utilization of taxpayers' money in compliance with citizens' needs.