MONITORING PUBLIC PROCUREMENT

AT THE LOCAL GOVERNMENT LEVEL

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INTRODUCTION: GOALS AND METHODOLOGY

The Center for Civil Communications (CCC) has been regularly monitoring the implementation of the public procurement procedures in Macedonia since 2008, i.e., from the time when the new Law on Public Procurement, drafted in line with the European Commission's Directives, started to apply. The purpose of the monitoring is to assess whether and to what extent state institutions adhere to the general principles on the spending of public funds that are stipulated in the law itself: competition among companies, equal treatment and non-discrimination thereof, transparency and integrity in conducting the procedures, as well as the rational and efficient use of money.

The subject of the monitoring performed by CCC are the procurements carried out by all state institutions in the country, both at central and local government levels. Due to the detected differences and specifics in the conducting of public procurement procedures between the institutions at the central and local government level, as of 2010, the procurements carried out by these institutions have been monitored separately. In this manner, more detailed and significant data can be obtained for all of them, enabling all interested parties to significantly promote and improve the manner of conducting public procurement procedures in view of achieving consistent enforcement of the law and full adherence to general public procurement principles.

This particular report has been drafted based on the results of monitoring the implementation of a selected sample of 40 public procurement procedures conducted by local government institutions throughout Macedonia during the period from April 1 to September 30, 2012.

The sample was selected at the time of the publication of the procurements on the Electronic System for Public Procurement (ESPP) and in the Official Gazette of RM. When the procurements to be monitored were selected, account was taken to provide for a wide, diverse, and equal scope of institutions (local self-government units and local institutions within their scope of competences: public enterprises, schools, kindergartens, etc.), types of public procurement procedures (competitive procedures, open procedures, etc.), types of contracts (goods, services, and works), and subjects of procurement, as well an equal geographical distribution of the institutions whose procurements were monitored.

The monitoring is carried out by gathering primary and secondary data by virtue of CCC monitors' attendance at the public opening of the tenders, discussions with the tenderers, browsing and researching data available on the ESPP, searching for information on the received appeals and the relevant decisions thereupon by the State Appeals Commission for Public Procurements, available at the web page of this institution, and by sending applications for access to information of public character for data that is not available

otherwise. The questionnaires and all other forms that are used within the monitoring process are structured in such a way as to provide for the most effective monitoring of the conducting of procurement procedures in terms of compliance with the legislation and adherence to general public procurement principles.

In accordance with the data and information thus obtained, previously structured and entered into a specially designed matrix, the manner of conducting the public procurement procedures is analyzed in terms of adherence to the principles referred to above: competition among companies, equal treatment and non-discrimination thereof, transparency and integrity in conducting the procedures, as well as the rational and efficient use of money.

After the data has been analyzed, a report is drafted, which includes the main findings of the monitoring and an analysis of the procurements, recommendations on how to resolve the identified problems and weaknesses in the public procurement system, and detailed elaboration on the situation ascertained.

SUMMARY

Setting eligibility criteria that are inappropriate for the subject of the procurement, the estimated value of the procurement, or the market conditions is a serious problem found with local-level tenders. Such inappropriate criteria are required in nearly one third of the monitored procedures at the local level. The outcome is as follows: in 60% of these procedures, there has been, or has remained, a single tenderer; 30% of the procedures have been annulled; and in 90% of them, an e-auction has not been held. Setting inappropriate criteria is a problem with multiple negative consequences that the competent authorities must analyze separately and take adequate measures to resolve.

The statutory obligation to hold an e-auction for all public procurements, regardless of their value, is fulfilled very rarely in the case of tenders at the local level. This situation also implies a failure to implement the idea—through the mandatory holding of e-auctions—of streamlining the process when institutions are paying for goods, services, and works purchased in a public procurement procedure, on the one hand, and narrowing the opportunities to favor particular tenderers, on the other. Within the selected sample for public procurement monitoring at the local level, e-auctions were held in only 46% of the procurements. In the remaining 54%, e-auctions were not held for various reasons, the most dominant of which is the participation of only one tenderer, or several tenderers having participated but only a single one remaining at the time of the e-auction—thus rendering it inapplicable. The fact that fewer than half of the tenders fail to end in an e-auction, despite the legal obligation to that effect, notwithstanding the reasons, indicates that the reasons and purposes for this obligation will have to be reconsidered.

The transparency and accountability of the contracting authorities on the issues and matters relating to the spending of public funds, i.e., in the public procurement process, are still areas that require a lot of improvement. This refers not only to cases in which it is up to the institution to choose whether it will be transparent and accountable, but also to the cases in which transparency and accountability are explicitly stipulated legal obligations. The tender documentation has not been published on the ESPP in 45% of the monitored procedures, while several local institutions, all from Skopje, have refused to submit data on the procurement after having received applications for access to information of public character. For some of the procedures, the contract award notification has not been published on the ESPP even four months following the decision on the selection of the most favorable tenderer (the legally prescribed term is one month), while, in some cases, the outcome of the public procurement procedure has remained unknown several months after it has been completed.

The monitored procedures at the local government level also involved annulments of procedures, although the percentage of annulments within the monitored sample (15%) is

considerably lower than that for the monitored procedures within the institutions at the national level. Yet, an analysis leads to the conclusion that an annulment is not always applied as the last resort and as the solely applicable solution, but that an annulment is still seen as an easy way out whenever some initial calculations fail. What remains is to appeal to the competent authorities to restrict the legal possibilities for annulment of the procedures and to introduce sanctions against those institutions that have misused annulment to pursue some other goal.

When it comes to the contract award criterion of "lowest price" or "economically most favorable tender," there is no specific rule that is applied by local-level institutions, although the "lowest price" criterion predominates over that of the "economically most favorable tender." However, there is no particular standard pattern that the institutions apply when setting the criteria and selecting which of these two criteria should be used for the relevant procurement. When "quality" is used as an element of the "economically most favorable tender" criterion, how this element should be evaluated is still not explained. In addition to "lowest price" and "quality," other elements that are often used in local-level procurements are "delivery or execution time," "terms of payment," and "guarantee." The contracting authorities should consider the evaluation criteria only as instruments that would enable them to obtain the best value for money for the procurement, and not as yet another way to favor particular tenderers.

The companies that participate in the tenders organized by local institutions pinpoint the following problems as most frequent: extensive documentation required from them for participation in tenders, technical specifications and tender documents, criteria and manner of evaluation of the tenders, short deadlines, and mandatory e-auctions. The most frequent problem in the phase of performance of public procurement contracts is the late payment by state authorities. The companies are reluctant to speak about these problems in public.

ELIGIBILITY CRITERIA THAT ARE SET HIGH: AIMING AT QUALITY OR AT A PARTICULAR TENDERER

Setting eligibility criteria that are inappropriate for the subject of the procurement, the estimated value of the procurement, or the market conditions is a serious problem found with the tenders at the local level. Such inappropriate criteria are required in nearly one third of the monitored local-level procedures. The outcome is as follows: in 60% of these procedures, there has been, or has remained, a single tenderer; 30% of procedures have been annulled; and in 90% of them, e-auctions have not been held. Setting inappropriate criteria is a problem with multiple negative consequences that the competent authorities must analyze separately and take adequate measures to resolve.

A turnover as high as 115 times the value of the procurement as an eligibility criterion

In one of the procurements of services for amending and supplementing the General and the Detailed Urban Plans in one of the municipalities, the tenderers, in the part relating to their economic and financial standing, were required to have an annual turnover of over EUR 6 million! On the other hand, the value of the procurement had been estimated at EUR 52 thousand, which meant that the tenderers were required to have an annual turnover 115 times greater than the value of the procurement. Three tenderers had applied to the tender, but none of them met this criterion, and the procurement was annulled. The inadequacy of the criterion about the enormous annual turnover, which is not proportionate to the value of the procurement, is substantiated by the information that the European Commission, with the new amendments to the regulations on public procurement, will recommend the introduction of a legal obligation that the required turnover of the companies should be at most three times greater than the value of the procurement. Cases in which the companies are required to have an annual turnover that is disproportionate to the value of the procurement are not a rare phenomenon in local-level monitoring. In another case concerning a procurement of works for the purposes of reconstruction of a local institution's roof, the tenderers were required to have an annual turnover 10 times greater than the value of the procurement, i.e., a turnover of MKD 20 million for a procurement estimated at MKD 2 million. In this case, too, several tenderers applied, but the procurement was annulled eventually.

Another very common criterion used in local-level procurement procedures with such noted inadequate criteria concerns the requirement for tenderers to have been awarded similar contracts previously. Furthermore, several types of such criteria are set. In some cases, the companies are required an exact number of such previously performed contracts (for instance, three or five); sometimes, the tenderers are required to have performed such

previous contracts within a specified number of years (most often in the last three years), while in other cases, there is a requirement that such contracts should have been performed only for state institutions. It is interesting that, in some of these cases, the companies indicate that such a criterion is virtually impossible to meet, because within the specified period of time, in the entire country, there have not been as many procurements in total as the contracting authority requires from them so as to become eligible tenderers.

That's just too much!
In one procurement of works conducted by a municipality for the construction and reconstruction of a parking lot, the tenderers were required to meet the following criteria: to have an annual turnover exceeding EUR half a million in the last three years, realized exclusively by performing works relating to the subject of the procurement; to have a technical staff of 90 employees; to have been awarded at least three contracts for identical works and to present at least threereferences for high quality performance of the works; to have their own facility for production of the paving tiles to be used for the parking lot; to have been granted a concession for exploitation of the mineral raw materials for the manufacture of the paving tiles; to own a specified car pool; and to have an ISO 9001:2008 Standard of Quality certificate. One may guess the outcome: the criteria were met only by one tenderer, which was awarded the contract, and there was no e-auction and no reduction of the initially offered price.

The next problem relating to the eligibility criteria is the requirement that the tenderers should hold quality certificates, such as those under the ISO 9001:2008 standard, in particular for procurements for which even superficial market research would show that the companies expected to participate do not hold such certificates. Thus, for instance, such a certificate is required for the procurement of groceries, which are held even by small neighborhood markets, but such markets rarely have ISO 9001:2008 quality standards; even so, two local institutions set this as a criterion. In both cases, the outcome was the same—only a single tenderer was awarded the contract without a possibility to reduce the prices at an e-auction, since the requirements were not met to hold such an auction. This raises the following question: is this a matter of an extensive lack of understanding of the market and the market conditions, or are such criteria set purposely in order to enable only a single tenderer, known to have been certified for that standard, to apply at the tender? There are many similar examples.

Whether set intentionally or inadvertently, inadequate criteria cause numerous problems.

Setting inappropriate eligibility criteria is a very serious problem that has a range of negative consequences. Firstly, even if set with the purest of intentions, such criteria restrict competition because only a small number of companies are able to meet them and participate in the procurement procedures. Secondly, as is the case with the procurements within the monitored sample, when such criteria are set, the usual outcome is an annulment of the procurement, since none of the tenderers have met the criteria, or the the contract goes to the single tenderer that has met the criteria. Thirdly, in such cases, there is no e-auction, the purpose of which is to reduce the price of the procurement and restrict the possibility for bid-rigging. Fourthly, when only one tenderer meeting the criteria has applied or remained, the price of the procurement remains the same as the initial price offered by the tenderer, without any possibility for its reduction, unless the procurement is annulled and then the contracting authority engages in ever-so-dubious negotiations with the single tenderer to reduce the price and sign a direct contract, i.e., a "tete-a-tete contract." Fifthly, setting unrealistic and inadequate eligibility criteria shifts the very essence of procurements—instead of a competition for selection of the best tender, the procurement procedure turns into a competition to select the best company. Sixthly, setting the eligibility criteria so high discriminates against smaller and newly founded companies, instead fully favoring larger companies and those with more extensive experience, thus turning the public procurement market into a closed market. Seventhly, setting eligibility criteria that stipulate exact figures to be met by the companies, when there is no logic behind such figures, always casts a shadow of doubt that the tender has been rigged in favor of a particular company. (For instance, why require a turnover of 20 million, rather than, say, 10 million, for a procurement with a value of 2 million? Why require exactly 90 employees, rather than 100? Why require four instead of three trucks?). Eighthly, the broad discretion of any institution to set eligibility criteria as it sees fit and which it deems to be adequate always leaves room for manipulation and the favoring of particular tenderers.

Due to all of the above, the competent authorities, which cannot be aware of the criteria set in each separate procurement so as to intervene on a case-to-case basis, have to make an in-depth analysis of the aforementioned as a general problem and undertake measures to resolve it, whether by virtue of written guidelines and comments on how the criteria should be set, or by incorporating systematic mechanisms in the law to govern this specific element of the public procurement process.

FAILURE TO HOLD AN E-AUCTION: INTENTIONAL OR INADVERTENT VIOLATION OF THE LAW

The statutory obligation to hold an e-auction for all public procurements, regardless of their value, is fulfilled very rarely in the case of tenders at the local level. This situation implies a failure to implement the idea—through holding mandatory e-auctions—of streamlining the process when institutions are paying for the goods, services, and works purchased in a public procurement procedure, on the one hand, and narrowing the opportunities to favor particular tenderers. Within the selected sample for public procurement monitoring at the local level, e-auctions were held for only 46% of the procurements. In the remaining 54%, the e-auction was not held for various reasons, the most dominant of which was the participation of only one tenderer, or several tenderers having participated but only a single one remaining at the time of the e-auction—thus rendering it inapplicable. The fact that fewer than half of the tenders fail to end in an e-auction, despite the legal obligation to that effect, notwithstanding the reasons, indicates that the reasons and purposes of this obligation will have to be reconsidered.

Direct interdependence between the eligibility criteria and the chances to hold an e-auction

When it comes to the (lack of) e-auctions, there is a rule of thumb: in all procurement procedures in which it is apparent in the notice itself that the eligibility criteria have been set inadequately, one may assume that there will be no e-auction, and this assumption is almost without exception fulfilled. There are two possible outcomes in such a situation. The first is that only one tenderer meeting the criteria will apply, and it shall be awarded the contract (provided the tender is within the framework or is not considerably higher than the estimated contract value), or the procurement procedure shall be annulled (if the price of the tender is considerably higher than the estimated value), and then the contracting will open price negotiations, after which a direct agreement will be reached. The second outcome is that several tenderers will apply, but until the stage of the e-auction, only one company that meets the criteria will remain, and, once again, either this company will be awarded the contract or the procurement will be annulled and price negotiations will be initiated.

In 14% of the total number of procurement procedures within the monitored sample that did not conclude in an e-auction, there were no tenderers at all; in 5% of the cases, the e-auction was not held because the procedure had been annulled prior to it; in 43%, there was only a single tenderer; in 38% of the procedures, two or more tenderers applied, but only one or none remained at the end.

On the contrary, in 33% of the monitored procurements in which an e-auction was held, there were two tenderers, while in the remaining 66%, there were several tenderers, four on average.

No e-auction means no lower prices

Three tenderers applied and submitted their tenders for the notice for the procurement of services for amending and supplementing the General and the Detailed Urban Plans of one municipality. Although the tenders had been evaluated as complete and satisfactory, still none of the companies met the criterion of having realized an annual turnover of EUR 6 million in the preceding three years, while the contract in question had an estimated value of EUR 52 thousand. The companies had turnovers in the amount EUR 103, 174, and 303 thousand, respectively. Therefore, all three tenderers were excluded, the procurement was annulled, and no e-auction took place. The same procurement procedure was repeated two months afterwards, but the turnover criterion remained the same. This time, one tender was received by a company other than the initial three; it met the criterion and was awarded the contract. The value of the contract awarded was 32% greater than the estimated value of the contract.

Although an e-auction does not necessarily guarantee a price reduction, it still presents an opportunity for the institutions making the procurement to attempt to get prices that are lower than those achieved when there is no e-auction, i.e., no reduction of the initially offered price. In such cases, almost with no exception, the price at which the contract has been awarded is always considerably higher than the value of the procurement estimated by the institution.

The mandatory nature of e-auctions creates problems for both the companies and the institutions conducting the procurement procedures. The experience of the EU member states shows that these countries are pushing for the mandatory conducting of so-called electronic procurements, i.e., procurements that are entirely conducted by electronic means, without using paper or physical contact between the tenderers and the procuring entities. This requirement shall become a binding obligation for all contracting authorities with the new amendments of the set of public procurement regulations at the level of the European Union that have been announced for the end of the current year. On the other hand, the institution conducting the procurement has been given the discretion to decide whether it will end the procurement with an e-auction. In any case, the fact that fewer than half of the tenders fail to end in an e-auction, despite the legal obligation to that effect, notwithstanding the reasons, indicates that the reasons and purposes of this obligation will have to be reconsidered in our country, too. In the meantime, the contracting authorities should make endeavors to take all measures within their scope of competence to make the holding of e-auctions possible by setting adequate eligibility criteria.

TRANSPARENCY AND ACCOUNTABILITY STILL A PROBLEM, NOTWITHSTANDING WHETHER VOLUNTARY OR REQUIRED BY LAW

The transparency and accountability of contracting authorities at the local level are threatened not only when they should result from the good governance of institutions, but also when they are explicitly stipulated as legal obligations. Therefore, the transparency and accountability of the contracting authorities on the issues and matters relating to the spending of public funds, i.e., in the public procurement process, are still areas that require a lot of improvement. Of the monitored procedures, the tender documentation was not published on the ESPP in 45% of cases, while several local institutions, all from Skopje, have refused to submit data on the procurement after having received applications for access to information of public character. For some of the procedures, the contract award notification was not published on the ESPP even four months following the decision on the selection of the most favorable tenderer (the legally prescribed term is one month), while in some cases the outcome of the public procurement procedure has remained unknown several months after it has been completed.

Voluntary publication of tender documentation on the ESPP runs with difficulties.

Although not being obliged by law to do so, in 55% of the monitored procedures, the local-level institutions have used the good and useful practice of publishing the tender documentation at the Electronic System for Public Procurement, thus enabling all interested tenderers to download such documentation and review it before making a decision to participate in the procurement procedure. In the remaining 45% of the monitored procedures, the tender documentation pertaining to the published contract notices are not freely accessible in electronic format on the ESPP, but the interested tenderers may obtain them directly from the institutions by a phone call or in person (if the documentation is in hard copy only). In the first case, when the tender documentation is available on the ESPP, downloading it is free of charge, while in the case when it is only available directly from the contracting authority, most often the candidates have to pay a certain amount that, in practice, is almost always greater than the legally prescribed limit for the fee for obtaining the tender documentation: the costs for copying and delivery of the documentation. In those procedures in which fees had been charged, the tender documentation costs MKD 820 on average.

Publishing the tender documentation on the ESPP by the state institutions is simple, easy, and free of charge and has multiple benefits. Firstly, any interested company may see immediately what is needed and under which conditions. Secondly, it carries no costs for the companies, either in terms of money or time (required to visit the institution in person

and collect the tender documentation). Thirdly, it leaves the companies more time to prepare their tenders. Fourthly, it provides all interested citizens and organizations (such as ours) with easier, faster, and more comprehensive insight into how public money is spent. Fifthly, it enables all other companies and businessmen (current and future) to research the market prior to making the decision to enter the public procurement market.

Thus, the non-publication of tender documentations on the ESPP remains one of the most incomprehensible phenomena in the public procurement process. Although there is no legal obligation to that effect, the fact that it is already being done by more than half of the institutions, and that the ESPP provides for a specially designated function for publication of the tender documentations, tells us that this is a practice that should be applied.

Public procurements at a standstill

Several public procurement procedures within the monitored sample at the local level simply reached a standstill in the course of the monitoring. In the procedures in question, four months and more after the opening of the tenders, still no contract has been concluded, no decision has been made, and no contract award notification has been sent. This is the case in 8% of the monitored procedures, in which the delays because of various reasons average at more than four months. Otherwise, the Law on Public Procurement lays down strict terms for each phase of the procedure; hence, such behavior of the institutions is surprising.

It is interesting that for all of the institutions where such cases have been documented, the big delays refer solely to the procedures that are within the scope of the monitoring, while all of their other procurement procedures, preceding or following the monitored one, have been conducted regularly with an outcome and notification. In addition, in one of them, the public opening of the tenders (which is regularly attended by a CCC monitor) has been delayed four times already; in another,a CCC monitor was not allowed to attend the public opening, despite it being an explicitly stipulated legal right; and, in two cases, the tender documentation, requested officially through exercise of the right to access information of public character, has not been delivered.

One of the local-level institutions with a procurement procedure within the monitored sample prevented any monitoring of that procurement, although it was spending the citizens' money for it. First of all, this institution did not allow CCC's monitor to attend the public opening of the tenders—which the institution is obliged by law to do. Then, the same institution refused to deliver the requested information of public character under the Law on Free Access to Information of Public Character. Furthermore, although the notice was published in August, the outcome of the procurement procedure still remains unknown five months after its completion. There has also been no notification as to whether the contract has been awarded, whether the procurement has been annulled, and whether an e-auction has been scheduled.

The transparency and accountability of the contracting authorities at the local level as regards the spending of public money is a problem demanding considerable improvements. This problem is accentuated by the fact that the institutions fail to adhere to these principles not only when it comes to their good will, but also when transparency and accountability obligations arise by virtue of law. In any case, in order to strengthen the compliance, it is necessary to introduce additional legal transparency and accountability obligations relating to the spending of public funds for the institutions, since one cannot exist without the other. One cannot spend someone else's money, on the one hand, and refuse to tell that someone how his/her money has been spent. Since this is a highly ethical principle, a great deal of the transparency and accountability obligations are left to a voluntary decision by the institutions, but this also puts a powerful instrument in their hands—those who want to may use it to show that they work in line with such principles. However, such voluntary application appears to be insufficient, and the introduction of a relevant legal obligation should be taken into consideration. Additionally, the authorities should consider the idea of introducing sanctions for non-compliance with these principles that are deemed the highest when it comes to the sound management of public funds.

ANNULMENT OF PROCEDURES: A JUSTIFIED SOLUTION OR AN EASY OPPORTUNITY?

The monitored procedures at the local government level also involved annulments, although the percentage of annulments within the monitored sample (15%) is considerably lower than that for the monitored procedures within the institutions at the national level. Yet, an analysis leads to the conclusion that the annulment is not always applied as the last resort and the solely applicable solution, but that the annulment is still seen as an easy way out whenever some initial calculations fail. What remains is to appeal to the competent authorities to restrict the legal possibilities for annulment of the procedures and to introduce sanctions against institutions that have misused the annulment to pursue some other goal.

Annulments are a problem also for public procurements at local level, albeit at a lesser extent.

The annulment of public procurement procedures, as one of the most serious problems of public procurements in the country, is traditionally less present at local-level institutions than those at the national level. Thus, within this monitored sample of procurements conducted among institutions at the local level, 15% of the monitored procurements have been annulled, which is a ratio that is considerably lower than the one for the annulments at the national level (which is approximately 25%).

In any case, one third of the annulled procedures were annulled because none of the tenderers had satisfied the eligibility criteria. An analysis of these cases indicates that the criteria that the companies have not been able to meet have indeed been set too high and inadequate for the procurements. The criteria that the companies/tenderers have not been able to satisfy include an annual turnover of EUR 2 million, a turnover of EUR 6 million, and fulfillment of three contracts with the same subject of procurement, even though there has been only one procurement in the entire territory of Macedonia with such a subject in the past three years. Furthermore, 3.5 tenderers on average participated in the procurement procedures that were annulled because the eligibility criteria had not been met.

One of the procurements was annulled because, despite the participation of four tenderers eligible to take part in the e-auction, which was held, the lowest price offered was still higher than the one estimated by the institution. The same procurement was then repeated and one of the tenderers that participated in the previous procedure was selected, with a price similar to the one it offered the first time.

One of the annulments is particularly interesting. It concerns the procurement of a passenger motor vehicle. The local institutions that conducted the procurement published a notice for the procurement of a "passenger motor vehicle" on July 12. The term for delivery of the tenders was June 26. Ten days after the publication of the notice, i.e., just four days prior to the expiry of the term, the procurement was annulled due to significant deficiencies or omissions in the tender documentation. However, four days later, a new notice was published for a "used passenger motor vehicle." One tenderer applied for the second notice and was awarded the contract. Why did the institution need ten days to establish the significant omission in the tender documentation? Did something happen in those ten days that led to the annulment of the procedure and the alteration of the subject of the procurement from a "motor vehicle" to a "used motor vehicle"? Furthermore, what happened with the tenderers that prepared their tenders for a new vehicle during those ten days, and were they left with no possibility to submit such tenders for the new procurement due to the drastic change of the subject of the procurement?

Another procurement procedure was annulled even though there had been one tenderer, but with a price higher than the estimated one. In such cases, a considerable number of institutions opt to annul the procedure and then engage in direct negotiations with the single tenderer in order to reduce the price of the tender. Then, they proceed with awarding the contract in a negotiated procedure without publishing a notice, i.e., by entering into a so-called "tete-a-tete contract." Although such an option is provided for by the law, the institutions using it are running several risks. Firstly, they prolong the procedure. Secondly, they enter into direct relations and negotiations with the tenderer, which always leaves room for suspicions of misuse. Thirdly, there is a risk that the procurement will fail if the tenderer is not willing to reduce the price. Lastly, this situation only increases the already large problems with the annulments and the higher values of the contracts awarded directly.

Only one of the monitored procedures was annulled because no tenderer applied, and in that case, the institution immediately proceeded with negotiations with one tenderer, awarding the contract to that tenderer in a simplified negotiated procedure. It is interesting that the procurement was for fire wood—a good that is frequently a subject of procurements—and that there are a great number of suppliers on the market for such a good.

Despite being allowed by law under many circumstances, the annulments of the public procurement procedures remain a serious problem. Their number is ever increasing, together with doubts about the full justification of such annulments. Therefore, what remains is to appeal to the competent authorities to more seriously tackle the problem either by a drastic restriction of the legal possibilities for annulment of the procedures or by sanctions against institutions that have misused the annulment and applied it even in cases when it has not been necessary, or provoked it with other procedures.

PRICE OR QUALITY: IT IS IMPORTANT TO EXPLAIN WELL WHAT SHALL BE SCORED AND HOW

When it comes to the contract award criterion of "lowest price" or "economically most favorable tender," there is no specific rule that is applied by the institutions at the local level, although the "lowest price" predominates over the "economically most favorable tender." However, there is no particular standard pattern that the institutions apply when setting the criteria and selecting which of these two criteria should be used for the relevant procurement. When "quality" is used as an element of the "economically most favorable tender" criterion, it is still not explained how this element should be evaluated. In addition to "lowest price" and "quality," other elements that are often used in the procurements at the local level are "delivery or execution time," "terms of payment," and "guarantee." The economic operators should consider the evaluation criteria only as instruments that would enable them to obtain the best value for money for the procurement, not as yet another way to favor particular tenderers.

Economically most favorable tender—providing a way to select quality, but also an opportunity for manipulation

The "lowest price" was set as a criterion in 72.5% of the monitored public procurement procedures at the local level, while the remaining 27.5% of the procedures used the "economically most favorable tender" as a criterion.

Although it is not always the case, special attention has to be taken whenever the institutions set "economically most favorable tender" as a criterion for evaluating the tenders. Despite the fact that this criterion offers excellent possibilities when the institution wants to obtain the best value for money in its public procurements, still, as applied in our country, it often leaves room for manipulation in the selection of the most favorable tender. The examples for this are numerous. In one of the monitored procurements, in addition to the score for the price, 30 points were allocated for quality, with a clarification that "successful projects" shall be rated, but without any explanation as to what exactly a successful project means.

Yet, although rarely, there are examples where the element of "quality" is explained in detail. Thus, in a procurement of services for the development and installation of a road transport software package for a municipality, "quality" participated as much as 60 points in the final grade, and this element was divided into two parts, one with the weight of 20 and the other with a weight of 40 points. Each of these parts was further elaborated and divided into five sub-criteria. In this way, the scoring can be carried out precisely, leaving no room

for manipulations. The companies, on the other hand, benefit from having a clear understanding of the scoring criteria even in the stage when they are preparing their tenders.

It should be noted that "delivery or execution time" and “terms of payment” are often used as elements of the criterion "economically most favorable tender.” In the case of both elements, it is arguable whether they should be scored or clearly specified in the tender requirements.

In several cases, the "lowest price” was used as a criterion, but the tenderers were also required to submit a list of services rendered in the preceding three years, and in one case a reference list as well. In such cases, it is not clear how the lists submitted by the tenderers are to be evaluated. What if one tenderer submits a list containing a single work performed, while another has a list of four such works? Bearing in mind that this is not a criterion that is scored, is the tenderer that performed four works going to be in a advantageous position, and how shall that reflect in practice on the outcome of the procurement?

Too good to be true

In the case of one procurement (for fire wood), "economically most favorable tender” was used as a criterion for the selection of the best tender, with price having a weight of 80 points and the terms of payment having a weight of 20 points. Two tenders were submitted, and their evaluation led to the following outcome: tenderer A that offered a lower price got the maximum 80 points for the price, while tenderer B got 63.43 points for the price offered. The score relating to the terms of payment was as follows: tenderer A, which won 80 points for the price, got 3.38 points for the terms of payment, since it offered a term for payment of one year. On the other hand, tenderer B, which received 63.43 points for the price, got the maximum 20 points for the term of payment. It offered a term of six years! In the end, tenderer B won with a total of 83.43 points, 0.05 points ahead of tenderer A, which had 83.38 points. It is peculiar that if tenderer B offered five instead of six years, it would not have won the contract. One may ask the question of how tenderer B could have known to offer exactly six years, which would take it 0.05 ahead of the competitor and win it the contract. It is worth noting that the offered term for payment of six years has been, so far, the longest such term offered for a procurement of that type in all of the procurements monitored by CCC from 2008 to the present day.

Contracting authorities should be very cautious when developing the criterion for selecting the best tender. It is not by accident that the European directives, on the grounds of which the public procurement procedures were developed, stipulate two criteria, leaving it up to the procuring entity to decide which one it will use. The basic idea is to apply a criterion that would enable the procuring institution to obtain the best value for money in each individual public procurement. Although it is hard to tell, still, it appears that the "economically most favorable tender" criterion, when applied honestly and properly,

enables the evaluation, in addition to the price, of some other elements that will eventually enable the procuring entity to obtain the best value for money. On the other hand, as opposed to the “lowest price" criterion, that of “economically most favorable tender” involves a greater risk of misuse and selection of a favored tenderer. Therefore, institutions should use both criteria as mechanisms for helping them to select the genuinely best tender, rather than as a chance to use the opportunity granted by the law to select a favored tenderer.

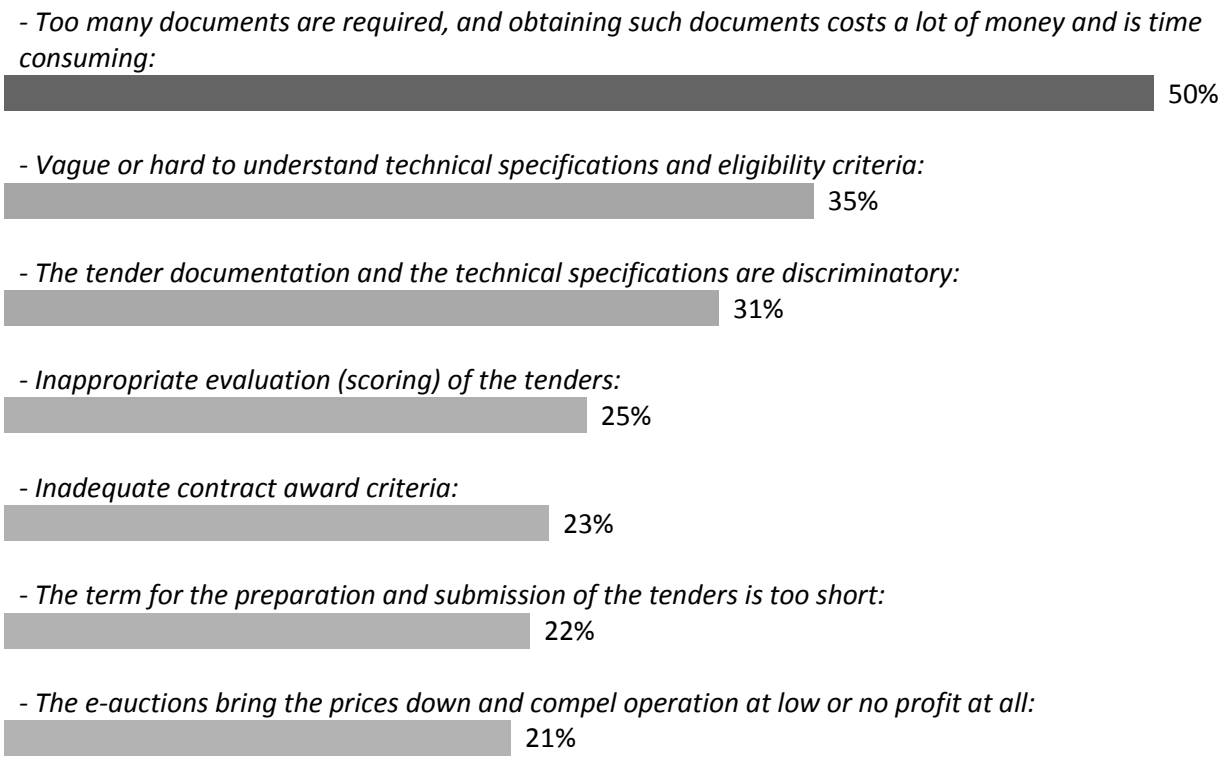
LOCAL COMPANIES ON LOCAL PROCUREMENTS

Companies that participate in the tenders organized by local institutions pinpoint the following problems as the most frequent: extensive documentation required from them for participation in the tender, technical specifications and tender documents, criteria and manner of evaluation of the tenders, short deadlines, and mandatory e-auctions. The most frequent problem in the phase of performance of the public procurement contracts is late payment by the state authorities. The companies are reluctant about speaking about these problems in public.

The most frequent problems in public procurements, according to the companies, coincide with those identified in the monitoring.

In the course of August and September, a survey was carried out among 125 companies from approximately twenty municipalities that are participating primarily in public procurement procedures conducted by local government institutions. Among other things, the companies were asked about the problems that they most frequently face when participating in the public procurement procedures, and they were given multiple choices to select from.

Which are the most frequent problems that you are facing in the public procurement procedures?



The reply to the question about the most frequent problems that the companies have in the performance of the public procurement contracts is also worth mentioning. As many as 70% of the respondents answered that the most frequent problem in the performance of the public procurement contracts is late payment by the institutions. The next problem faced by 24% of the surveyed companies is the additional requirements that the contracting authorities set in the contracts, which differ from the initially agreed ones.

Nevertheless, although the companies are facing a lot of problems in the public procurement procedures, they are reluctant to speak in public and discuss the potential solutions to such problems with the contracting authorities. A public debate in which the companies point to the problems in the public procurements, at their own initiative or at the initiative of their associations, is not a possibility that they consider. On the other hand, whenever asked within a survey or another medium through which they can answer anonymously, the companies always list a range of problems occurring in the public procurement procedures. Taking into account the fact that the relationship between the contracting authorities and the companies in the public procurements should be one of mutual trust, understanding, respect, and partnership, the business community should discuss its views and proposed solutions to the identified problems and deficiencies of the public procurement process more openly in view of further promotion of this process.