PUBLIC PROCUREMENT MONITORING REPORT

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ABBREVIATIONS

BPP – Bureau of Public Procurements

SAO – State Audit Office

SCPPA – State Commission on Public Procurement Appeals

CA – Contracting Authorities

EO – Economic Operators

EPPS – Electronic Public Procurement System

EU – European Union

PPL – Public Procurement Law

RM – Republic of Macedonia

CCC – Center for Civil Communications

KEY FINDINGS AND RECOMMENDATIONS

- **The biggest issues in public procurements, according to the company survey, are the late payments on the part of the institutions for realized procurements, favoring and vague tender documentations, as well as the unrealistically laid down and difficult to meet bidding criteria for companies. These are part of the findings of the research conducted among 220 companies in 15 cities throughout Macedonia.**

Recommendation: Competent institutions should set up open dialogue with the business sector to overcome the identified issues and adapt the public procurement system to the needs of both contracting authorities and companies.

- **Around 70% of the responded companies declared they had been unprepared for the mandatory conduct of e-auctions in 2012 due to their scarce previous experience.**

Recommendation: There is also a necessity for a larger-scale education of companies, as the public procurement system efficiency does not rest only on educated institutions, but on trained business sector as well.

- **In the first half of this year, the number of company appeals to the State Commission on Public Procurement Appeals decreased by one third relative to the same period last year. Nevertheless, 30% of the appeals lodged have been approved, which is significantly more than the same period last year when 21% of the lodged appeals were approved.**

Recommendation: The companies dissatisfied with the decisions passed in public procurement procedures should not give up on their legal right to appeal.

- **Number of weaknesses have been noted in the selection of elements by which state institutions evaluate the received company tenders. The focus, inter alia, is on the bidders rather than on the bids, thus undermining the sole purpose of tenders – getting best value for the spent budget funds.**

Recommendation: Contracting authorities must in future consistently comply with the Public Procurement Law and not mix up the manners of proving company's technical or professional ability by bid point-ranking.

- **Tenders lay down disproportionally high requirements for bidding companies to prove their ability to take part in the procedure, which is why many companies are unable to submit bids.**

Recommendation: The Bureau of Public Procurements should carry out analysis of the most frequently laid-down tender participation criteria for companies and establish which of them are inappropriate, disproportionate and discriminating. It is this particular concern to which BPP should also pay more attention while educating the representatives of the contracting authorities by pointing out what is considered inappropriate, disproportionate and discriminating criterion.

- **There were no more than two bidders in 60% of the procedures monitored. Public procurement competition is still dropping, which suggests to existing issues in the public procurement market.**

Recommendation: Urgent measures are needed to overcome the issue of poor competition in most of tenders, as it undermines one of the fundamental instruments for market economy functioning – fair competition that will provide for bids of higher-quality and more competitive goods, services or works for as less public funds as possible.

- **Annulments of public procurement procedures are on the rise again. 30% of the public procurement procedures of the sample monitored in this quarter were annulled.**

Recommendation: The first step to reduce annulments may include amendments to the Public Procurement Law, specifically to Article 169 regarding cases when contracting authorities may annul the public contract award procedure: 'unforeseeable changes to the budget' and 'changes to the needs of the contracting authority', it should be envisaged that the procurement that has been annulled based on the said two cases may not be repeated during that budget year.

- **Although announced, the legally mandatory e-auction was not used in 45% of the procedures monitored due to lack of conditions to be conducted, i.e. only one bid had been submitted or only one bid had been acceptable and appropriate.**

Recommendation: With e-auctions mandatory for all public procurement procedures, institutions have even greater responsibility to provide conditions for competition among companies and to hold e-auctions. Otherwise, in absence of e-actions and when contract is concluded with the only company that submitted bid or that was eligible, there is a risk of a higher contract value than the real one, since the prices quoted in the original company bids are often set higher in expectation they will be decreased with the reverse bidding at the e-auction. Furthermore, the annulment of these procedures is another risk due to deviations from the estimated value.

GOALS AND METHODOLOGY

Since November 2008, the Center for Civil Communications from Skopje has continuously analyzed the implementation of the public procurement process in the Republic of Macedonia as regulated with the Public Procurement Law. The analysis aims at assessing the public procurement process implementation in light of the new Public Procurement Law and establishing whether and to what extent the following fundamental public procurement principles are met: transparency, competitiveness, equal treatment of economic operators, lawfulness, cost-effective, efficient, effective and rational use of budget funds, commitment to obtain the best bid under most favorable terms and conditions, as well as accountability for the funds spent for procurements.

The analysis of the public procurement process in the Republic of Macedonia is performed based on the monitoring of randomly selected public procurement procedures (40 per quarter). Monitoring activities start with the publication of calls for bids in the Official Gazette, followed by attendance on public opening of bids and data collection on the procedure course by the means of in-depth interviews and structured questionnaires submitted to economic operators, as well as data obtained from contracting authorities by means of Freedom of Information applications.

The analysis of the present Report has been performed based on monitoring of selected sample of 40 public procurement procedures implemented by central-level contracting authorities, while the public opening of those bids took place in the period April – June 2012. This Report also includes the findings of the analysis of procedures before the State Commission on Public Procurement Appeals for the period January - June 2012, as well those of the survey of companies about their experiences with public procurements.

- **Number of weaknesses have been noted in the selection of elements by which state institutions evaluate the received company bids. The focus, inter alia, is on the bidders rather than on the bids, thus undermining the sole purpose of tenders – getting best value for the spent budget funds. Contracting authorities increasingly define the manner of point-ranking the quality of products or services subjects to procurement, which is positive, but in doing so they make substantial errors that, in turn, lead to incorrect bid-evaluation. Deadlines for delivery and payment continue to be used as bid point-ranking elements, which opens possibilities for manipulations in the course of the procurement realization. Bid-evaluation elements are also laid down that are not relevant to the procurement subject or do not contribute to better bid-evaluation.**

The reference lists, i.e. lists of main deliveries by a company in the recent years, have become one of the key elements by which institutions started point-ranking the quality of products and services that are subject of procurements. This tendency has been noted in significant part of the monitored procedures where the criterion 'economically most advantageous bid' was used for selection. Such approach is unacceptable for a consistent implementation of the Public Procurement Law and according to the interpretations of the European directives (the Macedonian law has been drafted in compliance therewith) provided by the European Court of Justice. The Public Procurement Law, Article 153 paragraph 1, expressly states that the list of principal deliveries by the bidders or the candidates may be used for proving technical and professional ability. The State Commission on Public Procurement Appeals in several of its decisions of the first half of this year reiterated its position that the elements for proving technical and professional ability of companies may not be used for point-ranking bids submitted by companies. The fact that using reference lists as bid point-ranking element is not correct is also confirmed by the European Court of Justice when asked whether Directive 93/96 prevents contracting authorities to take into

consideration reference lists as a contract award criterion in a public contract award procedure. The Court believes that “a simple reference list containing only names and number of previous clients of the supplier, without any other details on the deliveries to those clients” cannot be used as a contract award criterion, as it does not provide any information to help identify the economically most advantageous bid[1] In this case it is evident that a simple reference list as used by Macedonian institutions does not provide sufficient information on the procurement subject quality.

The monitored procedure for procurement of branded toners and magnetic media should be pointed out as particularly concerning in this respect, where the element ‘quality’, inter alia, is also defined by a ‘reference list of made deliveries’. In this case, not only that an inappropriate element is used, but it is also stated that more deliveries would mean more ranking points, failing to specify exactly how many points will be given to a particular number of deliveries. These seemingly measurable and objective parameters hide a danger of favoring certain larger and more experienced companies.

Incorrect quality valuation is also noted in cases where technical equipment and human resources are used as sub-elements for bidding companies. These cases are also refer to ways of proving technical and professional ability of bidders, not to elements appropriate for valuing the quality of products or services offered by bidding companies.

Further to the incorrect point-ranking of quality is the case of monitored public procurement procedure for attorney services, where the stated sub-elements for valuing the element 'quality' were the following:

- Number of certificates – without providing formula or guidelines for objective point-ranking thereof;
- Concluded agreement with the Central Registry of Macedonia for using the Registry’s distribution system - any person may use this system by paying certain fee, so it is unclear what exactly is to be point-ranked and why it is necessary this to be point-ranked; and
- Number of attorney awards, recognitions and diplomas - without providing formula for objective point-ranking of the number of submitted diplomas or any

[1] *Tender Evaluation – Regulation and Experience in EU and Republic of Macedonia,* www.bjn.gov.mk

point-ranking framework whatsoever. On this note, it is doubtful whether this is a legitimate parameter, particularly having in mind that there is no established practice in awarding certificates and awards in the field of the attorney's practice.

There is another case noted from the monitored sample where for concluding annual framework agreement for reconstructing low-voltage installations, supply, mounting and dismounting of a range of products, the bids had been evaluated by quality, which accounts for 30 of a total of 100 points, while the tendering documentation fails to state how the bid quality would have been evaluated. Another confirmation that these terms and conditions can be extremely discouraging for companies is the fact that only one company submitted bid at that tender. The failure to define the way of evaluation, i.e. the point-ranking of the element 'quality', brings subjectivity in bid evaluations, which is in discrepancy with the Public Procurement Law.

Public procurement monitoring suggests that some contracting authorities continue to lay down point-ranking elements that contribute very little to the selection of most advantageous bid, and open much more possibilities for manipulations, which are most evident while concluding contracts, i.e. during procurement realization. This group of elements primarily includes 'delivery deadline' and 'payment deadline', which were laid down in some monitored procedures in this quarter, too.

With the case of the public procurement of vehicles by the means of leasing, the 'delivery deadline' was laid down as sub-element of the element 'technical support' with the following sub-elements:

- Technical personnel/human resources – not only that is not so relevant, but it is also not decisive in the selection, since only 5 points are given for that sub-element; and
- Delivery deadline – accounts for 15 points, and in this particular case it has nothing to do with the technical support for the product, but the supplier had found out a way to plant it there, so it would not be as noticeable for the stakeholders and the expert public as it would have been if it had been laid down as a separate point-ranking element. With this sub-element one may favor a company that has the vehicles in stock.

In the case of the procurement of branded toners and magnetic media, 5 points each were given for ‘delivery deadline’ and ’payment deadline’ No point-ranking formula was stated for 'payment deadline', which caused all bidders to offer deadlines varying from 120 to 180 days, and one even offered 370 days, which is odd, having in mind that companies complain that payments are late 3-4 months, and now they agree for the payment to take place even after 6 months. Considering that no point-ranking formula was provided, one could justifiable ask how many points will be given to bidders who offered 120 days, to those who offered 180 days and to that one bidder that offered 370 days.

In the case of the public procurement of expert supervision during performance of construction works, the ‘manner of payment’ was set forth as a point-ranking element. This probably refers to ‘deadline for payment’, as it remains unclear what could be point-ranked with the manner of payment.

In the case of the public procurement of oil derivative, ‘provided own or leased excise reservoir capacities’ was point-ranking element, which was also stated in one monitored procedure in the previous quarter. This element should not be point-ranked at all, since it is a typical criterion for a company’s technical ability. The issue here is that if all bidders provide own or leased excise reservoir capacities, then they will each get 20 points, so it remains unclear what is the purpose of introducing this element. If, however, the company lacks such capacities, it cannot bid.

Recommendation: Contracting authorities must in future consistently comply with the Public Procurement Law and not mix up the manners of proving company’s technical or professional eligibility with bid point-ranking. The appeal procedure analysis for the first semester of this year, which is integral part of this quarterly report, reveals that SCPPA does sanction this type of behavior among the institutions and annuls the procedures in which the ways of proving technical and professional ability are used as bid point-ranking elements.

- **Tenders lay down disproportionally high requirements for bidding companies to prove their ability to take part in the procedure, which is why many companies are unable to submit bids.**

Tenders lay down terms and criteria for the purpose of assessing whether companies are capable to realize the procurement from the aspect of financial assets and technical equipment. Number of cases of omissions, errors and manipulations as regards the criteria for determining technical and professional ability of companies have been identified in this quarter as well, and this also applies for their economic and financial ability. Concerning the technical and professional ability of companies, most specific are the terms and conditions requiring excessively high number of full-time employees, detailed profile of employed personnel, detailed description of required equipment and machinery, etc. Additionally, as far as the economic and financial stability is concerned, symptomatic are the procedures requiring from companies exceptionally high annual income/turnover, and a high value of previous contracts.

Part of the monitored procedures list proofs that companies should submit for determining their ability, but they fail to elaborate what the contracting authority will check and determine based on those proofs. In other words, there is no minimum requirement laid down for companies. An example of such omission with the criteria for establishing the economic and financial ability of companies is the requirement for financial report without stating what any such financial report should present (lucrative company operations, minimum annual income, etc.).

Following are some of the more specific cases from the procedures monitored in this quarter in which such omissions have been identified.

The public procurement of a sports hall construction required from bidding companies to have previous sports hall construction contract with a value of minimum 500,000 EUR in the previous year only. Hall construction is not as frequent engagement as other regular construction works and activities, which is a reason why the competition is reduced from the very beginning. Additionally to this requirement, excessively detailed structure and profile of employed personnel is also required, including at least 20 persons with minimum one year of employment with the economic operators. The extremely detailed specifications for equipment and machinery that the economic operator should have at

its disposal further limits competition and may lead to favoring certain company or companies.

In the case of the public procurement of transportation of delegations and passengers, the proofs for establishing the technical and professional ability of the economic operator were at the same time point-ranked as quality sub-elements.

The public procurement of printer paper required from companies to submit a list of technical equipment - warehousing premises and vehicles owned. Seemingly logical and undisputable requirement, but in the larger procurement context – what is to be established is the ability of a distribution company, not of a paper producer.

The public procurement of design and hosting e-stores sets strict requirements for the companies: proof that the system is certified for integration with the most renown domestic and world electronic payment systems and a portfolio of designed electronic stores, at least 30 of them in the past 3 years. Having in consideration the brief history of development and the situation with the e-stores in RM, these criteria seem hard to meet.

In the case of the public procurement of constructing a recreational aqua park there were no bids submitted, which is most likely a result of the excessively strict criteria for establishing the technical and professional ability of companies, among which a requirement for a statement that 100 workers will work on site for 10 hours every day during the construction works. The aqua park construction deadline for the companies was under 3 months, i.e. until 15.08.2012, while the bid opening had been scheduled for 17.05.2012.

In the case of the public procurement of organizing excursions, summer camp, colonies, training courses and events, the technical criteria for companies included 15-year experience and 10 similar services of this type realized in the past 3 years, which makes many companies unable to compete. Hence, it is not a surprising fact that the two companies that had submitted bids failed to meet the required eligibility conditions and after assessing their bids as inacceptable, the tender was annulled.

In the case of the public procurement of cattle ear tags, most of the criteria for establishing technical and professional ability are disproportionate to the procurement

subject, such as minimum 3 contracts of same or similar nature in the past 3 years performed in RM or in EU only.

The public procurement of expert supervision during performance of construction works does not require high amounts of minimum income that companies need to have in the previous years, but it contradicts the subsequent requirement set in the criteria for establishing technical and professional ability, requiring from the company to have supervised at least 5 construction works, each in value of at least 5,000,000 MKD. Another requirement is having 30 engineers with full-time employment.

There is also a large number of contracting authorities that require minimum amounts of annual income as a bidding requirement. If these minimum amounts are set high, as often is, it eliminates the possibility for a large number of companies to submit their bids. Whenever such financial biding requirement is laid down, it should be proportional to the procurement value. As a reminder, the world practice suggests that the ratio between the assessed value of the procurement item and the company's annual income should be around 1:2.5.

A requirement laid down in 37.5% of the monitored tenders is the minimum annual turnover/income of companies. This is at the nearly same level as in the previous quarter, when this requirement was laid down in 40% of the procedures monitored, which means there is no significant change in this aspect. It can be concluded there is a slight improvement in the amount (proportionality) of the required annual income/turnover.

However, there are still cases of evident disproportionately such as the one in the procurement procedure for duplicate cattle ear tags, where the procurement-assessed-value to annual-income-ratio was 1:29.

In the procedures requiring excessively high (disproportionate) annual income amount there is evidently poor competition. Namely, only one bid was submitted for the procedure with 1:7 ratio, while in the procedure where the ratio was 1:29, none of the two bidders met the criteria. Taking the fact that a successful procedure largely depends on the selected criteria and the compliance with the principles for competition and non-discriminating treatment, it is shown that these criteria are often used in practice to eliminate competition and favor certain companies.

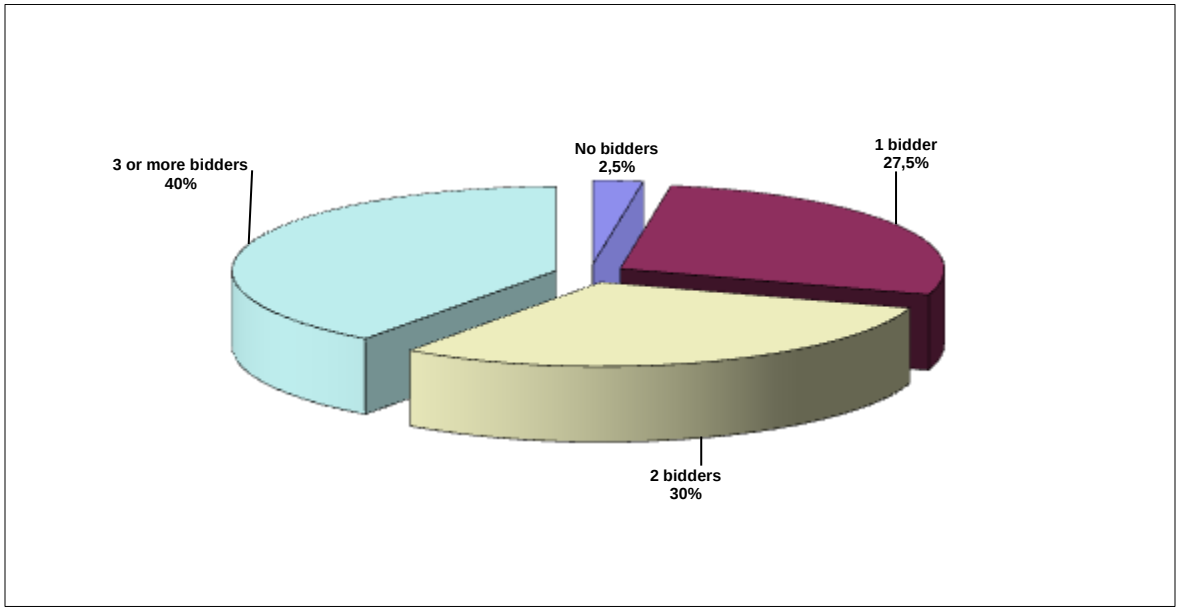
Recommendation: The Bureau of Public Procurements should carry out analysis of the most frequently laid-down tender participation criteria for companies and establish which of them are inappropriate, disproportionate and discriminating. It is this particular concern to which BPP should also pay more attention while educating the representatives of the contracting authorities by pointing out what is considered inappropriate, disproportionate and discriminating criterion. If the education fails to yield results, the next step should be amending the legal provisions regarding the criteria and setting forth more specific requirements with regard to their selection and defining.

- **There were no more than two bidders in 60% of the procedures monitored. Public procurement competition is still dropping, which suggests to existing issues in the public procurement market.**

As shown in the following graph, no bids were submitted in 2.5% of the tenders monitored; only one bidder has been noticed in 27.5% of the following procedures; and only two companies submitted bids in another 30% of the tenders. Significant competition of three to nine bidding companies was noticed in 40% of the procedures monitored. However, even in the cases with 3 or more bids one cannot automatically conclude that the competition contributed to the positive outcome of the public procurement procedures, as part of them were annulled on the grounds that all bids had been evaluated as inacceptable (bidders failed to meet the criteria for technical and professional ability and/or economic and financial standing) and inappropriate (bids delivered were over the procurement assessed value).

The average number of bids submitted in the monitored sample is 2.63 per tender, which is less than in the first quarter of 3.18 bids per tender.

Overview of tender competition in monitored procedures (April – June 2012)



There is biggest competition in procurements of computer equipment, office materials and foodstuffs, with four or more bids in a single procedure. No or insufficient competition is noted in procurements subjects of technical nature (e.g. certain type of communication devices) or in procedures where strict participation requirements prevent many companies from participating. It is a surprising fact that there were no bidders for procurement of hygiene maintenance and bedding, having in mind there are a lot of players in these markets.

Reasons for poor competition in public procurements can certainly be traced back to some of the issues noted in the monitoring, primarily concerning high eligibility criteria for tender participation for companies, as well as to the problematical tendering documentations. The survey of companies attached to this quarterly report offer best insight as seen from the business sector perspective towards better understanding of the issues pending in the public procurement field, which in turn result in reduced competition.

Recommendation: Urgent measures are needed to overcome the issue of poor competition in most of tenders, as it undermines one of the fundamental instruments for

market economy functioning – fair competition that will provide for bids of higher-quality and more competitive goods, services or works for as less public funds as possible. Alongside the efforts by the Bureau of Public Procurements for overcoming this issue, there is a necessity for including of the business sector and their associations, which should openly try to identify the reasons and propose efficient measures for overcoming them. Business associations should open debate and analyze the reasons for the decreasing company interest for participating in public procurements and in a joint effort together with the competent state bodies to undertake specific measures for removing these reasons.

- **Omissions and errors that may be or are misleading for the companies and result into making errors in their bids have been noticed in several of the tendering documentations.**

In part of the tendering documentations received and considered in details, there are obvious number of omissions of substantial nature. The information contained therein and critical to potential bidders contradict with the data provided in the call. This misleads companies, which could result in making errors in their bids or in the supporting documents, causing their bids to be rejected due to formal inconsistencies. Following are several examples of such omissions in tendering documentations from the procedures monitored.

The tendering documentation for public procurement of hygiene maintenance in a healthcare institution is confusing. It is obvious that the contracting authority had been using a sample tendering documentation for a procedure with a request to participate, although this was a case of open procedure. Due to this, the tendering documentation contains substantial errors in different places that mislead potential bidders, for instance, in one place it is stated that the selection criterion would be the lowest price, and in other place that the economically most advantageous bid would be the selection criterion.

The criteria for technical and professional ability in a public procurement of vaccines and serums state ‘manner of payment’ and ‘delivery deadline’, while the standards for

company's quality assurance systems require 'certificate of use of the procurement subject'. Furthermore, the documentation contains too unfair contracting terms and conditions, in particular: fixed price without possibility for any change in the realization of a successive procurement, ban on foreign exchange clause in the contract, possibility for the contracting authority not to deplete all contracted quantities of the procurement subject and payment deadline – 150 days from the delivery.

There is another noticeable contradiction between the data stated in the call and those in the tendering documentation for the public procurement of audio equipment. The call requires 'list of deliveries' as a criterion for economic and financial ability and does not require anything for technical and professional ability, while this same criterion in the tendering documentation is placed under technical and professional ability.

Recommendation: Incompetent and unprofessional preparation of tendering documentation should be overcome by means advisory meetings for training and professionalization of the persons working with public procurements and by means of additional sanctioning measures for contracting authorities. Errors and omissions in calls and tendering documentations are sliding through in all quarters. Partial 'sanctioning' have already been introduced by payment of fee for corrections made by contracting authorities to EPPS. However, BPP should also consider introducing additional sanctions by means of negative points. Contracting authorities with many negative points could be placed in a sort of list for further training and professionalization. Nevertheless, the best solution would be BPP to identify those contracting authorities that are making biggest number of errors and hold special advisory meetings with them.

- **Annulments of public procurement procedures are on the rise again. 30% of the public procurement procedures of the sample monitored in this quarter were annulled.**

Dominant part of the annulled procedures from the monitored sample were due to 'not having submitted a single acceptable or appropriate bid'. The bids by companies who

failed to meet the requirements to prove their economic and financial standing and/or technical and professional ability are deemed unacceptable. Inappropriate, however, are those bids in which companies request more money for the procurement than the funds that the institution assessed to spend.

Mindful of this rise of tender annulments due to 'not having submitted a single acceptable or appropriate bid', there are obviously different interpretations of one of the latest amendments to the PPL, which introduced the term 'appropriate bid'. The goal of the amendment and the introduction of the term 'appropriate bid' was not to reject a bid that is otherwise acceptable from a formal aspect and meets all terms and conditions and requirements, but its quoted price exceeds the assessed value and where the contracting authority could provide additional funds thereto.

This raises another question; having in mind that in a substantial number of tenders companies fail to meet requirements for establishing ability or offered higher prices than the funds planned by the institutions, perhaps the reasons for these issues lie on the part of contracting authorities for laying down terms and conditions that are hard to be met by the business sector or perhaps they unrealistically asses the procurement values in times of ever-increasing prices.

That the annulment issue is flaring up again is also supported by the Electronic Public Procurement System data, according to which, total of 24.31% of the tenders were annulled in the first six months of this year. This is the highest share of annulled public procurement procedures in a first semester of a year in the past 4 years.

Overview of procedure annulment

Period	Number of calls published	Number of procedure annulment decisions	Share of procedures annulled
January–June 2012	4,176	1,015	**24.31%**
January–June 2011	3,978	849	**21.34%**
January–June 2010	3,700	700	**18.92%**
January–June 2009	**3,511**	**526**	**14.98%**

Source: Electronic Public Procurement System

Judging by EPPS data, the latest legal amendments (Law amending the Public Procurement Law, Official Gazette of the Republic of Macedonia No. 185/11), which also envisaged measures for reducing annulments did not quite give the expected results.

Recommendation: The upward trend of annulments threatening to hit new highs must be prevented. Hence, there is a necessity to limit and closely define the possibilities for public procurement procedure annulment. The first step to reduce annulments may include amendments to the Public Procurement Law, specifically to Article 169 regarding cases when contracting authorities may annul the public contract award procedure: 'unforeseeable changes to the budget' and 'changes to the needs of the contracting authority', it should be envisaged that the procurement that has been annulled based on the said two cases may not be repeated during that budget year.
Moreover, when e-auctions are planned to be conducted, the decisions for bid inappropriateness - which are followed by procedure annulment - should be passed after the conduct of reverse auction, that is, after the companies have provided their final lowest prices, and not before the e-auction.

- **Although announced, the legally mandatory e-auction was not used in 45% of the procedures monitored due to lack of conditions to be conducted, i.e. only one bid had been submitted or only one bid had been acceptable and appropriate. There are cases of different interpretation and application of the exception from mandatory conduct of e-auctions regarding the procurement subject.**

All calls of the sample monitored provided for conduct of e-auction, that is, there were no procedures that could be legally exempted from e-auction under Article 123 of PPL. However, although prescribed, e-auction had been scheduled and held only in 22 of the 40 monitored procedures, while in 18 procedures it had not been even scheduled. The procedures in which e-auctions had not been scheduled and not been conducted

account for high 45%. It is a 10-percent increase relative to the previous quarter when e-auctions were not scheduled in 14 of monitored 40 procedures, or in 35%.

The reasons for not holding e-auctions in 18 of the 40 monitored procedures in this quarter are as follows:

- No bids had been submitted in one procedure:
- The conditions for scheduling e-auction were not met in 11 procedures because only one bid had been submitted;
- 5 procedures received 2 bids each, but none of them received acceptable number of bids for holding e-auction, in particular, in 2 of the procedures decisions were passed for selecting the only acceptable bid, and in 3 procedures both bids were rejected as inacceptable and inappropriate and the contracting authorities passed procedure annulment decision; and
- One procedure was annulled as early as in the evaluation stage on the grounds of occurrence of unforeseeable changes to the institution's budget.

Hence, the failure to hold the planned e-auctions is a consequence of poor competition and inability by the companies that had shown interest to meet the required tender eligibility criteria. In the event when e-auction had been planned, but only one company submitted a bid, there is a risk of concluding a contract with value much higher than the real one (with prescribed conditions for mandatory e-auction, companies would understandably submit higher financial offers first, leaving room to maneuver in expectance of the reverse bidding ahead) or of tender annulment. Both consequences of this situation are detrimental to the budget of the Republic of Macedonia, as they either increase public procurement prices or increase the costs of institutions for carrying out new tenders.

An exceptionally specific example of failure to hold e-auction from the sample monitored is the case of the public procurement procedure for artistic handwritten text on diplomas on ready-made surfaces for graduate students, masters of art, specialized study graduates, PhD holders for a period of one year conducted by the Ss. Cyril and Methodius University.

The Center for Civil Communications was not allowed to attend at this public opening of the bids (which is contrary to Article 136 paragraph 1 of PPL). The CCC Monitor had

legitimately requested from the University Public Procurement Commission representative to be allowed to attend or to request opinion of the Bureau of Public Procurements regarding the implementation of Article 136 paragraph 1 of PPL, which guarantees the right of all people to attend bid openings, which is actually why it is referred to as 'public'. It remains unclear why the Monitor was not allowed to attend the bid opening, even more due to the fact that CCC has been performing public procurement monitoring for full 4 years, and such situations of preventing the monitoring process are very rare and extremely symptomatic.

The provided information about the further course of the procedure is even more interesting. One out of the two bidders that attended the opening had given up from further participation in the procedure die to 'tensed event that happened on the bid opening day'. It is important to underline that the so-called tensed event is most likely the discussion around the possibility for CCC Monitor's attendance at the public opening.

The outcome of this tender is that the giving up of one of the bidders actually disabled the e-auction and a contract had been concluded with the only bidding company for a value of 1,958,800 MKD, which is identical to the assessed contract value.

Preventing attendance by the public at a public bid opening (very rare), bidder giving up from further evaluation of its bid under the excuse that a tensed event was the reason for that (perhaps the first case of this type in Macedonia), which in turn lead to non-conduct of e-auction and conclusion of a contract for a price identical to the assessed value are too much facts to be called a coincidence.

As regards the issue of not holding e-auctions, it can be concluded both from the procedures monitored and from the survey among the economic operators that there are different interpretations of the exception from the mandatory conduct of e-auction concerning the procurement subject. Namely, there is vagueness in the interpretation of what should be included under *'certain services or works the subject of which is intellectual service, such as designing and similar services '*. For instance, consulting services for introducing standards or systems for IT security or attorney services are

procurement subjects considered by the supplying companies as intellectual services that do not require e-auction. Contracting authorities, however, do not share this opinion and schedule e-auctions for these services, too. SCPPA has its own interpretation by which the term *'similar services'* relates only with *'designing'* (as stated in one of its decisions upon a lodged appeal). This is very narrow interpretation that may result in non-conduct of e-auctions for a very small number of procurement subjects, which is far from the intention of this legal provision.

The mandatory conduct of e-auctions had no effect in the increase in procedures performed by electronic means (e-procurements). Performed e-procurements account for 22.5% of the monitored sample in this quarter, while this share in this quarter is even lower nation-wide at 19.3%. Although certain increase in e-procurements can be noticed with every passing quarter, there is still insufficient number of contracting authorities that use the benefits from conducting public procurements by electronic means.

Recommendation: With e-auctions mandatory for all public procurement procedures, institutions have even greater responsibility to provide conditions for competition among companies and to hold e-auctions. Otherwise, in absence of e-actions and when contract is concluded with the only company that submitted bid or that was eligible, there is a risk of a higher contract value than the real one, since the prices quoted in the original company bids are often set higher in expectation they will be decreased with the downward bidding at the e-auction. Furthermore, the annulment of these procedures is another risk due to deviations from the estimated value.

Currently, there is no common understanding among all stakeholders in public procurement procedures, including in SCPPA, on which procurement subjects may be exempted from mandatory conduct of e-auctions. Most contracting authorities, with certain exceptions, schedule e-auctions even for procurement subjects considered by companies as intellectual services that do not require e-auctions under Article 123 of PPL. SCPPA holds the position that the exceptions relate solely to 'designing and similar services thereto'. If these different positions are not aligned, which can be performed best by the BPP, there will continue to be different interpretations in practice leading to uncertainty and confusion, primarily among companies, but also among those contracting authorities that intentionally schedule e-auctions for all procurement

subjects out of fear and absence of knowledge. This is a matter of not only of maintaining the format, but also the essence of public procurements. If e-auctions fail to give the desired effect in the procurement of certain intellectual services, then those services should be specified.

- **The value of contracts concluded in a negotiated procedure without prior call in the second quarter of 2012 is at 5.8 million EUR.**

213 contracts totaling around 359 million MKD (5.8 million EUR) were concluded by negotiated procedure without calls in the period April-June this year. The value of these procedures is half the value in the first quarter of this year, and half the value in the same period last year.

Value of contracts concluded in negotiated procedure without calls (in MKD)

Period	Contract value (in MKD)
January–June 2012	1,090,224,297
January–June 2011	1,335,930,649
January–June 2010	622,209,265
January–June 2009	468,607,429

Source: Electronic Public Procurement System

Recommendation: It is necessary that the downward trend of negotiated procedures without call continues, since it is a procedure that is conducted without transparency, which increases the corruption risks.

- **The bank guarantee requirement, whether for the bid or for contract quality performance, is a common practice by contracting authorities, which is also supported by the fact that in this quarter, too, bid guarantee was required in 60% of the procedures monitored, and a contract quality performance guarantee in 67.5%**

As regards the required guarantee amount, in dominant part of the tenders for bid guarantees it was 3% of the procurement value, which is also the legal maximum allowed amount. The required average amount percentage of bid bank guarantee is 2.58%.

The situation with the required amount percentage for contract quality performance guarantees is different, where only in a small part of the tenders there was a requirement for the legal maximum of 15%, while the legal minimum of 5% had been required in a dominant part of the tenders. The average, however, for all procedures requiring such guarantee is 8.14% of the concluded contract value.

As of the following quarter (1 July 2012), legal provisions will start to be implemented, envisaging possibility for contracting authorities to replace the bank guarantee requirement with a requirement for companies to submit a statement on seriousness. On one hand, it should contribute to reducing bank guarantee requirements, but on the other hand, it may be measure to intimidated companies with the possibility to be issued with a negative reference and thus eliminated from further participation in public procurements in the country.

Recommendation: In order to stimulate competition among companies to a highest level possible, it is necessary that the institutions require dominantly statements on seriousness in the bids instead of bank guarantees. This will have an impact to the reduction of company costs for tender participation.

- **No significant changes to the requirement for fee to obtain tendering documentation, which was required in 20% of the procedures monitored, and to the electronic publishing of the tendering documentation, which was the case in 55% of the procedures monitored.**

Fee for obtaining tendering documentation was required in 20% of the procedures monitored. This percentage is almost identical to that in the previous quarter (22.5% of procedures). Slight decrease has been noted in the fee amount for obtaining tendering

documentation now averaging 1,062 MKD. This average was at 1,300 MKD in the previous quarter.

There are no significant improvements in the electronic publishing of tendering documentation in EPPS. In 55% of the procedures monitored, the tendering documentation had been published electronically and obtainable from EPPS, while in 45% of the cases, the documentation could have been obtained at the contracting authority premises in hard copy only. However, there is slight trend of improvement with every subsequent quarter, although it still cannot be concluded that the electronic publishing of the tendering documentation has become a common practice of contracting authorities.

Not publishing the tendering documentation electronically and colleting fee for obtaining it is not to the benefit of anyone. Quite the contrary, it has negative consequences for all participants and stakeholders to a public procurement procedure. It incurs additional costs for companies in terms of human and financial resources and time consumed. Filling payment forms, making bank payments, submitting the payment form to the contracting authority, preparing and submitting communication to the contracting authority to request tendering documentation, visits to the contracting authority premises to obtain the documentation, are the actions that economic operators must take if the tendering documentation had not been published electronically and/or if obtaining fee is required. The collection of tendering documentation fee is seemingly to the benefit of the contracting authority in a form of an income. However, this amount is negligible compared to the issue it gives rise to – lack of competition (insufficient number of bidders), which is the reason for procedure annulment and reopening. Ultimately, the public is deprived of the possibility to access the tendering documentation and ‘check’ the expertise and the objectiveness of the contracting authority in the procurement performance.

Recommendation: The increase rate of tendering documentation publishing in EPPS is slow and it seems that if the manner of publication of the tendering documentation were left to the free will of the contracting authorities, electronic publishing would never become a general practice. Similar with that brave step with the introduction of an

obligation for electronic publishing of tendering documentation and mandatory e-auctions made a couple of years ago, the next step should be mandatory publishing of the tendering documentation in EPPS. There is willingness among all stakeholders – all contracting authorities have been using EPPS to publish calls and notices for many years, and an enormous number of companies have registered in EPPS and use it at least to participate in e-auctions. The electronic publishing of tendering documentation has advantages: for contracting authorities - reduces the period of time for public procurement procedure, saves funds and provides possibility for taking documentation from another authority; for companies - saves human, financial resources and time; for the public - provides easy and better insight into the operations of legal entities regarding public spending.

- **Serious number of contracting authorities breach the legal deadlines for passing decisions (in 36.1% of the procedures monitored) and for publishing notice for concluded contract (in 18.8% of the procedures monitored).**

Again, the deadlines for passing decision for most advantageous bids or procedure annulment are not obeyed. This means that the contracting authorities failed to pass a decision in the period equal to that one provided to the economic operators to prepare and submit bids. There is no information when the decision was passed for few procedures, but it is assumed that these deadlines were also breached, since the notices for concluded contracts were published couple of months after the public bid openings.

The obligation for submitting/publishing notices for concluded contract within 30 days from the day of signing of the contract is still not fully obeyed. Such notices were not published in the legally prescribed deadline in 18.8% percent of the monitored procedures with obligation for delivery of a notice for concluded contract. Although this percentage is significantly lower than the one for the procedures monitored in the previous quarter, which was 40%, there should not be tolerance when it is a matter of legally prescribed obligation.

It is a worrying fact that in average, there is a breach of the deadline for passing decision for awarding or annulment in every third procedure, and breach of the deadline for publishing notice of concluded contracts in every fifth procedure. Regarding the latter, BPP has undertaken a measure to eliminate this tendency by disabling contracting authorities to publish a call for new procurement until they submit, in reasonable period of time, notice of concluded contract for the previously conducted procedure. However, CCC analyses suggest that even this measure failure to result in complete compliance with the legal obligation.

Recommendation: BPP is the most legitimate institution to carry out analysis and establish whether this incompliance is due to short legal deadlines or to unprofessional and non-transparent operations on the part of the contracting authorities. If it is the first, the following amendments to PPL should provide for extension of these deadlines. If it is the latter, then contracting authorities should be either sanctioned by introducing misdemeanor provisions to PPL or by undertaking other technical measures via EPPS to raise discipline among contracting authorities. The public must be timely and fully informed on the spending of taxpayers' money.

ANALYSIS OF ACTIONS BEFORE THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS FOR THE PERIOD JANUARY-JUNE 2012

- **The number of company appeals to the State Commission on Public Procurement Appeals (SCPPA) has been reduced in the first half of this year, and by a third compared to the same period the previous year. However, 30% of the lodged appeals were adopted, which is significantly more in comparison to the same period last year, when 21% of the lodged appeals were adopted.**

During the period January - June 2012, 345 appeal procedures were initiated in front of the State Commission on Public Procurement Appeals, where 338 decisions (resolutions/conclusions) were passed. 32 resolutions were used to decide upon more than one appeal; therefore the number of passed decisions is smaller than the number of lodged appeals.

Table 1: Structure of the adopted decisions within an appeal procedure in the period January - June 2012

Decision type	Number of decisions	In %[2]
Rejected appeals	125	**36,23%**
Accepted appeals	104	**30,15%**
Dismissed appeals	66	**19,13%**
Interruption of the appeal procedure	43	**12,46%**
Dismissed requests for procedure extension	2	**0,58%**
Rejected requests for procedure extension	5	**1,45%**
Total	**345**	**100,00%**

The total number of lodged appeals in the first half of 2012 is reduced by a third in comparison with the number of appeals lodged in the periods January – June in 2011

[2] The percentage calculation rate is the total number of lodged appeals (345).

and 2010. Namely, the number of lodged appeals in the first half of 2011 amounted to 518 appeals, and 503 appeals were lodged in the first six months of 2010. The data on comparison of appeal procedures in the first half of 2012 with the same time period in 2011 and 2010 is presented in Table 2.

Table 2: Data on comparison of the structure of adopted decisions within the appeal procedure

Decision type	Jan-Jun 2010	Jan-Jun 2011	Jan-Jun 2012
Rejected appeals	41,00%	43,24%	**36,23%**
Accepted appeals	29,40%	21,04%	**30,15%**
Dismissed appeals	13,90%	17,37%	**19,13%**
Dismissal of the appeal procedure	13,70%	15,25%	**12,46%**
Dismissed requests for procedure extension	0,80%	0,60%	**0,58%**
Rejected requests for procedure extension	1,20%	2,50%	**1,45%**
Total	**100%**	**100%**	**100%**

I. Decisions on appeal rejection

As the structure of the adopted resolutions presents, the rejected appeals hold the greatest share. SCPPA rejected 36.23% of the lodged appeals, which is nevertheless less than the percentage of rejected appeals in the same period last year, when this share amounted to 43.24%.

II. Decisions on accepted appeals

The share of accepted appeals within the period January – June 2012 is increased and amounts to 30.15%. This is the greatest share of accepted appeals in the first half of the year for the last three years, since in the period January – June 2011 this share amounted to 21.04%, and 29.4% of the lodged appeals were accepted during the same time period in 2010.

By acceptance of the appeals, SCPPA adopts decisions which:

- Annul the decision on the most favorable bid choice and return the case to be decided upon once again and
- Annul not only the most favorable bid choice, but also annul the procedure.

In order to find out information about the most common violations of the Public Procurement Law by the contracting authorities, a detailed analysis of all decisions from the period January – June 2012 adopted by SCPPA has been carried out which accepts the company's appeals, annulling the reached decisions and procedure. For this purpose, the resolutions which annul the most favorable bid choice have been separately analyzed and return the case to be once again decided upon, as well as the resolutions which annul the procedures.

- **Resolutions on annulment of the most favorable bid choice and return of the case to be once again decided upon.**

Almost one third of the adopted resolutions by SCPPA that annul the adopted decisions about the most favorable bid choice and return the case to be once again decided upon refer to violations of Article 210, Paragraph 1, Line 5 and 8 of the Public Procurement Law. This means that the contracting authorities have done violations that refer to bid evaluation and have chosen unacceptable bids. Most commonly this means that not only did the institutions include the company's bid in the evaluation, but also chose the bids that have not succeeded in meeting the eligibility criteria foreseen in the tender documents. In addition to this, a part of the companies were found not to meet the criteria foreseen in the tender documents with regard to proof of the economic and financial condition, as well as proof of the technical and professional capabilities, whereas another part of the chosen companies were found not to meet the criteria defined in the tender document's technical specification. Furthermore, cases were noted wherein during execution of the received bids the contracting parties did not take into consideration the parameters included in the technical specification as well, enabling the inclusion of bids, that are inappropriate in terms of the foreseen specification. For the predominant part of these cases, the contracting authorities did not act according to Article 3 Item 24 of the Public Procurement Law which stipulates that: an "acceptable bid" is a bid that has been submitted within the determined time frame and which has

been established to fully meet every criteria of the tender documentation and technical specifications, as well as that every criteria, condition and possible request about the bidder's capabilities.

According to the SCPPA's adopted resolutions, the economic operators are facing the problem of incorrect exclusion from the evaluation as well. In these cases, based on the revision of the submitted evidence with regard to the case, the State Commission determined that the public procurement commissions failed to objectively and unbiased establish the submitted bids' completeness and validity for the contracting authorities during the bids' technical acceptability assessment, as well as for the minimal criteria about evidence for the economic operators' capability. By doing so, the institutions have violated the appellant's material right of appeal, i.e. according to Article 210 of PPL they made a serious violation of the contract –awarding procedure for public procurements.

It is important to note that part of the resolutions adopted by the SCPPA refer to annulment of the contracting authorities' decisions about annulment of the carried out public procurement procedures. SCPPA has established in some of these cases that the PPL does not foresee a procedure annulment as a result of insufficient number of bidders in order to carry out a procedure, even in the case of an e-auction. According to Article 140 Paragraph 8 and 9 of the Public Procurement Law "… 8) the bid evaluation shall be carried out strictly in compliance with the criteria defined in the tender documentation and published in the announcement for contract-awarding for public procurements and 9) After the carried out evaluation, the Commission shall rank the bids and develop a choice proposal for the most favorable bid".

Furthermore, SCPPA has denied the contracting authorities' right to annul the public procurement procedure according to Article 169 Paragraph 1 Indent 7 of the Public Procurement Law (due to unforeseen and objective circumstances, the contracting authorities' needs have changed) with the elaboration that the institutions had no legal grounds to annul the procedure, since the reason due to which the contracting authority has annulled the procedure is a reason yet to occur within an indefinite time period in the future, and the reason did not occur at the moment of decision making. SCPPA has in certain cases denied the tender annulment decision according to Article 169 Paragraph 1 Indent 4 of the Public Procurement Law, due to occurrence of unforeseen

budget changes with the contracting authority. The Commission annulled this decision with the elaboration that the contracting authority did not provide relevant evidence that can establish with certainty that the occurred financial changes refer to the particular public procurement. According to the adopted resolutions, another issue is the tender annulment according to Article 169 of the Public Procurement Law with the elaboration that the bidders bid prices and conditions for the public procurement contract execution that were less favorable than the real ones on the market, in cases when the certain procurement requires an e-auction. The Commission assessed that the contracting authority cannot assess the primarily bid prices and compare them to the market prices, since these will be subject to change during the e-auction.

Part of the SCPPA's adopted annulment resolutions of the decision on the most favorable bid choice has been established to have incorrectly assessed the bids, which resulted with a request for a new bids evaluation in compliance with the tender documents' conditions and criteria and for new appropriate decisions.

With regard to the adopted resolutions which accepted the companies' appeals, SCPPA annulled the decisions made by the institutions in cases of enabling advantage for a certain economic operator by using the requested elaborations or amendments of the provided documents. Therefore, according to the SCPPA the contracting authority has unjustly exercised its material right, i.e. has unjustly applied the provisions of the Public Procurement Law which establish that according to Article 2 of the Public Procurement Law> "This law shall specifically ensure: Competition between the economic operators, equal treatment and non-discrimination of the economic operators; transparency and integrity in the process of public procurement contract assignment and rational and efficient exploitation of the means in the process of public procurement contract assignment". Simultaneously, according to Article 140 Paragraph 2 and 3 of the Public Procurement Law "… 2) In the case of an open procedure, before starting the bids' evaluation the Commission shall verify the completeness and validity of the documents for establishment of the bidder's capabilities and 3) During verification of the completeness and validity of the documents for establishment of the bidder's capabilities and during bid evaluation the Commission may request for the bidders to elaborate or amend the documents, if the nonconformities with the requested

documents are not significant". Therefore, SCPPA establishes that the contracting authorities must not create advantage in favor of a certain economic operator by using the requested elaborations or amendments.

The information of interest to the participants in the public procurement market shows that SCPPA has accepted the appeals lodged by the economic operators about the fact that the contracting authorities have acted unlawfully, when their bids were assessed as inappropriate (the primarily bid price was far higher than the assessed value of the public procurement) in the case when the tender should have ended with an e-auction.

SCPPA assessed that the important segment in these cases was the starting price of the e-auction, i.e. if the lowest primarily bid price by the companies is within the assessed value. In this case, every acceptable bidder would bid starting from this price and the contracting authority would not be able to get a final bid that would exceed the amount of the public procurement's assessed value.

Also, through its decisions SCPPA confirms the transferability of the quality system standards in a bidder group. SCPPA indicated that according to Article 3 Item 22 of the Public Procurement Law the term Procurement Supplier has been established: "Public Supplier is a bidder or a group of bidders that have concluded a public procurement contract".

The adopted resolutions from this year's first half present that SCPPA has annulled decisions about the most favorable bid choice which do not comply with Article 163 Paragraph 1 and Article 167 Paragraph 1. Namely, the Commission assesses when the procedure ends with an e-auction and if the final price really exceeds the assessed value, the contracting authority has to act according to Article 163 of the Public Procurement Law in order to assess if the bidder can provide the procurement subject with high quality, and to make a fair and lawful decision about the choice.

The State Commission on Public Procurement Appeals has established that the appeal statement has been determined, according to which the notification about the most favorable bidder, provided for the appellant, does not comply with the timeframe established in Article 167 of the Public Procurement Law. Article 167 Paragraph (1) of the Public Procurement Law prescribes that: "The contracting authority, depending on the contract-awarding procedure for public procurements shall notify the candidates, i.e.

the bidders in writing with regard to the carried out prequalification, contract-awarding for the public procurement, conclusion of the framework agreement or annulment of the contract-awarding procedure. The notification shall be delivered within three days from the moment of the particular decision-making". Paragraph (2) of the same Article prescribes that: "A sample of the particular decision shall be delivered enclosed to the notification". With its resolution on the annulment of the most favorable bid choice SCPPA refers to Article 168 of the Public Procurement Law, which prescribes that: "Depending on the contract-awarding procedure for public procurements, in the notification from Article 167 Paragraph (1) of this Law, the contracting authority is obliged to notify the bidder or bidders, as well as the candidates or bidders denied or not elected for the most favorable bid, about the most favorable bid choice and about the reasons for the decision made, and this shall include: notification to every unelected candidate of the reasons for rejection of his/her participation application, every bidder of a dismissed bid of the reasons for dismissing his/her bid with a detailed elaboration on the reasons why the bid is unacceptable, and every bidder of an acceptable bid that has not been elected as the most favorable one, as well as information about the elected bidder or bidders and the reasons for the choice made".

- **Annulment resolutions of public procurement procedures**

The performed detailed resolution analysis that SCPPA has adopted in order to completely annul the public procurement procedures points to the conclusion that the most common reason for this type of decisions are significant violations of the PPL, whereas the tender documents from the carried out procedures do not comply with the Law and resulted or could have resulted with discrimination of economic operators or limitation of market competition. This is about violation of Article 210 Paragraph 1 Indent 3 of the Public Procurement Law (the tender documents for the procedure for public procurement contract provision do not comply with this Law and have resulted or could have resulted with discrimination of economic operators or limitation of the market competition). This action by the institutions is against Article 2 of the Public Procurement Law, that foresees that: "This Law shall particularly provide: Competition between the economic operators, equal treatment and non-discrimination of the

economic operators; transparency and integrity in the contract-awarding process of public procurements and rational and efficient exploitation of the means in the contract-awarding process of public procurements". Due to this, a significant part of SCPPA annulment resolutions of public procurement procedures refer to Article 211 (in the case of legal protection procedure the SCPPA acts within the appeal statements, whereas in case of significant violations prescribed in Article 210 SCPPA acts ex officio).

It is important to note that SCPPA has made decisions though many appeal procedures on tender annulment with the elaboration that the possession of ISO certification cannot be taken as criterion element "economically most favorable bid", but it could be seen as establishment criterion for the economic operator's capabilities according to Article 143 of the Public Procurement Law. Article 143 of the Public Procurement Law stipulates that "Establishment criteria for the economic operator's capabilities shall be: the personal state; the ability to perform professional activities; the economic and financial state; the technical or professional capabilities; the quality system standards and the environment management standards." The contracting authorities have for the most part used the ISO certification as a way of quality evaluation of the company's bids. According to SCPPA this type of approach does not comply with the PPL, as well as with the Methodology for Expression of Criteria for Contract-Awarding of Public Procurements.

According to SCPPA, the bidder companies' creditworthiness must not be an evaluation element of the criterion "economically most favorable bid", which according to the Public Procurement Law Article 143 and Article 150 is a criterion to be met with regard to the economic operator's economic and financial capabilities, and must not be an evaluation element by all means according to Article 161 Paragraph 2 of the Public Procurement Law.

Part of the public procurement procedures were annulled after appeal lodgment by the bidder companies with SCPPA's assessment that the contracting authorities had not determined the manner i.e. methodology of assessment i.e. evaluation of every foreseen element individually. The non-determination of the assessment manner of the quality element is against Article 161 Paragraph 4 of the Public Procurement Law and Article 5 of the Methodology for Expression of Criteria for Contract-Awarding of Public

Procurements with point-ranking. Article 161 Paragraph 4 of the Public Procurement Law stipulates that “The contracting authority is obliged to provide elaboration within the tender documents on how the elements of the criterion economically most favorable bid shall be assessed”.

The non-determination of the assessment, i.e. evaluation manner of every foreseen element results with subjectivism during bid evaluation, which is against the Public Procurement Law. Moreover, according to the Commission it is not possible to verify the bids’ comparability, as well as the performed evaluations’ objectiveness in these cases. Due to the fact that the economic operators did not dispose of complete, accurate and precise information on the manner of bid evaluation, i.e. the manner of procedure execution of the contract-awarding for public procurements.

Based on the bidder companies’ appeal statements, SCPPA has also annulled public procurement procedures carried out without a public procurement decision containing the prescribed elements according to Article 28 Paragraph 2 and 3 of the PPL, as well as tenders which establish the existence of non-conformities of significant information determined in the tender documents and in the public procurement announcement, which affected and resulted with unjust bid development.

It is important to note that procedure annulment resolutions have been adopted within the decisions made by SCPPA, because the contracting authorities have not provided the SCPPA with the requested documents within five days upon appeal receipt according to Article 215 of the Public Procurement Law. In one case the SCPPA executed the annulment at the request of the appellant company and in another case the annulment occurred after the timeframe of 30 days upon appeal receipt determined by law, according to Article 222 Paragraph 1 of the PPL.

III. Decisions to dismiss the appeals

In the course of 2012, the share of dismissed appeals continued to increase. During the first six months, 19.13% of lodged appeals were dismissed, compared to 17.37% in the same period in 2011, or 13.90% in 2010.

Appeals are mainly dismissed as not allowed or unduly. SCPPA usually dismisses the appeals on the grounds of not being allowed, due to their untimely submission.

The dismissal of a certain number of appeals as not allowed indicates that a part of the economic operators are not fully aware of the rights related to lodging an appeal in all stages of the procedure, starting with the announcement of the call, and due to the reasons referred to in Article 216 of the PPL. Notably, in compliance with the paragraph 2 of Article 216, the appeal can be lodged within eight days, that is, three days in relation to the invitation to tender, from:

- the publication of the announcement for the public procurement contract award the data, actions or failures to undertake action under the announcement,
- the tender opening, in relation to the actions or failures to undertake actions related to the tender documentation, i.e., the tender opening procedure,
- expiry of the deadline for making a selection decision or to annul the procedure in accordance with article 162 paragraph (2) of the Law related to the omission to make a decision to select or annul the procedure within the set deadline;
- the receipt of the decision on a specific right arising from the contract award procedure, in terms of the establishment of the eligibility of the tenders, or the evaluation of the tenders and of the decision, or
- findings about illegal carrying out of the contract award procedure, no later than one year following the date of completion of the procedure.

Not being knowledgeable of such law, that is, not lodging an appeal in terms of the provisions of paragraph 2 presents grounds to dismiss the appeals as not allowed.

As concerns the dismissal of appeals as unduly, they are dismissed due to noncompliance with the obligation set forth in article 212 paragraph 2 of the PPL, related to payment of fee for the procedure, whose amount, depending on the value of the public procurement contract, is prescribed with the provisions of the article 229 of the PPL.

Also, a share of appeals is dismissed as unduly due to the reason they were not composed in compliance with the PPL, or, they did not contain the prescribed data and they were not amended after the deadline provided by the SCPPA.

IV. Decisions to cease/to suspend the appellate procedure

During the analyzed period, SCPPA, in accordance with the provisions of article 220, paragraph 1, indent 1 of the PPL, passed 43 decisions to cease the procedure, mainly due to withdrawal of the appeal by the applicant.

A share of the decisions (conclusions) to cease/suspend the procedure were made because the contracting party found the appeal was fully or partly grounded, and under article 221 of the PPL, reached a new decision, or a decision which invalidated the existing one, or a decision annulling the procedure or undertook the activity they failed to undertake or carried out a new proceeding.

Reaching a decision with which the contracting authority fully or in part accepts the economic operator's appeal, basically, is a new decision that is submitted to the SCPPA against which the applicant is entitled to appeal a new.

From January to June 2012, decisions to stop or suspend the proceedings were reached in 43 cases, i.e. a share of 12.46% of the total number of reached decisions, while from January to June 2011 that share was 15.25%, and in the same period in 2010, 13.70%.

Decisions to reject/dismiss the requests to extend the procedure

As regards the decisions to extend the procedure, in terms of conclusion a public procurement contract even though an appeal has been lodged, SCPPA rejected or dismissed such applications. Total of 7 (2 dismissed and 5 rejected applications) such decisions were reached in the period from January to June 2012.

SURVEY ON COMPANIES' EXPERIENCE WITH THE PUBLIC PROCUREMENTS

KEY FINDINGS

- Main problems in the public procurements the companies face are the delayed payments of the realized procurement by the institutions, favoring and unclear tender documentation and technical specifications, and unrealistically set and hardly reachable criteria the companies must meet to participate in the tender procedure.
- In addition, companies pointed out the following problems: existence of cases of prior agreements between certain companies and officials in the institutions, violation of the decision and notification period on the selection decision, failure to comply with the contracting conditions during the realization of the procurement, annulment of the procedures without grounded cause, etc.
- Approximately 70% of the companies interviewed were not prepared for the mandatory e-auctions in 2012, because they rarely, or never before, had participated in e-auctions.
- Majority of the companies interviewed stated that they lowered their firstly submitted prices several times when they participated in the e-auctions.
- The e-auctions carried out when 'economically the most favorable bid' is the selected criterion do not contribute to the achievement of the 'best value for money' principle.
- Majority of the companies interviewed stated that they rarely or never experienced technical problems when they participated in the e-auctions.
- Most of the companies interviewed considered that institutions often intentionally set high criteria for participation in the public procurement procedure in order to avoid the arrangement and realization of e-auction.

- Virtually half of the companies interviewed considered that tacit and not allowed agreements existed between the companies prior to the e-auction.
- Many of the companies interviewed believed that negative references would be misused by the institutions.
- Lack of trust in the appellate procedure and the high amount of the fees for the lodged appeal are the two main reasons why companies rarely or never complain against the public procurement procedures.
- There is a dominant number of companies that are rarely or never satisfied with the SCPPA' decisions.
- Companies evaluated the public procurements system with 2.84 at the scale from 1 to 5, which is a slight drop compared to 2011 when the grade was 2.97.

I. INTRODUCTION

The survey on the experience with the public procurements was conducted in May-July 2012, among 220 companies from 10 regions, or 15 cities in Macedonia (Struga, Ohrid, Bitola, Prilep, Strumica, Shtip, Gevgelija, Kumanovo, Sveti Nikole, Vinica, Kochani, Berovo, Pehchevo, Tetovo and Skopje). The survey was based on questionnaire prepared in advance with 14 questions structured and formulated in a manner to collect answers that would provide a clear picture of the situation with the public procurements from the participants' – the companies - point of view. The survey was focused on the identification of the most common problems and irregularities the companies face in the public procurement procedure, the main challenges and considerations on the e-auctions, and the level of satisfaction with the appellate procedure. Finally, the questionnaire provided an opportunity for the companies interviewed to make suggestions on the improvement of the regulations, and the public procurement system in general.

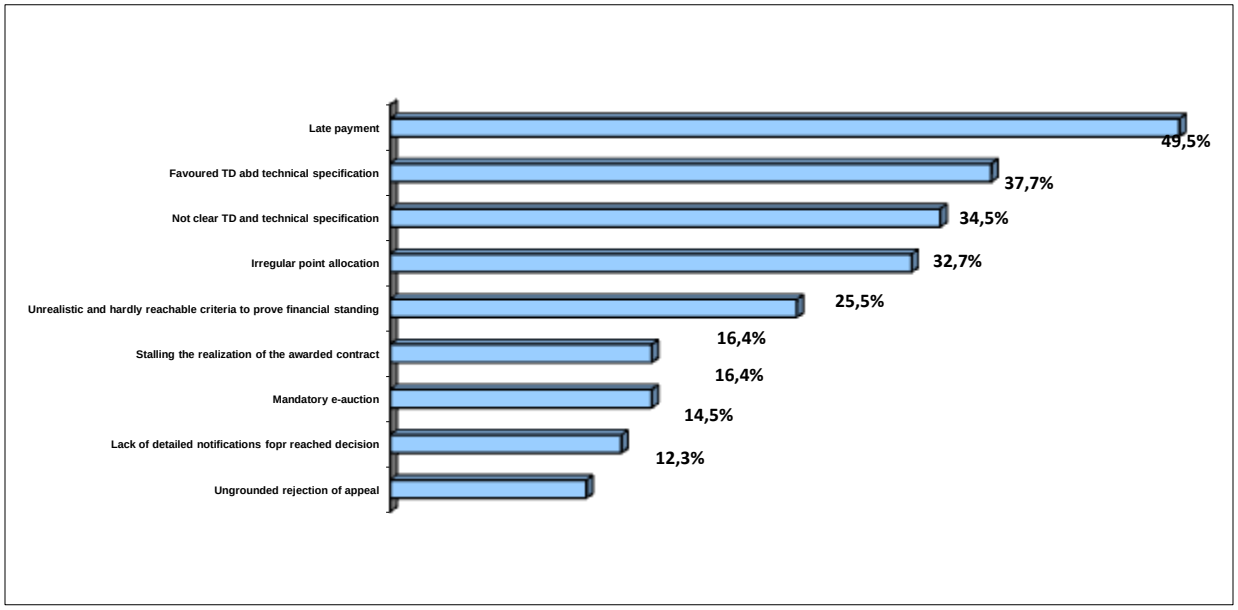
Since 2009, this is the fourth regular annual survey on the companies in terms of public procurements conducted by the CCC within the frames of the project on the monitoring of the enforcement of the Public Procurement Law. Previous survey was conducted in February 2011, and the results were presented in the Quarterly Report no.9. In order to determine whether there is a progress in the field of the public procurement, at least from the companies' point of view, some of the summarized answers from the present survey were compared to the results from the previous survey.

In order to identify the experience of the interviewed companies on the public procurements market, the average annual number of public procurement procedures they participated in was determined. Highest percentage of the interviewed companies (up to 49%) annually participate in up to 5 public procurement procedures, and then companies (a share of 24%) which participate 6 to 12 times at annual level followed. Companies for which it can be said that their 'primary activity' are public procurements, since they participate in more than 24 procedures annually, make a share of 16% in this survey, and the companies that participate in the public procurements market 13-24 times a year, make a share of 11%.

II. PROBLEMS IN THE PUBLIC PROCUREMENTS

- **Main problems in the public procurements the companies face are the delayed payments of the realized procurement by the institutions, favoring and/or unclear tender documentation and technical specifications, and unrealistically set and hardly reachable criteria the companies must meet to participate in the tender procedure.**

What are the main problems you are facing in the public procurements procedures? (circle one or more answers)



As regards the problems companies face in the public procurements, many issues were identified that occur in various stages of the procedure implementation or during the realization of the public procurements contract. Each of the companies interviewed mainly pointed out more than one problem. Delayed payments of the agreed amount for the realized procurement by certain institutions was the most frequent problem. 3.7% of the interviewed companies complained against the favoring tender documentation and technical specifications, and nearly the same share (34.5%) characterized the tender documentation and the technical specification as unclear. 32.7% of the interviewed companies criticized the irregular point-allocation to the bids, while 25.5% remarked on

the unrealistically set and hardly reachable participation criteria (economical and financial standing, technical and professional capabilities). The same number of companies (16.4%) pointed out the mandatory character of the e-auctions and stalling of the realization of the awarded contract. In addition, smaller, but yet significant number of companies (14.5%) complained about the insufficiently elaborated notifications the institutions sent along with the selection decision, and 12.3% complained about the ungrounded rejection of appeals. Smaller share of companies pointed out other specific problems they faced, such as: lack of clearly defined 'quality' criterion (in particular, the point-allocation), changing the conditions during the tender procedure, unrealistically low price on the basis of which the competitors were awarded the contract, request for high annual turnover which is disproportionate with the procurement value, too high bank guarantees and technical problems during the e-auction realization.

- **At the opportunity to list a problem they face in the field of public procurements by themselves, companies pointed out numerous irregularities and non-compliance with the law by the contracting authorities, which mainly refer to favoring technical specifications and disproportionate participation conditions, violation of the decision and notification period, failure to comply with the contracting conditions during the realization of the procurement, annulment of the procedures without a grounded cause, etc.**

Companies usually list the following problems: delayed announcement of tender documentation, lack of project documentation and sufficient detailed information on the formation of a price, mistakes in the tender documentation, possible connections, corruption and bribery, that is, prior agreement between the companies and institution officials and without violating the PPL a company is favored, in particular through the specification for the subject of the procurement created specifically for a certain bidder, no technical problems in the EPPS are recognized, notifications are not received within the legally prescribed deadlines, or they lack elaborated explanation, no evaluation report s provided in some of the procedures, the contracted amounts are not obeyed,

irregular point allocation to the bids, when the favored company was not selected, the tender is annulled on the grounds of trivial excuses, tender is annulled 2-3 times on the grounds of unplanned procurement means, procedures are often annulled due to trivial excuses, there is no ranking list with the awarded points and methodology for awarding points, bids are eliminated due to minor omissions not significantly related to the selection of the most favorable bidder, non-compliance with the non-discrimination principle, too long period between submitted bid and final decision, no control over the work of the contracting authorities in the selection phase and the realization of the contract phase, misuse of article 36 paragraph 2 of the PPL, in particular the wording ‘or equivalent’ of the registered trademark when the subject of the procurement can easily be described, and it is done in order to dismiss the bidded equivalent products explaining that they are 'not equivalent/applicative' to the requested product, a company is favored with a particular type of document or goods with certain weight and packaging characteristic for a particular company, non-compliance with the PPL in terms of that intellectual services should be excluded from e-auction, etc.

III. E-AUCTIONS

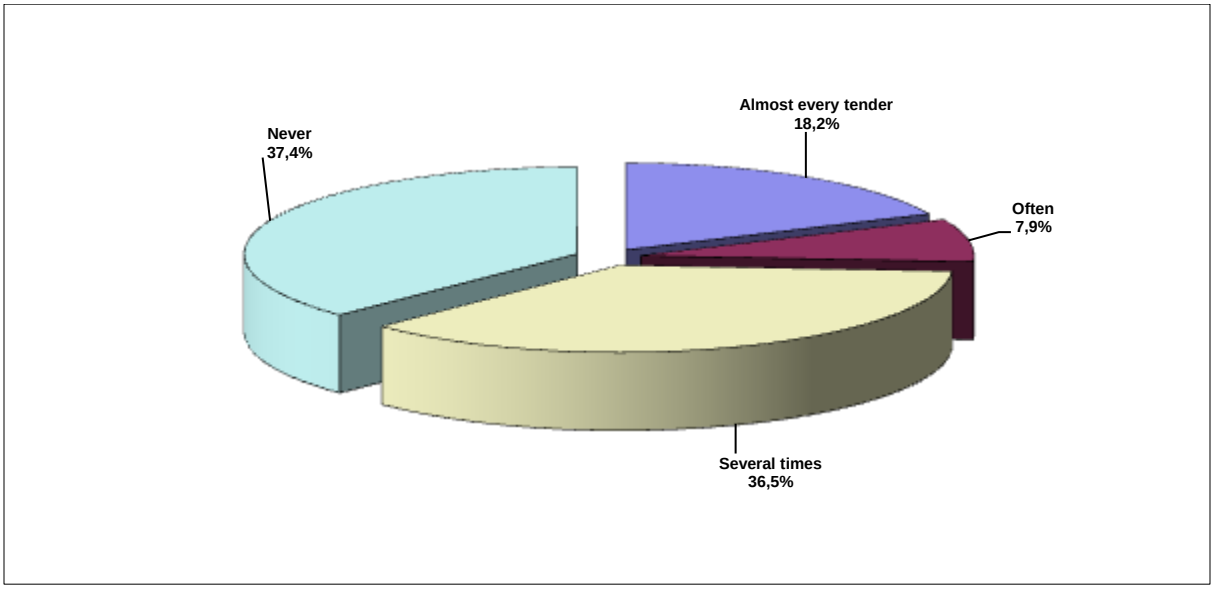
A significant share of the present survey was dedicated to e-auctions, because since 1 January 2012 they became a mandatory manner for public procurement procedures completion. Answers to several questions related to various aspects of the e-auctions follow.

- **About 70% of the interviewed companies stated that they were not prepared for the mandatory manner of conducting the e-auctions in 2012, because they rarely or never had participated in e-auctions in the previous period.**

It should be noted that even though the survey was conducted in May-July 2012, the question related to companies’ experience with the e-auction participation referred to

the previous year. Therefore, it is no surprise that most of the companies interviewed (37.4%) had never participated in e-auction in the previous year, and 36.5% participated only a few times. Smaller share of companies (18.2%) participated in e-auctions almost for every tender, and 7.9% often participated.

How often did you participate in e-auction in 2011?



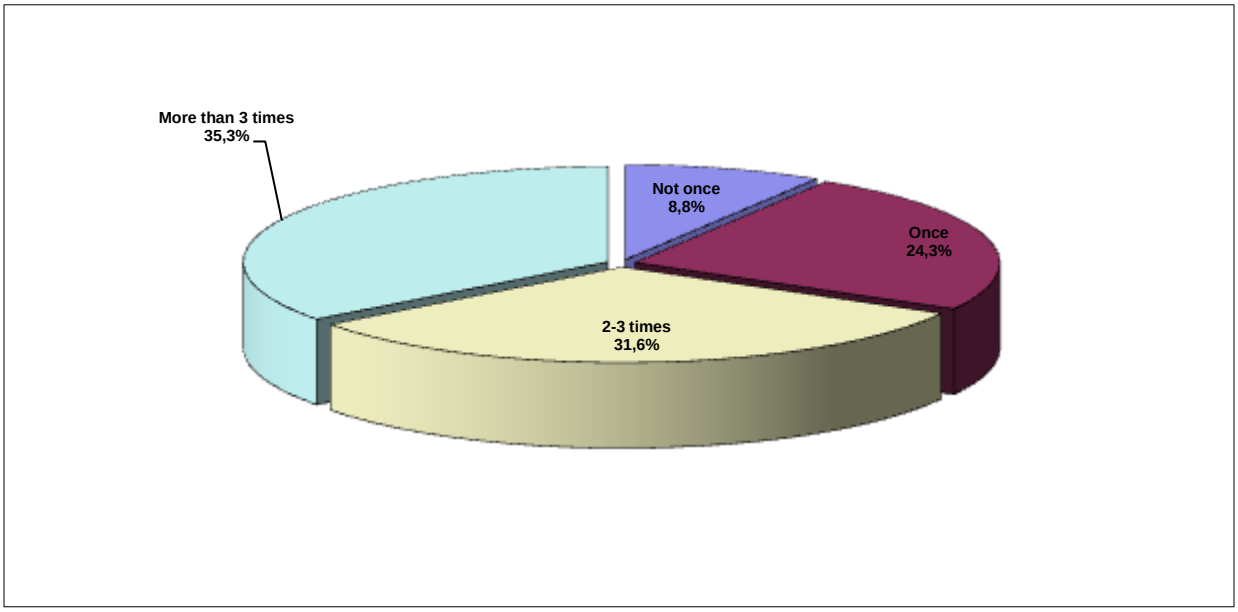
At least half of the companies were not prepared for the mandatory participation in e-auctions during the current year due to the fact that the institutions did not comply with the law-stipulated threshold of 70% for e-auctions in 2011, or 50% in 2010.

- **When participating in e-auctions, most of the companies interviewed bid by lowering their initially submitted price.**

Public holds two completely contrary beliefs about the price reduction during the e-auction. Some believe that companies offer extremely high prices in their initial bids, and during the e-auction they continuously lower them. Others believe that the companies offer their best (the lowest) price in the initial bids, and the e-auctions are a

waste of time, since the companies do not reduce their initial prices at all. Answers obtained during the present survey mainly support the first thesis.

How often do you lower your initial price during the negative bid?

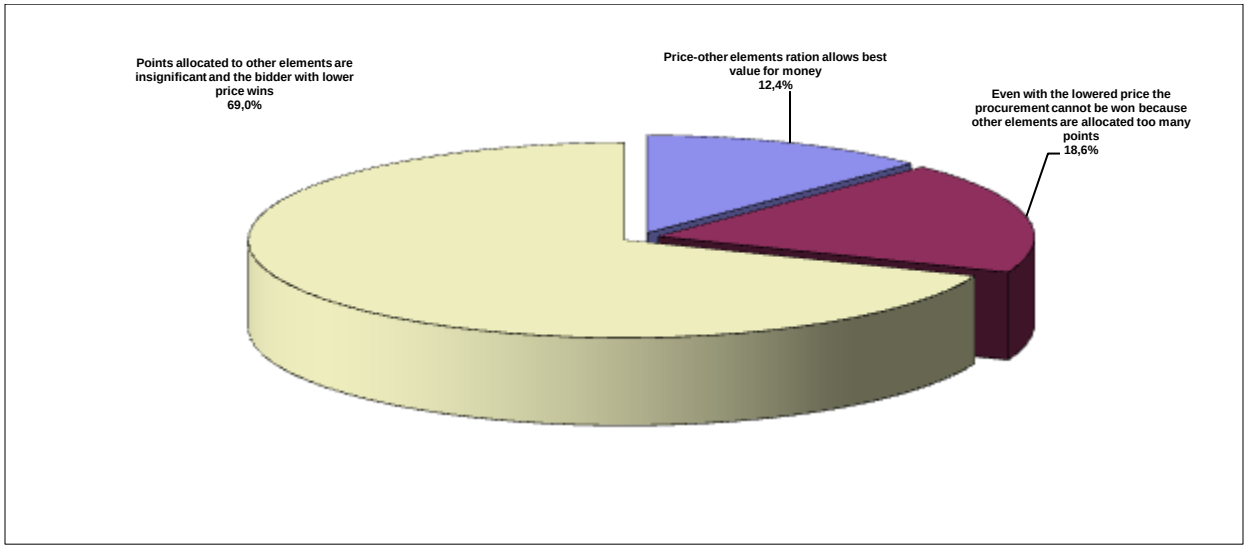


More precisely, majority of companies (35.3%) lower their price more than three times during the negative bid. Then, bidders that lower their price 2-3 times follow (31.6%), and there is a smaller share of companies that lower their initial price only once (24.3%). The smallest share of companies (8.8%) do not lower their price not once. Such answers indicate that, on one hand, e-auctions are effective, because the prices are lowered and hence the institutions save. On the other hand, frequent lowering of the prices during the e-auction may signify that the institutions fail to determine the scope of price lowering, and each participant is 'forced' to lower it several times with slight differences compared to the previous price.

- **E-auctions implemented when the selected criterion is 'economically most favorable bid' do not contribute to the achievement of the 'best value for money' principle.**

Interesting answers were obtained as regards the effects of the e-auction when implemented in a procedure where the selected criterion is ‘economically most favorable bid’.

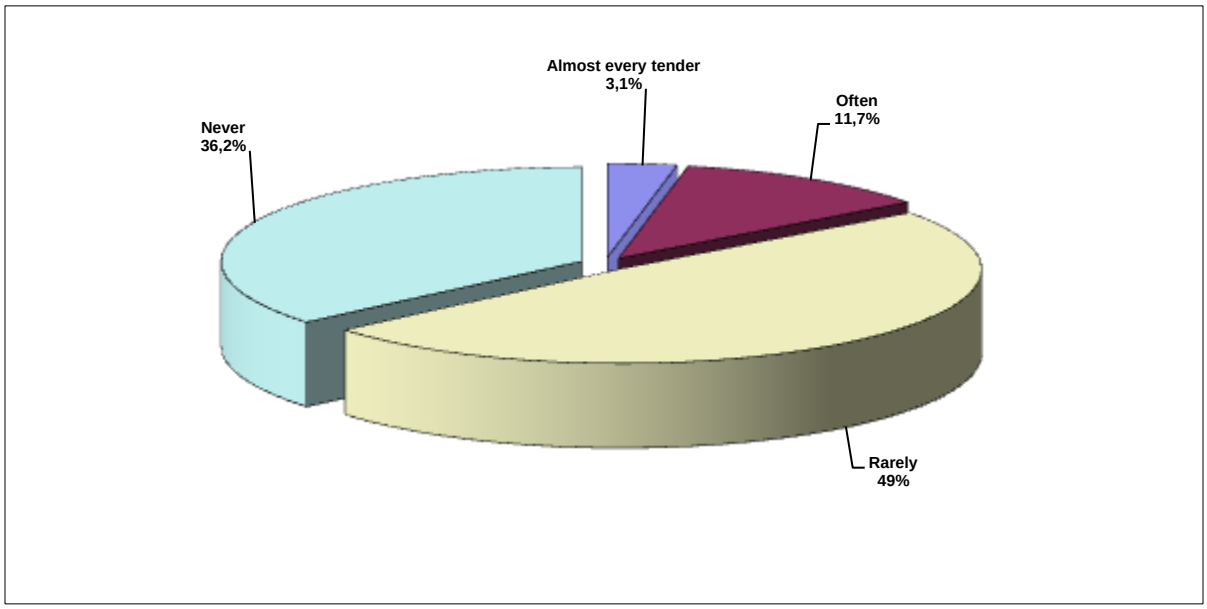
Which of the following effects of the e-auction are achieved in a procedure where the selected criterion is ‘economically most favorable bid’?



Evidently, the highest percentage of the interviewed companies (69%) believe that the points allocated to the other elements are insignificant and the bidder with the lowest price wins. Far lower number of companies (18.6%) consider that the lowered price is not crucial, because the other elements bring too many points. Finally, the lowest share of interviewees (12.4%) stated that the selected price – other elements ratio ensure the best value for money. Hence, a question of the cost-effectiveness of the e-auctions arises when contract awarding criterion is ‘economically most favorable bid’.

- **The greatest share of interviewees rarely or never faced any technical problems when participating in e-auctions.**

How often do you experience technical problems when participating in e-auctions?

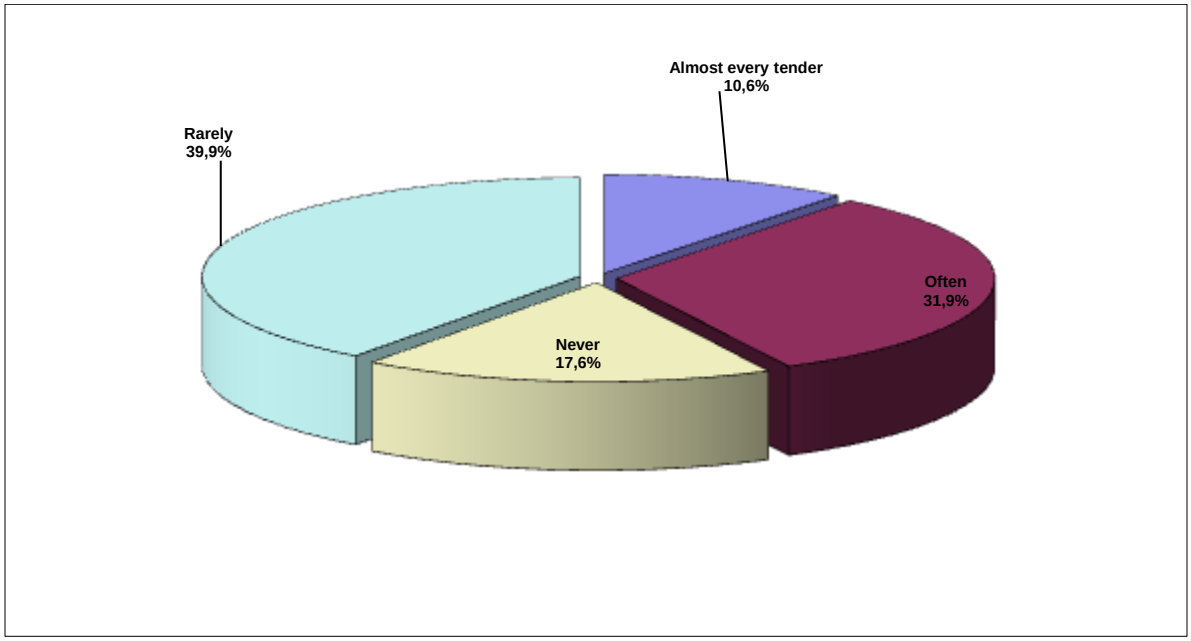


Nearly half of the companies (49%) rarely encounter technical problems during the e-auction, while 36.2% never experienced such problems. On the other hand, 11.7% of the companies often encounter technical problems, and an insignificant share of 3.1% always experience technical problems.

- **Most of the companies interviewed stated that the institutions intentionally set high tender participation criteria in order to avoid arrangement and implementation of an e-auction. Understandably, the e-auction is not implemented when in the public procurement procedure only a single company submits a bid or when the Public procurements Commission assessed as eligible only one bid.**

Interesting answers were obtained when the companies were asked whether they witnessed in a situation when the contracting authorities intentionally set higher participation criteria in the public procurement procedures in order to avoid the implementation of e-auction (explaining that there were not sufficient competitors), which could result in various consequences.

Have you ever been in a situation – the contracting authority deliberately set higher minimum criteria companies should meet in order to participate in the tender procedure, in order to remain only a single company-bidder and to avoid the implementation of the envisaged e-auction?

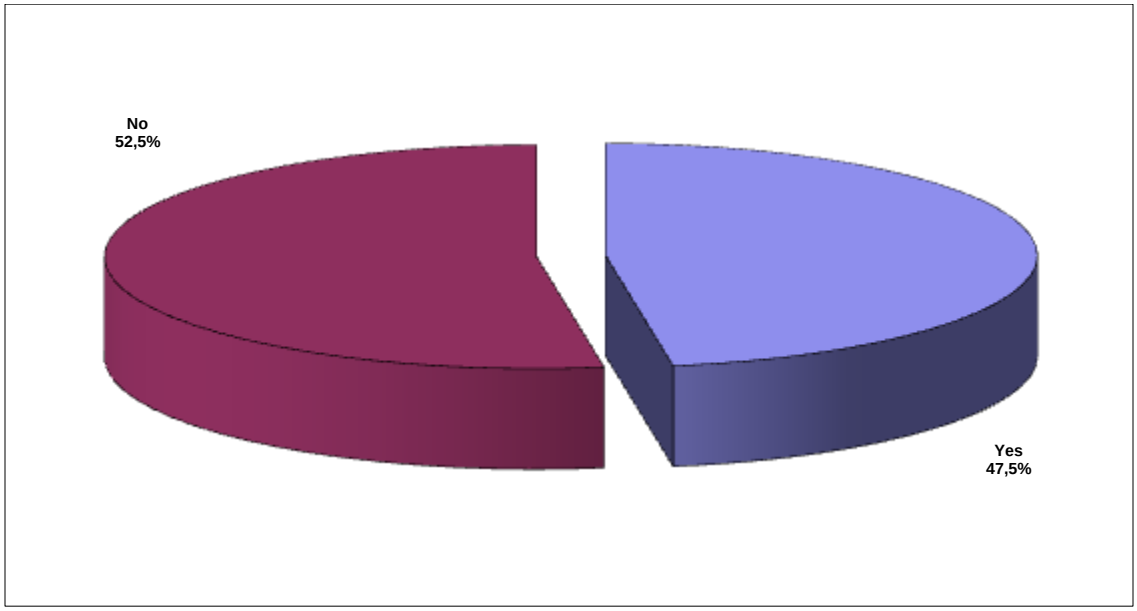


Answers obtained by the interviewees were divided. Most of the companies interviewed (39.9%) stated they had rarely been in a situation when the institutions deliberately set high participation criteria in order to avoid e-auction. Nevertheless, not small share of 31.9% stated they had found themselves in such situation. 17.6% of the companies never experienced such problem, and the lowest share of the interviewees (10.6%) stated they faced such situation in virtually every procedure.

- **Almost half of the interviewees stated there was a tacit and not allowed agreement between the companies prior to the implementation of the e-auction.**

Considering the public speculations that there are secret agreements between the companies prior to the e-auctions, even prior to the submission of the initial bids, companies were asked whether they knew or believed such agreements existed or not.

Do you consider that prior to the e-auction there are agreements between the bidders that result in auction failure (initial prices are not lowered)?



Opinions were divided, and most of the companies interviewed (52.5%) stated there were no such agreement among the bidders prior to the e-auction, while 47.5% stated there were such agreements.

IV. NEGATIVE REFERENCES

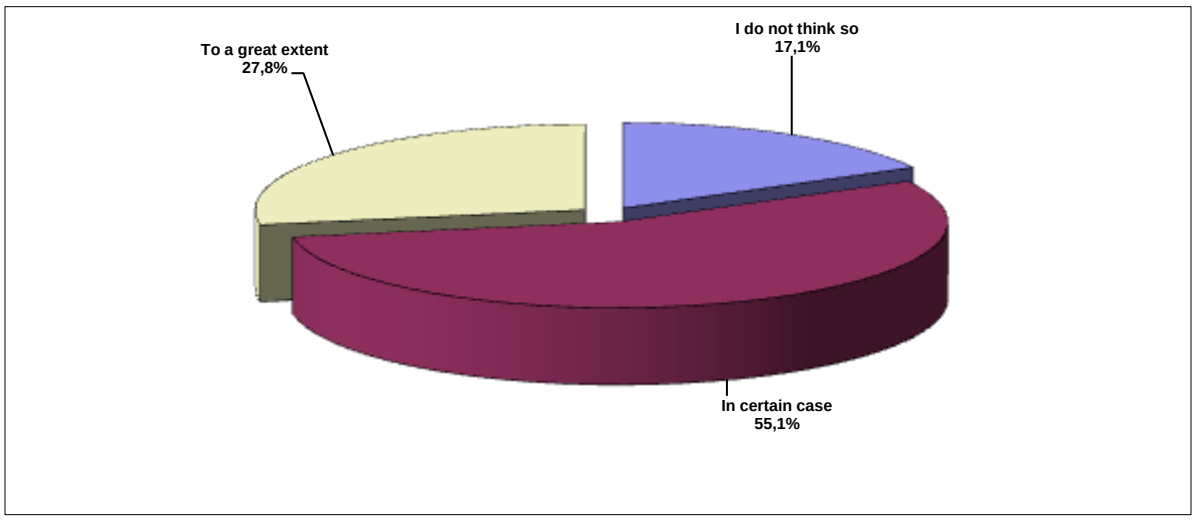
- **Most of the companies interviewed considered that negative references would be misused by the institutions.**

The survey intended to obtain the business sector opinion related to the novelty in the Law on Public Procurements – the negative references for the companies. As a

clarification, the negative reference is issued by the institutions to a company that violates any of the provisions stipulated with the PPL during the procedure or the realization of the public procurement contract, and as a consequence, such company is forbidden to participate in public procurement procedures in the Republic of Macedonia for one year.

Most of the companies (55.1%) considered that CA would misuse the negative references only in certain cases. Not small share of interviewees (27.8%) considered that the misuse would often occur, while 17.1% stated they did not believe such misuse would happen.

Do you think that the contracting authorities would misuse the recently introduced negative references for the economic operators in order to decrease the competition and to favor certain economic operators?

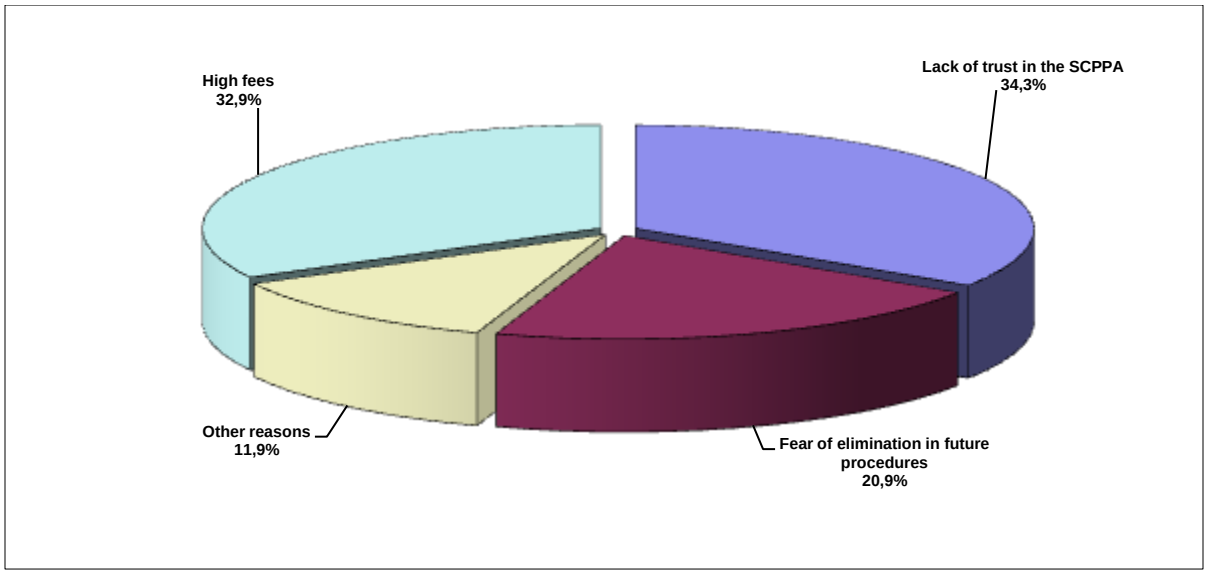


Such considerations point that there is an on-going concern within the business sector that negative references might be misused to eliminate certain companies and to favor others.

V. APPELLATE PROCEDURE

- **The lack of trust in the appellate procedure and the high amount of fees for lodged appeal are the two main reasons why companies rarely or never lodge appeals in the public procurement procedures.**

Why, if rarely or never you contested a decision of the public procurement commission in front of the State Appellate Commission?



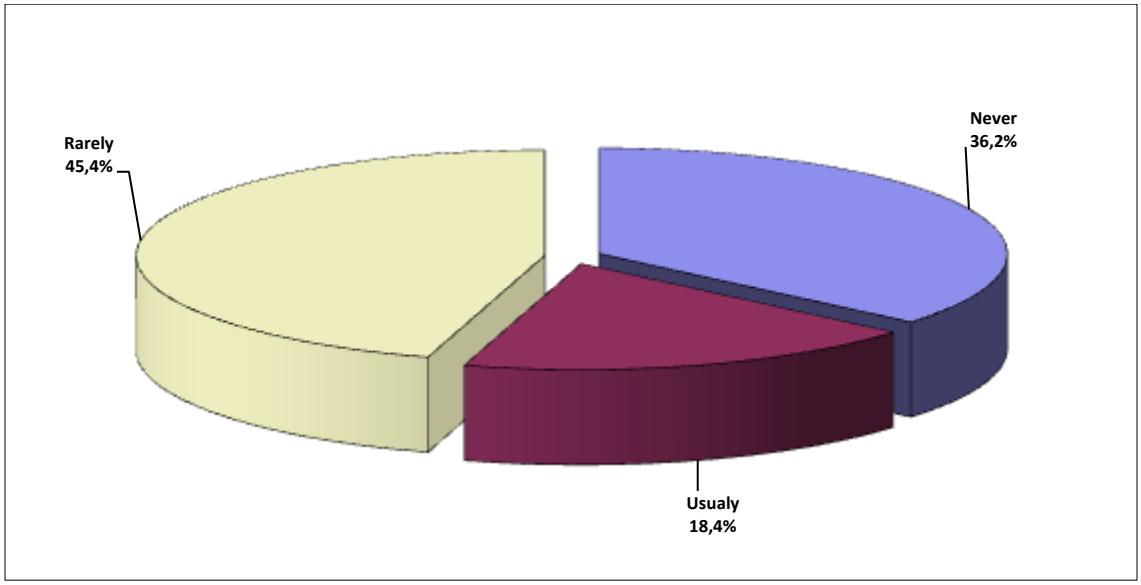
As in the previous surveys, again, the companies were asked to evaluate their satisfaction with the appellate procedure and the decision-making process of the SCPPA. 95.45% of the companies interviewed stated they never or rarely appealed against the public procurement procedures. Two main reasons were provided: lack of trust in the State Commission on Public Procurement Appeals (34.3%) and the high amount of fees for lodged appeal (32.9%). Slightly smaller share of companies (20.9%) pointed the fear of being eliminated in the future contracts as a reason for non lodging any complaints. Some of the companies (11.9%) pointed other reasons for non lodging any complaints, such as: lack of need to appeal, not meeting the appeal period, not effective appellate procedure and legal inability to lodge an appeal against certain activities (for example, answer to a raised question). It is interesting to mention some

companies pointed that even if they attached a written rationale from the PPB supporting their grounds for the appeal, the SCPPA, when deciding, took into consideration only their own opinion which was not in favor of the applicant. On the other hand, some companies pointed that SCPPA is a professional authority, and the fee to be paid when lodging an appeal was not high and there was no need to fear threats or pressure of any kind if an appeal was lodged.

Compared to the previous survey, the number of companies considering that the high amount of the fee was not the reason for not lodging appeals is decreased, but the percentage of companies not trusting the SCPPA and therefore, rarely or never lodge an appeal, remains almost the same. There is an increase of 3 percentage points in the third cause for not lodging appeals against the most favorable bid selection decision - fear of being eliminated in the future contracts.

- **There is a dominant number of companies that are rarely or never satisfied with the SCPPA's decisions.**

When you lodged an appeal in public procurement procedure, were you satisfied with the decision of the SCPPA?

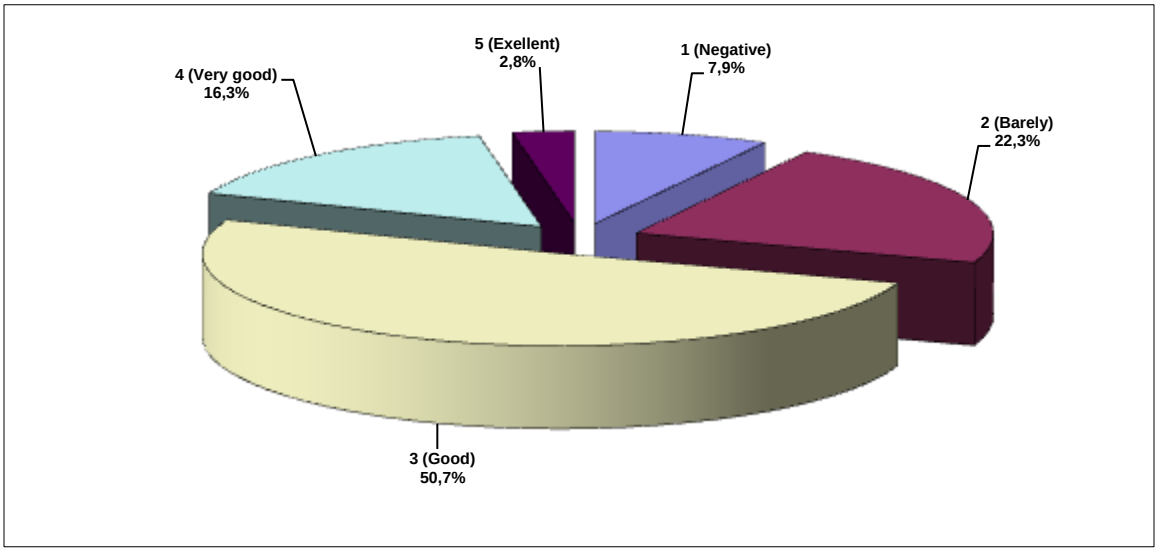


As regards the question of satisfaction with the SCPPA's decisions, most of the economic operators (45.4%) are rarely satisfied. They are followed by the EO that are never satisfied with the SCPPA's decisions (36.2%), while 18.4% are usually satisfied.

VI. ASSESSMENT OF THE PUBLIC PROCUREMENT PROCESS

- **Companies assessed the public procurement process and system with the grade of 2.84% on the scale from 1 to 5. Compared to the previous survey, there is a decrease of the average assessment (average grade for the previous survey was 2.97).**

How do you assess the overall process of public procurements you participated in? (please circle the appropriate number)



There is a slight decrease in the evaluation of the public procurement process (system) in the Republic of Macedonia in terms of the results from the previous survey. Most of the companies (50.7%) assessed the public procurement process with the grade 3 (good). Then, 22.3% of the companies assessed it with the grade 2 (barely satisfactory),

and 16.3% of the companies assessed it with the grade 4 (very good). The smallest share of companies assessed it with the lowest and the highest grade on the scale from 1 to 5, that is, 7.9$ assessed it 1 (negative), while the highest grade 5 (excellent) is least present (2.8%). The average assessment for the public procurement process accounts for 2.84.

Compared to the previous survey, there is a slight decrease of the average assessment (average assessment for the previous survey accounted for 2.97), however, in general, the average assessment in all surveys so far accounted for from 2.80 to 2.97.

VII. RECOMMENDATIONS FOR AMENDMENTS OF THE PUBLIC PROCUREMENT LAW

Again, the companies interviewed provided many suggestions and recommendations how to improve the Law on Public Procurements and the public procurement system, in general. Following recommendations are usually reiterated and conveyed genuinely as they were suggested by interviewed companies:

- to regulate the regular payment obligation of the CA and to shorten the payment deadlines;
- to increase the value threshold for public procurement procedures implementation;
- to define the annual allowance for the use of the EPPS and the mandatory character of the e-auctions in a different manner, or to completely eliminate them;
- to define the subject of the procurement in a more detailed manner, unless the complete tender documentation is uploaded;
- to prolong the expiry date of the certificates for more than six months, not to require additional documents apart from the registration;

- to simplify the certificate requesting procedures by certain state institutions and to minimize them to certificates by the Central Registry of the Republic of Macedonia, that is, if more bids are to be submitted in different procedures by the same contracting authority within two months, part of the documents to submitted only once (to avoid submitting sheets and sheets of paper for every tender);
- to prove the technical and professional competence with only single document;
- to exclude subcontractors and companies to execute the contact by themselves;
- detailed notification on the reasons why a bid was rejected;
- to increase the liability of the Public Procurements Commission and the members thereof;
- not to be able to annul a tender;
- to eliminate the e-auction;
- to prevent companies not registered for a certain activity to apply;
- the lowest price should not be a contract awarding criterion;
- only up to 50 points to be allocated to the price;
- each tender should require and define the quality;
- competent person only can develop tender documentation;
- PPB to be an independent authority, and under the auspices of the Ministry of Finance;
- to prevent any 'dubious actions' with additional and envisaged matters simply by signing annexes to the contracts;
- penalty provisions to be stipulated by the law;

- contracting authorities should gather the companies and deliver educational workshops, that is, presentation on how to participate in e-auctions;
- no fees for collecting tender documentation and possibility for free information on how to participate in tenders for everybody;
- to reduce the possibilities to cease or annul the procedure after the bids were opened;
- greater control over the institutions and how they apply the PPL;
- PPL should provide for specific conditions when procuring airplane tickets where main qualities should be the quality and references, and not the price of the service;
- mandatory participation of an expert as a member of the PPC who will assess the quality of the product and would be personally liable to the institutions if the quality of the selected goods does not comply;
- to specify (to shorten) the bid evaluation deadlines;
- tender documentation to be downloaded from the EPPS, and not collected from the contracting authorities;
- paragraph (2) of article 36 of the PPL to be deleted;
- to introduce a provision stipulating an obligation for the contracting authority to prepare specification of the required product quality, as a qualification condition for the following phase - e-auction.