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BALKAN TENDER WATCH

Center for Civil Communications
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SHADOW REPORT

ON PUBLIC PROCUREMENT IN NORTH MACEDONIA FOR THE YEAR 2020

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INTRODUCTION

Almost two years into implementation of the new Law on Public Procurements[1] and effects thereof are still missing. Although the new law was adopted with a view to align national legislation with the most recent EU Directive on Public Procurement and under pressure of numerous criticism by all stakeholders indicating that the legal framework is unsustainable, restrictive and, in many cases, allows malpractices, public procurements in North Macedonia, by inertia, continue to be implemented pursuant to main provisions from the old law.

The new law was adopted in January 2019 and had delayed enforcement from 1 April the same year, which was certainly uncommon for such piece of legislation, having in mind the major role of calendar year both in terms of fiscal implications and in terms of planning needs, procurements and budget execution.

Be that as it may, the new law defines public procurements at higher conceptual and more contemporary level, and provides a solid framework for state institutions to procure what they actually need. On the other hand, the law anticipated a multitude of instruments for prevention of abuses and malpractices – from greater transparency and accountability of institutions, through specific anticorruption provisions, to control during contract performance. Finally, the law defined the concept of cost-effectiveness, i.e. obtaining the best value for money spent, as key principle of public procurements.

However, none of major novelties introduced by the law is applied in a manner that would allow effectuation of their respective purpose and would guarantee effective and efficient implementation of public procurements. In that regard, competent institutions failed to demonstrate proactive engagement in respect to adherent law enforcement by contracting authorities.

The most criticized provision from the old law, i.e. use of "lowest price" as single criterion for selection of the most favourable bid, is replaced with "economically most favourable bid" under the new law, i.e. in addition to price, other elements are also used in evaluation and selection of bids. In practice, 97% of public procurements still use "lowest price" as single selection criterion. Even in the case of procurements for which institutions have long complained that they are unable to procure what they need because of mandatory use of lowest price as single criterion. Now, when they are no longer obliged to use this criterion, lowest price is still used by these institutions for the same types of procurements.

The next major problem under the old law, mandatory organization of electronic auction for reduction of initially bided prices, was resolved under the new law by defining e-auctions as optional, i.e. downward bidding should be organized only in the case of procurements related to standard goods of equitable quality. In this regard as well, 94% of tender procedures in 2019 included organization of e-auction with all its shortfalls which, combined with use of lowest price, rendered significant portion of procurements irrational.

In addition to these two, a series of other law provisions are not enforced, although they were introduced to address problems in public procurements - procurement needs are not elaborated; market research and consultations are not conducted; corruption is not reported; deadlines for mandatory submission of notifications on contract signed, the contract itself and annexes thereto and notifications on contract performance are not complied with; administrative controls during contract performance are not implemented in complete and comprehensive manner; possibilities for innovation, social and environmental reconsiderations are not applied, etc.

Planning of public procurements and performance of procurement contracts remain poor, and practices continue whereby large portion of time and efforts are invested in the middle stage, i.e. organization of the public procurement procedure. Hence, public procurements are predominantly understood as technical and administrative procedure, instead of a system to meet public needs.

In 2020, the COVID-19 crisis further emphasized above enlisted problems, but none of them was addressed throughout the year.

There were no particular results concerning fight against corruption in public procurements, while corruption risks in this field were additionally enhanced with implementation of urgent procurements for coronavirus protection in 2020.

[1] Law on Public Procurements, "Official Gazette of the Republic of Macedonia" no. 24 from 1 February 2019, available at: http://www.bjn.gov.mk/wp-content/uploads/2019/05/ZJN_Sluzben-vesnik_24-2018-od-01.02.2019.pdf

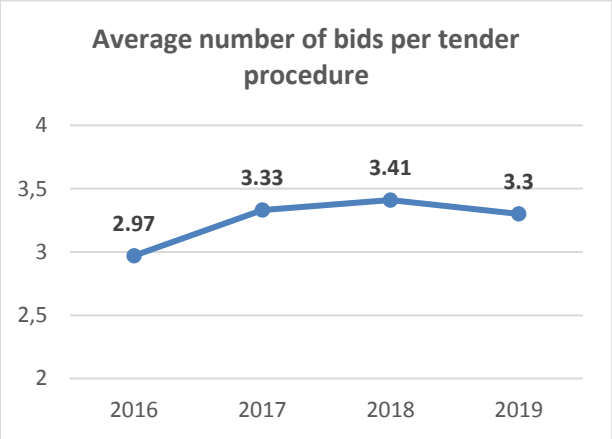
INCREASED VALUE OF PROCUREMENTS, REDUCED COMPETITION

In 2019 and for the second consecutive year, the value of public procurements has increased compared to the previous year, reaching 908 million euros and accounting for an increase by 20%. The value of public procurements in the country's gross domestic product accounted for a share of 8% in 2019, while their share in the state budget reached one quarter.

Value of public procurements

Year	Value (mill. EUR)	GDP share (%)	Budget share (%)
2016	962	10%	30%
2017	625	6%	19%
2018	755	7%	22%
2019	908	8%	24%

In 2019, competition in tender procedures was again reduced after the modest increase noted in the previous two years. The average number of bids per tender procedure was reduced to 3.30 from 3.41 in the previous year. This piece of information, however, does not completely reflect actual state-of-affairs in respect to tender procedures organized in North Macedonia. Notably, high 28% of tender procedures were presented with only one bid or were not presented with any bids, while 21% of them were presented with two bids. Three and more bids were observed only in 51% of tender procedures.



Also, concentration of companies in tender procedures is high. Namely, the top 10 companies with highest value of public procurement contracts account for 19% of the total value of tender procedures in 2019, while the top 20 companies "capture" 29% of all public procurements.

In continuation, the value of public procurements awarded to micro enterprises is very low and in 2019 it narrowly accounted for 3% of the total value of procurements, although these companies represent 91% of the total number of active business entities in the country. In 2019, foreign companies accounted for a modest share of 4% in the total value of tender procedures.

The long-term problem related to enormously high shares of annulled tender procedures continued in 2019 as well. Although the share of annulled tender procedures in all public procurements was slightly reduced and stands at 26.6 %, major jump was noted in respect to fully annulled tender procedures. In 2019, every fourth tender procedure was fully annulled, setting a new record-breaking share.

Annulment of tender procedures

Year	Partially annulled tenders	Fully annulled tenders	Total of annulled tenders
2016	7.3%	15.6%	22.9%
2017	8.2%	16.3%	24.4%
2018	8.1%	19.2%	27.2%
2019	1.6%	25.0%	26.6%

As many as 42% of procurement procedures were annulled on the grounds that no bids are received or that no acceptable bids are submitted. While the old law distinguished between these two reasons, the new law merged the two provisions into single ground for tender annulment, i.e. does not distinguish cases in which a tender procedure is not presented with any bids or cases in which, after the bid-evaluation stage, no bids were deemed acceptable.

The second most frequently indicated reason for tender annulment concerns the fact that bidders have offered prices or conditions that are less favourable than market prices and conditions. In practice, this means that bided prices were higher than the amount of funds planned or estimated by the contracting authority for the procurement in question by the contracting authority. This was indicated as reason for annulment of 15% of tender procedures.

The high share of tender annulments, which is one of long-standing problems in public procurements in our country, is recognized by all factors in the system of public procurements, but – at least for the time being – competent institutions have not offered any meaningful solution.

Representatives from contracting authorities that participated in the consultations process have stressed that tender annulment is viewed as the "easiest option" when they are not fully certain in the selection of the most favourable bid.

The trend on increased value of so-called face-to-face contracts, i.e. negotiation procedures without previous announcement of call for bids, continued in 2019. Nevertheless, the share of such procurements under direct contracts in all public procurements is continuously decreasing due to the increased volume of public procurements in the country.

Contracts awarded under negotiation procedures without previous announcement of call for bids (direct contracts)

Year	Value (mill. EUR)	Share in the value of all contracts (%)
2016	38.5	4.0%
2017	29.3	4.7%
2018	33.5	4.4%
2019	37.8	4.2%

Otherwise, a total of 376 direct contracts were awarded in 2019, accounting for cumulative value of 37.8 million euros. High 59% of this value belongs to contracts signed under direct negotiations as a result of two failed tender procedures organized before.

2019 marks an evident increase in respect to the number of appeals lodged by companies before the State Commission on Public Procurement Appeals. Hence, a total of 834 appeals were lodged, which is a record-breaking figure both in terms of the absolute and in terms of the relative number, i.e. the share of appeals in the total number of tender procedures in the country. Nevertheless, even these figures do not correspond to complaints made by companies in respect to irregularities in public procurements. Namely, under the regular annual survey among companies inquiring about their views and opinions on implementation of tender procedures, 48% of interviewed companies have responded that corruption is present in public procurements organized in our country.

Number, share and approved appeals lodged by companies in public procurement procedures

Year	Number of procurement notices	Number of appeals	Appeals as share in the total number of tender procedures	Approved appeals as share in total number of appeals
2016	18,444	557	3.02%	45%
2017	17,227	513	2.98%	43%
2018	21,406	705	3.29%	47%
2019	22,538	834	3.70%	56%

In the same survey, companies indicated high fees and distrust in the State Commission on Public Procurement Appeals as the main reasons behind their reluctance to lodge appeals.

ANOTHER YEAR WITHOUT FOCUS ON ADVANCEMENT OF PUBLIC PROCUREMENTS

What characterized 2019 and continued in 2020 is implementation of public procurement without use of possibilities offered by the relatively new Law on Public Procurements, which entered in effect on 1 April 2019.

The three most important indicators for this observation include: use of “lowest price” as criterion for selection of the most favourable bid; organization of e-auction for reduction of initially bided prices; and competition in tender procedures. All three indicators show that public procurements in the country are implemented as if the old law is still in effect.

Notably, 97.5% of tender procedures used “lowest price” as single criterion for selection of the most favourable bid although the law stipulates “economically most favourable bid” as the single criterion, where price is only one of bid-evaluation elements. The problem here is not the fact that lowest price cannot be used as criterion when contracting authorities have established that as the most rational criterion for the procurement subject, but that use of “lowest price” continues as easiest, simplest and safest solution, without taking into consideration whether this solution is also the most cost-effective and whether it allows contracting authorities to obtain the best value for money spent.

The situation is similar in respect to organization of electronic auctions, which was mandatory under the old law, but is now left to contracting authorities to decide when e-auctions will be used, mainly in cases when there are precisely defined technical specifications and in cases of goods with standard or known quality. Nevertheless, electronic auctions were organized in 93.8% of tender procedures implemented in 2019. Together with lowest price, e-auction was among most criticized provisions under the old law. Law-mandated organization of e-auction and mandatory use of lowest price were used as justification for all problems in public procurements - from unrealistic prices attained (be it extremely low or excessively high), through poor quality of goods, services and works procured, to annulment of tender procedures. Now, when contracting authorities have a choice in respect to selection criteria and organization of e-auction, they continue to fully use these instruments. Fear of tender failure if economically most favourable bid is used as selection criterion and fear of mistakes if economically most favourable bid is not used as selection criterion are indicated as the main reason for use of lowest price and e-auction by those implementing public procurements. Of course, other reasons include lack of knowledge and insufficient confidence in use of other elements for selection of the most favourable bid, such as the best price-quality ratio and costs related to application of the cost-effectiveness approach. On the other hand, the few institutions that use other selection criteria indicated that these offer greater possibility to procure what is really needed and make public procurements more cost-effective and rational.

As indicated earlier in this report, downward trends are noted in respect to competition in tender procedures that has been further reduced even after the new law entered into effect, which could be understandable given the fact that factors with discouraging effect for companies in respect to their participation in more tender procedures primarily concern lowest price as single selection criterion and organization of e-auction for reduction of initially bided prices.

It seems that this constellation of factors maintains the perception of corruption in public procurements at high level. 48% of companies that participate in tender procedures believe that corruption is present in public procurements. The biggest problem in public procurements reported by companies concerns lowest price as single criterion (problem indicated by 74% of companies), followed by voluminous documents required for participation in tender procedures and problems related to collection of payment (46%). The third ranked problem implies adjustment of eligibility criteria to favour certain companies (43%).

Only 6% of companies believe that e-auctions result in selection of the best bid. 49% of them believe that e-auctions result in attainment of unrealistically low prices, while 45% indicated that e-auctions undermine quality of the procurement subject.

Almost half of companies believe that previous arrangements are in place among bidders prior to organization of e-auctions.

Otherwise, the so-called negative reference or blacklisting of companies and imposing sanctions by means of prohibition for participation in public procurements, despite criticism and non-alignment with European practices, continued under the new law. Although the new law, to some extent, mitigated these sanctions for companies, notably by shortening the period of prohibition and the list of grounds for blacklisting, the number of negative references issued is insignificantly reduced compared to the previous year, but is still higher compared to the situation in 2017. In particular, 64 negative references were issued in 2019, accounting for reduction by 19% compared to 2018 (when 79 sanctions were issued), but has increased by 56% compared to 2017 (when 41 sanctions were issued). Hence, it cannot be concluded that law interventions in this respect have yielded any results.

One of more significant novelties under the new law, i.e. introduction of ex-ante control or control during implementation of public procurement procedures, which is conducted by the Bureau of Public Procurements in the form of administrative control, is also marked by limited enforcement. Namely, for the time being this control is conducted only in cases where it is mandated by law, i.e. in all procedures whose value exceeds 500,000 euros for goods and services and 2,000,000 euros for works. At the moment, there are no administrative controls conducted according to the other two legal grounds, i.e. based on risk assessment and on random sample of procurements.

Nevertheless, in 2019, administrative controls were conducted in 128 public procurement procedures, whereby in one third of them the Bureau of Public Procurements has established irregularities that could have affected procedure outcome and issued instructions for contracting authorities to annul relevant procedures or returned them for repeated bid-evaluation.

The fact that the subject of these administrative controls concerned biggest tender procedures in the country and that irregularities have been detected in one third of these procedures speaks volumes about the importance of this control and the need for these controls to be enhanced and to expand the scope of procedures covered.

The next important aspect of public procurements, i.e. transparency, is also ridden with shortfalls. In spite of the fact that, last year, relevant provisions on transparency in public procurements under the Law on Public Procurements were enhanced, but also under the new Law on Free Access to Public Information, the Open Government Partnership's Action Plan and the Government's Transparency Strategy – transparency is still below the desired level.

While transparency in public procurements is continuously improved since 2017, different research papers developed by the civil society assess that institutions publish only around 50% of information they are obliged to make publicly available in respect to public spending under public procurements. This also includes obligations for greater accountability and integrity on the part of institutions in respect to public procurements.

Institutions are late in respect to publishing in the Electronic Public Procurement System notifications on contract signed and the contract itself within a deadline of 10 days from contract signing, and the situation is identical in respect to notifications on contract performance. Annual plans for public procurements, procurement notices with tender documents, notifications on contract signed and notifications on contract performance are not regularly published on websites of relevant institutions.

Low awareness among institutions in respect to voluntary transparency is confirmed by the fact that only an insignificant number of them have used the law-facilitated possibility for publication of notifications on selection of the most favourable bid, together with the bid selection decisions in the case of negotiation procedures without call for bids. The so-called notification for voluntary proactive transparency was published for only 6 from 376 negotiation procedures without call for bids, i.e. for 1.6% of such procedures.

Even non-publication of procurements' estimated value, as novelty under the new law, has proved to be futile. When estimated values had to be published, under the old law, this piece of information did not play its intended role in public procurements. Due to poor assessment of needs and failure to conduct market research, vast portion of contracting authorities defined imprecise estimated values that later negatively affected the outcome of their tender procedures. Under the new law, this incompetence was replaced with a provision whereby publication of estimated value is no longer mandatory. In spite of that, the practice abounds in cases whereby, although the estimated value is not published, some bids overlap with that value, which could indicate to previous arrangements between the contracting authority and particular companies. Also, the share of tender annulments has increased as a result of bided prices lower than the estimated value.

Since late December 2019, procurements notices are also published for procedures organized pursuant to the new Law on Public Procurements in the Field of Defence and Security, adopted in August 2019 without prior consultations with the broader public.

On the other hand, without any public explanation, the electronic market for small-value procurements did not become operation, although it was envisaged as electronic platform in the form of catalogue for procurement of standard goods and services in the value up to 10,000 euros for goods and service and up to 200,000 euros for works. The Law on Public Procurements anticipated this market to start operation on 1 July 2020.

At institutional level, there is still lack of internal procedures for organization of public procurements, especially in regard to aspects that are too generally and vaguely regulated by the law, which currently create the biggest problems in respect to implementation of public procurements. These include the first and the last stage from the cycle of public procurement, i.e. needs assessment and procurement planning, as well as development of technical specifications and tender documents, and the stage on procurement contract performance. This is important also in terms of reducing possibilities for malpractices, intentional or due to ignorance, and in terms of increasing the integrity of institutions in public spending.

In this context, needs assessment is not conducted in respect to procurements and procurement needs are not elaborated in detail, while reasons for indivisibility of procurements into lots are not justified – all of which are obligations stipulated under the Law on Public Procurements. Market research is rarely conducted, external expertise is not used for development of technical specifications, and technical dialogue is undermined as method to improve public procurements. Hence, one third of public procurements is unsuccessful and annulled, while annual plans for public procurements are frequently amended, to great extent nonetheless. In the contract performance stage, the mandatory notification on contract performance is not published, while monitoring of contract performance is still predominantly viewed only in financial terms.

It should be noted that the COVID-19 crisis in the course of 2020 did not only emphasize all above elaborated problems, but prevented any of them to be adequately addressed. What characterized public procurements for coronavirus protection is the fact that, since early March 2020, i.e. immediately after declaration of the global pandemic, public procurements were organized by means of direct negotiations due to utter urgency. Hence, by October 2020, a total of 523 tender procedures were implemented, in total value of 8.1 million euros.[2]

While the scope of public procurements was marked by certain reduction in the early months of the crisis, the scope of public procurements in the period March-October 2020 is only 11% lower compared to the same period in 2019.

NO IMPROVEMENTS IN RESPECT TO THE FIGHT AGAINST CORRUPTION IN PUBLIC PROCUREMENTS

There were no significant improvements in the fight against corruption in public procurements during 2019, and a similar situation continued in 2020.

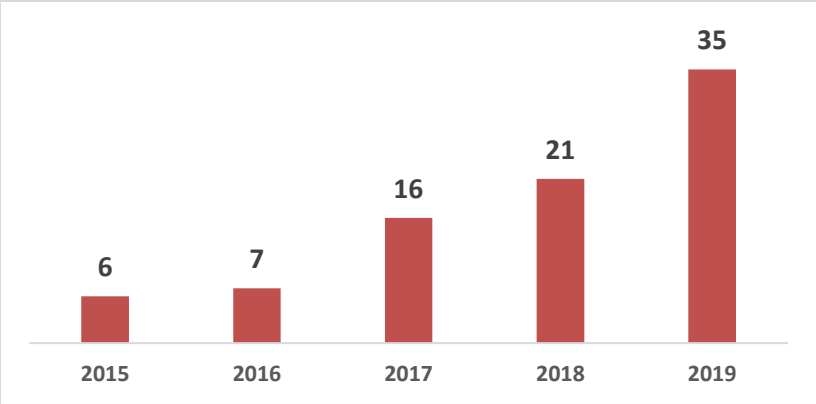
The number of investigations initiated and indictments for criminal offences filed by the public prosecution office in relation to implementation of public procurements is low and insignificant, and only few cases have been motioned for further processing before the public prosecution office and before other institutions, such as the State Commission for Prevention of Corruption, the State Audit Office, the Financial Police Office, the Commission for Protection of Competition, etc.

[2] More information on implementation of public procurements during the COVID-19 crisis in North Macedonia is available in the following policy brief: https://www.ccc.org.mk/images/stories/pbcovid-19en.pdf

Among the total of 90 audit reports drafted and issued in 2019, the State Audit Office has forwarded only three reports to the public prosecution office and one report to the State Commission for Prevention of Corruption. No information is available about their outcomes.

On the other hand, the number of findings on irregularities in public procurements detected in audit reports of the State Audit Office is increasing. In 2019, the number of such findings accounted for 35 and represents only 4% of all findings established under audit reports.

SAO findings on irregularities in public procurements



Otherwise, audit reports are also forwarded to the Parliament, but several years ago the legislator had revoked its obligation to discuss and reconsider them, and only notes their receipt without engaging in material discussions. Reports are also submitted to the Government, as the founder of entities that have been subject of auditing, but the practice on absence of any public information about outcomes from discussions at government session upon these reports continues to present day.

In the case of the State Commission for Prevention of Corruption, among six initiatives motioned by this commission before the public prosecution office for initiation of criminal proceedings for corruption cases, one motion fully and one motion partially concerned doubts about irregularities in public procurements. At the moment, both motions are without final outcome.

Although, in 2019, the Commission developed and presented the Parliament with a five-year National Programme for Prevention of Corruption and Conflict of Interests, which anticipates relevant measures for prevention of corruption in public procurements, this document is still not adopted due to the parliamentary elections and their postponement.

In 2019, as part of its administrative controls, the Bureau of Public Procurements has not established any irregularities bearing characteristics of criminal offence that should be forwarded to the competent public prosecution office, as expressly allowed under the new Law on Public Procurements. Although, in the past, the Bureau was allowed to present such findings to competent institutions, this provision officially and legally integrates this institution within the system of state institutions for fight against corruption in public procurements.

After a one-year break, in 2019, the Commission for Protection of Competition again established a violation and issued a fine in one case on the grounds of prohibited arrangements among companies when submitting bids in public procurement procedures. The last time when such violation was established happened in 2017.

As regards the Financial Police Office, among the total of 79 criminal charges raised in 2019, only one motion concerns abuse of public procurement procedure.

There are no improvements in respect to the role played by two important factors in the fight against corruption in public procurements in North Macedonia - internal audits and whistleblower reports. Internal audits at institutions are still perceived as internal instrument for protection of managers against abuses by employees, while the whistleblower system has not become operation several years after the new law was adopted and after relevant changes were made pursuant to GRECO's recommendations aimed at ensuring greater functionality of this system.

NEXT STEPS

Due to the fact that little has changed in implementation of public procurements and fight against corruption in public procurements in North Macedonia, vast majority of recommendations put forward in previous reports are still valid.

Notably, calls for adherent enforcement of the new Law on Public Procurements are still valid and are aimed at utilization of its potential and possibilities it offers in respect to more cost-effective, efficient and rational spending of public funds under public procurements. Representatives from institutions that work on implementation of public procurements insist on practical guides for law implementation, especially in respect to use of other criteria for selection of the most favourable bid different from lowest price. Large scale and free-of-charge trainings on these issues need to be organized. In that regard, due to limited capacity at the Bureau of Public Procurements for organization of necessary education on public procurements, the concept for training delivery should be reconsidered with a view to allow external entities to organize and deliver such trainings, based on curricula, rules and standards defined by the Bureau.

Efforts needed to address other weaknesses detected in implementation of public procurements include:

- Adequate assessment and elaboration of procurement needs in respect to type, quality, quantity and delivery deadline for goods, services and works that are subject of procurement;
- Conducting market research prior to development of public procurement plans and prior to adoption of procurement decisions;
- Conducting market checks, use of expertise and involvement of more people in development of technical specifications and tender documents;
- Designing mechanisms and implementing measures at institutional level to increase competition in tender procedures and to reduce tender annulments;
- Full and adherent compliance with obligations for transparency, accountability and integrity in implementation of public procurements, by setting internal rules and sanctions in cases of non-compliance;
- Development of detailed and precise internal procedures for implementation of public procurements, especially for the initial stage related to needs assessment and procurement planning and the final stage related to contract performance.

Aimed at reducing corruption in public procurements, all institutions involved must make their best efforts to use the potential of instruments that are currently available to them.

As regards the Bureau of Public Procurements, it should make efforts for full operationalization of administrative controls that already yield results. These controls should be expanded and should not be conducted only in cases of large-scale tender procedures, but also on the basis of risk assessment and on randomly selected sample of public procurements.

Other competent institutions should enhance their efforts aimed at detecting and preventing corruption in public procurements, having in mind its widespread presence, and the prosecution office must prioritize its action in cases motioned y other institutions. In that regard, greater and more regular cooperation and coordination is needed among all institutions, with a possibility for such cooperation to be institutionalized.