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INTRODUCTION

After criticism from all stakeholders, the old and non-functional Law on Public Procurements – adopted in 2008 and frequently amended thereafter - is finally replaced with completely new law,¹ which was adopted in January 2019 and entered into effect on 1 April 2019.

In addition to alignment with the EU Directive on Public Procurement from 2014, the new Law on Public Procurements attempts to “correct” a series of problems in the system of public procurements in North Macedonia.

In particular, it addresses the two problems that have been indicated by all stakeholders as the most burning issues under the old law and concerned use of lowest price as the single criterion for tender award and mandatory organization of electronic auctions. Hence, except for lowest price, the new law introduced other selection elements, while e-auctions became optional with an idea to be organized in cases when there is standard and equal quality and therefore it is logical for the selection to be based on prices offered.

The new law introduced the so-called administrative control conducted by the Bureau of Public Procurements as follows: mandatory control in case of tender procedures whose value exceeds 500,000 euros (goods and services) and 2,000,000 euros (works); control based on risk assessment and random sample control.

In general, the new law liberalizes all public procurements and introduces new possibilities for contracting authorities to procure what they actually need by getting the best value for the money spent. Under the new law, but also previously, a series of measures had been introduced to increase transparency in public procurements.

Nevertheless, the monitoring of public procurements in the first seven months from the entry in effect of the new law shows that procurements are still implemented according to old and bad practices, like nothing had changed.

In this period, high 97% of tender procedures still used lowest price as the selection criterion for most favourable bid; electronic auctions were organized in more than 90% of tender procedures; competition is not significantly improved; more than 30% of tender procedures were annulled; every fifth tender procedure was not presented with any bids; every third tender procedure was presented with only one bid; and there are numerous reports by the media and civil society organizations about problematic tender procedures.

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

Representatives from contracting authorities mainly refer to three reasons for such practices: lack of knowledge about the manner in which opportunities under the new law could be used; fear that they might make errors and consequences therefrom; and their lack of motivation, primarily in relation to the responsibility they bear.

At system level, the competent institution, i.e. the Bureau of Public Procurements, did not increase its capacity to adequately respond to increased competences, especially those related to faster and timely development of the multitude of bylaws arising from the new Law on Public Procurements, as well as full and efficient implementation of newly-introduced ex-ante administrative control on implementation of tender procedures. Models of tender documents for all types of procurement procedures are still not developed, including detailed manual for application of the criterion defined as “economically most favourable bid” pursuant to the new law. No efforts are made to organize frequent and tailor-made training for people tasked with public procurements.

Also, broad public consultations were not organized for development of relevant bylaws, but also for the new Law on Public Procurements in the Field of Defence and Security, which was adopted in August 2019.²

RISE IN THE VALUE OF PROCUREMENTS

In 2018, as the last completed year, public procurements were implemented according to the old and heavily criticized Law on Public Procurements, almost by inertia, with all the problems affecting public procurements for many years.

After the major drop in 2017, total value of public procurements in 2018 started to increase again (by 21%) and reached 755 million euros, i.e. 7% of GDP and 22% of the state budget. However, total value of public procurements in 2018 remained much lower compared to the record-breaking amount observed in 2016 (almost one billion euros), as the last completed year during the previous government’s decade-long tenure.

² Law on Public Procurements in the Field of Defence and Security, Official Gazette of the Republic of North Macedonia no. 180 from 2 August 2019, available at: http://www.bjn.gov.mk/wp-content/uploads/2019/09/ZJN_Odbrana.pdf

Value of public procurements

Year	Value (mil. euros)	Share of GDP (%)	Share of the budget (%)
2016	962	10%	30%
2017	625	6%	19%
2018	755	7%	22%

The average number of bids per tender procedure remained unchanged in 2018. Although 2017 would be remembered as the most uncommon year for public procurements in the country in many aspects, the average number of bids per tender procedure in 2018 was only insignificantly increased and stood at 3.41. Be that as it may, after many years of fluctuations under this parameter below the value of 3, this is the second consecutive year in which the average number of bids per tender procedure is above this threshold.

Average number of bids per tender procedure

Year	Number of bids
2016	2.97
2017	3.33
2018	3.41

Another significant parameter in public procurements, i.e. direct award of contracts under negotiation procedures without prior announcement of calls for bids is marked by increase in absolute number, but small decrease compared to the previous year in terms of the share of direct contracts in the total value of all tender procedures.

Contracts signed under negotiation procedures without prior announcement of call for bids (direct contracts)

Year	Value (million euros)	Share in value of all contracts (%)
2016	38.5	4.0%
2017	29.3	4.7%
2018	33.5	4.4%

In 2018, one of the major problems affecting public procurements in the country, i.e. frequent annulment of tender procedures,³ was marked by increase and reached record-breaking 27% of annulled tender procedures.

Annulment of public procurement procedures

Year	Partially annulled tenders	Fully annulled tenders	Total tenders annulments
2016	7.3%	15.6%	22.9%
2017	8.2%	16.3%	24.4%
2018	8.1%	19.2%	27.2%

In 2018, an insignificant increase is observed in the number of appeals lodged compared to all tender procedures and the share of appeals approved by the State Commission on Public Procurement Appeals.

Hence, in 2018, appeals were lodged for 3.3% of tender procedures, which is the highest share recorded in the last three years, although it still accounts for insignificant percent of all tender procedures, having in mind day-to-day complaints on the part of companies in regard to tender irregularities and the fact that for years appeals are perceived as mechanism for prevention of corruption in public procurements. In the same 2018, results from the regular annual survey⁴ show that 48% of companies indicated existence of corruption in public procurements.

Number, share and approved appeals from companies in public procurements

Year	Number of procurement calls	Number of appeals	Appeals as share in total tender procedures	Approved appeals as share in total appeals
2016	18,444	557	3.02%	45%
2017	17,227	513	2.98%	43%
2018	21,406	705	3.29%	47%

³ For detailed elaboration of the problem related to tender annulments, please see policy brief “Frequent annulment of tender procedures are one of the major problems in public procurements”, available at: <http://www.ccc.org.mk/images/stories/pbwtwmk.pdf>

⁴ Survey results are available as part of the regular monitoring report on public procurements developed by the Center for Civil Communications, available at: <http://www.ccc.org.mk/images/stories/31mk.pdf>

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

Analysis of randomly-selected sample of tender procedures in 2018 shows that the two major problems are identified in the stage related to contract performance, primarily due to lack of adequate control and internal rules with contracting authorities for monitoring contract performance. In general, such rules are missing for all stages of public procurement procedures that are not regulated by the law.

Another omnipresent problem with analysed tender procedures concerns low competition, i.e. low number of bids received. In this context, particular problem is identified in discriminatory eligibility criteria defined by contracting authorities for participation in tender procedures.

No cases are observed in which external experts had been engaged for development of technical specifications, which are frequently indicated as source of corruption and problems in implementation of tender procedures.

Evident poor planning of tender procedures is another important problem, viewed in regard to frequent changes made to annual plans for public procurements. Oftentimes, contracting authorities disrespect relevant deadlines for organization and implementation of planned public procurements.

2019: YET ANOTHER YEAR LOST

The new government elected in mid-2017 had failed to institute faster reforms in the field of public procurements and has lost almost two years before implementation of the new law that is fully aligned with the EU Directive from 2014.

According to the rationale provided by the proposing party, i.e. the government, the new law is adopted to harmonize legislation with the EU Directive on Public Procurement from 2014, and it also implies an attempt to, at least, correct burning issues that have plagued the system for many years. In particular, this refers to use of lowest price as single criterion for selection of the most favourable bid and mandatory organization of electronic auction in all tender procedures - combination that has led to absurd situations and inability to guarantee quality of goods and services procured.

In addition, there were no controls on implementation of tender procedures, which had contributed to frequent, serious and evident violations of the Law on Public Procurements without relevant consequences and sanctions imposed in such cases.

In addition to lowest price, the new law introduces other elements in the selection criterion and electronic auctions become optional, i.e. contracting authorities are allowed to use them when they believe there is standard and equal quality of what is being procured, whereby it is logical for bidding companies to compete among them on the basis of prices offered.

In general, the new law liberalizes all public procurements by allowing contracting authorities to more easily procure what they need, i.e. obtain the best value for the money spent. Under the new law, but also previously, a series of measures had been introduced to increase transparency in public procurements.

The new law also introduced the so-called administrative (ex-ante) control conducted by the Bureau of Public Procurement while tender procedures are still underway, i.e. by the moment when selection decision or tender annulment decision is adopted and submitted. Administrative controls are conducted in three cases: mandatory control for tender procedures whose value exceeds 500,000 euros (goods and services) and 2,000,000 euros (works); control based on risk assessment and random sample control.

Nevertheless, the monitoring of public procurements in the first seven months from the entry into effect of the new law shows that procurements are still implemented according to old and bad practices, like nothing had changed.

Hence, under the new law, high 97% of tender procedures still used lowest price as the single criterion for selection of the most favourable bid; electronic auctions were organized in more than 90% of tender procedures; competition is not significantly improved; more than 30% of tender procedure were annulled; every fifth tender procedure was not presented with any bids; every third tender was presented with only one bid; and there are numerous reports by the media and civil society organizations about problematic tender procedures.

Representatives from contracting authorities mainly refer to three reasons for such practices: lack of knowledge about the manner in which opportunities under the new law could be used; fear that they might make errors and consequences therefrom; and their lack of motivation, primarily in relation to the responsibility they bear.

It should be noted that use of lowest price and organization of electronic auction are most prominent in public procurements that had been heavily criticized for law-mandated use of lowest price and e-auction which resulted in poor quality of procurements. Examples thereof are procedures on procurement of food for kindergartens and medical supplies for hospitals.

At system level, the competent institution, i.e. the Bureau of Public Procurements, did not increase its staff capacity in order to be able to adequately respond to increased competences, especially those related to full and efficient implementation of newly-introduced administrative control on implementation of tender procedures, but also faster and timely development of the multitude of bylaws arising from the new Law on Public Procurements (and the Law on Public Procurements in the Field of Defence and Security).

Models of tender documents for all types of procurement procedures have not been developed, as well as detailed manual for application of the criterion defined as “economically most favourable bid”, while no efforts are made to organize frequent training for people tasked with public procurements, especially in respect to application of the selection criterion “economically most favourable bid” as envisaged in the new law.

The administrative controls, at least those conducted in the first seven months after the law entered in effect, covered large-scale tender procedures, but not high-risk procedures and random sample. Nevertheless, such controls were performed for 80 large-scale tender procedures, whereby BPP issued instructions for tender annulment in 10 cases and recommended repetition of the bid-evaluation process in 18 cases. This means that irregularities have been identified in one-third of controlled tender procedures, which further confirms the need for controls, but also the urgency for BPP to increase its capacity in this regard.

It should be noted that, in 2019, broad public consultations were not organized for development of bylaws in the area of public procurements, but also for the new Law on Public Procurements in the Field of Defence and Security, which was adopted in August 2019.⁵

HOW (IF AT ALL) THE SYSTEM FIGHTS AGAINST CORRUPTION IN PUBLIC PROCUREMENTS?

Despite the multitude of institutions with competence in terms of prevention and fight against corruption in public procurements, no significant and tangible results have been achieved in this regard.⁶

The number of investigations opened and indictments filed by both prosecution offices, i.e. regular and special, on the grounds of criminal offences in implementation of public procurements can be counted on one hand. Equally low is the number of cases opened and motioned before the prosecution office by other institutions: State Commission for Prevention of Corruption, Financial Police Administration, Commission for Protection of Competition, State Attorney General, etc.

Recently, the new Law on Public Procurements complemented this list of institutions with the Bureau of Public Procurements, which is now allowed to notify the competent prosecution office in cases when its administrative controls have identified irregularities pertaining to criminal offences that are punishable by law.

In addition to the Bureau of Public Procurements, the Law on Public Procurements also refers to the State Audit Office as institution competent to perform audit on the manner in which public funds are used and spent for procurements. Hence, when chartered state auditors find serious misdemeanours and criminal offences they are obliged to present their reports to the competent prosecution office.

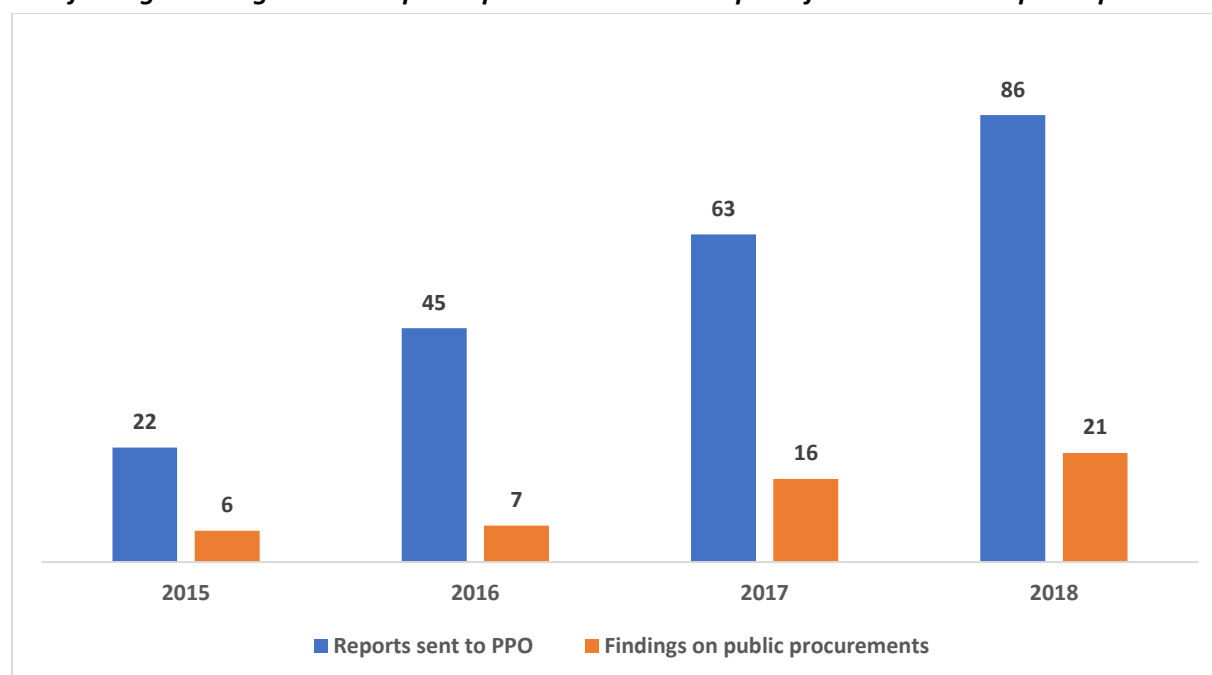
In 2018, the State Audit Office had presented the Public Prosecution Office with 21 final audit reports. Comparison of audit findings related to irregularities in public procurements of audited institutions and

⁵ Law on Public Procurements in the Field of Defence and Security, Official Gazette of the Republic of North Macedonia no. 180 from 2 August 2019, available at http://www.bjn.gov.mk/wp-content/uploads/2019/09/ZJN_Odbrana.pdf

⁶ For more information on the institutional fight against corruption in public procurements, please see the relevant analysis, available at: <http://www.ccc.org.mk/images/stories/ppmk.pdf>

number of submitted audit reports with serious misdemeanours and criminal offences shows strong correlation between these two parameters. In particular, the number of audit reports submitted to the prosecution office for further processing is increased in direct proportion to increased number of findings on irregularities in public procurements. Unfortunately, there are no precise records about the “destiny” of these reports in further proceedings; however, for many years, the prosecution office has justified absence of action in these cases with insufficient evidence and information, which makes it difficult for these criminal reports to be processed.

SAO findings on irregularities in public procurements and reports forwarded to the public prosecution



In addition to the public prosecution, the State Audit Office presents its reports to the State Commission for Prevention of Corruption, which can then use them as basis to open cases on corruption or conflict of interest, in addition to other instruments at its disposal, such as reports from other entities and citizens, and ex-officio formation of corruption cases. In particular, one case formed by this commission is partially based on audit report submitted by SAO.

Audit reports are presented to the parliament which, several years ago, exempted itself from the obligation to reconsider these reports and nowadays only takes them into knowledge. Audits reports are also submitted to the government, but only for bodies under its competences, and they are reconsidered at government sessions, but there is no feedback whether and what actions are taken in cases when it has established that serious misdemeanours and criminal offences have been committed.

Finally, this chain of competent institutions includes two very important factors, i.e. internal auditors who should be the first line of defence against corruption in public procurements and the whistleblowing report mechanism. However, both mechanisms are non-functional in this regard.

WHAT IS NEXT?

The next step towards improving state-of-affairs in public procurements is to ensure full enforcement of the new Law on Public Procurements, notably by utilization of all opportunities it offers to contracting authorities for procurement of necessary goods, services and works by obtaining the best value for the money spent. To that end, the Bureau of Public Procurements should organize frequent and mass-attended training and should produce manuals on practical application of the selection criterion defined as “economically most favourable bid”.

On the other hand and aimed to reduce corruption in public procurements, the newly-introduced control on implementation of public procurements conducted by the Bureau of Public Procurements needs to become fully functional. In that, the government must urgently strengthen capacity at BPP to ensure regular and professional control of large-scale tender procedures, as well as use of the other two types of controls defined under the law, i.e. high-risk tender procedures (according to previous defined red flags) and random sample. The fact that already performed controls have established irregularities with one-third of tender procedures is indicative of the need for small-scale tender procedures to be covered with controls.

In addition to actions at system level, measures should be taken at institutional level, i.e. by individual institutions that implement public procurements, aimed to improve their internal capacity, integrity and accountability, in order to ensure cost-effective spending of already limited public funds and to guarantee procurement of affordable goods, services and works.

Moreover, other institutions of the system need to be involved in the fight against corruption in public procurements, primarily the public prosecution, the government and the State Commission for Prevention of Corruption.

Position of all institutions within the anticorruption system and chain should be put in the context of achieving results and, when necessary, measures should be taken in cases when institutions have failed to take relevant action in spite of the fact that there were relevant grounds for such action.

Additional measures in this regard need to be anticipated under the new 5-year National Strategy on Prevention of Corruption and Conflict of Interest, whose implementation will start in 2020.