QUARTERLY REPORT ON MONITORING PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

1/2014

REPORT NO. 21

Skopje, July 2014

This report is made possible by the generous support of the American people through the United States Agency for International Development (USAID) within the USAID Civil Society Project. The contents of this publication are the responsibility of the Foundation Open Society – Macedonia and the Centre for Civil Communications and do not reflect the views of USAID or the United States Government.

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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

LPP – Law on Public Procurements

RM – Republic of Macedonia

CCC – Centre for Civil Communications

KEY FINDINGS AND RECOMMENDATIONS

- **In the first quarter of this year, the total value of contracts signed by means of negotiation procedure without previously announced call for bids is marked by major increase, notably in the wake of entry in effect of legal provisions that should reduce the occurrence of this type of procurement contracts. Within a period of only three months, the negotiation procedure without previously announced call for bids was used to sign 228 procurement contracts in total value of 19.3 million EUR. Same applies to the number of tender procedures annulled, as 1,075 or 23.2% of all tender procedures announced in the first quarter of 2014 were annulled.**

Recommendation: Insufficient or low competition in tender procedures continues to negatively affect state-of-affairs in the field of public procurements. In addition to law amendments, this imposes the need for series of other measures aimed at increasing business sector's trust in the system and stimulating greater competition in public procurements.

- **Given the subject of most public procurements implemented in the first quarter of this year, such as computer equipment, office supplies, insurance services, air-tickets, hygiene services, etc., the competition in public procurements was on higher level compared to the average competition observed in 2013. Some institutions continued to condition companies' participation in tender procedures with evidence on their profitability.**

Recommendation: Legal mechanisms that enable bidding companies to protect themselves from favouring tender documents need to be strengthened. In that regard, bidding companies should be entitled to appeal the tender documents from the publication of the procurement notice/call for bids.

- **Elements used to evaluate the quality of bids remain the weakest link in the system of public procurements. After May 2014, particularly problematic are tender procedures which, in addition to the price**

element, will use other elements for point-allocation and bid-ranking, i.e. tender procedures organized for procurement of creative project designs for media campaigns.

Recommendation: BPP should develop a guide of good practices, including the best practices from around the world and positive examples from the domestic system of public procurements related to adequate elements used for point-allocation and evaluation of quality.

- **Every fourth tender procedures from the monitoring sample requested bank guarantees for bid submission and every second tender procedure requested guarantees for quality contract performance.**

Recommendation: Additional measures should be taken to discontinue the practices whereby contracting authorities request the companies to submit bank guarantees and by doing so discourage them to participate in tender procedures. On the contrary, contracting authorities should use bank guarantees for quality contract performance more often, because some tender procedures are presented with exceptionally low prices, which raise concerns about the quality performance of procurement contracts signed.

- **By March 2014, the number of companies that have been prohibited to participate in tender procedures reached 45. One company from the black list has been prohibited to participate in tender procedures for an accumulative period longer than the law-stipulated maximum of five years.**

Recommendation: Greater transparency is needed in the process on issuing negative references to bidding companies, which means that decisions on issuance of negative references must also indicate the contracting authority that has issued the negative reference and the relevant number of the tender procedure under which this reference was issued. At the same time, it should be examined whether it is justified for all contracting authorities to issue this type of sanctions and whether

prohibition should concern all tender procedures, as well as examination of violations on the basis of which negative references are issued.

GOALS AND METHODOLOGY

From November 2008, the Centre for Civil Communications from Skopje is continuously analysing the implementation of public procurements in the Republic of Macedonia as regulated under the Law on Public Procurements. The analysis aims to assess the implementation of public procurements in the light of the new Law on Public Procurements and the application of the underlying principles of transparency, competitiveness, equal treatment of economic operators, non-discrimination, legal proceeding, cost-effective, efficient, effective and rational public spending, commitment to obtain the best bid under the most favourable terms and conditions, as well as accountability for public spending in procurements.

Analysis of public procurements in the Republic of Macedonia is performed on the basis of monitoring a randomly selected sample of public procurement procedures (40 per quarter). Monitoring activities start with the publication of calls for bids in the *"Official Gazette of the Republic of Macedonia"* and in the Electronic Public Procurement System (EPPS), followed by attendance at public opening of bids and data collection on the procedure's course, and use in-depth interviews and structured questionnaires submitted to economic operators, as well as data collection from contracting authorities through EPPS and by means of Freedom of Information (FOI) applications.

The present analysis is based on the monitoring of a selected sample comprised of 40 public procurements implemented by central level contracting authorities, whose public opening of bids took place in the period January – March 2014.

- **In the first quarter of this year, the total value of contracts signed by means of negotiation procedure without previously announced call for bids is marked by a major increase, notably in the wake of entry in effect of legal provisions that should reduce the occurrence of this type of procurement contracts. Same applies to the number of tender procedures annulled, as their share in the first quarter of 2014 is still high.**

In the first quarter of 2014, the negotiation procedure without previously announced call for bids was used to sign 228 contracts in total value of 19.3 million EUR, which is by 73.9% higher compared to the same period last year.

Value of contracts signed by means of negotiation procedure without previously announced call for bids, per monitoring period

Period	Value of contracts (in million EUR)	Difference
January – March 2012	11.9	+26.6%
January – March 2013	11.1	-6.7%
January – March 2014	19.3	**+73.9%**

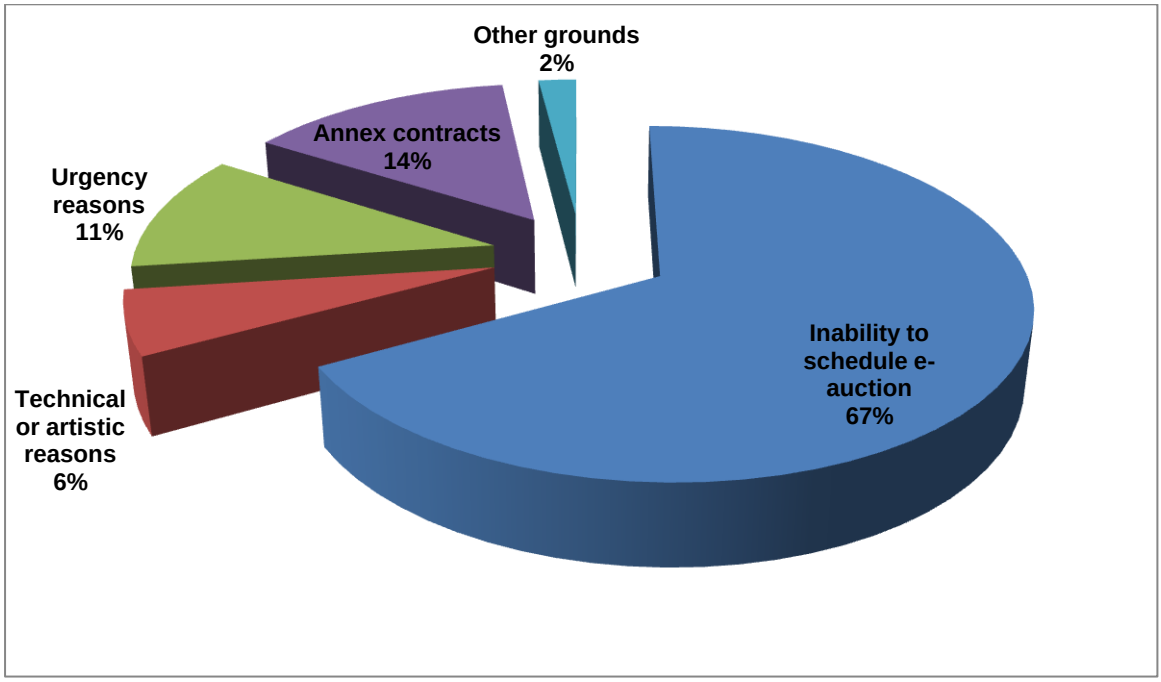
Calculations include data available by 30.6.2014.

In the first quarter of 2014, most frequently indicated reason by contracting authorities for organizing the negotiation procedure are cases in which, under the previously announced tender procedure, they have been presented with only one bid or only one bid was assessed as acceptable, which prevented them to schedule and organize e-auctions as the final stage in the procurement procedures. In the case of tender procedures announced before 1 January 2014, contracting authorities are entitled to annul the tender procedure in question and continue with the negotiation

procedure for the purpose of lowering the initially bided price. However, amendments to the Law on Public Procurements from October 2013 (*"Official Gazette of the Republic of Macedonia"* no. 148/2013) which entered in effect on 1 January 2014, stipulate that, in cases when the only bidder has offered prices higher than the procurement's estimated value, contracting authorities should not annul the tender procedure and negotiate for price reduction, but apply the so-called final offer/price. According to this newly-introduced model, in cases when they have received only one bid, contracting authorities should invite the single bidder to reduce the initial price/bid.

Having in mind that most of tender procedures announced by the end of 2013 were completed in the first quarter of this year, they were still governed by the old legal provisions and obligations. Therefore, as shown on the chart below, as high as 67% (12.9 million EUR) of the total value of tender procedures without previously announced call for bids in the first quarter of 2014 are a direct result of cases in which only one bidding company applied on the previously announced call for bids and it requested more funds for the goods, services or works compared to the money disposed by the contracting authority. In these cases, negotiation is used for the purpose of aligning the initially bided price with the procurement's estimated value or with the contracting authority's budget. This group of contracts signed by means of negotiation procedure without previously announced call for bids includes one of the biggest contracts signed in the Republic of Macedonia in the first quarter of 2014. Notably, the said contract was signed by JSC "Electricity Plants of Macedonia" and concerned project design and construction of cable-car with six-seat gondolas in the Ski Centre "Popova Sapka" in the value of 9.4 million EUR. Under the previously implemented open procedure with announced call for bids, this public enterprise was presented with two bids for project design and construction of cable-car with six-seat gondolas for the Ski Centre "Popova Sapka". However, one of the bids was assessed as inacceptable by the relevant public procurement committee on the grounds that the bidding company did not meet the eligibility criteria defined, while the other bid implied prices higher than the procurement's estimated value. On this account, the public enterprise annulled the tender procedure (no. 01-135/2013 announced on 9.8.2013) and, in compliance with the old legal provisions (Article 99, paragraph 1, item 4 of the LPP), moved to direct negotiations.

Overview of reasons indicated for contract-awarding by means of negotiation procedure without previously announced call for bids, in the first quarter of 2014



In the first quarter of 2014, a total of 24 public procurement contacts were followed up with annex contracts in total value of around 2.7 million EUR (14%). Urgency reasons were indicated as grounds for the signing of 59 direct contracts in total value of 2.2 million EUR (11%). By referring to urgent need for the procurement in question and inability to comply with deadlines governing the regular procedures, the State Election Commission signed 20 procurement contracts in total value of 1.2 million EUR. In that, this ground was used to sign contracts for transportation of election board's members tasked with organization and implementation of the balloting process abroad, manufacturing of identification badges, markers for voters, development of educational campaign targeting the voters, printing of education guidelines for electoral bodies established for the 2014 presidential elections, electronic communication services, tonners, purchase of fuel for SEC's official vehicles, etc. Dilemma is raised whether all these contracts should have been signed by means of the negotiation procedure, especially knowing that in most cases the time period from election process' announcement to the Election Day is sufficient for organization and implementation of transparent tender procedures.

One of frequently indicated reasons for contract-awarding by means of direct negotiations without previously announced call for bids are technical and artistic reasons, i.e. reasons related to protection of exclusive rights (patents, etc.), meaning that the contract can be performed only by a particular economic operator. In the first quarter of 2014, this ground was indicated for the signing of 51 procurement contracts in total value of 1.2 million EUR (6%).

As regards tender annulment, a total of 1,075 tender procedures were annulled in the first quarter of 2014 and they account for 23.2% of all tender procedures announced. Despite the modest decrease of the number of annulled tender procedures compared to the same period in 2013, their share of 23.2% remains high and is identical with the situation observed in 2012.

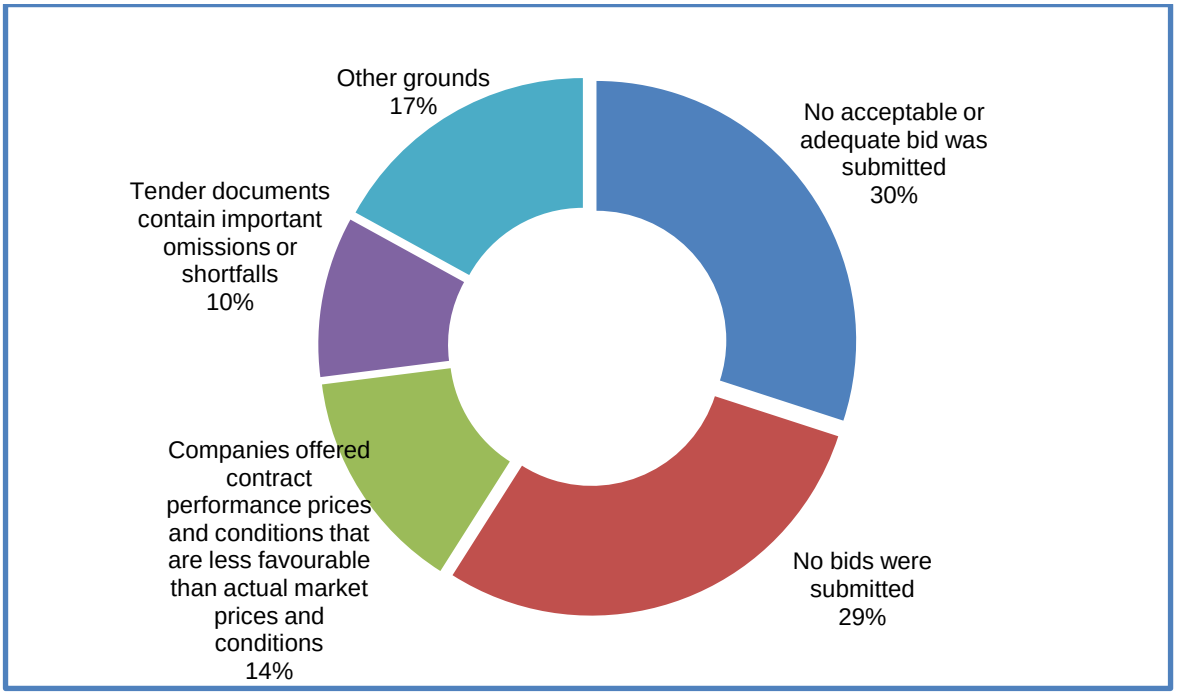
Trend on tender annulment, per monitoring period

Period	Number of tenders announced	Number of tender annulment decisions	Share of annulled procedures
January – March 2012	1,945	451	23.2%
January – March 2013	3,661	972	26.6%
January – March 2014	4,637	1,075	**23.2%**

Calculations include data available by 30.6.2014.

In-depth analysis of reasons indicated for tender annulment provides the conclusion that unsuccessful tender procedures are primarily a result of low competition among the companies.

Overview of reasons indicated for tender annulment, in the first quarter of 2014



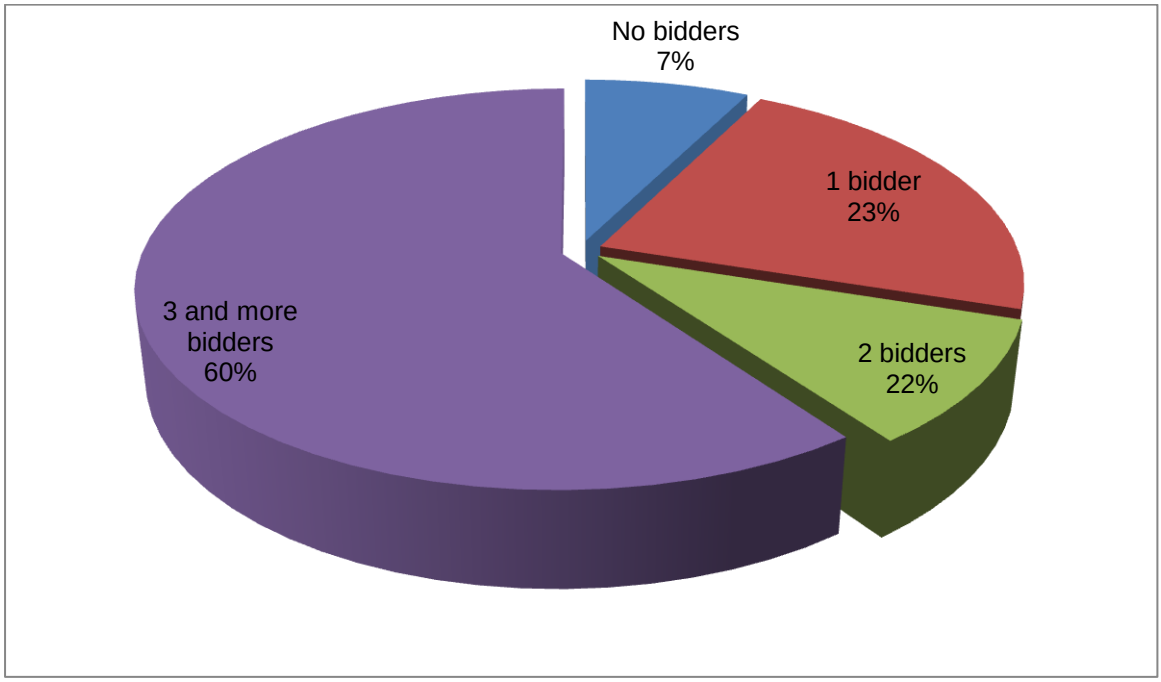
30% of tender procedures annulled were not presented with a single acceptable or adequate bid (commonly these cases imply one bidding company that has requested prices higher than the contract's estimated value). High 29% of tender procedures annulled were not presented with any bids. Origins of these reasons for tender annulment should be sought in the manner in which tender documents have been drafted by the contracting authority, notably because terms and conditions stipulated therein have prevented greater competition among the companies.

Recommendation: Insufficient or low competition in tender procedures continues to negatively affect state-of-affairs in the field of public procurements. In addition to law amendments, this imposes the need for series of other measures aimed at increasing business sector's trust in the system and stimulating greater competition in public procurements.

- **Given the subject of most public procurements implemented in the first quarter of this year, such as computer equipment, office supplies, insurance services, air-tickets, hygiene services, etc., the competition in public procurements was on higher level compared to the average competition observed in 2013.**

Tender procedures organized in the beginning of this year predominantly concerned procurement subjects that are traditionally supplied by high number of companies. Therefore, high competition with at least three bidding companies was observed in 60% of tender procedures monitored. As shown on the chart below, tender procedures presented with only one bid accounted for 23% of all tender procedures monitored, while tender procedures without any bids accounted for 7% of all tender procedures monitored.

Overview of competition in tender procedures monitored, in the first quarter of 2014

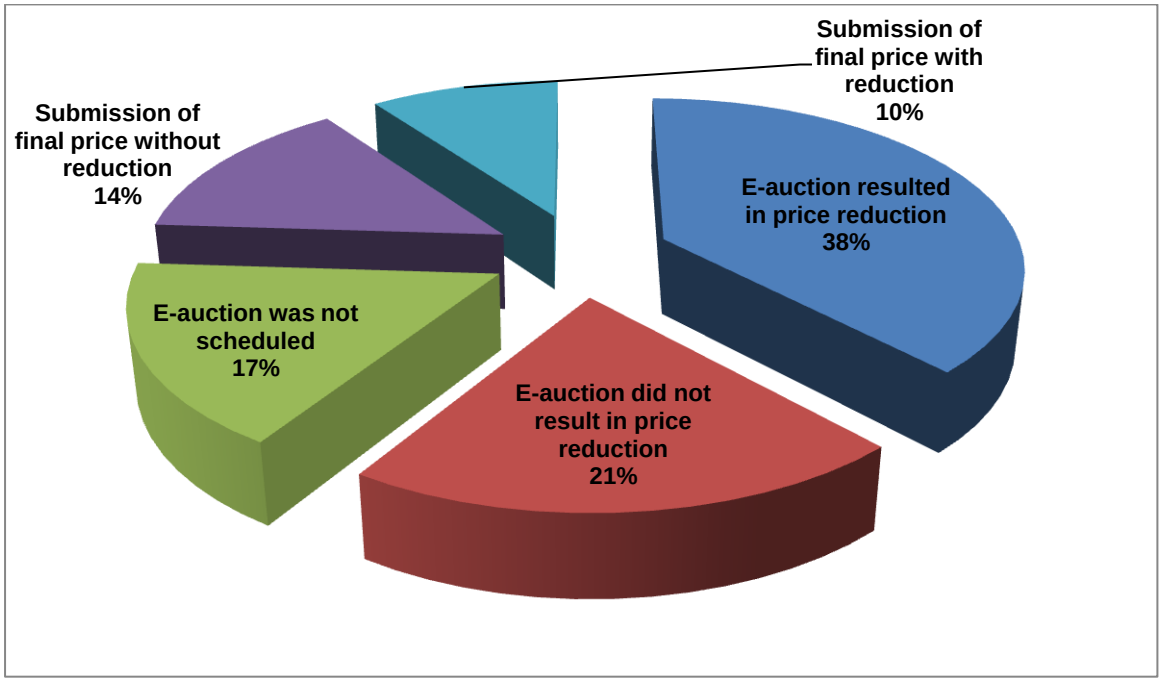


Greater competition observed in the tender procedures from the monitoring sample resulted in higher number of scheduled and organized e-auctions (59%). However, as shown on the chart below, e-auctions facilitated price reduction in only 38% of tender procedures, while in 21% of cases the bidding companies did not reduce their initially bided prices.

E-auctions were not scheduled in 17% of tender procedures monitored, most commonly in cases when tender procedures were not presented with any bids; when tender procedures were presented with bids, but were annulled prior to the e-auction; and in cases of tender procedures which did not anticipate e-auction in

compliance with the LPP (procurement of insurance services, air-tickets, and procurement of project designs and implementation of activities related to public information and communication).

Overview of effects created by electronic downward bidding, in the first quarter of 2014



In the first quarter of this year, the law amendments introduced a possibility whereby contracting authorities that have been presented with only one bid can invite the only bidding company to reduce its initial bid/price, by submitting a so-called final price/bid. On the basis of monitoring findings the conclusion is inferred that in such cases the companies often decide to keep their initially bided priced and, in few cases, offered new and reduced prices. Moreover, even when the companies offered new final prices, in most cases, they were only symbolically reduced.

Attempts to identify the reasons behind companies' low interest to participate in public procurements (7% of tender procedures monitored were not presented with any bids and 23% of tender procedures monitored were presented with only one bid)

which results in tender annulment or failure to secure conditions for organization of e–auctions, ultimately lead to the restricting eligibility criteria for tender participation that should be met by bidding companies. The monitoring sample for this quarter included a tender procedure for procurement of services concerning organization of a conference on behalf of a line ministry. Relevant tender documents required the bidding companies to demonstrate annual turnover of at least 25 million MKD accumulatively in the last three years and profits of at least 5 million MKD accumulatively in the last three years. Such eligibility criteria are absolutely inadequate, having in mind the fact that the contract's value was estimated at around 2 million MKD. Hence, the fact that only one company participated in this tender procedure and was awarded the contract does not come as surprise.

Another tender procedure organized for procurement of laboratory equipment also required the bidding companies to demonstrate positive financial results and was presented with only one bid to which the contract was awarded.

Final balance sheets certified by competent authority, i.e. audited final balance sheets demonstrating positive results, i.e. profits in the last three years was enlisted among eligibility criteria for bidding companies wishing to participate in the public procurement of hygiene, operational and technical maintenance and supervision services to be performed at one building.

Recommendation: Legal mechanisms that enable bidding companies to protect themselves from favouring tender documents need to be strengthened. In that regard, bidding companies should be entitled to appeal the tender documents from the publication of procurement notice/call for bids.

- **Elements used to evaluate the quality of bids remains the weakest link in the system of public procurements. After May 2014, particularly problematic are tender procedures which, in addition to the price element, will use other elements for point-allocation and bid-ranking, i.e. tender procedures organized for procurement of creative project designs for media campaigns.**

One tender procedure from the monitoring sample concerned procurement of project design and implementation of activities related to public information and communication about Republic of Macedonia's accession in the EU and used "economically most favourable bid" as the selection criterion. This criterion was comprised of the following elements: "quality" was assigned maximum of 60 points and "price" was assigned maximum of 40 points. In this tender procedure disputable is the fact that tender documents drafted by the contracting authority indicate that points for the quality element will be awarded in compliance with the opinion issued by an expert commission established for that purpose, as follows:

- maximum of 60 points will be awarded to bidding companies that have an excellent project design adequate for attainment of campaign's expected results and have a detailed communication strategy;
- maximum of 30 points will be awarded to bidding companies that have a good project design and have a solid communication strategy; and
- maximum of 10 points will be awarded to bidding companies that do not have developed project design and whose communication strategy is not well aligned with the required effects.

This approach does not guarantee selection of the most favourable bid and creates possibilities for subjective assessment of bids, because the tender documents do not include clearly defined and measurable goals that would guarantee quality services.

Additional problem with this public procurement is the fact that technical specifications stipulated series of activities that should be implemented within a period of 60 days, those being: project design on rebranding the Sector for European Affairs; website design; design for printed materials, outdoor and internet advertising materials; organization of events; production of documentary film in duration of 20 minutes and 2 video clips in duration of 1 minute, each; organization and implementation of 5 nation-wide research studies on IPA assistance and public opinion polls about the EU accession process; 4 media briefings; 4 nation-wide debates and 4 nation-wide training sessions for NGOs; organization of events with influential persons and organizations; organization and implementation of information dissemination caravans in 12 municipalities country-wide, etc. Nevertheless, this ambitious public procurement in an estimated value of 7.5 million MKD (without VAT)

was annulled several days after the publication of the relevant call for bids due to the announcement of presidential elections. In its decision on tender annulment, the contracting authority has assessed that there is a risk of the campaign overlapping with the presidential election campaign. On this account, the monitoring team identified the need for detailed elaboration of this public procurement which, if announced again, will have to include clearly defined quality assessment elements and will have to set realistic and achievable implementation deadlines. Having in mind the different types of services being procured, due consideration should be made of the possibility to divide the procurement into several lots that would enable companies of different profiles to implement, i.e. perform different types of services.

As regards prioritization of quality among contracting authorities, comparison of two tender procedures from the monitoring sample is indicative of the absence of clear quality criteria defined at national level. Namely, the tender procedure organized by the Institute for Rehabilitation of Children and Youth used “lowest price” as the selection criterion for procurement of foodstuffs, while the other contracting authority, in addition to price, defined certain quality elements in the tender procedure for procurement of hygiene, operational and technical maintenance services.

In general, it could be assessed that in the wake of new law amendments that will enter in effect in May 2014 and stipulate price as the only selection criterion, with exceptional cases in which “economically most favourable bid” should be used as the selection criterion, monitoring findings allow the conclusion that contracting authorities do not have clear indicators and guidelines about the cases in which they should use “lowest price” as the selection criterion and when quality is important.

Recommendation: BPP should develop a guide of good practices, including the best practices from around the world and positive examples from the domestic system of public procurements related to adequate elements used for point-allocation and evaluation of quality.

- **Every fourth tender procedure from the monitoring sample requested bank guarantees for bid submission and every second tender procedure requested guarantees for quality contract performance.**

Use of bank guarantees is marked by positive trends compared to the situation observed last year. Actually, there is a trend of decreasing requests for bank guarantees for bid submission and a trend of increasing requests for quality contract performance. In the first quarter of 2014, bank guarantees were requested in 25% of tender procedures monitored, which is a lower share compared to the 2013 average of 39.4%, while bank guarantees for quality contract performance were requested in 55% of tender procedures monitored, which is a higher share compared to the 2013 average of 52.5%. This trend is in line with the recommendation put forward in our monitoring reports. In that, reduced use of bank guarantees for bid submission results in decreased costs for tender participation and companies are only required to demonstrate serious intent for contract performance by submitting the relevant declarations that have the same type of legal consequences as bid guarantees. On the other hand, increased use of bank guarantees for quality contract performance increases the pressure for the companies to adherently perform public procurement contracts they have been awarded.

Recommendation: Additional measures should be taken to discontinue the practice whereby contracting authorities request the companies to submit bank guarantees and by doing so discourage them to participate in tender procedures. On the contrary, contracting authorities should use bank guarantees for quality contract performance more often, because some tender procedures are presented with exceptionally low prices, which raise concerns about the quality performance of procurement contracts signed.

- **By March 2014, the number of companies that have been prohibited to participate in tender procedures reached 45. One company from the black list has been prohibited to participate in tender procedures for an accumulative period longer than the law-stipulated maximum of five years.**

In the first quarter of 2014, a total of nine companies were issued negative references that imply prohibition for participation in tender procedures for a period of

one year. In that, eight of these companies were issued their first negative references and will not be able to participate in tender procedures by the first quarter of 2015. However, this was the eight negative reference issued for one company and it was prohibited to participate in tender procedures by 15 January 2019. Having in mind that this company was black-listed for the first time in February 2013, it seems that the company will be prohibited to take part in tender procedures for a period of 5 years and 11 months. According to Article 47, paragraph 6 and Article 48, paragraph 8 of the LPP, the period of prohibition to participate in public procurements is increased by one additional year with every new negative reference issued, but it should not be longer than five years accumulatively. On this account, in this specific case, it should be examined whether the prohibition's excessive duration is due to an error in the system or is a matter of inadequate enforcement of the Law on Public Procurements.

In the first quarter of 2014, most frequently indicated reason for which the companies have been issued negative references is their refusal to sign the procurement contract. Namely, four companies were issued negative references on this account. In two cases, the companies were issued negative reference due to their refusal to provide guarantees for quality contract performance and in other two cases it was a matter of activated guarantees in the course of contract performance. In one case, the negative reference was issued due to the fact that the bidding company has withdrawn the bid prior to its validity expiration.

In summary, from the entry in effect of legal provisions governing issuance of negative references in July 2012 to present, i.e. March 2014, a total of 45 companies have been black-listed and prohibited to participate in public procurements.

Recommendation: Greater transparency is needed in the process on issuing negative references to bidding companies, which means that decisions on issuance of negative references must also indicate the contracting authority that has issued the negative reference and the relevant number of the tender procedure under which this reference was issued. At the same time, it should be examined whether it is justified for all contracting authorities to issue this type of sanctions and whether

prohibition should concern all tender procedures, as well as examination of violations on the basis of which negative references are issued.