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REPORT

JANUARY-JUNE 2015

FROM MONITORING OF **PUBLIC PROCUREMENTS** IN THE REPUBLIC OF MACEDONIA



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ОПЕНТИВОРЕНО
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МАКЕДОНИЈА



Center for Civil Communications
Центар за граѓански комуникации

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REPORT FROM
**MONITORING OF
PUBLIC PROCUREMENTS**
IN THE REPUBLIC
OF MACEDONIA

JANUARY – JUNE 2015

SKOPJE, OCTOBER 2015

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PROCUREMENT APPEALS IN THE PERIOD
JANUARY-JUNE 2015

ABBREVIATIONS:

| | |
|--------------|--|
| BPP | Bureau of Public Procurements |
| 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 |
| CCC | Center for Civil Communications |

KEY FINDINGS AND RECOMMENDATIONS

- LOW COMPETITION, WHICH BRINGS UNDER QUESTION THE EFFECTIVENESS OF PUBLIC SPENDING, CONTINUES TO BE THE KEY HALLMARK OF TENDER PROCEDURES IN THE FIRST HALF OF 2015. ALTHOUGH ESTABLISHED FOR THE PURPOSE OF INCREASING COMPETITION, THE COUNCIL OF PUBLIC PROCUREMENTS HAS FAILED TO YIELD ANY RESULTS.

RECOMMENDATION: COMPETENT AUTHORITIES SHOULD DEVELOP A DETAILED ANALYSIS ON ASSESSING EFFECTS AND PURPOSEFULNESS OF HAVING INTRODUCED THE COUNCIL OF PUBLIC PROCUREMENTS AS ADDITIONAL AND FINANCIAL BURDEN IN THE SYSTEM OF PUBLIC PROCUREMENTS.

- IN THE FIRST SIX MONTHS OF THIS YEAR, THE COUNCIL OF PUBLIC PROCUREMENTS WAS PRESENTED WITH 10,362 APPLICATIONS FOR APPROVAL, COSTING THE INSTITUTIONS AS MUCH AS 74.3 MILLION MKD, I.E. 1.2 MILLION EUR.

RECOMMENDATION: SEVERAL SIGNIFICANT CHANGES NEED TO BE MADE TO THE LAW ON PUBLIC PROCUREMENTS IN RELATION TO MARKET RESEARCH AND AIMED AT STIMULATING COMPETITION IN PUBLIC PROCUREMENTS

- INTRODUCED CONTROLS HAVE DISCIPLINED THE INSTITUTIONS AND FORCED THEM TO REDUCE THEIR USE OF NON-TRANSPARENT NEGOTIATION PROCEDURES WITHOUT PRIOR ANNOUNCEMENT OF CALL FOR BIDS. IN THE FIRST HALF OF 2015, PUBLIC FUNDS SPENT BY MEANS OF THIS TYPE OF CONTRACTS AMOUNTED TO AROUND 11.5 MILLION EUR AND ARE BY 61.4% LOWER COMPARED TO THE SAME PERIOD LAST YEAR.

RECOMMENDATION: THE TREND ON REDUCED USE OF NEGOTIATION PROCEDURES WITHOUT PRIOR ANNOUNCEMENT OF CALL FOR BIDS SHOULD BE MAINTAINED.

- IN THE FIRST HALF OF 2015, 18.5% OF ALL TENDER PROCEDURES ANNOUNCED WERE ANNULLED. THIS MARKED A MODEST DECREASE IN THE NUMBER OF TENDER ANNULMENTS COMPARED TO THE PREVIOUS MONITORING PERIODS.

RECOMMENDATION: FURTHER DECREASE OF THE SHARE OF ANNULLED TENDER PROCEDURES IS NEEDED, AS THE RATE OF 18.5% IS UNREASONABLY HIGH.

- MONITORING ACTIVITIES OBSERVED DECREASED USE OF BANK GUARANTEES FOR BIDS, AS WELL AS BANK GUARANTEES REQUIRED FROM COMPANIES FOR QUALITY PERFORMANCE OF CONTRACTS.

RECOMMENDATION: BID GUARANTEES (IN THE FORM OF BANK GUARANTEES OR DEPOSITS) STIPULATED UNDER ARTICLE 47 OF LPP SHOULD BE REVOKED AND SHOULD BE REPLACED WITH THE SO CALLED "STATEMENT ON SERIOUS INTENT". GUARANTEES FOR QUALITY PERFORMANCE OF CONTRACTS (IN THE FORM OF BANK GUARANTEES) STIPULATED UNDER ARTICLE 48 OF LPP SHOULD BE MANDATORY FOR ALL PUBLIC PROCUREMENTS EXCEEDING THE AMOUNT OF 500,000 EUR IN MKD COUNTER VALUE OR AN ADEQUATE FINANCIAL THRESHOLD SHOULD BE DEFINED IN CONSULTATIONS WITH THE BUSINESS SECTOR.

- IN THE FIRST SIX MONTHS OF 2015, 25 COMPANIES HAVE BEEN ISSUED NEGATIVE REFERENCES. THUS, BY JUNE 2015 INCLUDING, A TOTAL OF 38 COMPANIES ARE PROHIBITED TO PARTICIPATE IN PUBLIC PROCUREMENTS. MAJORITY OF THEM WILL NOT HAVE THE RIGHT TO SUBMIT BIDS IN TENDER PROCEDURES BY 2016.

RECOMMENDATION: SERIES OF CHANGES TO THE LAW ON PUBLIC PROCUREMENTS ARE NEEDED WITH A VIEW TO IMPROVE THE MANNER IN WHICH COMPANIES ARE SANCTIONED IN PUBLIC PROCUREMENT PROCEDURES.

- IN THE FIRST HALF OF THIS YEAR, COMPANIES SUBMITTED THE LOWEST NUMBER OF APPEALS RECORDED IN THE LAST SEVERAL YEARS. THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS WAS PRESENTED WITH 252 APPEALS IN TOTAL, WHICH IS BY 23.6% LOWER COMPARED TO THE SAME PERIOD LAST YEAR. MORE THAN HALF OF APPEALS LODGED HAVE BEEN SUBMITTED BY COMPANIES CONTESTING THE SELECTION DECISION ON THE MOST FAVOURABLE BID IN THE TENDER PROCEDURE.

RECOMMENDATION: MONITORING FINDINGS INEVITABLY IMPOSE THE NEED FOR CHANGES TO THE LAW AIMED AT IMPROVING LEGAL PROTECTION AND ENSURING GREATER EDUCATION FOR PARTICIPANTS IN PUBLIC PROCUREMENTS FOR THE PURPOSE OF GETTING BETTER ACQUAINTED WITH THEIR RIGHTS RELATED TO LEGAL PROTECTION.

GOALS AND METHODOLOGY

From November 2008, the Center 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 application of the underlying principles of transparency, competitiveness, equal treatment of economic operators, non-discrimination, legal proceedings, cost-effectiveness, efficiency, effectiveness 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.

In the period November 2008 – June 2014, the monitoring activities were implemented on a quarterly monitoring sample comprised of randomly selected public procurement procedures; however, starting from the second half of 2014 the monitoring sample is defined on semi-annual level and includes random selection of 60 public procurement procedures. Monitoring activities start

with the publication of procurement notices in the “Official Gazette of the Republic of Macedonia” and in the Electronic Public Procurement System, followed by attendance at public opening of bids and data collection on procedure course, and use in-depth interviews and structured questionnaires submitted to economic operators, as well as data collected from contracting authorities through EPPS and by means of Freedom of Information (FOI) applications. Some monitoring parameters (number, share and structure of annulled tender procedures, value of signed contracts per particular type of procedure and the like) are now analysed by processing all data submitted to EPPS.

The analysis presented in this report is performed on the basis of monitoring a randomly selected sample comprised of 60 public procurement procedures organized by contracting authorities on central level, whose public opening of bids took place in the period January-June 2015. In addition, this report includes an analysis of appeals procedures led in front of the State Commission on Public Procurement Appeals in the period January-June 2015.

PUBLIC PROCUREMENT MONITORING REPORT

- LOW COMPETITION, WHICH BRINGS UNDER QUESTION THE EFFECTIVENESS OF PUBLIC SPENDING, CONTINUES TO BE THE KEY HALLMARK OF TENDER PROCEDURES IN THE FIRST HALF OF 2015. ALTHOUGH ESTABLISHED FOR THE PURPOSE OF INCREASING COMPETITION, THE COUNCIL OF PUBLIC PROCUREMENTS HAS FAILED TO YIELD ANY RESULTS.

As many as 26% of tender procedures monitored in this reporting period were characterized by only one bid, whereas two bids were submitted in 19%

of tender procedures. Satisfactory level of competition with three or more bids was recorded in half of tender procedures monitored (51%).

This situation is indicative of worsened competition in tender procedures compared to the same period last year. Worrying is the fact that submission of only one bid per tender procedure was registered also in public procurements that are expected to be marked by high competition, such as printing services, procurement of products and drinks for cafeterias, procurement of bread and sweets, maintenance of building hygiene, procurement of vehicles, procurement of construction machinery – bulldozers and the like.

Overview of competition in tender procedures on semi-annual level*

| Period | No bidders | 1 bidder | 2 bidders | 3 and more bidders |
|---------------------|------------|----------|-----------|--------------------|
| January - June 2014 | 5% | 28% | 11% | 56% |
| January - June 2015 | 4% | 26% | 19% | 51% |

*Calculations are made on the basis of the monitoring sample for the period January-June 2015

For a dominant share of tender procedures with only one bid, the Council of Public Procurements has previously approved the technical specifications or the eligibility criteria for tender participation, whereby it has assessed that competition in said tender procedures is not limited. This, of course, has brought under question the effects from the existence of the Council of Public Procurements that was established for the purpose of stimulating competition, notably by limiting possibilities for institutions to develop and use favouring tender documents. Furthermore, this situation is indicative of the fact that the long-standing problem of low competition is not merely a result of tender documents, be it in terms of technical specifications or in terms of eligibility criteria for tender participation. Problems seem to be more complex and obviously they cannot be solved only with administrative measures.

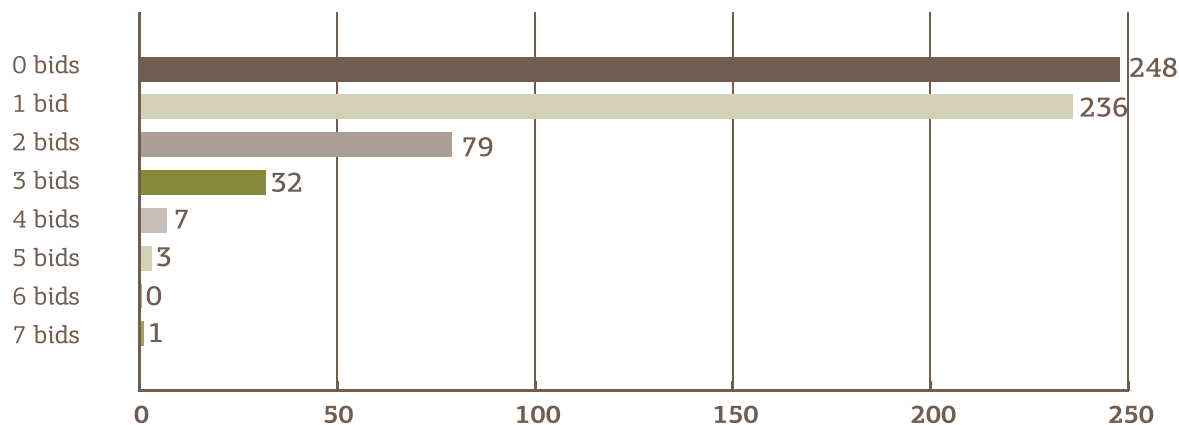
The problem of low competition is partially concealed by division of tender procedures into lots, which has become more common in the last years and in all areas of procurements, and partially as result of recently introduced legal obligations, which is the case with public procurements organized in the field of health care. Namely, according to the Law on Public Procurements (Article 15, paragraph 7) individual lots need to be established for each and every medicine, medical aid or disposable medical supplies.

The monitoring sample for this reporting period (January – June 2015) included the biggest tender procedure implemented so far in the field of health care. It is a matter of the tender procedure organized for procurement of medicines for the needs of public health

facilities in the Republic of Macedonia, comprised of 606 lots with an estimated value of more than 3 billion MKD, i.e. 51 million EUR without VAT. 18 companies submitted bids in this tender procedure. At first glance, it seems that desired level of competition had been achieved. Nevertheless, 18 bids were not submitted for all 606 individual lots, i.e. for all medicines being procured. Notably, detailed analysis of data collected at the public opening of bids attended as part of monitoring activities revealed that not a single bid was submitted for 248 medicines from the total of 606, whereas one bid was submitted for 236 medicines, i.e. lots. Hence, competition among two or more bidding companies was observed only for 123 lots from this tender procedure, i.e. competition was observed for only 20% of this procurement. It should be noted that competition for reduction of prices, i.e. e-auctions, were organized for only 123 medicines, which accounts for one fifth of medicines being procured. On the other hand, in the case of medicines for which only one bid was received, almost without exceptions, bidding companies remained at their initially bided prices as final prices.

Analysis of the biggest tender procedure implemented in 2015 was performed on the basis of direct monitoring of the tender procedure and processing of partial data available in the Electronic Public Procurement System (EPPS) under the section dedicated to e-auctions. Notably, the Ministry of Health did not comply with the Law on Free Access to Public Information and did not disclose requested documents related to this tender procedure.

Overview of competition in the tender procedure for procurement of medicines – (public procurement organized by the Ministry of Health no.20/2015)



*Data collected at the public opening of bids held on 28.04.2015

Transparency in implementation of this tender procedure, which is the biggest public procurement organized in the first half of 2015, is brought under question also in terms of compliance with the Law on Public Procurements. Namely, 4 months after its implementation, notifications on contracts signed under this tender procedure are still not submitted to EPPS and there is no information available as to what happened with tender lots for which no bids were submitted, because - according to the logical course of things – the contracting authority should submit to EPPS notifications on annulment of said lots from the tender procedure.

As it could be seen with the example related to the tender procedure of the Ministry of Health, low competition in tender procedures has negative effects on organi-

zation of planned e-auctions. E-auctions were not organized in 43% of tender procedures from the monitoring sample. Even in procurement procedures characterized by competition among two or three bidding companies it often happens some of them to be exempted from the bid-evaluation process on the grounds of incomplete documents or on the grounds that offered products/services do not correspond with what has been requested.

Non-organization of planned e-auctions is indicative of greater risk for procuring goods and/or services at prices that are unrealistically high. Notably, there is an unwritten rule whereby companies initially submit prices higher than the actual ones, with the intention of having them reduced in the course of anticipated e-auctions.

RECOMMENDATION:

COMPETENT AUTHORITIES SHOULD DEVELOP A DETAILED ANALYSIS OF THE EFFECTS AND PURPOSEFULNESS OF HAVING INTRODUCED THE COUNCIL OF PUBLIC PROCUREMENTS AS ADDITIONAL AND FINANCIAL BURDEN IN THE SYSTEM OF PUBLIC PROCUREMENTS. THERE IS AN OBVIOUS NEED FOR MORE SYSTEMATIC APPROACH TO ADDRESSING THE PROBLEM OF LOW COMPETITION, BY FOCUSING ON REDUCING RISKS OF CORRUPTION AS PRECONDITION FOR RESTORING THE BUSINESS SECTOR'S LOST CONFIDENCE IN FAIR SELECTION OF THE BEST BID IN TENDER PROCEDURES.

- IN THE FIRST SIX MONTHS OF THIS YEAR, THE COUNCIL OF PUBLIC PROCUREMENTS WAS PRESENTED WITH 10,362 APPLICATIONS FOR APPROVAL, COSTING THE INSTITUTION AS MUCH AS 74.3 MILLION MKD, I.E. 1.2 MILLION EUR.

The number of applications for approval submitted by contracting authorities to the Council of Public Procurements is increasing. In the first half of this year, a total of 10,362 such applications were submitted, which is almost double the number recorded in the previous six months, when this legal obligation first entered in effect. According to findings compiled on the basis of monitoring of public procurements, majority of applications are submitted for the purpose of having approved the technical specifications used to describe goods being procured.

As regards decisions taken by the Council of Public Procurements, the ratio of positive versus negative opinions issued is 48.8%:51.2%. More specifically, the Council has taken positive decisions for 5,054 applications and has not provided its approval for 5,308 applications. The Council of Public Procurements did not disclose the information requested concerning the number of public procurements for which applications for approval have been submitted with the explanation that it does not dispose with such information. This information is relevant because several applications for approval can be submitted for one and the same tender procedure.

In financial terms, the requested approvals costed the institutions 74.3 million MKD, i.e. 1.2 million EUR, which is an exceptionally high amount spent on the newly introduced legal obligation.

Applications for approval submitted to the Council of Public Procurements

| Period | Number of approvals requested | Costs paid to the Council of Public Procurements (in EUR) |
|---------------------|-------------------------------|---|
| January – June 2014 | 5.725 | 580.740 |
| January – June 2015 | 10.362 | 1.207.626 |
| Difference | +81% | +108% |

According to monitoring findings, without any exceptions, tender procedures for procurement of goods start with application for approval from the Council of Public Procurements related to technical specifications. Institutions that are implementing tender procedures have unsuccessfully attempted to contact foreign companies and obtain confirmation that they manufacture specifically described procurement subjects. This obligation is stipulated by the Law on Public Procurements, which requires the institutions to demonstrate, by means of market research, that the procurement subject is manufactured by more than 3, 4 or 5 companies (depending on the size of relevant tender procedures) based not only in Macedonia, but abroad as well. By tradition, foreign companies do not respond to such requests submitted by contracting authorities from Macedonia. This ignorant attitude is most probably a result of the fact that practices like this do not exist anywhere in the world and companies do not have experience in issuing such confirmations.

The paradox of requesting confirmations from companies seated abroad that they manufacture particular products is best represented by the monitored procedure for procurement of fruits and vegetables. The state institution wishing to procure fruits and vegetables in the value of 3.5 million MKD without VAT managed to prove that there are Macedonian products on the market, but not foreign as well, and therefore it was obliged to request approval from the Council. In that, the technical specifications did not include any description of fruits and vegetables being procured, but provided tabular overview of the types and quantity thereof. Hence, it remains unclear what the Council was approving in this case, given that the specifications did not describe the fruits and vegetables, except by their type. Finally, why there is need for obtaining confirmations from foreign producers for this type of procurements and would it be

sufficient to just enlist them as potential bidders. The fact that the problem of low competition does not lie in this type of procurements is further supported by the information that the tender procedure received 4 bids and the planned e-auction was organized and resulted in price reduction by 17%.

Furthermore, the attempt made by the ministry acting as contracting authority in the monitored procurement of fresh eggs, in the value of 1 million MKD, to obtain confirmations by three companies based in neighbouring Serbia that they produce fresh eggs was ultimately unsuccessful. The ministry had to request approval from the Council of Public Procurements for the description of eggs being procured (class A, with individual weight from 63 to 73 grams). This procurement procedure was presented with bids from two companies based in Macedonia, which had previously confirmed, as part of the market research, that they are producers of fresh eggs.

As part of the procurement procedure organized for photocopying paper, staplers, clippers, cardboard folders, correction fluids, marker pens, rulers, book-binding spirals etc., failing to prove that at least 4 companies from abroad are manufacturing such type of small office supplies, the institution had to request approval from the Council of Public Procurements. This raises the question whether foreign companies can be considered as potential bidders in this tender procedure in the first place, having in mind that its value amounted to 400,000 MKD and concerned small office supplies. In that, trading with office supplies is one of the most competitive sectors in the country and, without any exceptions, increasing number of traders participate in this type of tender procedures. Hence, this tender procedure was marked by participation of as many as 7 bidding companies from the country, which is a true rarity in tender procedures.

Approval from the Council of Public Procurements must be sought even for procurement of oil derivatives, although everybody is aware that there is only one registered manufacturer of such goods in the country. In practice, this means that regardless of the manner in which an individual institution would draft its tender documents for this type of procurements, it must request approval from the Council of Public Procurements.

RECOMMENDATION:

SEVERAL SIGNIFICANT CHANGES NEED TO BE MADE TO LAW ON PUBLIC PROCUREMENTS IN RELATION TO MARKET RESEARCH AND AIMED AT STIMULATING COMPETITION IN PUBLIC PROCUREMENTS. THROUGHOUT THE TEXT IN ARTICLE 36-A, PARAGRAPH (1) OF LPP, THE WORD "PRODUCERS" SHOULD BE REPLACED WITH THE WORD "ECONOMIC OPERATORS". IN ARTICLE 36-A, PARAGRAPH (1), LINE (1) OF LPP, THE CONJUNCTION "AND" IN THE PROVISION "THREE PRODUCERS ON THE MARKET IN REPUBLIC OF MACEDONIA AND THREE PRODUCERS ON THE FOREIGN MARKETS" SHOULD BE REPLACED WITH THE CONJUNCTION "OR". THESE CHANGES WILL CREATE PRECONDITIONS FOR ACTUAL IMPLEMENTATION OF MARKET RESEARCH, INSTEAD OF THE FORMAL WHICH, BY RULE, IS UNSUCCESSFUL AND IS USUALLY FOLLOWED BY APPLICATION FOR APPROVAL SUBMITTED TO THE COUNCIL OF PUBLIC PROCUREMENTS. FURTHERMORE, IN ORDER TO REDUCE ADMINISTRATIVE AND FINANCIAL BURDENS, LPP NEEDS TO BE AMENDED WITH A VIEW TO INTRODUCE LEGAL SOLUTION WHEREBY IN CASES WHEN CONTRACTING AUTHORITIES HAVE PRESENTED THE COUNCIL OF PUBLIC PROCUREMENTS WITH EVIDENCE THAT THEY HAD ACTED UPON THE RECOMMENDATIONS ISSUED WHEN THEY HAVE NOT BEEN ISSUED APPROVAL, THE COUNCIL WOULD BY DEFAULT ISSUE THE APPROVAL FOR THE PROCUREMENT PROCEDURE IN QUESTION, WITHOUT ADDITIONAL ENGAGEMENT OF EXPERTS (ARTICLE 14 OF LPP).

- INTRODUCED CONTROLS HAVE DISCIPLINED THE INSTITUTIONS AND FORCED THEM TO REDUCE THEIR USE OF NON-TRANSPARENT NEGOTIATION PROCEDURES WITHOUT PRIOR ANNOUNCEMENT OF CALL FOR BIDS. IN THE FIRST HALF OF 2015, THE VALUE OF SUCH CONTRACTS IS BY 61.4% LOWER THAN THE RELEVANT AMOUNT SPENT IN THE SAME PERIOD LAST YEAR.

The conclusion is inferred that in all above indicated cases, applications for approval are merely a formality that has resulted in unnecessary spending of time and money due to objective fear among people responsible for organizing the public procurement that should they fail to obtain such approval, they might be sanctioned with imprisonment in duration of up to 1 year in compliance with Article 232-d, paragraph (1) of the Law on Public Procurements.¹

¹ Article 232-d: (1) Any person that has taken actions contrary to this law or has consciously failed to take actions that he/she had been obliged to take in compliance with this law, thereby announcing procedure on awarding contract for public procurement of goods without prior approval from the Council, in cases when the technical specifications can be met by less than the minimum number of producers indicated in Article 36-a, paragraph (1) of this law, and by doing so has earned proceeds for himself/herself or for somebody else, or has caused major damage, shall be sanctioned with imprisonment in duration of up to 1 year.

In the first six months of this year, 474 contracts were signed under negotiation procedures without prior announcement of call for bids in total value of 704,811,581 MKD, i.e. 11,460,350 EUR. This decreasing trend is a result of the legal obligation introduced in the second half of 2014 whereby contracting authori-

ties are obliged to request approval for organization of negotiation procedures without prior announcement of call for bids. Obvious is that newly introduced controls have disciplined the institutions and forced them to reduce their use of this non-transparent procedure.

Overview of amounts contracted under negotiation procedures without prior announcement of call for bids

| Period | Contracts' value (in million EUR) | Difference |
|---------------------|-----------------------------------|------------|
| January – June 2012 | 17,7 | -18,4% |
| January – June 2013 | 22,6 | +27,7% |
| January – June 2014 | 29,8 | +31,9% |
| January – June 2015 | 11,5 | -61,4% |

Calculations are based on data available by 31.08.2015.

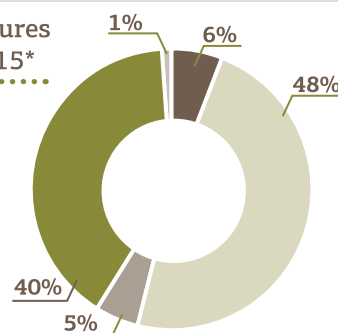
As regards reasons indicated for signing such contracts in this monitoring period, the most dominant explanation offered by contracting authorities implies urgency of matters and lack of time to organize public procurements. This ground was indicated for 306 contracts in total value of 341 million MKD, i.e. almost half of all public funds spent by means of this type of procedures.

Next significant share (40%) concerns contracts signed because of technical or artistic reasons, i.e. due to protection of exclusive rights (patents and the like), which means that the contract in question could be performed only by a particular economic operator. This ground was used to sign 126 contracts in total value of around 279 million MKD.

Overview of contracts awarded by means of negotiation procedures without prior announcement of call for bids, January – June 2015*

- Annex contracts
- Urgency reasons
- Selection of project design
- Technical or artistic reasons
- Other grounds

*The structure of reasons indicated for contracts awarded by means of negotiation procedure without prior announcement of call for bids is based on processing of all 474 notifications on contracts signed in the period 1 January – 30 June 2015, submitted to EPPS by August 2015.



As shown on the chart above, other grounds indicated for use of negotiation procedures without prior announcement of call for bids include annex contracts, which amount to 41 million MKD, i.e. 6 % of total funds

spend under this type of contracts, as well contracts awarded as part of open competition for project design when the highest ranking participant is awarded the contract, which accounted for 35 million MKD in total.

RECOMMENDATION: THE TREND ON REDUCED USE OF NEGOTIATION PROCEDURES WITHOUT PRIOR ANNOUNCEMENT OF CALL FOR BIDS SHOULD BE MAINTAINED.

- IN THE FIRST HALF OF 2015, 18.5% OF ALL TENDER PROCEDURES ANNOUNCED WERE ANNULLED. THE MOST DOMINANT REASON INDICATED FOR TENDER ANNULMENT IS THAT THE CONTRACTING AUTHORITY DID NOT RECEIVE ANY BIDS.

Monitoring activities observed a modest decrease in the number of annulled tender procedures compared

to the previous reporting periods. 1,602 from the total of 8,657 procurement procedures announced in the first half of this year were annulled. Share of annulled procedures accounts for 18.5% of all tenders, which is by 4.3 percentile points lower compared to the first six months last year. The unfavourable trend on more frequent annulment of tender procedures with higher values compared to those with lower values continued in this monitoring period as well.

Annulment of tender procedures, on semi-annual level

| Period | No. of announced procurement notices | No. of decisions on tender annulment | Share of annulled tender procedures |
|---------------------|--------------------------------------|--------------------------------------|-------------------------------------|
| January – June 2012 | 4.176 | 1.015 | 24,3% |
| January – June 2013 | 9.046 | 1.951 | 21,6% |
| January – June 2014 | 8.637 | 1.967 | 22,8% |
| January – June 2015 | 8.657 | 1.602 | 18,5% |

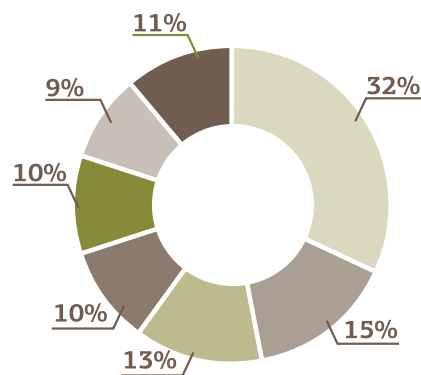
As regards reasons for tender annulment, the most dominant one concerns the fact that there were no bids submitted and this ground was indicated for annulment of one third of tender procedures. Next is the explanation offered by contracting authorities that there were no acceptable bids submitted, which means that the bids submitted were not in compli-

ance with what has been requested in relevant tender documents, which was used as grounds for tender annulment in 15% of cases. Third most frequently used reason for tender annulments implied that prices bid were more unfavourable than market prices, and this reason was indicated in 13% of annulled public procurement procedures.

Overview of reasons indicated for tender annulment, January – June 2015*

- No bids were submitted.
- No acceptable bids were submitted.
- Prices offered are more unfavorable than market prices.
- Tender documents contain omissions.
- Significant violations to LPP.
- No adequate bids were submitted.
- Other grounds.

*The structure of reasons indicated for tender annulments is based on processing of data from all 1,602 notifications on tender annulments in 2014, submitted to EPPS by September 2015.



Among annulled tender procedures, special attention should be given to the monitored tender procedure for procurement of publication services concerning open calls, press releases, open competitions and other types of notifications in Macedonian and Albanian languages, as well as preparation, printing and inserting articles in daily newspapers. This public procurement was comprised of three lots and after having received 5 bids, the Employment Agency of the Republic of Macedonia organized an e-auction, followed by decision to sign contracts with 3 different companies for each of the three individual lots. Dissatisfied with the decision taken, one bidding company lodged an appeal in front of the State Commission on Public Procurement Appeals (SCPPA). Without engaging in analysis of appeal allegations or responses provided by SCPPA, the most important thing in this procurement procedure is the decision taken by the Commission, when acting ex officio, whereby it has assessed that the Employment Agency did not act in compliance with Article 8, paragraph (1), item (2) of the Law on Public Procurements and thereby annulled this tender procedure. Essence of this problem lies in the fact that, according to the referenced article, the Employment Agency is not obliged to organize public

procurement procedure for leasing media space. It is a matter of a legal provision adopted as part of amendments to the Law on Public Procurements from December 2014. This example was underlined in the light of the assessment that SCPPA's decision is contrary to the spirit of transparency and accountability in public spending. It remains unclear why SCPPA annulled this tender procedure and thereby discourages attempts on the part of contracting authorities to comply with the Law on Public Procurements, even in cases when that is not deemed necessary, but represents a good practice. Actually, consequences from sending such message to institutions spending public funds can also be seen in the action of the Employment Agency which, after SCPPA's decision, refused to disclose requested documents related to this public procurement. Documents related to this tender procedure were obtained after the monitoring team lodged an appeal and decision was taken by the Commission on Protection of the Right to Free Access to Public Information.

Another example related to tender annulments concerns procurement of LED screen for outdoor use. Four bids were submitted in this tender procedure, but the contracting authority decided to annul the pro-

curement procedure on the grounds that bids received do not meet all characteristics enlisted in technical specifications. In this case concerns are raised due to monitoring findings that bidding companies were not presented with specific explanations about the parts of their bids that are not in compliance with the tech-

nical specifications. At the same time, this raises the question about the likelihood for all four bidding companies to have offered LED screens that do not meet the technical specifications, which had been previously approved by the Council of Public Procurements and assessed that they do not limit competition.

RECOMMENDATION:

FURTHER DECREASE OF THE SHARE OF ANNULLED TENDERS IS NEEDED, AS THE RATE OF 18.5% IS UNREASONABLY HIGH. IN CASE THE RELEVANT RATE OF TENDER ANNULMENTS IS NOT REDUCED BELOW 10 PERCENT IN THE FORTHCOMING PERIOD, SANCTIONS SHOULD BE INTRODUCED FOR THE CONTRACTING AUTHORITIES CHARACTERIZED BY HIGH SHARE OF ANNULLED TENDER PROCEDURES.

- **MONITORING ACTIVITIES OBSERVED DECREASED USE OF BANK GUARANTEES FOR BIDS, AS WELL AS BANK GUARANTEES REQUIRED FROM COMPANIES FOR QUALITY PERFORMANCE OF CONTRACTS.**

Bank guarantees for bids were requested in 18% of monitored tender procedures, which accounts for a decrease by 4 percentile points compared to the previous six-month period. This is a positive trend, but the dilemma remains as to why this share of procurement procedures has created costs for the companies, especially knowing that they could have been requested to provide statement on serious intent as guarantee that they would not withdraw their bid. Such actions are undoubtedly indicating that some contracting authorities are not led by the idea of stimulating competition among companies, but rather - purposefully or by inertia - use old mechanisms that create additional costs for bidding companies.

On the contrary, guarantees for quality performance of contracts were requested in 42% of mon-

itored tender procedures, which represents a decrease by 11% compared to the previous six-month period. Reduced use of bank guarantees for quality performance of contracts is not favourable because it is indicative of reduced care for and commitment to adherent implementation of public procurement contracts. At the same time, they put companies in unequal position because those required to provide bank guarantees for quality performance of contracts are not only burdened with additional costs, but are also faced with the possibility of being issued negative references if they fail to adherently perform the contract awarded and will be prohibited to participate in tender procedures for a period of at least one year. This imposes the need for clear definition of terms and conditions governing use of bank guarantees for quality performance of contracts, as well as introduction of statements on quality performance of contracts. In practice, this would mean that for each public procurement contract companies will be obliged to provide statement on quality performance of contracts or bank guarantees whose amount would depend on the ten-

der procedure's size and scope. This would address the problem observed in tender procedures where companies are not requested to provide bank guarantees for quality performance of contracts and where suppliers failing to comply with the contract cannot be issued

negative references. Since this mechanism is in place and already used for sanctioning companies, such as issuance of negative references, the same must ensure equal treatment of all economic operators.

RECOMMENDATION:

BID GUARANTEES (IN THE FORM OF BANK GUARANTEES OR DEPOSITS) STIPULATED UNDER ARTICLE 47 OF LPP SHOULD BE REVOKED AND SHOULD BE REPLACED WITH THE SO CALLED "STATEMENT ON SERIOUS INTENT". GUARANTEES FOR QUALITY PERFORMANCE OF CONTRACTS (IN THE FORM OF BANK GUARANTEES) STIPULATED UNDER ARTICLE 48 OF LPP SHOULD BE MANDATORY FOR ALL PUBLIC PROCUREMENTS EXCEEDING THE AMOUNT OF 500,000 EUR IN MKD COUNTER VALUE OR AN ADEQUATE FINANCIAL THRESHOLD SHOULD BE DEFINED IN CONSULTATIONS WITH THE BUSINESS SECTOR.

- **IN THE FIRST SIX MONTHS OF 2015, 25 COMPANIES HAVE BEEN ISSUED NEGATIVE REFERENCES. THUS, BY JUNE 2015 INCLUDING, A TOTAL OF 38 COMPANIES ARE PROHIBITED TO PARTICIPATE IN PUBLIC PROCUREMENTS. MAJORITY OF THEM WILL NOT HAVE THE RIGHT TO SUBMIT BIDS IN TENDER PROCEDURES BY 2016.**

The most frequent reason for issuance of above-indicated 25 negative references in the first half of this year is failure on the part of companies to provide bank guarantees for quality performance of contracts, as anticipated in relevant tender documents (32%). Second in frequency is refusal on the part of companies that have been selected as most favourable bidders to sign the public procurement contract (28%).

Third place is reserved for activation of bank guarantees for quality performance of contracts (24%). Less represented, but still indicated as grounds for issuing prohibition for tender participation is withdrawal of bids prior to expiration of their validity (12%) and non-acceptance of corrections for arithmetic errors by the commission (4%).

By the end of the first half of 2015, there are a total of 38 companies on the so called black list for tender participation. In that, for majority of them (i.e. 27 companies) the prohibition for participation in tender procedures will expire in the course of 2016. Sanctions imposed to 8 companies prohibited from tender participation will expire in the second half of this year, while three companies will remain on the black list by 2017, 2018 and 2019, respectively.

RECOMMENDATION:

NEGATIVE REFERENCES FROM ARTICLE 47, PARAGRAPH (5) OF LPP SHOULD NOT BE ISSUED WHEN BIDDING COMPANIES WITHDRAW THEIR BIDS PRIOR TO EXPIRATION THEREOF AND WHEN BIDDING COMPANIES DO NOT SIGN THE PUBLIC PROCUREMENT CONTRACT ACCORDING TO THE TERMS AND CONDITIONS SET IN THE TENDER DOCUMENTS AND THE SUBMITTED BID. ISSUANCE OF NEGATIVE REFERENCES FROM ARTICLE 47, PARAGRAPH (6) OF LPP SHOULD RESULT IN EXEMPTION OF THE BIDDER IN QUESTION FROM FUTURE PROCEDURES ON AWARDING PUBLIC PROCUREMENT CONTRACT ORGANIZED ONLY BY THE CONTRACTING AUTHORITY ISSUING THE NEGATIVE REFERENCE.

ANALYSIS OF PROCEDURES LED IN FRONT OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS IN THE PERIOD

JANUARY – JUNE 2015

- IN THE FIRST HALF THIS YEAR, COMPANIES HAVE SUBMITTED THE LOWEST NUMBER OF APPEALS RECORDED IN THE LAST SEVERAL YEARS. THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS (SCPPA) WAS PRESENTED WITH 252 APPEALS IN TOTAL, WHICH IS BY 23.6% LOWER COMPARED TO THE SAME PERIOD LAST YEAR. MORE THAN HALF OF APPEALS LODGED HAVE BEEN SUBMITTED BY COMPANIES AND CONCERN CONTESTING THE DECISION ON SELECTION OF THE MOST FAVOURABLE BID IN THE TENDER PROCEDURES.

The overall trend on decreasing number of appeals lodged by companies participating in tender procedures in front of the competent SCPPA continued also in the first half of 2015. In this reporting period there were a total of 8,657 tender procedures announced and only 252 appeals lodged. This provides the conclusion that the share of appeals compared to the total number of tender procedures implemented in the first half of 2015 accounts for only 2.9% compared to the same period in 2012 when 8.1% of tender procedures were appealed. In other words, while the number of tender procedures in this reporting period remained the same compared to the corresponding period last year, the number of appeals was decreased by 23.6%.

Overview of ratios between public procurements announced and number of appeals lodged by companies in front of SCPPA

| Year | No. of tender procedures | % difference | No. of appeals before SCPPA | % difference | % of appeals compared to tender procedures |
|----------------|--------------------------|--------------|-----------------------------|--------------|--|
| Jan.-June 2012 | 4.178 | +4,1 | 338 | -32,7 | 8,1 |
| Jan.-June 2013 | 9.049 | +116,6 | 291 | -13,9 | 3,2 |
| Jan.-June 2014 | 8.670 | -4,2 | 330 | +13,4 | 3,8 |
| Jan.-June 2015 | 8.657 | -0,1 | 252 | -23,6 | 2,9 |

Calculations are based on processing of data concerning appeals lodged, as published on SCPPA's website.

Of course, such low level of utilizing legal protection in public procurements is unfavourable, as it provides the conclusion that companies are passive when it comes to defending their rights in public procurement procedures.

According to the structure of decisions taken by SCPPA in the first half of 2015, the highest share of them concern admission of motions of appeal, i.e. 43.2%. In that, from the total of 109 appeals admitted SCPPA has taken 71 decisions on annulling the tender procedure in question and 38 decisions on revoking contracting authorities' selection decision on the most favourable bid and returning the procedure for re-evaluation of bids. This shows that dominant share of decisions include assessments that contracting authorities have made such irregularities and violations of the Law

on Public Procurements that no additional action on their part could correct them and therefore the tender procedure had to be annulled.

In the first half of this year SCPPA has assessed that 87 appeals lodged by the companies are ungrounded and that they should be rejected (34.5%). 36 appeals submitted by the companies (14.3%) were rejected on the grounds that they have not been lodged in compliance with the relevant law-stipulated deadline or on the grounds that companies have failed to settle the fee charged for leading the appeal procedure. In 10 cases, the companies withdrew their appeals, while in the case of other 10 appeals submitted in the same period the contracting authorities requested discontinuation of proceedings by accepting the appeal allegations presented by the companies.

Structure of decisions taken by SCPPA in the period January-June 2015

| Type of decision | No. of appeals | Share (%) |
|---|----------------|-------------|
| Approving motion of appeal | 109 | 43,2% |
| Rejecting motion of appeal | 87 | 34,5% |
| Denying motion of appeal | 36 | 14,3% |
| Withdrawn appeals (terminated procedure) | 10 | 4,0% |
| Appeal approved by the contracting authority (discontinued procedure) | 10 | 4,0% |
| Total | 252 | 100% |

Calculations are made by processing data concerning decisions taken by SCPPA available on this institution's website.

Comparison against the situation observed in previous years provides the conclusion that the share of approved motions of appeal is significantly increasing from year to year. Increase of approved motions in the first half of 2015 compared to the

same period last year amounts to 3.5 percentile points, and compared to the first half of 2012 – as many as 12.4 percentile points. Due to increased share of approved motions of appeal, the number of rejected motions of appeal is understandably lower.

Such change of structure in terms of decisions taken upon motions of appeal, which is favourable for the companies, could be directly correlated with the continuous decrease of the number of appeals lodged. Conclusion is inferred that companies

decide to lodge appeals when they are faced with more significant violations to the Law on Public Procurements and when there is greater likelihood that their appeals will be admitted.

Comparison table concerning structure of decisions taken as part of appeal procedure

| Type of decision | Jan-June 2012 | Jan-June 2013 | Jan-June 2014 | Jan-June 2015 |
|--|---------------|---------------|---------------|---------------|
| Approved appeals | 30,8% | 29,5% | 39,7% | 43,2% |
| Rejected appeals | 37,0% | 41,2% | 33,6% | 34,5% |
| Denied appeals | 19,5% | 18,6% | 15,8% | 14,3% |
| Terminated/discontinued appeal proceedings | 12,7% | 10,7% | 10,9% | 8,0% |
| Total | 100% | 100% | 100% | 100% |

Calculations are made by processing data concerning decisions taken by SCPPA available on this institution's website.

As shown in the table above, the share of denied appeals remains high throughout the entire monitoring period 2012-2015. More specifically, they accounted for around 19.5% in the first half of 2012 and 14.3% in the first half of 2015. They concern appeals lodged in advance of the law-stipulated deadline and have been assessed as inadmissible or appeals lodged after the deadline's expiration and have been assessed as untimely. Particularly problematic and unclear is the deadline for submission of appeals contesting tender documents whose expiration period starts from the public opening of bids. By the effect of this legal solution, Macedonia deviates from the general rule governing deadlines for submission of appeals related to tender documents whose expiration period starts from the publication of tender documents. Despite the frequent changes made to the Law on

Public Procurements, this illogical solution remained in effect, further confusing and discouraging companies to lodge appeals in cases when they have assessed that tender documents are not in compliance with the Law. Continued pursuit of this approach seems to manifest the unpreparedness on the part of competent institutions to encourage companies to defend themselves against favouring tender documents that are both discriminatory and limit the competition in public procurements. Analysis of decisions taken by SCPPA in cases of admitted appeals provides the conclusion that in the first six months of 2015 dominant are decisions whereby tender procedures are completely annulled (65%), compared to decisions on revoking the contracting authorities' selection decisions and returning the procedure for re-evaluation of bids (35%). This ratio is indicative of the fact that crucial

violations of the Law on Public Procurements are continuously increasing, which means that illegal actions taken in the course of tender procedures cannot be addressed or corrected by means of repeated decision making, but the entire tender procedure needs to be annulled and organized anew. Most often, it is a matter of cases in which the institutions did not comply with provisions contained in LPP governing development of tender documents and did not create conditions for lawful and objective selection of the most favourable bid. Analysis of reasons for submission of appeals demonstrated that a dominant share, i.e. more than 60% of appeals lodged by companies contest the selection decision for the most favourable bid. In that, as part of their appeal allegations companies have indicated that they disagree with the selection of a bid made by another company or complained that their bids have been rejected as unacceptable. In general, there are two grounds for rejecting: the first concerns the company's failure to demonstrate fulfilment of eligibility criteria for tender participation and the second one implies that the bid submitted does not meet the technical specifications set in relevant tender documents. Furthermore, the analysis shows that companies frequently contest tender documents and decisions on tender annulment. As regards public procurement procedures, in addition to companies, SCPPA was presented with appeals lodged by contracting authorities when dissatisfied with decisions taken by the Council of Public Procurements, which started its operation on 1 May 2014. In the first six months of this year, the State Commission was presented with 62 appeals contesting decisions of the Council of Public Procurements. This information is indicative of the fact that lower number of institutions has lodged

appeals in front of the Commission compared to the situation observed last year. For comparison purpose, in the period May-December 2014 SCPPA was presented with 109 appeals contesting decisions taken by the Council.

Analysis of appeals lodged by contracting authorities shows that around 70% of them concern decisions of the Council of Public Procurements taken upon applications for approval related to use of tender requirements for specific part of technical specifications. This is quite logical, having in mind that this is the most common ground for requesting approval from the Council. Other grounds enlisted in the appeal allegations contesting decisions of the Council concern applications for approval related to use of eligibility criteria; applications for approval related to organization of negotiation procedures without prior announcement of call for bids, and applications for approval concerning use of the selection criterion defined as "economically most favourable bid".

Monitoring findings inevitably impose the need for changes to the Law aimed at improving legal protection and ensuring greater education for participants in public procurements for the purpose of getting better acquainted with their rights related to legal protection. Continuous education of participants in public procurements gains in importance when combined with the fact that legislation in the field of public procurements is exceptionally complicated and, additionally, has been subject of frequent changes. At the same time, efforts are needed to create an encouraging climate for participants in public procurements to protect their rights by lodging appeals in front of SCPPA, as precondition for attaining the broader goal: cost-effective and efficient public spending, in compliance with the legislation in effect.

