

MONITORING THE IMPLEMENTATION OF PUBLIC PROCUREMENTS



QUARTERLY REPORT ON MONITORING THE IMPLEMENTATION OF PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA





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MONITORING THE IMPLEMENTATION OF PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

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CONTENTS

- | | |
|----|---|
| 7 | Key Findings |
| 9 | Goals And Methodology |
| 11 | Quarterly Public Procurement
Monitoring Report |
| 32 | Analysis Of Appeals Lodged In Front Of The
State Commission On Public Procurement Ap-
peals In The Period January-June 2011 |

ABBREVIATIONS

BPP	Bureau of Public Procurements
SAO	State Audit Office
SCPPA	State Commission on Public Procurement Appeals
CA	Contracting Authorities
EO	Economic Operators
EPPS	Electronic Public Procurement System
EU	European Union
PPL	Public Procurement Law
RM	Republic of Macedonia
CCC	Center for Civil Communications

KEY FINDINGS

Annulment of public procurement procedures continues to increase. In the second quarter of 2011, an unprecedented high number of tenders annulled was noted and represents the highest share of procedures annulled in the last 3 years, i.e., from the onset of monitoring activities. As high as 32.5% of monitoring-targeted tenders were annulled; all annulment decisions were taken by the contracting authorities.

Cases where eligibility criteria for companies are misused with a view to limit competition remain. Minimum eligibility requirements for bidding companies are disproportional to the tender procedure's value and complexity. By setting high eligibility criteria for companies' participation in tender procedures, contracting authorities directly discriminate the tender participants.

Number of companies that participate on calls for bids was marked by a decrease and leads to reduced competition.

Almost one third of procurement procedures subject to monitoring in the first half of 2011 obtained 0 to 2 bids from companies.

Selection criteria for the most favourable bid do not provide precise definition of the "quality" element and therefore result in subjective point-allocation. Thorough analysis of tender documents in public procurements that use the "quality" element provides the conclusion that this element is not clearly divided into sub-elements, i.e., there are no precise definitions on criteria used to evaluate the quality of bids submitted.

Portion of technical specifications continue to provide reference to specific products or to favour certain companies, which is contrary to the principles of equal treatment and non-discrimination of bidders and is in breach of Article 36 of the Public Procurement Law. Problems of this type were identified by the analysis of

tender documents included in the monitoring sample, assessments provided by economic operators, as well as the analysis of appeals lodged by them.

Value of contracts signed without previously announced call for bids has doubled. In the second quarter of 2011, procurement contracts signed by means of direct negotiations accounted for 12.3 million EUR, which is by 114.7% higher than the value of such contracts signed in the same period last year. At the same time, it was noted that the number of contracts signed with direct negotiations has decreased, but the value thereof has increased.

43.68% of tenders used e-auctions to lower prices of goods and services purchased or facilities constructed. This share is still below the law-stipulated obligation to use e-auctions in at least 70% of the total number of public procurements announced.

Institutions continue to ignore their legal obligation on submitting detailed notifications to companies as regards the reasons for selection of the most favourable bid or procedure annulment. In the public procurements from the monitoring sample, the contracting authorities - as if by a rule - provide poor notifications that include only information on the company whose bid was assessed as the most favourable one.

Requirements on bank guarantees for participation in tenders were marked by a slight decrease. Nevertheless, this trend is still unsatisfactory. Bank guarantees were requested in 42.5% of procedures monitored.

In the first half of 2011, the share of approved appeals has decreased. Only 21.04% of appeals were approved, which is a significantly lower share compared to 2010 and 2009 figures, when it accounted for 31.13% and 25.9%, respectively.

GOALS AND METHODOLOGY

From November 2008, the Centre for Civil Communications from Skopje has continuously analysed the implementation of public procurements in the Republic of Macedonia as regulated under the Public Procurement Law. The analysis aimed to assess the implementation of public procurements in the light of the process implementation and the application of the basic principles of transparency, competitiveness, equal treatment of economic operators, non-discrimination, legal proceeding, cost-effectiveness, efficiency, effectiveness and cost-effective public spending, the commitment to obtain the best bid under most favourable terms and conditions, as well as accountability for the public spending as part of procurements.

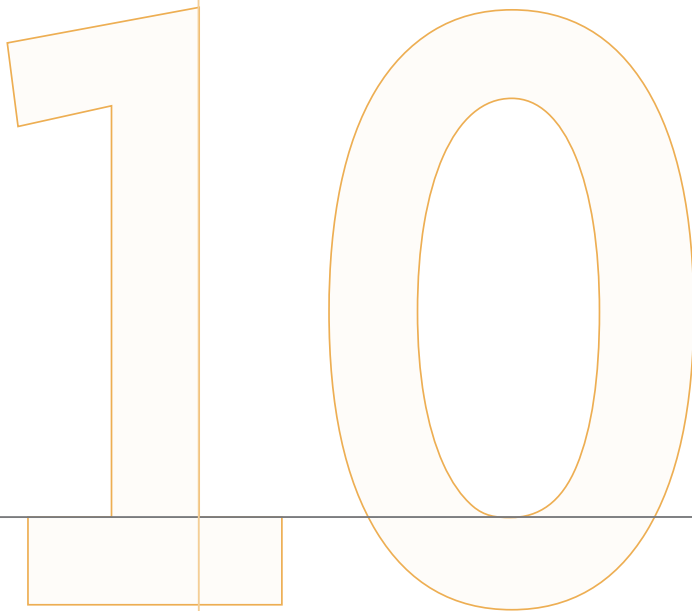
The analysis of the public procurement process in the Republic of Macedonia was performed based on the monitoring of randomly selected sample of public procurement procedures (40 per quarter). Monitoring activities start with the publication of calls for bids in the "Official Gazette of the

Republic of Macedonia", followed by attendance on public opening of bids and data collection on the procedure course, and use in-depth interviews and structured questionnaires submitted to the economic operators, as well as data obtained from contracting authorities by means of Freedom of Information (FOI) applications.

The present analysis was performed based on monitoring of selected sample of 40 public procurement procedures implemented by central level contracting authorities, whose public opening of bids took place in the period April – June 2011.

For each quarter, in addition to the monitoring findings, the report also includes analytical processing of other issues related to public procurements. Hence, the present quarterly report includes the analysis of the appeal procedures at the State Commission on Public Procurement Appeals in the period January – June 2011.

The present report on the monitoring of public procurement process was developed in cooperation and the financial support from the Foundation Open Society – Macedonia.



QUARTERLY PUBLIC PROCUREMENT MONITORING REPORT

- **Annulment of public procurement procedures continues to increase. In the second quarter of 2011, an unprecedented high number of tenders annulled was noted and represents the highest share of procedures annulled in the last 3 years, i.e., from the onset of monitoring activities.**

As high as 32.5% of monitoring-targeted tenders were annulled; all annulment decisions from the monitoring sample were taken by the contracting authorities. In most of these procedures, reasons for tender's failure and need for repeated announcement thereof were of subjective nature and due to errors made by state institutions. Hence, some institutions stated major shortfalls in their relevant tender documents only after they had previously announced the call and collected the bids. Moreover, in a significant number of tender procedures, public procurement commissions have determined that the bidding companies did not fulfil the so-called eligibility criteria. Common were also cases

when there were no bids submitted on the calls announced, in particular because the relevant tender documents contained eligibility requirements that had been assessed by the companies as unattainable for all market participants.

Annulment of almost every third tender procedure from the monitoring sample stresses the severity of this problem, which - in addition to creating problems related to the public procurement's implementation - triggers mistrust on the part of business entities and doubts as regards possible concealed motives of frequent annulments.

List of annulled procedures from the monitoring sample included the procurement of 80 ambulance vehicles for public health care facilities in the Republic of Macedonia. The annulment decision in this tender procedure, which was estimated in the value of approximately four to five million EUR, was taken by referring to Article 169, line 4 and 5 of the Public Procurement Law. This means that the tender

procedure was annulled due to unplanned changes made to the contracting authority's budget, i.e., the Ministry of Health, as well as the fact that bided prices were higher than the actual market prices. This annulment decision was taken as late as 80 days following the public opening of bids submitted by five companies, which represents a violation to the legally stipulated deadline on taking the selection decision or procedure annulment decision.

Interviews conducted with companies that participated in this tender procedure showed that they were surprised with the explanation provided (unplanned changes in the budget), notably because the payment deadline for vehicle procurement was defined for the period January 2012 - December 2014. Disputable is also the second reason for tender's annulment indicated by the Ministry, i.e., bidding companies had offered prices higher than the actual market prices. Companies that participated in the tender procedure claim that high prices were a result of requirements defined in relevant tender documents, whereby the contracting authority insisted on operative, instead of financial leasing

for the vehicles procured and that companies entrusted with installation of medical equipment in the emergency vehicles were required to hold relevant certificates for EN 17/89 2007 Standards.

Such discrepancy between state institution's possibilities and wishes is indicative of its inappropriate understanding of market terms and conditions and the misconception on financial implications related to requirements set in tender documents and specifications. Given that the Ministry had been announcing the opening of this tender procedure from 2010 and given that companies had been preparing and negotiating with foreign associates for at least two months, its annulment is considered detrimental not only to citizens of the Republic of Macedonia, but also to the overall public procurement system which cannot rely on subjective assessments, but on facts and precise analyses that were apparently missing in this case. On the other hand, unfathomable is the reason why this tender procedure was "rushed", in particular knowing that relevant tender documents were not developed in due time. This problem

surfaced when one company lodged an appeal in front of the State Commission on Public Procurement Appeals (SCPPA). The appeal indicated that the company was issued the relevant tender documents as late as 9 days from the day the call for bids was announced. SCPPA rejected the application for tender annulment due to delayed issuance of tender documents, whereby the Ministry was obliged to extend the deadline on bid submission in order to compensate for time lost.

The fact that tenders are frequently announced without previously developed analyses on the actual state of affairs was confirmed also in the case on procurement of consulting services related to expert assistance in identification, evaluation of physical condition, functionality, technical and other utilization of business facilities and equipment located within the former factory JSC OHIS - GES Ltd. Gostivar and evaluation of their value accompanied with proposal on the transformation model. This tender was doomed to be annulled because at the moment of its implementation (April 2011) there were no companies that fulfilled the

requirement related to the possession of relevant property-evaluation license. Notably, at the time when the tender was announced, companies' licenses had expired and no entity was issued a renewed license. Moreover, the Law on Evaluation Performance adopted on 31 August 2010 anticipated development of inception training program and exam taking on property evaluation within a period of 8 months, but the same has not been initiated as well.

The monitoring sample included a case where the procurement procedure on lighting and video-support equipment required the companies to submit relevant EUR-1 certificates as early as the stage on bid selection. On the account of companies' failure to submit such certificates in advance, they were disqualified from tender participation and ultimately the tender procedure was annulled. EUR-1 certificate as evidence on European origin of goods can only be requested after the selection of the most favourable bid and at the time of equipment's import. When competing in tender procedures, the companies can only guarantee that if their bid is selected they will submit the certificate when the equipment is delivered.

Concerning is the fact that in a significant portion of annulled public procurements from the monitoring sample the number of companies participating therein was quite high (in some cases even 9 or 10), sometimes even higher than the average number of participants per procurement. Annulment of procurement procedures with high number of participating companies raises reasonable doubts that contracting authorities' expectations for signing the contract with the pre-selected (favoured) bidder were unrealized. Absence of any responsibility whatsoever further encourages contracting authorities to continue misusing the law-stipulated possibility on procedure annulment without providing detailed rationale on the reasons that have led to the conclusion that bids submitted were unacceptable.

In general, when it comes to procedure annulment, non-compliance with the obligation on providing detailed rationale on the annulment decision is an additional problem that intensifies the impression that such decisions are based on subjective motives. Precise explanation of reasons for the tender annulment decision taken by the contracting authority

is an exception, rather than a rule. Most often these decisions refer to a certain paragraph from Article 169 of the Public Procurement Law, which stipulates the cases when public procurement procedures can be annulled. Nevertheless, in cases where the contracting authorities indicate the fact that they did not obtain a single acceptable bid, they must provide a precise explanation thereof to all bidding companies and they must specify the requirement which the company in question did not fulfil or the document it did not submit. As regards the procedures included in the monitoring sample, this question remains unanswered, even in the procurement procedure wherein 10 companies competed for sale of air-conditioners. The relevant contracting authority for this procurement procedure presented the participating companies with poor information on the reason for the procedure annulment by referring to "failure to obtain single acceptable bid".

As for unplanned changes in the budget, the question is raised on what this implies and who takes the decision on ministry's or institution's budget adjustments. Notably,

provision of the rationale on and detailed arguments for the annulment decision is essential with a view to mitigate consequences stemming from high share of annulments, which per se create a climate of mistrust and increase doubts that such decisions are based on corruptive motives.

In terms of half-year statistics (January-June 2011), 26.3% of procurement procedures included in the monitoring sample were annulled. The trend on increased number of tender annulment decisions taken in the first six months of 2011 compared to the same period last year was also confirmed by data obtained from the Electronic Public Procurement System (EPPS). According to EPPS data, a total of 850 decisions on tender annulment were taken in the period January-June 2011, whereas their number for the same period in 2010 was 700.

Overview of procedure annulments

Period	Number of announced calls for bids	Number of decisions on procedure annulment	Share of procedures annulled
January-June 2009	3,511	526	14.98%
January-June 2010	3,700	700	18.92%
January-June 2011	3,978	849	21.34%

Given than practices on procedure annulment in 2009 and 2010 were marked by an increased intensity towards the second half of the year, likely is that this year will mark a new negative record in this regard. Notably, in 2008 annulled tenders accounted for 10.5%, in 2009 their share was increased to 17%, and in 2010 they accounted for 26.2%. Knowing that high number of annulled procedures raises serious doubts in malpractices related to legal provisions

and based on unrealized expectations as regards the selection of the favoured bid, such events should alert the competent institutions to take relevant actions.

Recommendation: The trend on increased number of annulled public procurements should trigger the alarms with competent institutions to take immediate actions in response thereto. First, the Bureau of Public Procurements should take specific measures to realize the proposal included in the 2010 Annual Report, which reads: “To reduce the number of annulled procedures and provide detailed rationale on reasons for procedure annulment (significant shortcomings in tender documents) with the aim to pursue direct and specific measures aimed to address the negative trend identified.” Second, the Public Procurement Law should be amended with a view to limit and provide more rigid criteria on tender procedure annulment, including provisions on fines and sanctions imposed in cases of malpractice.

- **Contrary to annulment of public procurements where only a small portion of tenders were negatively affected by the Early Parliamentary Elections held in June, their influence was more evident in regard to due course of decision-taking in procurement procedures.**

In 10% of procedures included in the sample, the decision on the selection of the most favourable bid was not taken 3 or 4 months following the public opening of bids. Considering the fact that these cases primarily concern the line ministries, the contracting authorities explained that the decision taken by public procurement commission is pending approval and endorsement by the Minister. This certainly indicates that the public procurement process is under direct influence of high management structures at relevant institutions, which is contrary to the spirit of the Public Procurement Law, as it stipulates that public procurement commissions established at contracting authorities should have the final word in the decision-making process for public procurements. Delays in taking the selection decision are particularly concerning in

cases where bids are evaluated also in terms of performance deadlines.

The tender procedure announced for basic geological research in 2011 stipulates that the selection criterion for the most favourable bid is “economically most favourable bid” where 20 of the 100 points in total are allocated to performance deadline. Hence, it might happen that public funds are spent on a more expensive bid provided that it implies shorter performance deadline, while at the same time the institution that implements this procurement has postponed the completion thereof. Notably, public procurement commission’s report on the procedure is pending endorsement from the responsible officer at the ministry for months now.

Concerns are raised also in regard to cases where only one bid was obtained on the call for bids, but the selection decision was not taken for several months. The question is raised on what is so perplexing in assessing the one bid submitted, knowing that it must be accepted if the company

fulfilled the minimum eligibility criteria and if the bid corresponds with tender specifications and its price is within the tender’s estimated value.

In general, the legally-stipulated deadline on taking the selection or annulment decision was not complied with by 22.5% of contracting authorities whose procedures were subject to monitoring in the second quarter of 2011. This share is identical with those recorded in the previous two quarters (October-December 2010 and January-March 2011), and thereby confirms the conclusion that some institutions continue to ignore this legally-stipulated obligation. Such behaviour on the part of institutions is contrary to the legal obligation stipulated under Article 162, paragraph 2 of the Law on Amending the Public Procurement Law, according to which contracting authorities are obliged to take selection of annulment decision within a deadline not longer than the deadline set for bid submission.

Recommendation: BPP should support the proposal on sanctions for non-compliance with the Public Procurement Law. On the contrary, contracting authorities – as was the

case before – will continue their arbitrary behaviour as regards their compliance with the PPL, and will thereby create a negative climate in the overall public procurement system.

- **Cases where eligibility criteria for the companies are misused with a view to limit competition remain. Minimum eligibility requirements for bidding companies are disproportional to the tender procedure's value and complexity.**

Eligibility criteria for companies' participation in tenders defined under a significant number of public procurements included in the monitoring sample are considered problematic, in particular because they anticipate unattainable requirements and provide basis for discrimination among participants. This was confirmed by several examples.

The first example concerns procurement of instant lottery and express lottery tickets. In order to prove their technical

or professional ability to participate in this tender procedure, companies were required to provide a list on main deliveries of instant lottery and express lottery tickets made in the last three years. They were also required to submit at least 3 confirmations issued by previous instant lottery users and at least one confirmation issued by previous express lottery user indicating the quality development and timely delivery of tickets. Moreover, the companies were required to provide evidence in support of their membership in the European Lottery Association, as well as statement that the company has provided its services in five countries, at least one of which should be an EU Member State. The minimum criteria on companies' technical and professional ability implied 3 successful deliveries of one million instant lottery tickets and successful delivery of at least 500,000 express lottery tickets. The criteria related to companies' economic and financial ability implied minimum annual revenue in the amount of 25 million EUR for the last 3 years.

When considering these criteria in conjunction with the procurement contract's value of 81,300 EUR, the conclusion

is inferred that in addition to having to demonstrate previous extensive experience in the relevant business, companies' total turnover must be more than 300 times higher than the contract's value. Although these ratios are not commonly regulated by law, good practices imply that contract's value and company's total turnover ratio should account to 1:2 or 1:3. Given the high eligibility criteria defined in this tender procedure, understandable is the fact that only one company submitted a bid and was awarded the contract on procurement of instant lottery and express lottery tickets.

In this context, it should be noted that the procurement procedure on chemicals with hexavalent chromium for technology process at the waste-water treatment plant in the village Jegunovce required the bidding companies to have minimum annual revenue in the amount of 1.6 million EUR (100 million MKD), to have gained a total profit of more than 800,000 EUR in the last 3 years and to have previously signed relevant contracts in the amount of minimum 6 million MKD. Companies that wish to participate in this tender must also have a minimum of 30 employees. Only

one company applied to the call for bids, but it failed to fulfil these criteria. Here the question is raised on the need for such high criteria for bidding companies' eligibility. Tender documents developed in this procedure should have focused on defining the quality of chemicals, instead of company's size, in particular because chemicals are usually imported and a quality bid could have been obtained by a commercial company, as well.

Disputable were also the terms and conditions stipulated in the procurement procedure which included placement of horizontal and vertical road signs on the M-1/E-75 Highway; the border crossing point Tabanovce; Rafinerija - Miladinovci junction with pay toll; Airport "Alexander the Great" - Petrovec junction with pay toll; the border crossing point Bogorodica. In order to qualify for bid-submission, companies were required to have minimum annual revenue of 1.5 million EUR, to dispose with 100,000 EUR in order to guarantee uninterrupted performance of works until the payment for works performed is due [acceptable documents for that included a letter of intent or credit loan confirmed

by a commercial bank). Companies were also required to have 25 employees and to demonstrate successful work performance under at least 2 previously signed contracts on placement of vertical and horizontal road signs and/or light signals, each in minimum amount of 200,000 EUR. The call for bids included a detailed description of the team tasked to perform the contract and the equipment needed (owned or leased). No bids were submitted in this tender procedure.

It should be emphasized that cases where no bids are submitted to calls for bids result in creation of preconditions that lead to contract-signing in a procurement procedure with direct negotiation without previously announced call. Namely, pursuant to Article 99 of the Public Procurement Law, the negotiation procedure without announcement of call for bids can be applied when no bids were obtained in the open procedure implemented.

Although previous monitoring reports noted such procedures as negative examples, this monitoring sample also recorded

a case wherein a public enterprise which was procuring oil derivatives had defined discriminating criteria. Namely, the minimum criterion on economic operators' technical and professional eligibility stipulates that bidders should own petrol stations in the following towns: Skopje, Kumanovo, Tetovo, Gostivar, Kicevo, Bitola, Prilep, Veles, Gevgelija, Stip, Kocani, Ohrid, Kriva Palanka, and to dispose with electronic payment system. As expected, only one company submitted a bid and signed the procurement contract in the amount of 150,000 EUR.

The fact that in most procurement procedures the development of eligibility criteria for companies is a result of contracting authorities' subjective assessment rather than an established rule is also confirmed by the procurement implemented by a line ministry and related to transport services for VIP delegations and other official delegations at various events. Eligibility criteria required the companies to have a total turnover of 6 million MKD in the last three years, i.e., minimum of 2 million MKD per year. In that, the company that offered the lowest price was awarded the

contract in the amount of 2.5 million MKD, i.e., the contract's value exceeded the company's total annual turnover.

Monitoring findings for this quarter's sample were confirmed with the results from the company survey. Hence, the June 2009 survey carried out by the Centre for Civil Communications indicated that only 14% of companies interviewed stated that the main problems they face were unrealistic and highly unattainable criteria on companies' economic and financial ability and technical eligibility. The relevant share of companies surveyed in 2010 was 22.5%, whereas the 2011 survey results indicate that as high as 28.4% of companies believe that this is the major problem in the field of public procurements¹.

Recommendation: Competent institutions must provide direct recommendations for all contracting authorities to define realistic minimum requirements on companies'

¹ More information on the company survey findings is available in the 9th Quarterly Report on Monitoring the Implementation of Public Procurements.

eligibility to participate in tender procedures. Contracting authorities should be instructed that minimum requirements for bidders must not limit the competition. In that, due consideration should be given to introduction of sanctions for contracting authorities that abuse these criteria with a view to discriminate among companies and that violate one of the basic principles in the public procurement system: fair competition among bidders.

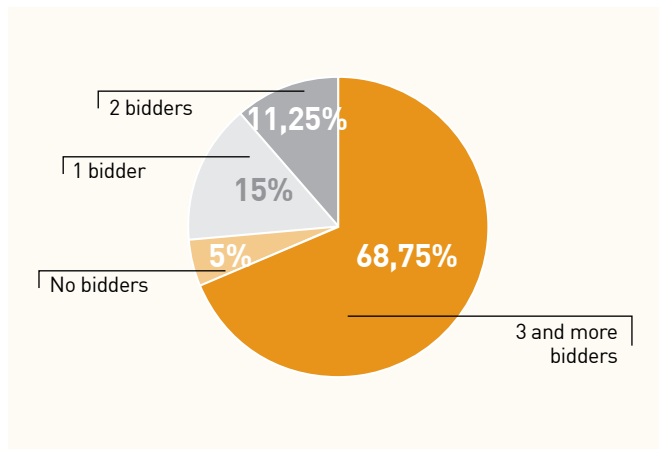
- **Number of companies that participate in calls for bids was marked by a decrease and leads to reduced competition. Almost one third of procurement procedures subject to monitoring in the first half of 2011 obtained 0 to 2 bids from companies.**

In as high as 42.5% of public procurement procedures from the monitoring sample, bids were obtained by a maximum of 2 companies. Only one bid was obtained in almost one quarter of procedures monitored. According to monitoring results and on the basis of interviews conducted with companies, some of the reasons for reduced number of

bidders can be located in the eligibility criteria for companies' participation and tender documents that favour certain bids, but one should also consider the possibility that reduced competition is partly due to problems related to payment of goods and services delivered and works performed. This was also confirmed by the survey results, which showed that companies more often complain on long payment deadlines that endanger their liquidity. In that, if in the year 2009, 30.2% of companies stated that they experienced problems related to collection of receivables, in the 2011 survey this share has increased to 41.7%.

In terms of half-year statistics (January-June 2011), poor competition was recorded in less than one third (31.25%) of tenders from the monitoring sample that included 80 public procurement procedures.

Overview of tender competition (January-June 2011)



As shown on the chart above, satisfactory level of bidders' participation was achieved in 68.75% of procedures.

Public procurements which included the highest number of bidders were related to procurement of office materials, IT equipment, air-conditioning equipment and like.

Nevertheless, the reasons for smaller number of companies that participate in public procurement procedures, which in turn result in reduced competition, should be subject of a thorough analysis made by competent institutions. Such analysis should determine whether the current situation in that regard is a result of bidders' mistrust as regards objective bid-evaluation, doubts raised in unequal treatment and discrimination among companies due to imprecise bid-evaluation criteria, or discriminating criteria for companies' participation in tender procedures. In this context, worrying is also the low interest on the part of foreign bidders to participate in tender procedures, which further reduces the competition and discourages domestic companies to offer goods and services of better quality at lower prices.

Recommendation: The Ministry of Finance, the Ministry of Economy, the Bureau of Public Procurements, the Chamber of Commerce and business community should analyse the reasons for small number of companies interested to participate in tender procedures. The goal of such analyses should be to identify the reasons for reduced competition and take measures to eliminate subjective aspects in procurement procedures by means of which the contracting authorities discourage companies to participate in tender procedures.

- **Selection criteria for the most favourable bid do not provide precise definition of the “quality” element and therefore result in subjective point-allocation. Majority of procurement procedures included in the monitoring sample did not define sub-elements that provide precise manner of point-allocation for quality.**

Public procurement procedures from the monitoring sample included provisions on quality point-allocation in the range

from 10 to 55 points of the 100 points in total. Including this element under the selection criteria on “economically most favourable bid” is in compliance with the Law; however concerns are raised in regard to its application. Thorough analysis of tender documents in public procurements that use the “quality” element provides the conclusion that this element is not clearly divided into sub-elements, i.e., there are no precise definitions on criteria used to evaluate the quality of bids submitted. Such practices enable subjective evaluation of quality where the public procurement commission members allocate points and select bids on the grounds of personal assessments and preferences.

Hence, in the procurement procedure on office materials 25 points were allocated to the “quality” element, but the relevant tender documents did not provide an explanation on the evaluation thereof. As part of the selection decision taken, the state authority indicates the most favourable bid selected, but does not include information on companies’ point-based ranking. The same attitude was noted also in the procurement procedure on equipment servicing and

maintenance and automatic installations for air-conditioning (electrical and IT support), where as many as 40 points were awarded to quality, although the relevant tender documents did not include the manner in which quality will be assessed. Another example that provides explanation as regards this problem is the procurement procedure on working clothes and gear. The selection criteria indicated that in addition to price which is allocated a maximum of 60 points, quality will also be subject of evaluation and is allocated a total of 40 points. Concerning is the fact that tender documents did not explain the manner in which points are allocated, but indicate that assessment thereof will be made on the basis of samples. Given that tender specifications clearly define the fabrics to be used (wool and polyester ratio for the protective clothes and fabric weight in grams per meter), as well as precise description of their designs, the question is raised as to the purpose of allocating 40 points thereto.

The issue on point-allocation to the quality element is of exceptional importance given the fact that more expensive bids were selected in majority of procedures which

included this component, i.e., they were selected on the grounds of obtaining more points for quality. This behaviour demonstrated on the part of institutions causes problems not only in relation to implementing contracted tenders where there is no precise evidence that the companies awarded the contract actually submitted the most favourable bid, but also results in business sector's distrust that the public procurement system provides terms and conditions conducive to fair and transparent competition where the best bidder wins.

Recommendation: Given that allocation of high number of points to the “quality” element without a precise definition thereof provides for subjective bid-evaluation and the possibility to favour certain bidders, the Public Procurement Law should be adherently applied in this segment of public procurements.

- **Portion of technical specifications continue to provide reference to specific products or to favour certain companies, which is contrary to the**

principles of equal treatment and non-discrimination of bidders and is in breach of Article 36 of the Public Procurement Law.

Problems of this type were identified by the analysis of technical specifications included in the monitoring sample, assessments provided by economic operators, as well as the analysis of appeals lodged by them.

Hence, doubts related to disputable documents were expressed in the procurement procedure on placement of horizontal and vertical road signals where no bids were submitted, as well as in the procurement procedure on microphones, where “lowest price” was used as the selection criterion and which resulted in selection of the most expensive from the four bids submitted, notably under the auspices that it was the only bid that fulfilled the requirements defined in the technical specifications.

Moreover, as part of tender documents for the procurement procedure on equipment servicing and maintenance and

automatic installations for air-conditioning (electrical and IT support), the contracting authority made a specific referral to the equipment manufacturer. This, of course, resulted in the submission of one bid, i.e., the bid was submitted by the Macedonian dealer for the said equipment. This raises the question on the need to announce an open call for bids, knowing that the services procured could be performed only by this company. As regards tender documents and specifications, another case was recorded where the contracting authority did not comply with the requirements it stipulated. In the procurement procedure on promotion materials and website designs, according to a participant therein who lodged an appeal in front of SCPPA, the bid selected as the most favourable did not offer design solutions as required in the tender specifications. Furthermore, in its response to the appeal, the contracting authority that performed this procurement procedure indicated that not all tender lots required the submission of creative designs, except for those referred to in the tender specifications. Nevertheless, the tender specifications stipulated that the designs that were not submitted by the company selected

as the most favourable bidder are mandatory. Cases such as this result in companies' distrust as regards fair and loyal competition under public procurement procedures.

If the issue of inappropriate and tendentiously detailed tender documents are put in correlation with frequent annulments of tender procedures on the grounds of inappropriate tender documents, the conclusion is inferred that the elected members of public procurement commission and those tasked with tender documents' development lack necessary knowledge on the procurement subject, including research on all market parameters for goods and services in question. On the other hand, some economic operators lack thorough knowledge on the Public Procurement Law. Ignorance of relevant legislation is mostly related to economic operators' rights to legal remedies, i.e., the stage of public procurement procedures when the economic operator is entitled to lodge an appeal related to tender documents, the deadline thereof and competent institutions. All these are indicative of the need for increased education targeting public procurement commission members and economic operators for the

purpose of mitigating consequences from inappropriate and tendentiously detailed tender documents.

Recommendation: Greater education of state institutions' staff tasked with tender documents' development is needed, as well as education and encouragement of economic operators to lodge appeals in front of SCPPA whenever they find that technical specifications provide reference to or favour a specific product or bidder.

- > **Value of contracts signed without previously announced call for bids has doubled. In the second quarter of 2011, procurement contracts signed by means of direct negotiations accounted for 12.3 million EUR, which is by 114.7% higher than the value of such contract signed in the same period last year.**

Procurement procedures with direct negotiations without previously announced call for bids, i.e., direct contracts signed are marked by a considerable increase in their

value. At the same time, it was noted that the number of contracts signed with direct negotiations has decreased. In the period April - June 2011, a total number of 159 procurement contracts in the total value of 755,065,637 MKD, i.e., 12,277,490 EUR were signed without previously announced call for bids, compared against the 172 contracts signed in the total value of 372,876,261 MKD, or 6,063,029 EUR recorded in the same period last year.

Given the non-transparency of this type of contracts, clear is the fact that this procedure enables subjective behaviour on the part of contracting authorities and can result in occurrence and expansion of corruption. Therefore, the trend on continuous increase of public funds spent on public procurements with direct negotiations is considered unfavourable and concerning. Moreover, the dynamic increase of their value has been continuously noted from 2009 onwards. As shown on the Table below, the value of contracts signed with direct negotiations accounted for 468,607,429 MKD, or 7,619,633 EUR in the first half of 2009 compared to 2011 figures when their value accounted for

1,335,930,649 MKD, or 21,722,450 EUR of public funds spent under this non-transparent procedure.

Value of contracts signed under direct negotiations without previously announced call for bids (MKD)

Period	Value of contracts signed
January – June 2009	468,607,429
January – June 2010	622,209,265
January – June 2011	1,335,930,649

These figures provide the conclusion that the share of contracts signed under direct negotiations is marked by a constant increase from year to year, instead of decline. Most certainly, such trends are indicative of the need for comprehensive analysis by the competent institutions in order to re-examine the justification of signing public procurement contracts by means of direct negotiations with the companies without previously announced call for bids, instead by applying transparent procedures.

Recommendation: Having in mind the several-year trend on increase in the value of public funds spent by signing public procurement contracts by means of direct negotiations without previously announced call for bids, the establishment of a monitoring mechanism is considered urgent. This will result in limited possibilities for signing such contracts and will identify possible shortfalls in the relevant legislation that are conducive to such practices.

- **43.68% of tenders used e-auctions to lower prices of goods and services purchased or facilities constructed. This share is still below the law-stipulated obligation to use e-auctions in at least 70% of the total number of public procurements announced.**

In the second quarter of 2011, e-auctions were used in 819 public procurement procedures and they account for 43.68% of the total calls for bids announced in the same period. Hence, the share of implemented e-auctions – which provide lower-price auctioning and should result in cheaper public procurements – is still below the legally-stipulated threshold set at 70%.

Although the relevant legislation does not stipulate a legal obligation for using e-procurements and does not set their share in total procedures, it should be noted that in the first quarter of 2011 they were applied in 238 cases, or 12.69% of tender procedures announced, which is unsatisfactory considering the funds and efforts invested in the establishment of the electronic system.

In terms of half-year statistics (January-June 2011), the share of e-auctions and use of e-procurements are still below the legally-stipulated threshold.

Overview of e-auctions

Period	Number of e-auctions	Share of e-auctions	Legally-stipulated threshold
January – June 2011	1,592	40.02%	70%
January – June 2010	337	9.11%	30%

Recent announcements made by governmental representatives in relation to sanctioning relevant heads of departments at state institutions on the grounds of failing to use e-auctions is indicative of the need to introduce sanctions for non-compliance with legally-stipulated obligations.

Recommendation: In addition to amendments to the PPL with a view to introduce sanctions on non-compliance with legal obligations, the Bureau of Public Procurements should also pursue technical measures aimed to prevent inconsistent use of the electronic system. At the same time, greater efforts are needed on the part of the Government and aimed to comply with this obligation. The contracting authorities should more frequently use e-procurements and e-auctions because, on one hand they enable greater efficiency and budget savings, and on the other hand, application thereof is regulated under the relevant legislation in effect.

- **Institutions continue to ignore their legal obligation on submitting detailed notifications to companies as regards the reasons for selection of the most favourable bid or procedure annulment.**

Tender participants do not receive rationale on the selection decision, which is contrary to legal provisions stipulating that the contracting authorities are obliged to provide detailed justification on the reasons for the selection or annulment decision taken, as well as to give reasons on why the acceptable bid submitted was not selected as most favourable one. Such practice “blurs” the economic operators’ perception on the public procurement system and results in their inability to obtain a clear and understandable image of the decision-taking process in public procurements. Moreover, it creates doubts in the bid-evaluation process and ultimately deprives the unsatisfied parties of legal instruments to appeal decisions.

As part of procedures included in the monitoring sample, contracting authorities – as if by a rule - submitted poor notifications that indicate the company whose bid had been evaluated as the most favourable one. However, the law contains a decisive provision on their obligation to provide detailed rationale of reasons for the selection decision taken or reasons for rejecting other bids.

Recommendation: Considering the gravity of this problem, due consideration should be made of the possibility to sanction practices that are contrary to this obligation, including cases where the competent institutions tolerated such occurrences.

- **Requirements on bank guarantees for participation in tenders were marked by a slight decrease. Nevertheless, this trend is still unsatisfactory.**

Bank guarantees were required in 42.5% of procedures monitored and are marked by a slight decrease compared to the previous quarter when their share accounted for 45%. In that, bank guarantees set at the law-stipulated threshold value (3% of the bid’s value) were requested in 27.5% of procedures monitored and indicate a modest improvement. Nevertheless, present state of affairs in this regard is unsatisfactory given the recommendation that bank guarantee should be set in an amount lower than the law-stipulated threshold of 3%. The need to reduce use of

bank guarantee requirements for tender participation is also conducive to increasing competition in tender procedures.

Recommendation: Bank guarantees should not be included as formal requirements for public procurement participation, whereas in the cases where they are required, efforts should be made to set the bank guarantee's value in an amount lower than the law-stipulated threshold of 3%.

- **Issuance of tender documents was subject to fee payment in 32.5% of procedures included in the monitoring sample, which indicates that the positive trend on accepting and complying with recommendations on free-of-charge issuance of tender documents was abandoned.**

The positive trend on decreased number of public procurements that require the companies to settle the fee for tender documents is disputable. In 67.5% of procedures monitored in the second quarter of 2011 the companies were issued the relevant tender documents free-of-charge.

As for 32.5% of procedures monitored where the contracting authorities imposed a fee for issuing tender documents, the same was set in an amount from 200 to 6,000 MKD, the latter imposed in internationally published tender procedures. However, the fact that the average fee for issuing tender documents amounts to 1,400 MKD shows a positive trend, at least in terms of fee's amount. Namely, in the period 2009-2010, the contracting authorities in average charged 3,000 MKD for issuance of tender documents.

Contracting authorities' reluctance to abandon this practice is unclear given the possibilities offered by the Electronic Public Procurement System in regard to uploading tender documents.

Recommendation: Considering the broad availability of electronic communication means, the practice on imposing fees for issuance of tender documents should be fully abandoned and the documents in question should be made available in the Electronic Public Procurement System and on the contracting authorities' websites.

ANALYSIS OF APPEALS LODGED IN FRONT OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS IN THE PERIOD JANUARY-JUNE 2011

- > In the first half of 2011, the share of approved appeals has decreased. Only 21.04% of appeals were approved, which is a significantly lower share compared to 2010 and 2009 figures, when it accounted for 31.13% and 25.9%, respectively.

In the period January-June 2011, the State Commission on Public Procurement Appeals was addressed with 518 appeals and took 502 decisions/conclusions, as follows:

Type of decision	Number of decisions	% ¹
Termination/discontinuation of appeal procedure	79	15.25%
Rejected appeals	224	43.24%
Denied appeals	90	17.37%
Approved appeals	109	21.04%
Rejected application to continue the procurement procedure	3	0.60%
Denied application to continue the procurement procedure	13	2.50%
Total	518	100%

² The calculation of relevant shares was done on the basis of total number of appeals lodged (518).

SCPPA took 97 decisions whereby it resolved more than one appeal, i.e., most often 2 appeals lodged for the same matter/case, and thus the number of decisions/conclusions taken in appeal procedures (421) is lower than the total number of appeals lodged (518).

82 of the total number of approved appeals (109) concerned revoking of contracting authorities' selection decision or returning the case for repeated bid-evaluation, while in 27 cases SCPPA annulled the selection decisions and/or procedures (most cases concern the both, annulment of selection decision and procedure) as taken and/or implemented by the contracting authorities. Compared against last year's figures, the analysis indicates a decrease in procurement procedures that are annulled by the State Commission on Public Procurement Appeals.

Compared against the same period last year (January-June 2010) when a total of 503 decisions were adopted, the total number of decisions adopted (518) in the period January-June 2011 is marked by a small increase. Number of denied

appeals has increased, as well. Namely, in the period January-June 2010, the number of appeals denied was 206, whereas in the same period in 2011 a total of 224 appeals were denied. Also, the number of rejected appeals has increased (90 decisions in the first half of 2011 compared to 70 decisions in the same period last year).

As regards decisions taken to approve economic operators' appeals, the number of approved appeals in the period January-June 2011 has decreased and was 109, compared to 148 approved appeals in the period January-June 2010. In the reporting period, the State Commission on Public Procurement Appeals held 27 sessions. The appeals were lodged only by economic operators.

This means that, as was concluded in the analysis for SCPPA's operation in the first half of 2010, the Attorney General has not lodged any appeals, although pursuant to Article 207 of the Public Procurement Law it is authorized to request legal protection of public and state interests. Moreover, the Attorney General did not appear as a litigation

party in any court procedure where the appealing party had requested annulment/waiver of a given public procurement contract, where the procurement has been implemented without initiating the relevant public procurement procedure in compliance with the PPL.

In relation to SCPPA decisions/conclusions, in addition to the statistical analysis thereof, the present monitoring aims to identify economic operators' reasons for lodging appeals or addressing the State Commission on Public Procurement Appeals, i.e., to identify the reasons for appeal's rejection, denial or approval by the SCPPA without interfering in or assessing the legality of its decisions. The present analysis targeted SCPPA's decisions to terminate/discontinue the appeal procedure, decisions to reject or deny appeals lodged by economic operators, decisions to approve appeals, as well as decisions by means of which SCPPA denied or rejected applications to continue the procurement procedure.

Decisions to terminate/discontinue the appeal procedure

On the basis of provisions from Article 220, paragraph 1, item 1 of the PPL, SCPPA adopted 69 decisions to terminate the appeal procedure, most frequently because the appealing party has withdrawn the appeal lodged.

Portion of decisions/conclusions taken to terminate/discontinue the appeal procedure were based on reasons that the contracting authority has found that the appeal lodged against it is reasonably grounded in part or in full and therefore pursuant to provisions from Article 221 of the PPL it has adopted a new decision whereby it waived the effect of the appealed decision, annulled the procedure, corrected the action, has taken the action alleged as omitted in the appeal or implemented a new procurement procedure.

Decision whereby the contracting authority approves the appeal lodged by the economic operator in full or in part is a novelty introduced in the system. Decisions of this type are

communicated to the SCPPA and the appealing party in the initial procedure is entitled to lodge an appeal against this second decision, as well.

In the period January-June 2011, SCPAA took 79 decisions to terminate/discontinue the appeal procedure, whereas it adopted 69 such decisions/conclusions in the period January-June 2010.

Decisions to deny appeals

This type of decisions were thoroughly analysed with the aim to identify the “mistakes” made by economic operators when lodging appeals and on the grounds of which SCPPA - without endeavouring material and essential deliberation on appeal allegations - denied the appeals on the grounds of formal shortcomings as stipulated under the PPL. This analysis was pursued in order to instruct the economic operations on the most common mistakes made when lodging appeals so that they could avoid them in future.

Most frequently, appeals were denied on the grounds of being incomplete or lacking reasonable grounds.

Usually, SCPAA denied the appeals as inadmissible because they have been lodged beyond the deadline stipulated.

The fact that a number of appeals were denied on the grounds of being inadmissible implies that some economic operators are still lacking information on their rights related to lodging appeals in all procurement procedure stages and as early as in the announcement of the call for bids and based on reasons set forth in Article 216 of the PPL.

Namely, in compliance with paragraph 2 of the said Article, an appeal can be lodged within a deadline of eight days from the day when:

- **the call on public procurement contract-awarding was announced, in cases when the appeal is related to data, actions or failure to take actions following the call for bids;**

- **the public opening of bids has been organized, in cases when the appeal is related to actions or failure to take actions stipulated in tender documents;**
- **the concerned party has received the decision taken on certain rights from the contract-awarding procedure, in cases when the appeal is related to eligibility assessment, bid-evaluation or selection or procedure annulment decision; or**
- **the concerned party has gained information/knowledge on illegal proceedings in the contract-awarding procedure, and on these grounds it can appeal the procedure within a period of one year the latest from the day when the procedure was completed.**

According to paragraph 4 of the said Article, ignorance of these rights, i.e., non-compliance with relevant deadlines on initiating the appeal procedure related to bases stipulated in provisions from paragraph 2 provide the grounds to deny the appeal as inadmissible.

Denial of appeals on the grounds of being incomplete is a result of non-compliance with the obligation set forth in Article 212, paragraph 2 of the PPL, which stipulates that economic operators must present evidence that they have settled the fee for initiation of appeal procedure whose amount, depending on the value of the public procurement contract in question, is stipulated under Article 229 of the PPL.

Moreover, certain appeals that were denied on the grounds of being incomplete were actually not developed in compliance with the PPL, which means that they did not contain data stipulated and were not amended even after the expiration of the additional deadline granted by SCPPA.

Decisions to approve appeals

As was the case with denied appeals, this type of decisions was also subject of in-depth analysis in order to inform the contracting authorities on the most common reasons for approval of appeals lodged by economic operators. These

are especially important because, in our opinion, although the share of approved appeals has decreased compared to the period January-June 2010, it is still high.

When approving the appeals, SCPPA takes decisions by means of which:

- > **it revokes the decision taken by the contracting authority and orders re-evaluation of bids; and**
- > **it annuls the selection decision for the most favourable bid and thereby annuls the procurement procedure.**

The analysis of decisions whereby economic operator's appeals are approved indicates that SCPPA most frequently takes revoking decisions in cases when it believes that in compliance with Article 210, paragraph 1, line 4 of the PPL major violations have been made to the PPL in the public procurement contract-awarding procedures, in particular concerning the bid-evaluation process.

Decisions by means of which SCPPA approves economic operators' appeals and revokes the contracting authorities' decisions and procurement procedure contain guidelines for the contracting authorities to eliminate the shortcomings identified when repeating the procurement procedure. More precisely, revoking decisions are taken when the repeated procedure on the part of the contracting authority can eliminate the shortcomings appealed. Portion of contracting authorities' decisions were revoked when the SCPPA acted ex officio, in compliance with Article 211 of the PPL. Namely, according to Article 211, in a procedure related to legal protection/remedy, SCPPA acts upon the appeal allegations, whereas in the ex officio procedure it acts upon major violations made and stipulated in Article 210 of this Law, such as, for example, violation made to the bid-evaluation process.

Reasons that provide grounds to revoke the selection decision, in addition to violations made to the bid-evaluation process, also include:

- **Inappropriate assessment of bidders' technical and professional eligibility, or the selected bidder did not submit documents needed to determine its technical and professional ability, as required in the tender documents;**
- **The selected bid is considered unacceptable, whereby a violation was made to Article 3, item 24 of the PPL, according to which an acceptable bid is a bid that is submitted within the stipulated deadline and for which it has been determined that it fulfils all requirements stipulated in the tender documents and technical specifications and that meets all criteria, terms and conditions and requirements related to bidder's eligibility;**
- **The contracting authority violated the procedure when it selected an unacceptable bid as the most favourable one;**
- **The contracting authority excluded the appealing party from the bid-evaluation without having reasonable grounds thereto;**
- **The procedure was violated due to non-compliance with provisions from Article 136, paragraph 5 of the PPL, which governs the public opening of bids and their reading out loud; or**
- **Erroneous application of Article 163 from the PPL, according to which the contracting authority should have taken into consideration the evidence presented by the appealing party in support of the unusually low price bided.**

Decisions taken and procurement procedures are annulled in cases when major violations to the PPL have been determined, i.e., when the selection decisions and, in general, the procurement procedure contain certain shortcomings and when they cannot be eliminated by means of repeated decision-taking by the contracting authority. Decisions to annul the contracting authority's selection decision and the procedure implemented are taken in cases when:

- Major violations have been made to the public procurement procedure;
- The actual situation was improperly or incompletely determined; and
- The relevant material law was not properly applied.

Some reasons to annul the selection decisions and the procedure implemented include:

- Cases when pursuant to Article 153, paragraph 1 of the PPL an eligibility criterion on bidder's ability was used as bid-evaluation criterion, which leads to discrimination among economic operators and limited competition, and thereby violates the right of equal treatment and equal level playing field for economic operators as guaranteed under Article 2 of the PPL;
- Major violations were made to provisions from Article 210, paragraph 1, line 2, i.e., when tender documents were not developed in compliance with the PPL;

- The bid-evaluation process was performed contrary to criteria established, i.e., contrary to Article 140, paragraph 8 which stipulates that the bid-evaluation should be performed without exceptions therefrom and pursuant to criteria specified in the tender documents and published in the call on public procurement contract awarding, and contrary to Article 161, paragraph 4 which stipulates that the contracting authority is obliged – as part of tender documents – to provide an explanation of the manner in which it will evaluate and apply elements of the criterion “economically most favourable bid”;
- Major violations were made to the procedure pursuant to Article 210, paragraph 1, line 2 in relation to Article 211 of the PPL, in particular because the contracting party has not developed any tender documents, but only technical specifications whereby the procurement subject is divided into lots and in the call for bids submitted to the BPP it specified that the public procurement cannot be divided into lots.

Decisions to reject/deny application to continue the procurement procedure

As for applications to continue the procurement procedure, which means that the public procurement contract will be signed despite the fact that the procurement procedure in question has been appealed, SCPPA has either denied or rejected them. In the period January-June 2011, SCPPA has adopted 16 decisions of this type, while in the same period in 2010 their number was 10.